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# U.S. SUPREME COURT DECISIONS AND SEX OFFENDER LEGISLATION: EVIDENCE OF EVIDENCE-BASED POLICY?

**CHRISTINA MANCINI* & DANIEL P. MEARS****

*In the past two decades, the federal government and states have enacted a wide range of new laws that target sex offenders. A series of U.S. Supreme Court cases has addressed the constitutionality of such legislation and, in so doing, contributed to the current policy landscape. The Court's influence is noteworthy in part because of the calls during this same time period for evidence-based policy. Does the influence, however, reflect not only the legal considerations that necessarily attend to these cases but also an accurate and balanced assessment of social science theory and research? We address this question by examining Supreme Court cases from 1991 to 2011 involving sex crime laws. The findings indicate that the Court demonstrates an awareness of scientific research by referencing it in almost all decisions involving sex offender legislation, yet the Court frequently overstates or misinterprets empirical findings. Implications for research and policy are discussed.*

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## I. INTRODUCTION

U.S. Supreme Court decisions constitute the "law of the land"—that is, they have the potential to affirm, modify, and even overturn public policy.[1] For example, the 1972 decision *Furman v. Georgia* prohibited states from imposing capital punishment pursuant to statutes allowing unbridled discretion of the judge or of the jury,[2] while the 1976 decision *Gregg v. Georgia* enabled them to resume using it.[3] Such an influence on public policy historically has derived from the Court's interpretation of contested constitutional issues. However, scholars have argued that the influence increasingly involves interpretation and use of social science research.[4] The greater accessibility of such research, for example, "has made American law receptive to valid science to an unprecedented degree."[5] Indeed, the Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*[6] requires courts to "evaluate the research methods supporting expert evidence and the principles used to extrapolate from that research to the task at hand."[7]

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[1] *See* BARBARA ANN STOLZ, CRIMINAL JUSTICE POLICYMAKING: FEDERAL ROLES AND PROCESSES 4 (2002).

[2] Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

[3] Gregg v. Georgia, 428 U.S. 153, 195 (1976) (holding that the concerns regarding arbitrary or capricious imposition of capital punishment can be addressed by carefully drafted statutes that ensure the sentencing authority is given adequate guidance).

[4] *See, e.g.*, Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 310–14 (2005).

[5] David L. Faigman & John Monahan, *Psychological Evidence at the Dawn of the Law's Scientific Age*, 56 ANN. REV. PSYCHOL. 631, 631 (2005).

[6] Daubert v. Merrell Dow Pharm., 509 U.S. 579, 595–98 (1993).

[7] Faigman & Monahan, *supra* note 5, at 654.

Thus, in addition to settling questions of law, judges and Justices must also be able to consider and assess social scientific research.

This requirement presents substantial challenges for judges because legal education typically does not include training in research methods or statistics, or, by extension, instruction in how to interpret the results of empirical research studies, especially when such studies involve complicated questions involving research design, measurement, sampling, or analysis.[8] Supreme Court Justice Antonin Scalia has emphasized this point. In his dissenting opinion in *Roper v. Simmons*, a case in which the Court prohibited the execution of juveniles, he remarked, "Given the nuances of scientific methodology and conflicting views, courts . . . are ill equipped to determine which view of science is the right one."[9] Notably, the problem is central to the Court's decisions in cases that affect many prominent criminal justice policies. The findings from empirical research, for example, have been cited in such landmark cases as *McCleskey v. Kemp* (racial discrimination and capital punishment),[10] *Atkins v. Virginia* (execution of the mentally handicapped),[11] and *District of Columbia v. Heller* (gun control).[12]

This use of social scientific research in Court decisions has occurred as policymakers and practitioners have increasingly emphasized the importance of evidence-based policy,[13] which draws on credible research to support the assumptions on which it is premised.[14] Given the Court's prominence in shaping policy,[15] and its use of empirical research in some decisions,[16] the question arises: How is the social scientific research

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[8] *See generally* John Monahan & Laurens Walker, *Twenty-Five Years of Social Science in Law*, 35 LAW & HUM. BEHAV. 72 (2011) (discussing case law that requires judges to assess the validity of the methods supporting expert evidence).

[9] Roper v. Simmons, 543 U.S. 551, 618 (2005) (Scalia, J., dissenting).

[10] McCleskey v. Kemp, 481 U.S. 279, 286–90 (1987) (discussing social science studies showing racial disparities in the imposition of the death penalty).

[11] Atkins v. Virginia, 536 U.S. 304, 318 (2002) (citing psychological studies indicating that individuals with lower than average intelligence have more difficulty anticipating the consequences of their actions than those with higher intelligence).

[12] District of Columbia v. Heller, 554 U.S. 570, 577 (2008) (citing empirical legal scholarship examining the interpretation of the Second Amendment).

[13] *See, e.g.*, Michael R. Smith & Geoffrey P. Alpert, *Searching for Direction: Courts, Social Science, and the Adjudication of Racial Profiling Claims*, 19 JUST. Q. 673, 699–701 (2002).

[14] DANIEL P. MEARS, AMERICAN CRIMINAL JUSTICE POLICY: AN EVALUATION APPROACH TO INCREASING ACCOUNTABILITY AND EFFECTIVENESS 1 (2010).

[15] *See* STOLZ, *supra* note 1, at 4, 5, 11.

[16] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954) (citing an array of social science studies to support its opinion on the effect of segregation on children); *see also* Rachel F. Moran, *What Counts as Knowledge? A Reflection on Race, Social Science, and the Law*, 44 LAW & SOC'Y REV. 515, 536 (2010) (discussing the risks and benefits of

interpreted? For example, does the Court interpret scholarship in a manner that accords broadly with the state of empirical evidence and not only that from select studies? Does the Court acknowledge competing claims supported by different bodies of empirical research? If it does, then its decisions arguably rest on an evidence-based foundation. If it does not, then, conversely, its decisions arguably lack an evidence-based foundation.

Against this backdrop, the goal of this study is to supplement scholarship on the Court's role in contributing to evidence-based crime and criminal justice policy. To this end, we focus on a largely neglected area of investigation—the Court's role in upholding, reversing, or modifying sex crime laws, and, in particular, whether the Court not only has drawn on social science but has accurately interpreted extant scholarship. This focus stems from two considerations. First, sex crime laws have proliferated during a period of time in which courts increasingly have evaluated research that bears on legal decisions.[17] Second, many of these laws proceed from faulty assumptions about sex crime.[18]

Accordingly, this study examines all Supreme Court decisions from 1991 to 2011 that focused on sex crimes or sex offenders. We address two research questions. First, to what extent does the Court make reference to scholarly work in its decisions? Second, is the Court's use and interpretation of research in these cases consistent with findings from a larger body of scholarship centered on understanding sexual offending? Specifically, Part II of the study describes the Supreme Court's role in affecting public policy and its use of social science research in rendering decisions. Part III reviews prominent sex crime laws enacted nationally. In Part IV, we examine Supreme Court decisions concerning the constitutionality of these reforms. Study methodology is outlined in Part V.

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"using social science evidence to reconsider fundamental normative commitments" in cases such as *Brown*).

[17] *See* Andrew J. Harris & Arthur J. Lurigio, *Introduction to Special Issue on Sex Offenses and Offenders: Toward Evidence-Based Public Policy*, 37 CRIM. JUST. & BEHAV. 477, 478 (2010).

[18] *See* Candace Kruttschnitt et al., *Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls*, 17 JUST. Q. 61, 83 (2000); Wayne A. Logan, *Megan's Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 406 (2010); Lisa L. Sample, Policy Essay, *The Need to Debate the Fate of Sex Offender Community Notification Laws*, 10 CRIMINOLOGY & PUB. POL'Y 265, 267 (2011); Richard Tewksbury & Wesley G. Jennings, *Assessing the Impact of Sex Offender Registration and Community Notification on Sex-Offending Trajectories*, 37 CRIM. JUST. & BEHAV. 570, 580 (2010); Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 973 (2011); Michael R. Handler, Comment, *A Law of Passion, Not of Principle, Nor Even Purpose: A Call to Repeal or Revise the Adam Walsh Act Amendments to the Bail Reform Act of 1984*, 101 J. CRIM. L. & CRIMINOLOGY 279, 281 (2011).

Findings are presented in the subsequent section, Part VI. Finally, in Part VII, we conclude with a discussion of the study's implications for theory, research, and policy.

## II. THE U.S. SUPREME COURT, POLICY, AND SOCIAL SCIENCE

Scholars have long observed that U.S. Supreme Court decisions constitute a form of public policy. For example, Barbara Ann Stolz has emphasized that the Court, through its interpretation of the law, engages in policymaking directly affecting the actions of law enforcement, corrections, and, more broadly, the criminal justice system.[19] Recently, Richard D. Hartley and Rob Tillyer showed how the Court's decisions have substantially altered sentencing laws.[20] There are, to be sure, clear limits to the Court's influence on policy. The Court can only hear cases brought before it, and there may be substantial gaps between what its decisions require and how well these requirements are implemented in the criminal justice system; even so, Court decisions have the potential to affect crime reforms by, among other things, ruling that they are unconstitutional.[21]

Court rulings derive from several sources, but historically social science research has not been one of them.[22] Indeed, prior to the 1900s, the Court had not relied on social science research in an opinion.[23] At the turn of the century, however, a shift occurred. In *Muller v. Oregon*, Louis D. Brandeis, acting as a litigator, submitted a brief to the Court that cited research describing the negative effects of long industrial work hours on women.[24] The Court referenced this research to help justify its decision in *Muller*.[25] This recognition of empirical work "is considered a watershed in the Supreme Court's use of social science research evidence . . . ."[26]

A half-century later, in one of its most famous cases, *Brown v. Board of Education*, the Court drew heavily on psychological and educational research.[27] Since then, social scientific research increasingly has surfaced

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[19] *See* STOLZ, *supra* note 1, at 177.

[20] Richard D. Hartley & Rob Tillyer, *Defending the Homeland: Judicial Sentencing Practices for Federal Immigration Offenses*, 29 JUST. Q. 76, 78–79 (2012).

[21] *See* STOLZ, *supra* note 1, at 4–5, 177.

[22] *See* Monahan & Walker, *supra* note 8, at 73.

[23] *Id.* at 76.

[24] Brief for Defendant in Error at 19, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107).

[25] Muller v. Oregon, 208 U.S. 412, 419 (1908).

[26] James R. Acker, *Thirty Years of Social Science in Supreme Court Criminal Cases*, 12 LAW & POL'Y 1, 2 (1990).

[27] Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954) (citing psychological research showing the detrimental effects of segregation on African-American students in finding that separate educational facilities are inherently unequal).

in the proceedings and decisions of American courts.[28] More recently, Shawn D. Bushway and Anne Morrison Piehl emphasized that "it is clear that social science can and will be taken into account by legal actors such as the Supreme Court."[29] How the Court uses social science research varies. Justices may obtain information from briefs submitted by the parties or amicus curiae. As but one example, the American Psychological Association et al. submitted an amici curiae brief that argued against mandatory life sentences without the possibility of parole for juveniles convicted of homicide offenses in *Miller v. Alabama*.[30] The brief argued, in part, that psychological research strongly indicates that juveniles are not as capable as adults of anticipating the consequences of their actions and, as a result, should not be held as culpable as adults for their offenses.[31] The Court appeared persuaded by the evidence presented in the brief,[32] as it reversed the practice, finding that mandatory life without parole sentences for juveniles amounted to cruel and unusual punishment. In contrast, some accounts suggest that Justices may occasionally undertake independent literature searches.[33] To date, studies of the Supreme Court's use of research have focused on such dimensions as the number of citations mentioned in court decisions,[34] the role of amicus curiae briefs and judicial decisionmaking,[35] and the influence of expert testimony.[36] Notably, however, basic questions remain about the extent to which the Court draws on research and whether it does so accurately. Over twenty years ago, in a

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[28] *See* John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW & HUM. BEHAV. 571, 581 (1991).

[29] *See* Shawn D. Bushway & Anne Morrison Piehl, *Social Science Research and the Legal Threat to Presumptive Sentencing Guidelines*, 6 CRIMINOLOGY & PUB. POL'Y 461, 479 (2007).

[30] Brief for the American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 3–4, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646 & 10-9647).

[31] *Id.* at 7–14.

[32] Miller v. Alabama, 132 S. Ct. 2455, 2464 n.5 (2012); *see also* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (citing an amicus curiae brief as providing support for the finding that psychology and brain science research indicate significant differences between juvenile and adult minds).

[33] ROSEMARY J. ERICKSON & RITA J. SIMON, THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS 32, 154 (1998); J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 143 n.56 (1991).

[34] Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 74, 82 n.72 (2008).

[35] *See generally* Karen O'Connor & Lee Epstein, *Amicus Curiae Participation in the U.S. Supreme Court: An Appraisal of Hakman's "Folklore*," 16 LAW & SOC'Y REV. 311 (1982) (concluding that amicus curiae participation by private groups is the norm rather than the exception).

[36] *See* Ronald Roesch et al., *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 LAW & HUM. BEHAV. 1, 3 (1991).

review of Supreme Court reliance on scientific research, James R. Acker concluded that "we know little about such basic matters as . . . what kinds of references are utilized" and whether the Court summarized research findings in a manner consistent with the state of scientific research.[37] That assessment remains largely the same today.[38]

## III. SEX OFFENDER LAWS

The U.S. Supreme Court renders decisions on a broad range of issues each year. This fact makes it difficult to assess not only the Court's use of social science research but also the extent to which the research is accurately represented. One strategic avenue through which to investigate this issue, however, is to focus on the Court's decisions in a particular policy arena. Here, we adopt this approach and focus on sex offender laws for three reasons. First, the federal government and state legislatures have been active in developing and implementing an array of sex offender reforms in recent decades. Second, per some accounts, sex crime laws appear to reflect panic-driven responses that have resulted from misperceptions about sexual offending. Some scholars have observed that the emergence of sex crime reforms has not followed an increase in sexual offending;[39] indeed, in the last decade and a half, reports of forcible rape offenses involving adults[40] and offenses involving children[41] have steadily declined across the United States. As a result, scholars have identified public fear and anxiety about a putatively dangerous population driven to reoffend as potential catalysts of the proliferation of ever more sex crime laws.[42] Third, the Supreme Court has heard several cases involving these initiatives. Collectively, these circumstances present an opportunity to examine the Court's decisions in cases challenging these controversial laws, along with the Court's use and interpretation of social science research in

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[37] *See* Acker, *supra* note 26, at 3.

[38] Craig Haney & Deana Dorman Logan, *Broken Promise: The Supreme Court's Response to Social Science Research on Capital Punishment*, 50 J. SOC. ISSUES 75, 83 (1994). *See generally* Monahan & Walker, *supra* note 28.

[39] *See, e.g.*, TRACY VELÁZQUEZ, VERA INST. OF JUSTICE, THE PURSUIT OF SAFETY: SEX OFFENDER POLICY IN THE UNITED STATES 4–5 (2008).

[40] MICHAEL PLANTY ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, at 1 fig.1 (2013).

[41] David Finkelhor & Lisa Jones, *Have Sexual Abuse and Physical Abuse Declined Since the 1990s?*, CRIMES AGAINST CHILDREN RESEARCH CTR. 3 (2012), *available at* http://www.unh.edu/ccrc/pdf/CV267_Have%20SA%20%20PA%20Decline_FACT%20SHEET_11-7-12.pdf.

[42] *See, e.g.*, Christina Mancini, *Examining Factors that Predict Public Concern About the Collateral Consequences of Sex Crime Policy*, CRIM. JUST. POL'Y. REV. (forthcoming 2013).

majority opinions. This Part highlights the types of sex offender reforms enacted nationally.

Since the early 1990s, all states have enacted new sex crime laws.[43] This change was spurred, in part, by federal legislation that required states to create sex offender registries and notification policies.[44] These laws aim to promote public awareness of offenders' presence and, at the same time, increase law enforcement monitoring of offenders.[45] Other sex offender laws have also been enacted. For example, states have passed legislation that allows sex offenders to be civilly committed and released only when mental health professionals deem them no longer a risk to the community.[46] Some states now require that convicted sex offenders receive mandatory treatment, including chemical castration.[47] Still other laws have targeted sex offenders. For example, in recognition that victims may not be able or willing to immediately report sex crimes, some states have created legislation that allows sex offenders to be prosecuted beyond the statutes of limitations.[48]

Many states increasingly have enacted tougher sentencing guidelines for cases involving child victims. These laws do not always involve physical contact. For example, child pornography laws sometimes include penalties for individuals convicted of accessing child pornography,[49] even when the depictions consist of virtual or computer-generated images of children engaging in sex acts.[50] The focus on protecting child victims is reflected in laws that have allowed convicted child rapists to be executed.

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[43] For a recent compilation of state laws, see Christina Mancini et al., *It Varies from State to State: An Examination of Sex Crime Laws Nationally*, 24 CRIM. JUST. POL'Y REV. 166, 189–92 (2013).

[44] *See* Sample, *supra* note 18, at 267; Richard Tewksbury, *Sex Offender Registries as a Tool for Public Safety: Views from Registered Offenders*, 7 W. CRIMINOLOGY REV. 1, 2 (2006).

[45] *See* Mancini et al., *supra* note 43, at 169.

[46] Dennis M. Doren, *Recidivism Base Rates, Predictions of Sex Offender Recidivism, and the "Sexual Predator" Commitment Laws*, 16 BEHAV. SCI. & L. 97, 97 (1998).

[47] William M. Burdon & Catherine A. Gallagher, *Coercion and Sex Offenders: Controlling Sex-Offending Behavior Through Incapacitation and Treatment*, 29 CRIM. JUST. & BEHAV. 87, 95 (2002); Linda S. Grossman et al., *Are Sex Offenders Treatable? A Research Overview*, 50 PSYCHIATRIC SERVICES 349, 351 (1999).

[48] Ashran Jen, Comment, Stogner v. California*: A Collision Between the Ex Post Facto Clause and California's Interest in Protecting Child Sex Abuse Victims*, 94 J. CRIM. L. & CRIMINOLOGY 723, 728 (2004). For a compilation of state sex crime statutes, see Mancini et al., *supra* note 43, at 189–92.

[49] JANIS WOLAK ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE *NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY* at ix, 19–20 (2005).

[50] PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 37 (2001).

Prior to 2008, at least six states permitted the execution of sex offenders convicted of aggravated sex crimes against a child.[51]

Not least, federal legislation enacted in 2006, the Adam Walsh Child Protection and Safety Act (AWA), requires that states, tribal jurisdictions, and U.S. territories impose additional restrictions on released sex offenders.[52] Under Title I of the AWA, the Sex Offender Registration and Notification Act (SORNA), convicted sex offenders are required to register within a certain period of time when moving from one jurisdiction to another or face felony charges.[53] Individuals who do not register within the mandated time period face incarceration as a possible sanction.[54]

## IV. SEX CRIME LAWS AND THE U.S. SUPREME COURT

In response to challenges to sex offender laws over the past twenty years, the U.S. Supreme Court has issued decisions reflecting the laws' diversity. Decisions have addressed cases involving civil commitment, child pornography, sex offender treatment, notification policies, registries, extensions of statutes of limitations for sex crimes, capital punishment for rapists, and SORNA. This Part briefly reviews key Court decisions since 1991.[55] For parsimony, we describe cases that address different policies. The descriptions serve both to convey the range of policies and provide context for the subsequent analyses.

*Kansas v. Hendricks*:[56] Respondent Hendricks claimed that Kansas's civil commitment statute violated the Due Process, Double Jeopardy, and Ex Post Facto Clauses of the Constitution. The Court found that the law provided strict procedural safeguards and that the Act did not generate additional criminal proceedings and therefore was not punitive.

*Ashcroft v. Free Speech Coalition*:[57] The Supreme Court considered whether the Child Pornography Prevention Act of 1996 (CPPA), which banned virtual or computer-generated images of children engaging in sex

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[51] Joan Biskupic, *Justices Reject Death Penalty for Child Rapists: Court Limits Use of Capital Punishment*, USA TODAY, June 26, 2008, at A4.

[52] Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 10, 18, 21, 28, and 42 U.S.C.).

[53] *Id.* 120 Stat. at 590–611 (codified at 42 U.S.C. §§ 16901–16962 (2006) and 18 U.S.C. § 2250 (2012)).

[54] 18 U.S.C. § 2250(a); *see also* Andrew J. Harris & Christopher Lobanov-Rostovsky, *Implementing the Adam Walsh Act's Sex Offender Registration and Notification Provisions: A Survey of the States*, 21 CRIM. JUST. POL'Y REV. 202, 204–05 (2010).

[55] As we discuss *infra*, these cases touch on a wide range of distinct sex offender policies that states and the federal government have enacted.

[56] Kansas v. Hendricks, 521 U.S. 346 (1997).

[57] Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

acts, unduly restricted freedom of speech. The Court ruled that the CPPA was overly broad and restrictive and therefore was unconstitutional.

*McKune v. Lile*:[58] Respondent Lile, a convicted sex offender in the custody of the Kansas Department of Corrections, challenged the tenets of a treatment program that required him to admit guilt for his offense. Lile argued that an admission would violate his Fifth Amendment privilege against self-incrimination. The Court ruled that the treatment approach served a "vital penological purpose" and did not violate Lile's Fifth Amendment right.[59]

*Connecticut Department of Public Safety v. Doe*:[60] Respondent Doe, a convicted sex offender, challenged a Connecticut community notification law that required pictures of all sex offenders and their locations to be posted on a state website. Doe claimed that because the law did not allow him to demonstrate his low-risk status as a sex offender, posting his picture and personal information on the state website violated his constitutional rights, including his right to due process protected by the Fourteenth Amendment. The Court rejected Doe's claims that the law was punitive in nature and found that the website served to protect the public.

*Smith v. Doe*:[61] Respondents Doe I and Doe II challenged an Alaska law requiring retroactive registration for offenders who committed sex crimes prior to the passage of the 1994 Act. Both petitioners were released from prison and completed rehabilitative programs for sex offenders. Although Doe I and Doe II were convicted of their sex crimes before the Act's passage, they were still required to register. They claimed that the law was retroactive and punitive and thus violated their constitutional rights. The Court disagreed; it decided that the law served a regulatory, public safety purpose and thus found that it did not violate the Ex Post Facto Clause of the Constitution.

*Stogner v. California*:[62] Petitioner Stogner challenged a California statute that permitted prosecution for sex-related child abuse when the prior limitations period had expired if the prosecution began within one year of the victim's report to law enforcement. The Supreme Court found that the law had been applied retroactively and thus was unconstitutional.

*Kennedy v. Louisiana*:[63] Petitioner Kennedy was convicted of an aggravated sex crime in Louisiana and sentenced to death. He claimed that

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[58] McKune v. Lile, 536 U.S. 24 (2002).
[59] *Id.* at 29.
[60] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003).
[61] Smith v. Doe, 538 U.S. 84 (2003).
[62] Stogner v. California, 539 U.S. 607 (2003).
[63] Kennedy v. Louisiana, 554 U.S. 407 (2008).

the sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment. The Court agreed that his sentence constituted cruel and unusual punishment and invalidated the Louisiana statute.

*Carr v. United States*:[64] The Court invalidated a specific provision of the federally mandated SORNA legislation that aimed to tighten current sex offender registry laws. It ruled that the Act was retroactively applied to offenders, and thus unconstitutionally penalized registrants who moved before the law was officially implemented.

## V. THE PRESENT STUDY

This study examines the following questions: Does the Supreme Court refer to theoretical and empirical research when deciding whether sex offender laws and policies are constitutional? Does the Court's assessment of research accord with broader empirical literature on sexual offending and policy? To answer these research questions, we employed the following protocol to identify all Court cases involving sex offender laws. First, a search of Lexis-Nexis Lawyers' Edition was conducted. Using keywords "sex offender," "sex offenders," "sex offender laws," "sex crime laws," "sex crime policy," "child sexual abuse," and "child sexual abuse laws," twenty-five potential matches were found. Thirteen of the cases did not focus on sex offender laws. For example, *Blakely v. Washington*,[65] identified in the search, did not focus directly on sex offender policy but rather on mandatory sentencing guidelines, thereby having no implications directly relevant to our study. Another case, *United States v. Juvenile Male*, although pertaining to juvenile sex offender registration, was also excluded, because the Court simply responded to a certified question in a per curiam decision.[66] Here, then, there was no majority decision to analyze.

Review of the eleven remaining cases revealed that they centered on legislation regulating: civil commitment, virtual or computer-generated child pornography, treatment for sex offenders, sex offender community notification, sex offender registration, statutes of limitations for sexual offenses, and capital punishment for convicted sex offenders. The Court issued only one case per subject area with the exception of civil commitment, which garnered four separate decisions—*Kansas v. Hendricks*,[67] *Seling v. Young*,[68] *Kansas v. Crane*,[69] and *United States v.*

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[64] Carr v. United States, 130 S. Ct. 2229 (2010).
[65] Blakely v. Washington, 542 U.S. 296 (2004).
[66] United States v. Juvenile Male, 130 S. Ct. 2518 (2010).
[67] Kansas v. Hendricks, 521 U.S. 346 (1997).
[68] Seling v. Young, 531 U.S. 250 (2001).
[69] Kansas v. Crane, 534 U.S. 407 (2002).

*Comstock*.[70] The outcome of these cases was substantively the same—the Court upheld the states' civil commitment statutes in every instance. At the same time, the Court's rationale across the cases was consistent; the civil commitment procedures at issue did not constitute punitive sanctions and were therefore legally permissible. Given this overlap, and because *Hendricks* provided the analytical framework for subsequent cases, it is the only civil commitment decision examined. This approach ensured balance in our analyses of the types of sex offender laws addressed by the Court. In the end, the following cases were examined: *Hendricks*,[71] *Free Speech Coalition*,[72] *McKune*,[73] *Connecticut Department of Public Safety*,[74] *Smith*,[75] *Stogner*,[76] *Kennedy*,[77] and *Carr*.[78]

Following the general guidelines for qualitative analysis outlined by other scholars,[79] we identified virtually any reference to social science research in each Court decision. For the purpose of this study, such research was identified using criteria borrowed from Rosemary J. Erickson and Rita J. Simon, who operationalized social science data as "information dealing with social, social psychological, and psychological issues."[80] Specifically, we focused on citations within the majority opinions for each case from published journal articles, government reports, or public opinion polls involving sex crime research. Acker has cautioned that "[t]he mere citation of a social science reference does not, of course, necessarily signify that the writer was influenced by the work, nor that it was intended as supporting authority for the associated proposition."[81] At the same time, however, citations are generally considered "among the best evidence available of the judicial reasoning process"[82] and are arguably among the only visible indicators of the Court's awareness of research focused on sex crimes and offenders.

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[70] United States v. Comstock, 130 S. Ct. 1949 (2010).

[71] *Hendricks*, 521 U.S. at 346.

[72] Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

[73] McKune v. Lile, 536 U.S. 24 (2002).

[74] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003).

[75] Smith v. Doe, 538 U.S. 84 (2003).

[76] Stogner v. California, 539 U.S. 607 (2003).

[77] Kennedy v. Louisiana, 554 U.S. 407 (2008).

[78] Carr v. United States, 130 S. Ct. 2229 (2010).

[79] SHARAN B. MERRIAM, QUALITATIVE RESEARCH: A GUIDE TO DESIGN AND IMPLEMENTATION 55, 139 (2d ed. 2009); ANSELM STRAUSS & JULIET CORBIN, BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY 65, 159, 263 (2d ed. 1998).

[80] *See* ERICKSON & SIMON, *supra* note 33, at 2.

[81] *See* Acker, *supra* note 26, at 3.

[82] *Id.*

After compiling every instance in which the Court cited social science research, we then reviewed the extant literature and contrasted the claims made in the majority decisions against those in the cited works and in the broader literature on sex crimes, sex offenders, and the impacts of sex offender laws. This approach involved searching academic databases (e.g., JSTOR and ProQuest) for relevant scholarship using key terms that appeared relevant to each specific claim (for instance, "sex offender recidivism" where the Court mentioned a citation about rates of reoffending among sex offenders).

From there, we relied on the qualitative methodology used in prior legal research[83] to assess the extent to which the Court's interpretation of research accords with the larger state of empirical evidence. Specifically, we relied on a face-validity approach in our analysis: after identifying the specific account mentioned by the Court in each decision and reviewing relevant scholarship, we considered the preponderance of evidence in published scientific reviews and studies.

## VI. FINDINGS

We begin with the study's first question—does the Supreme Court refer to theory or empirical research on sex crimes when deciding cases involving sex offender policies? Analysis of the Court's majority opinions indicates that the Court indeed references such work. As inspection of Tables 1 through 5 shows, the Court cited a total of 23 scholarly accounts across 7 cases, averaging approximately 3.3 citations per case. The Court made no reference to social science in only one opinion—*Carr v. United States*[84]—a case challenging a provision of SORNA legislation. This estimate accords with findings from other studies. For example, in an analysis of the Supreme Court's use of social science in criminal justice cases decided in the 1958 to 1987 terms, Acker reported that the average number of social science citations was 1.3 in his study (n = 240 cases).[85] In

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[83] *See generally* Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379 (2006) (incorporating a similar methodology in an analysis of social science research use in a Supreme Court decision involving capital punishment). *See also* Haney & Logan, *supra* note 38, at 76 (analyzing references to psychological research in Supreme Court cases involving capital punishment); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 63 (1978) (analyzing Supreme Court decisions related to school desegregation policies). Here again, Yudof relies on a qualitative approach to understand how the Supreme Court references social science research in its decisions.

[84] Carr v. United States, 130 S. Ct. 2229 (2010).

[85] *See* Acker, *supra* note 26, at 10 tbl.3 (decided in the 1958 to 1987 terms). Acker reports 311 citations in 49 opinions (7% of the 700 opinions), and we took 311 and divided it by the 240 opinions. *See id.*

a similar study of the Court's use of social science research in death penalty cases, Acker found approximately eight citations per case (n = 28 cases).[86] The average citations per case here fits squarely within these estimates.

Our second and more fundamental question is whether the Court's interpretation of the literature accords with findings from a larger body of scholarly work. As we discuss below, we find substantial variation. Across five distinct substantive domains[87] in the literature on sex offenders—the prevalence of sex crimes; the nature and effects of sex crimes involving children; the effectiveness of sex offender treatment; sex offender recidivism and reentry; and the effects of sexual victimization—the Court's presentation and interpretation, or the implied meaning, of research findings sometimes accords with extant social science studies. In other instances, the findings are overstated or misleading. A lack of contextual information contributes to the misleading nature of some of the discussions—the lack of context, for example, typically creates the appearance that a given estimate is larger or that a general pattern is clearer than what is indicated by the broader body of scholarship on sex offenders. We turn now to each of these five substantive domains and show how the Court's use of social science accords with and, in some cases, departs from assessments in the scholarly literature.

### A. SEX CRIME PREVALENCE

We start with Court references to the prevalence of sex crime (*see* Table 1). There were two instances in which the Court referred to research about the frequency of sex offenses nationally; both occurred in *McKune*, which involved a challenge to an institutional treatment program for sex offenders. First, the Court stated: "In 1995, an estimated 355,000 rapes and sexual assaults occurred nationwide."[88] This fact was used in the decision in a way that seemingly implied that an unusually large number of these offenses occurred in 1995 and that significant increases in sex crimes were evident.[89] Although the estimate the Court cited was correct, we argue that

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[86] James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions*, *1986-1989*, 27 LAW & SOC'Y REV. 65, 72 tbl.1 (1993) (finding 8.3 citations per case).

[87] Drawing on prior research (e.g., Haney & Logan, *supra* note 38, at 80) and using a face-validity approach advocated by STRAUSS & CORBIN, *supra* note 79, at 263, we constructed these five domains after reviewing the themes of the Court's findings. For example, there were instances where the Court made mention of research examining the prevalence of sex offenses committed against children. These citations were grouped together into one category.

[88] McKune v. Lile, 536 U.S. 24, 32 (2002).

[89] *Id.* In our view, the Court's full quote emphasizes that sex offenders pose an especially

the claim lacked context and created a misleading image of both the prevalence and trends of sex crimes. In 1995, there were 1,099,207 aggravated assaults; 2,593,784 burglaries; 580,509 robberies; and 21,606 homicides.[90] Clearly, the number of sex crimes that occurred in 1995 compared to the number of other types of crime, with the exception of homicides, was relatively low. In addition, and of more relevance, rapes and sexual assaults had been declining in frequency since the early 1990s.[91]

**Table 1**

*U.S. Supreme Court References to Research in Sex Offender Cases: Sex Crime Prevalence*

| Claim | Supported? | Case |
|---|---|---|
| "In 1995, an estimated 355,000 rapes and sexual assaults occurred nationwide."[92] | Correct, but lacks context | *McKune* |
| "Between 1980 and 1994, the population of imprisoned sex offenders increased at a faster rate than for any other category of violent crime."[93] | Correct, but does not imply an actual increase in sex offenses | *McKune* |

dangerous threat, beyond that of other offender types, to vulnerable populations:

> Sex offenders are a serious threat in this Nation. In 1995, an estimated 355,000 rapes and sexual assaults occurred nationwide. Between 1980 and 1994, the population of imprisoned sex offenders increased at a faster rate than for any other category of violent crime. As in the present case, the victims of sexual assault are most often juveniles. In 1995, for instance, a majority of reported forcible sexual offenses were committed against persons under 18 years of age. *Id.* (internal citations omitted).

In support of our view, see also LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 6, 8 fig.8 (1997) (showing a decrease in reports of sex offenses in the 1990s).

[90] FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1996: UNIFORM CRIME REPORTS 64–65 tbl.4 (1997) [hereinafter 1996 UNIFORM CRIME].

[91] David Finkelhor, Editorial, *Improving Research, Policy, and Practice to Understand Child Sexual Abuse*, 280 J. AM. MED. ASS'N 1864, 1864 (1998) (reporting a "dramatic decline" in the prevalence of child sexual abuse claims from 1992 to 1997); *see also* LISA JONES & DAVID FINKELHOR, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, THE DECLINE IN CHILD SEXUAL ABUSE CASES 2–3 figs.1–4 (2001) (finding that a review of abuse allegations indicates a significant decrease nationally in sex offenses involving children during the 1990s); Gary LaFree, *Declining Violent Crime Rates in the 1990s: Predicting Crime Booms and Busts*, 25 ANN. REV. SOC. 145, 147 (1999) (finding that rape rates fell by 15.1% from 1991 to 1997).

[92] *McKune*, 536 U.S. at 32 (citing FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1999: UNIFORM CRIME REPORTS 24 (2000); Greenfeld, *supra* note 89, at 18).

[93] *Id.* (citing GREENFELD, *supra* note 89, at 18).

The Court also referred to sex offender incarceration trends: "Between 1980 and 1994, the population of imprisoned sex offenders increased at a faster rate than for any other category of violent crime."[94] This observation is correct, but any implication that this increase reflected an increase in sex crimes is not. The explanation that the increase instead resulted from tougher sanctioning policies—which would result in more sex offenders behind bars even if sex crime rates remained constant—better accords with studies showing that sex offending declined during the 1990s. Indeed, federal reports available before the time of the decision document this trend.[95]

Published research reported on the decline in sex offenses involving both children[96] and adults.[97] For example, in an article in the *Journal of the American Medical Association* published four years prior to the decision, David Finkelhor documented that estimates for child sexual victimization had declined by 40% since the early 1990s.[98] Not least, estimates using data from the National Crime Victimization Survey (NCVS) showed a decrease in the sexual battery victimization rate from 1993 to 2005, declining from 2.5 to 0.3 per 1,000 people age 12 and older.[99] In short, the suggestion in the Court's decision—that sex crimes were widespread and increasing—runs counter to scholarship available at the time of the decision.

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[94] *Id.*

[95] Put differently, incarceration rates do not necessarily correspond to actual crime rates. And so, increased incarceration rates for sex offenders may reflect policy shifts rather than actual increases in the extent of sex crime. *See, e.g.*, JONES & FINKELHOR, *supra* note 91, at 2–3 figs.1–4 (relaying that sex offenses dramatically declined across the country during the 1990s).

[96] Finkelhor, *supra* note 91, at 1864.

[97] LaFree, *supra* note 91, at 147.

[98] Finkelhor, *supra* note 91, at 1864 (citing Ching-Tung Wang & Deborah Daro, *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1997 Annual Fifty State Survey* (Ctr. on Child Abuse Prevention Research, Working Paper, 1998)).

[99] *Compare* SHANNON M. CATALANO, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2005, at 5 tbl.3 (2006), *with* MICHAEL R. RAND ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 1973-95, at 3 (1997). For another report documenting this trend, see CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1999: CHANGES 1998-99 WITH TRENDS 1993-99, at 1 (2000).

B. SEX CRIMES INVOLVING CHILDREN

We turn now to cases in which references to sex crimes involving children occurred in Court decisions. Examination of Table 2 identifies seven references to research on such crimes. In *Hendricks*, the Court observed that pedophilia is "a condition the psychiatric profession itself classifies as a serious mental disorder."[100] As reflected by the phrase "the psychiatric profession itself," the Court noted that agreement about this claim exists among practitioners, and in so doing, it cited three sources.[101] A review of research, however, indicates that scholars and practitioners disagree, as reflected in Linda S. Grossman et al.'s meta-analysis of studies published from 1970–1998.[102] The authors noted that "[c]linicians have not traditionally regarded sex offenders as falling within the target population of severely and persistently mentally ill persons considered appropriate for civil commitment."[103] The Court acknowledged that some disagreement may exist: "We recognize, of course, that psychiatric professionals are not in complete harmony in casting pedophilia, or paraphilias in general, as 'mental illnesses.' These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws."[104] In short, the Court seemingly generalized a claim beyond what prevailed in empirical research and scholarship and appeared to buttress the claim by referencing a standard, "complete harmony," that does not exist in the social sciences.

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[100] Kansas v. Hendricks, 521 U.S. 346, 360 (1997).

[101] *Id.* (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 525–25, 527–28 (4th ed. 1994) [hereinafter DSM–IV]; AM. PSYCHIATRIC ASS'N, TREATMENTS OF PSYCHIATRIC DISORDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION 617–33 (1989) [hereinafter TASK FORCE REPORT]; Gene G. Abel & Joanne L. Rouleau, *Male Sex Offenders*, *in* HANDBOOK OF OUTPATIENT TREATMENT OF ADULTS 271 (Michael E. Thase et al. eds., 1990)).

[102] *See* Grossman et al., *supra* note 47, at 359.

[103] *Id*.

[104] *Hendricks*, 521 U.S. at 360 n.3 (internal citation omitted). Put differently, although the Court recognizes that practitioners may disagree, it also acknowledges that when such discord exists, "legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Id.* (internal quotation marks and citation omitted).

**Table 2**

*U.S. Supreme Court References to Research in Sex Offender Cases: Sex Crimes Involving Children*

| Claim | Supported? | Case |
|---|---|---|
| "[Pedophilia is] a condition the psychiatric profession itself classifies as a serious mental disorder."[105] | Partially correct | *Hendricks* |
| "[T]here are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses."[106] | Partially correct | *Ashcroft* |
| "[T]he victims of sexual assault are most often juveniles. In 1995, for instance, a majority of reported forcible sexual offenses were committed against persons under 18 years of age. Nearly 4 in 10 imprisoned violent sex offenders said their victims were 12 or younger."[107] | Correct | *McKune* |
| "'[T]he victims of sex assault are most often juveniles.'"[108] | Correct | *Connecticut Department of Public Safety* |
| "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.'"[109] | Correct, but lacks context | *Smith* |
| "Memories fade, and witnesses can die or disappear. . . . Such problems can plague child abuse cases, where recollection after so many years may be uncertain, and 'recovered' memories faulty, but may nonetheless lead to prosecutions that destroy families."[110] | Correct, but underreporting of such abuse is more prevalent | *Stogner* |
| "Approximately 5,702 incidents of vaginal, anal, or oral rape of a child under the age of 12 were reported nationwide in 2005; this is almost twice the total incidents of intentional murder for victims of all ages (3,405) reported during the same period."[111] | Correct, but these are underestimates | *Kennedy* |

[105] *Id.* at 360 (citing DSM–IV, *supra* note 101, at 524–25, 527–28; TASK FORCE REPORT, *supra* note 101, at 617–33; Abel & Rouleau, *supra* note 101, at 271).

[106] Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002) (describing a congressional finding and citing CHILDREN'S BUREAU, U. S. DEP'T OF HEALTH & HUMAN SERVS., 10 YEARS OF REPORTING CHILD MALTREATMENT 1999 (2001)).

[107] McKune v. Lile, 536 U.S. 24, 32–33 (2002) (citing CRIMES AGAINST CHILDREN RESEARCH CTR., SEXUAL ABUSE (2000); GREENFELD, *supra* note 89, at 24, iii).

[108] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003) (quoting *McKune*, 536 U.S. at 32–33).

[109] Smith v. Doe, 538 U.S. 84, 104 (2003) (quoting ROBERT A. PRENTKY ET AL., NAT'L INST. OF JUSTICE, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 14 (1997)).

[110] Stogner v. California, 539 U.S. 607, 631 (2003) (citing Lynn Holdsworth, *Is It Repressed Memory with Delayed Recall or Is It False Memory Syndrome? The Controversy and Its Potential Legal Implications*, 22 LAW & PSYCHOL. REV. 103, 103–04 (1998)).

[111] Kennedy v. Louisiana, 554 U.S. 407, 438 (2008) (citing FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, NATIONAL INCIDENT-BASED REPORTING SYSTEM,

The next reference to sex crime research involved a discussion of child pornography in *Ashcroft*. In this case, the Court relied on legislative findings in which Congress had recognized that "there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses."[112] Such an assessment may best be characterized as partially accurate. The first part of the assertion is supported by prior research. For example, Philip Jenkins identified certain enclaves of individuals ("child porn enthusiasts") who visit child pornography websites, download pornographic images of children, and participate in child pornography message boards.[113] However, the second part of the statement—that such individuals "commit criminal acts to gratify the impulses"—is only questionably supported. At the time of the decision, no research had examined whether an association exists between viewing child pornography and committing child sex offenses and whether such an association, should it have existed, was causal.[114]

The Court made the third claim in *McKune*. Here, with a focus on child sex victimization, the Court stated, "[T]he victims of sexual assault are most often juveniles. In 1995, for instance, a majority of reported forcible offenses were committed against persons under 18 years of age. Nearly 4 in 10 imprisoned violent sex offenders said their victims were 12

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2005, Study No. 4720 (2005)).

[112] Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002) (citing CHILDREN'S BUREAU, *supra* note 106).

[113] *See* JENKINS, *supra* note 50, at 102.

[114] Since the *Ashcroft* decision, research has examined whether child pornography offenders are more likely to commit contact sex offenses. For example, in 2009, a study conducted by Michael L. Bourke and Andres E. Hernandez found that offenders with a prior child pornography offense were "significantly more likely than not" to have committed a "hands-on" sex offense. Michael L. Bourke & Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 188 (2009). However, the authors cautioned that it would be "presumptuous" to attribute a causal relationship between child pornography viewing and contact sexual offending. *Id.* at 189. Indeed, the majority of offenders in the study reported viewing child pornography only after having committed a contact sex offense (e.g., child molestation). *Id.; see also*, Michael C. Seto et al., *Contact Sexual Offending by Men with Online Sexual Offenses*, 23 SEXUAL ABUSE: J. RES. & TREATMENT 124, 136 (2011) (reporting that little evidence exists suggesting a causal link between viewing child pornography and actual hands-on, offending and "[a]lthough there is considerable overlap between online and offline offending, our results suggest there is a distinct group of online offenders whose only sexual crimes involve illegal (most often child) pornography"). Of primary relevance here is that at the time of the *Ashcroft* decision, no published studies had identified an association between viewing child pornography and engaging in sexual offending. *See generally* Bourke & Hernandez, *supra*, at 185 (stating that their 2009 article is one of the first to test for a correlation between child pornography use and contact offending).

or younger."[115] The Court also expressed this finding in *Connecticut*, noting that "victims of sex assault are most often juveniles."[116] Extant research supports both claims. From 1991 to 1996, the period overlapping with those referred to in these cases, 67% of all victims of sexual assaults reported to law enforcement were juveniles (under the age of 18) and more than half of all juvenile victims were under age 12.[117]

In a different case, *Smith*, the Court discussed research about child molesters. Quoting a study, the Court reasoned, "'[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.'"[118] Again, the Court's assessment accords with the larger body of sex offender research. Child molesters have lifetime reoffense rates that range from approximately 50%[119] to 70%,[120] compared to less than 20% for sex offenders as a group.[121] Studies also suggest that child molesters are at risk of reoffending many years after their first arrests. For example, R. Karl Hanson and colleagues reported in their study of child molesters that 42% were eventually reconvicted, "with 23% of the recidivists being reconvicted more than 10 years after they were released."[122]

Notwithstanding the accurate summary of research, the Court's decision then advanced an argument that ran counter to what is implied by scholarship on sex offenders. The Court emphasized that child molesters have high rates of lifetime recidivism, and thus "[t]he duration of the reporting requirements [of the Alaska registry] is not excessive."[123] However, child molesters represent only one type of sex offender while Alaska's sex offender registry applies to a wide range of sex offenders, not just those who engaged in child molestation. Such a distinction clearly

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[115] McKune v. Lile, 536 U.S. 24, 32–33 (2002) (citing CRIMES AGAINST CHILDREN RESEARCH CTR., *supra* note 107; GREENFELD, *supra* note 89, at 24, iii).

[116] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003) (quoting *McKune*, 536 U.S. at 32).

[117] HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 (2000).

[118] Smith v. Doe, 538 U.S. 84, 104 (2002) (quoting PRENTKY ET AL., *supra* note 109, at 14).

[119] *See* Doren, *supra* note 46, at 101.

[120] Ron Langevin et al., *Lifetime Sex Offender Recidivism: A 25-Year Follow-Up Study*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 531, 545 (2004).

[121] Don Grubin & Sarah Wingate, *Sexual Offence Recidivism: Prediction Versus Understanding*, 6 CRIM. BEHAV. & MENTAL HEALTH 349, 350 (1996); *see also* KAREN J. TERRY, SEXUAL OFFENSES AND OFFENDERS: THEORY, PRACTICE, AND POLICY 36 (2005).

[122] R. Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. CONSULTING & CLINICAL PSYCHOL. 646, 650 (1993).

[123] *Smith*, 538 U.S. at 104.

exists in scholarship on sex offenders. If the Court had recognized the distinction and followed the same logic of the decision, it would have held reporting requirements to be excessive for other types of sex offenders whose victims were not children. In short, two critical contexts were omitted—child molesters are not representative of all sex offenders, and the sex offender registry affected all sex offenders, not just child molesters.

In *Stogner*, a case challenging a state law that permitted prosecutors to bring sexual abuse charges against individuals even if the statutes of limitations for those crimes have expired, the Court stated: "Memories fade, and witnesses can die or disappear. Such problems can plague child abuse cases, where recollection after so many years may be uncertain, and 'recovered' memories faulty, but may nonetheless lead to prosecutions that destroy families."[124] For the latter proposition, the Court cited research questioning the reliability of child sexual abuse recollections. The Court intimates that distorted memories in the form of "false memory syndrome" could potentially lead to false allegations of sex crimes. Its citation, while generally discussing the issue at hand, does not provide an estimate of the extent to which faulty memories result in false allegations of sex offenses. To the contrary, little empirical justification exists to support the argument that faulty memory syndrome significantly contributes to false allegations of sex offenses. Under this logic, Stephanie J. Dallam's observation in a review (available at the time of the decision) is instructive:

> False memory advocates have failed to adequately define or document the existence of a specific syndrome, and a review of the relevant literature demonstrates that the construct is based on a series of faulty assumptions, many of which have been disproven. Likewise, there are no credible data showing that the vague symptoms they ascribe to this purported syndrome are widespread or constitute a crisis or epidemic.[125]

More generally, prior scholarship indicates the opposite concern. Specifically, U.S. child sexual abuse is most likely underreported.[126] Societal responses towards victims, often called "blaming the victim," can lead them to be unwilling to report sex offenders.[127] Thus, while faulty memory clearly can affect the accuracy of some individuals' recollections, a more likely situation appears to be one in which individuals do not report

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[124] Stogner v. California, 539 U.S. 607, 631 (2003) (citing Holdsworth, *supra* note 110, at 103–04).

[125] Stephanie J. Dallam, *Crisis or Creation? A Systematic Examination of "False Memory Syndrome,"* 9 J. CHILD SEXUAL ABUSE 9, 30 (2002).

[126] TERRY, *supra* note 121, at 9–10.

[127] *See, e.g.*, Cathy Spatz Widom & Suzanne Morris, *Accuracy of Adult Recollections of Childhood Victimization: Part 2. Childhood Sexual Abuse*, 9 PSYCHOL. ASSESSMENT 34, 35, 42 (1997) (discussing social pressures against reporting as experienced by males in particular).

victimization. Accordingly, no empirical evidence supports the claim that falsified reporting and the resulting bogus allegations would present greater problems than underreporting.

Finally, in *Kennedy*, the Court relied on National Incident-Based Reporting System (NIBRS) data in stating, "Approximately 5,702 incidents of vaginal, anal, or oral rape of a child under the age of 12 were reported nationwide in 2005; this is almost twice the total incidents of intentional murder for victims of all ages (3,405) reported during the same period."[128] The Court's concern in this case, in part, was that efforts to permit the death penalty for child rapists would substantially increase the number of capital-punishment-eligible cases. Here, the Court's use of NIBRS-based estimates accurately reflected published accounts, but it neglected to note that these estimates understate true crime—many sex crimes are not reported,[129] and many law enforcement agencies do not participate in NIBRS. Accordingly, the statistics represent a conservative estimate of sex crime nationally, and child sexual abuse is likely more prevalent.[130]

### C. SEX OFFENDER TREATMENT

The Court made three observations about research in examining the efficacy of sex offender treatment; all three appeared in *McKune* (*see* Table 3). First, the Court reported, "Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism."[131] A review of research suggests, however, that practitioners in fact do not widely agree that rehabilitative programs can help offenders control impulses and reduce recidivism. In a summary preceding her study, for example, Janice K. Marques emphasized that "[d]espite the efforts of many talented clinicians through the past several decades, the question of whether sex offender

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[128] Kennedy v. Louisiana, 554 U.S. 407, 438 (2008) (citing FED. BUREAU OF INVESTIGATION, *supra* note 111).

[129] Ronet Bachman, *The Factors Related to Rape Reporting Behavior and Arrest: New Evidence from the National Crime Victimization Survey*, 25 CRIM. JUST. & BEHAV. 8, 25 (1998).

[130] *See generally* DAVID FINKELHOR & RICHARD ORMROD, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, CHILD PORNOGRAPHY: PATTERNS FROM NIBRS 2 (2004) (discussing the limitations of NIBRS in measuring sex crime); JUSTICE RESEARCH & STATISTICS ASS'N, STATUS OF NIBRS IN THE STATES (2012) (noting that as of June 2012, approximately 29% of the population was covered by NIBRS data); Michael G. Maxfield, *The National Incident-Based Reporting System: Research and Policy Applications*, 15 J. QUANTITATIVE CRIMINOLOGY 119, 133 (1999) (highlighting the shortcomings of NIBRS in providing accurate estimates of crime nationally).

[131] McKune v. Lile, 536 U.S. 24, 33 (2002) (citing U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORRS., A PRACTITIONER'S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER xiii (Barbara K. Schwartz ed., 1988)).

treatment works is still hotly debated."[132] In a later review, Karen J. Terry found that "results of sex offender treatment programs are conflicting and researchers are largely divided as to the benefits of treatment."[133] Similarly, Hanson et al. in a meta-analysis of sex offender treatment programs noted that "[d]espite more than 35 review papers since 1990, and a review of reviews, researchers and policy-makers have yet to agree on whether treatment effectively reduces sexual recidivism."[134]

Actual empirical investigations available at the time of the decision also cast doubt on the Court's claim. For instance, Vernon L. Quinsey and Anne Maguire examined interclinician agreement on the recommended type of treatment for male offenders remanded for psychiatric evaluation (n = 200 cases; 21 included sex offenders).[135] Their findings indicated that "there is no consensus among clinicians even after a case has been discussed as to whether any particular treatment [other than drugs used to control mental disorders] is relevant for a particular remand or as to how much [an offender] might benefit from a particular treatment."[136]

Other work has focused on examining correctional staffs' views of offender treatment. To illustrate, a study published seven years prior to *McKune* found that correctional officers (n = 82) who supervised sex offenders were significantly less convinced that they could be treated as well as non-sex offenders (79.3% of officers were doubtful about treatment effects for sex offenders versus 47.6% for other offender types; $p < 0.05$).[137]

Collectively, these findings suggest the Court's claim about practitioner views[138] is not empirically supported. A more problematic

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[132] Janice K. Marques, *How to Answer the Question: "Does Sex Offender Treatment Work?*," 14 J. INTERPERSONAL VIOLENCE 437, 437 (1999).

[133] TERRY, *supra* note 121, at 139.

[134] R. Karl Hanson et al., *First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders*, 14 SEXUAL ABUSE: J. RES. & TREATMENT 169, 170 (2002) (internal citation omitted).

[135] Vernon L. Quinsey & Anne Maguire, *Offenders Remanded for a Psychiatric Examination: Perceived Treatability and Disposition*, 6 INT'L J.L. & PSYCHIATRY 193, 194–95 (1983).

[136] *Id*. at 204. Disagreement also exists among researchers. *Compare* Vernon L. Quinsey et al., *Assessing Treatment Efficacy in Outcome Studies of Sex Offenders*, 8 J. INTERPERSONAL VIOLENCE 512, 521 (1993) (arguing that the literature does not support the assumption that psychological and hormonal treatment are effective for reducing sexual recidivism), *with* W. L. Marshall & W. D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 CRIM. JUST. & BEHAV. 10, 23 (1994) (claiming, based on their analysis of extant studies, that research supports treatment as an effective policy to reduce recidivism since "at the very least some sex offenders respond effectively to treatment").

[137] John R. Weekes et al., *Correctional Officers: How Do They Perceive Sex Offenders?*, 39 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 55, 57–59 (1995).

[138] McKune v. Lile, 536 U.S. 24, 33 (2002) ("Therapists and correctional officers widely

assertion exists in the Court's logic, however. The Court equated practitioner beliefs with findings from actual impact evaluations, which indicate that a given policy or program is effective.[139] The belief that scientific evidence would flow from practitioner endorsement of a practice or program is questionable—as recognized by Todd Edmund Hogue: "although [practitioners are] happy with the programme . . . [it may be that] the treatment program is, itself, ineffective."[140] Stated differently, therapist and correctional officers' views might be considered "expert" opinions, but they are not evidence of effective policy.

**Table 3**

*U.S. Supreme Court References to Research in Sex Offender Cases: Sex Offender Treatment*

| Claim | Supported? | Case |
|---|---|---|
| "Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism."[141] | Incorrect; practitioner views do not equate to evidence of program efficacy | *McKune* |
| "'[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%,' whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%."[142] | Correct, but overstated | *McKune* |
| "'Denial is generally regarded as a main impediment to successful therapy,' and '[t]herapists depend on offenders' truthful descriptions of events leading to past offences in order to determine which behaviours need to be targeted in therapy.'"[143] | Correct, but overstated | *McKune* |
| "Research indicates that offenders who deny all allegations of sexual abuse are three times more likely to fail in treatment than those who admit even partial complicity."[144] | | |

agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism.").

[139] *Id.* (citing U.S. DEP'T OF JUSTICE, *supra* note 131, at xiii).

[140] Todd Edmund Hogue, *Training Multi-Disciplinary Teams to Work with Sex Offenders: Effects on Staff Attitudes*, 1 PSYCHOL. CRIME & L. 227, 234 (1995).

[141] *McKune*, 536 U.S. at 33 (citing U.S. DEP'T OF JUSTICE, *supra* note 131, at xiii).

[142] *Id.* (parenthetically quoting U.S. DEP'T OF JUSTICE, *supra* note 131, at xiii).

[143] *Id.* (quoting Howard E. Barbaree, *Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome*, 3 F. ON CORRECTIONS RES. 30 (1991)).

[144] *Id.* (citing BARRY M. MALETZKY WITH KEVIN B. MCGOVERN, TREATING THE SEXUAL OFFENDER 253–55 (1991)).

In *McKune*, the Court also quoted evidence to state: "'[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15 percent,' whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%."[145] The Court here is technically correct—some studies suggest that treatment can effectively reduce recidivism. However, the assertion is misleading in that it does not draw attention to the fact that many treatment programs have been found to be ineffective; some may increase recidivism; and treatment effectiveness can otherwise vary greatly depending on the type of intervention and the type of sex offenders.[146] To illustrate, Friedrich Lösel and Martin Schmucker used meta-analysis to examine results from extant sex offender treatment studies (n = 69).[147] They identified seven separate categories of treatment (e.g., "hormonal medication," "cognitive-behavioral," "insight-oriented," "therapeutic community").[148] Organic treatments (such as surgical castration and hormonal medication) showed the most promise in reducing sexual recidivism.[149] Under the psychosocial treatment category, cognitive behavioral therapy was the most effective intervention.[150] By contrast, the four other treatment methods were significantly less effective.[151] More relevant was the fact that other studies—available at the time of the decision—reported a similar pattern of treatment effects.[152] In a decision focused on sex offender treatment, the Court thus notably reported an accurate finding, but it did so in a way that obscured the equally true finding that many treatment programs are ineffective.

The Court's decision went further and asserted: "'Denial is generally regarded as a main impediment to successful therapy,' and '[t]herapists depend on offenders' truthful descriptions of events leading to past offences in order to determine which behaviours need to be targeted in therapy.'"[153] In addition, the Court stated, "Research indicates that offenders who deny all allegations of sexual abuse are three times more likely to fail in

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[145] *Id.* (quoting U.S. DEP'T OF JUSTICE, *supra* note 131, at xiii).

[146] *See* Vernon L. Quinsey et al., *A Retrospective Evaluation of the Regional Treatment Centre Sex Offender Treatment Program*, 13 J. INTERPERSONAL VIOLENCE 621, 640 (1998); *see also* TERRY, *supra* note 121, at 163.

[147] Friedrich Lösel & Martin Schmucker, *The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-Analysis*, 1 J. EXPERIMENTAL CRIMINOLOGY 117, 121 (2005).

[148] *Id.* at 124, 129.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] Catherine A. Gallagher et al., *A Quantitative Review of the Effects of Sex Offender Treatment on Sexual Reoffending*, 3 CORRECTIONS MGMT. Q. 19, 27 (1999).

[153] McKune v. Lile, 536 U.S. 24, 33 (2002) (quoting Barbaree, *supra* note 143, at 30).

treatment than those who admit even partial complicity."[154] The claim, therefore, is that denial contributes strongly to sex offending and should be targeted in treatment. However, reviews of the empirical literature indicate that "research is inconclusive about the linkage between denial and recidivism."[155] Indeed, some studies have found no statistically significant relationship between denial and subsequent sex offending.[156] Denial thus may contribute to sex offending and targeting denial may increase treatment effectiveness, but the literature to date provides no clear grounds from which to claim that these possibilities are supported empirically.

### D. SEX OFFENDER RECIDIVISM AND REENTRY

Another prominent and related focus in scholarship on sex offenders centers around prisoner reentry and recidivism. As shown in Table 4, there are five references to this theme in the Court's decisions. In both *McKune* and *Connecticut*, the Court reported, "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sex assault."[157] This claim is technically correct, but it also is misleading. Studies—notably, several available at the time of these decisions—consistently find that sex offenders as a group have low rates of recidivism.[158] Although the rates of recidivism for sex offenses are relatively low,[159] they are higher than the rates for individuals convicted for non-sex offenses.[160] Lisa L. Sample and Timothy M. Bray's

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[154] *Id.* (citing MALETZKY WITH MCGOVERN, *supra* note 144, at 253–55).

[155] Jill S. Levenson & Mark J. Macgowan, *Engagement, Denial, and Treatment Progress Among Sex Offenders in Group Therapy*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 49, 52 (2004).

[156] *See, e.g.*, R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 357 (1998).

[157] *McKune*, 536 U.S. at 33 (citing ALLEN J. BECK & BERNARD E. SHIPLEY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 6 (1997); GREENFELD, *supra* note 89, at 27); *see also* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003) (quoting *McKune*, 536 U.S. at 33).

[158] CTR. FOR SEX OFFENDER MGMT., RECIDIVISM OF SEX OFFENDERS 6 (2001) (discussing research finding low base rates for sex offenses); Hanson & Bussière, *supra* note 156, at 357 (reporting that their meta-analytic findings "contradict the popular view that sexual offenders inevitably reoffend," and that "a minority of the total sample (13.4% of 23,393) were known to have committed a new sexual offense within the average 4- to 5-year follow-up period").

[159] LEAM A. CRAIG ET AL., ASSESSING RISK IN SEX OFFENDERS: A PRACTITIONER'S GUIDE 41 (2008) (explaining that as a group, sex offenders have low reoffense rates and citing two studies that found base rates ranging from 3% to 6%).

[160] PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 1 (2003) (finding that, compared to offenders with no prior sex crime convictions, offenders with prior sex offense convictions were four times more likely to be rearrested over a three-year period for another sex offense).

study of offender recidivism in Illinois (n = 146, 918) is illustrative—6.5% of sex offenders were rearrested for a new sex crime.[161] Other types of offenders also were rearrested for sex crimes, but the percentages were lower, leading the authors to conclude "that the overwhelming majority of offenders in all listed crime categories were not rearrested for a sex crime, including those persons classified as sex offenders."[162] When relative rates of sex offender recidivism are compared to the rates of sex crimes committed by other prior offenders (e.g., 6.5% vs. 2.5%),[163] it thus can appear that convicted sex offenders are two or three times more likely to recidivate for a sex crime.

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[161] Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Dangerous?*, 3 CRIMINOLOGY & PUB. POL'Y 59, 74, 76 (2003).

[162] *Id*. at 74; *see also* Alex R. Piquero et al., *Sex Offenders and Sex Offending in the Cambridge Study in Delinquent Development: Prevalence, Frequency, Specialization, Recidivism, and (Dis)Continuity over the Life-Course*, 35 J. CRIME & JUST. 412, 421 (2012) ("Not only did we find sex offenders and sex offending to be very rare . . . , but there was no continuity in sex offending between the juvenile (>17) and adult (18–50) periods and very few sex recidivists (3/10). These results call into question the view that sex offenders are a highly chronic, specialist, recidivistic group of offenders.").

[163] Sample & Bray, *supra* note 161, at 74 (finding that among those previously convicted of robbery, kidnapping, and stalking, for example, the average percentage of rearrests for sex crimes fell between 2% and 3%). Thus, while the percentage of rearrests that represent sex crimes among the general offender population is somewhat lower than the percentage of rearrests that represent sex crimes among the sex offender population, the numbers are relatively close.

**Table 4**

*U.S. Supreme Court References to Research in Sex Offender Cases: Sex Offender Recidivism and Reentry*

| Claim | Supported? | Case |
|---|---|---|
| "'[W]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault.'"[164] | Correct, but misleading | *Connecticut Department of Public Safety* |
| "Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism."[165] | Correct, but overstated | *Smith* |
| "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.'"[166] | Incorrect | *Smith* |
| "'[T]he procedures employed under the Alaska statute are likely to make [respondents] *completely unemployable*' because 'employers will not want to risk loss of business when the public learns that they have hired sex offenders.' This [statement from the Court of Appeals] is conjecture."[167] | Incorrect | *Smith* |
| "Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment."[168] | Correct, but lacks context | *Smith* |

[164] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 33 (2002)). For the original proposition, *McKune* cited BECK & SHIPLEY, *supra* note 157, at 6 and GREENFELD, *supra* note 89, at 27.

[165] Smith v. Doe, 538 U.S. 84, 103 (2002).

[166] *Id.* (citing *McKune*, 536 U.S. at 33, 34).

[167] *Id.* at 100 (quoting *Doe I v. Otte*, 259 F.3d 979, 988 (9th Cir. 2001)). Earlier in the Court's opinion, it discussed the historical functions of punishment. *Id.* at 97–98 (citing THOMAS G. BLOMBERG & KAROL LUCKEN, AMERICAN PENOLOGY: A HISTORY OF CONTROL 30–31 (2000); ALICE MORSE EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS 1–2 (1896); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 38, 40 (1993); RAPHAEL SEMMES, CRIME AND PUNISHMENT IN EARLY MARYLAND 35 (1938); Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1226, 1228 (1982); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991)). Seemingly drawing a distinction between registries and historical sanctions intended to shame and ostracize offenders, the Court then stated that "any initial resemblance [of registries] to prior punishments is, however, misleading." *Id.* at 98.

[168] *Id.* at 105 (citing DONNA D. SCHRAM & CHERYL DARLING MILLOY, WASH. STATE INST. FOR PUB. POLICY, COMMUNITY NOTIFICATION: A STUDY OF OFFENDER CHARACTERISTICS AND RECIDIVISM 13 (1995)).

The Court adhered to similar reasoning in *Smith*: "Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism."[169] The question here is what constitutes "substantial." The literature documents that a conviction for a sex crime is associated with an increased likelihood of a subsequent sex crime arrest. It does not document the magnitude of this effect, what produces it (e.g., actual offending versus a greater likelihood of supervision of convicted sex offenders), or its magnitude relative to that of other risk factors.[170] At the same time, extant research has identified that dynamic risk factors—that is, factors that, unlike static factors (e.g., age, prior offense), can change (e.g., attitudes)—can greatly increase predictive accuracy.[171] Not least, research has found that recidivism rates vary greatly among types of sex offenders, with child molesters evidencing a substantially greater likelihood of offending.[172] Also, as noted above, studies typically show that base rates of sex offender recidivism for sex crimes are typically so low as to require large samples and longer follow-up periods to conduct robust assessments of recidivism risk.[173]

Elsewhere in *Smith*, the Court went beyond failing to provide context and asserted claims that simply were incorrect. The Court stated: "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.'"[174] The Court then referred to two citations that it had used previously in *McKune*.[175] One citation provides some support for the Court's assertion that a sex offender's overall odds of being rearrested for a sex offense is greater than a non-sex offender's odds.[176] Even so, the Court's citation buttresses an earlier point evident in the Sample and Bray study[177]—namely that sexual recidivism is a rare phenomenon as nearly

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[169] *Id.* at 103.

[170] *See* Hanson & Bussière, *supra* note 156, at 357 (finding in a meta-analysis that prior sex offense conviction history is one factor among many—"criminal lifestyle," "deviant sexual interests"—that predict recidivism).

[171] *See id.* at 358; R. Karl Hanson et al., *Sexual Offender Recidivism Risk: What We Know and What We Need to Know*, *in* SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT 154, 162–63 (Robert A. Prentky et al. eds., 2003).

[172] *See* Doren, *supra* note 46, at 101; *see also* ANDREW J. R. HARRIS & R. KARL HANSON, PUB. SAFETY & EMERGENCY PREPAREDNESS CAN., SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION, USER REPORT 1(2004).

[173] Doren, *supra* note 46, at 98.

[174] *Smith*, 538 U.S. at 103 (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)).

[175] *Id.* (quoting *McKune*, 536 U.S. at 34).

[176] BECK & SHIPLEY, *supra* note 157, at 6.

[177] Sample & Bray, *supra* note 161, at 76.

92% of released sex offenders in the Allen J. Beck and Bernard E. Shipley study did not go on to commit other sex offenses.[178] The other citation also indicates a decline in sex offense reports nationally during the 1990s[179]—a point the Court appears to miss.

More specifically, the Court relied on data from precedent and ignored findings from numerous other sources that were available at the time of the decision, including the federally funded Center for Sex Offender Management. The Center found that sex offenders, compared to other types of offenders, have lower levels of general recidivism and lower-than-assumed levels of sex recidivism; additionally, it concluded that such reoffending is relatively rare.[180] As one example, in an analysis of Canadian sex offenders, Andrew J. R. Harris and R. Karl Hanson found that after fifteen years, 73% of sex offenders had not been charged with or convicted of another sex offense.[181] Their study findings echo results from R. Karl Hanson and Monique T. Bussière's earlier quantitative review of recidivism studies, which found an average recidivism rate of 13.4% after a follow-up period of four to five years.[182] A similar study conducted by Patrick A. Langan et al. of U.S. sex offenders found a recidivism rate (measured by criminal conviction) of 5.3% after three years.[183] As noted above, the relative risk of sex offending is higher for sex offenders than for other types of offenders,[184] but the absolute risk is low.[185]

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[178] *See* BECK & SHIPLEY, *supra* note 157, at 6.

[179] *See* GREENFELD, *supra* note 89, at 1.

[180] *Myths and Facts About Sex Offenders*, CTR. FOR SEX OFFENDER MGMT. (Aug. 2000), http://www.csom.org/pubs/mythsfacts.html.

[181] HARRIS & HANSON, *supra* note 172, at 11.

[182] Hanson & Bussière, *supra* note 156, at 351.

[183] LANGAN ET AL., *supra* note 160, at 1.

[184] Sample & Bray, *supra* note 161, at 74.

[185] It should be emphasized that studies have measured the cost of sexual offending to society. For example, Matt DeLisi et al. calculated the monetary costs of various types of offenses—homicide, rape, armed robbery, aggravated assault, and burglary. Matt DeLisi et al., *Murder by Numbers: Monetary Costs Imposed by a Sample of Homicide Offenders*, 21 J. FORENSIC PSYCHIATRY & PSYCHOL. 501, 507 (2009). Results indicated that rape constituted the second most costly crime (after homicide). *Id*. Notably, the third most costly offense—armed robbery—imposed similar costs on the victim as rape would but had a higher cost to the justice system. *Id.* Although the study focused on the actual costs of rape offenses, it did not calculate costs for non-sexual intercourse crimes (e.g., lewd and lascivious acts, child pornography crimes). Thus, the extent to which these costs are comparable to other sex offenses is questionable, as substantial heterogeneity exists in sexual offending. This study was not available at the time of the *Smith* decision. The Court then had little clear empirical basis on which to argue that the risk of recidivism, and by extension the costs, posed by sex offenders was "frightening and high."

In *Smith*, the Court considered whether a registry law constituted ex post facto punishment, and it held that a lack of empirical evidence existed to support the claim that the law decreased employment prospects for released sex offenders.[186] Early in the opinion, the Court cited literature centered on understanding the effects of punishment.[187] The Court noted, for instance, that sanctions (such as public whippings, branding) were historically designed to ensure "offenders suffer[ed] 'permanent stigmas, which in effect cast the person out of the community.'"[188] However, the Court drew a distinction between these types of historical sanctions and sex offender registries: the former was intended to inflict physical harm and foment public confrontation; the latter's goal is to disseminate accurate information about the offender.[189] On the basis of this distinction, the Court dismissed as "conjecture" the lower court's reliance on the criticism that registries have the potential to affect offenders' employment prospects.[190] Specifically, the Court viewed as unsupported the claim that the Alaska statute would make offenders completely unemployable—or, at the least, more unemployable—than would have occurred without the registry. However, the Court's rebuke did not comport with the then-published social scientific research findings that supported the lower court's reasoning.

Research had indicated that registered sex offenders do face significant additional employment discrimination relative to other offenders.[191] All

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[186] Smith v. Doe, 538 U.S. 84, 100 (2003).

[187] *Id.* at 97–98.

[188] *Id.* at 98 (citations omitted) (quoting Massaro, *supra* note 167, at 1913 and citing others).

[189] *See id.* at 98–99.

[190] *Id.* at 100 (citation omitted). The Court further noted:

> Landlords and employers could conduct background checks on the criminal records of prospective employees or tenants even with the Act not in force. The record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords. *Id.*

[191] Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 BEHAV. SCI. & L. 375, 381 (2000) (finding nearly 60% of offenders reported employment loss due to registrant status); *see also* William Edwards & Christopher Hensley, *Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws*, 45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 83, 89 (2001) (identifying employment discrimination as a barrier to reentry for registered sex offenders, stating that while "it is vital for the released offender to reintegrate into a given community in a way that allows him or her to find employment and form positive adult supportive relationships, the intense stigma and shame surrounding the [registered] offender's prior behavior as well as the ever-present label of *sex offender* make these crucial adjustments extremely difficult and stressful as things stand now"); Wayne A. Logan, *Sex Offender Registration and Community Notification: Emerging Legal and Research Issues*, 989 ANNALS

criminal convictions are a matter of public record and thus have the potential to induce collateral consequences such as reduced employment. Per the extant scholarship available at the time of the decision,[192] and per Richard Tewksbury and Matthew Lees, registration "may promote unique and/or especially burdensome consequences and reentry challenges."[193] In short, then, according to scholarship available at the time of the decision, registries introduce additional collateral consequences for registrants compared to non-sex felony offenders who are not mandated to register. Although specific empirical research documenting such an effect in Alaska did not exist at the time of the decision, scholarship identifying additional barriers to employment imposed by registries was available. From this latter perspective, there was no conjecture. Rather, the Ninth Circuit was relying on an assumption supported by social scientific research; by contrast, the Supreme Court appears to have ignored such work and, in so doing, could claim that the Ninth Circuit's reasoning was conjecture.

Finally, the Court observed, "Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment."[194] As support for this assertion, the Court advised readers to see Donna D. Schram and Cheryl Darling Milloy's study on community notification, which found that 38% of sex offense recidivism events in Washington State took place in jurisdictions other than where the offenders previously committed the offenses.[195] This citation was offered as support to buttress the belief that a substantial proportion of sex offenders recidivate outside of the location where they initially offended. It derived, however, from one study focused on Washington's community notification law, not the Alaska registry requirement. This context was not provided nor was any information described about the cross-jurisdictional recidivism of individuals convicted of a wide range of other crimes. The latter information would have clarified the Court's understanding of the extent to which such a pattern was unique to sex offending or common to a range of offenses and offenders.

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N.Y. ACAD. SCI. 337, 343–44 (2003) (highlighting scholarship showing employment discrimination occurs among registrants). Other work emphasizes general reentry issues, which are likely compounded by registrant status. *See, e.g.*, JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 31–32 (2001) (identifying employment challenges as a significant barrier to successful reentry).

[192] *See supra* note 191 and accompanying text.

[193] Richard Tewksbury & Matthew Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 SOC. SPECTRUM 309, 314 (2006).

[194] *Smith*, 538 U.S. at 105.

[195] SCHRAM & MILLOY, *supra* note 168, at 13.

E. EFFECTS OF SEXUAL VICTIMIZATION

The Court discussed research about the effects of sexual victimization only in the *Kennedy* capital punishment decision. Table 5 presents six assertions the Court made in this case. First, describing the effects of rape, the Court stated, "Rape has a permanent psychological, emotional, and sometimes physical impact on the child."[196] This assessment clearly accords with the findings from research, which consistently has identified such outcomes as post-traumatic stress disorder, depression, and suicide as resulting from sexual abuse.[197]

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[196] Kennedy v. Louisiana, 554 U.S. 407, 435 (2008) (citing CHRISTOPHER BAGLEY & KATHLEEN KING, CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 2–24, 111–12 (1990); David Finkelhor & Angela Browne, *Assessing the Long-Term Impact of Child Sexual Abuse: A Review and Conceptualization*, *in* A HANDBOOK ON CHILD SEXUAL ABUSE 55–60 (Lenore E.A. Walker ed., 1988)).

[197] Elizabeth Oddone Paolucci et al., *A Meta-Analysis of Published Research on the Effects of Child Sexual Abuse*, 135 J. PSYCHOL. 17, 30 (2001); *see also* TERRY, *supra* note 121, at 115–18.

**Table 5**

*U.S. Supreme Court References to Research in Sex Offender Cases: Effects of Sexual Victimization*

| Claim | Supported by Theory/ Research? | Case |
|---|---|---|
| "Rape has a permanent psychological, emotional, and sometimes physical impact on the child."[198] | Correct | *Kennedy* |
| "It is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator."[199] | Correct | *Kennedy* |
| "Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement."[200] | Correct | *Kennedy* |
| "Underreporting is a common problem with respect to child sexual abuse."[201] | Correct | *Kennedy* |
| "[O]ne of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member."[202] | Correct | *Kennedy* |
| "Assuming the offender behaves in a rational way, as one must to justify the penalty on grounds of deterrence, the penalty in some respects gives less protection, not more, to the victim, who is often the sole witness to the crime."[203] | Logical inference, but few studies exist to support this argument | *Kennedy* |

[198] *Kennedy*, 554 U.S. at 435 (citing BAGLEY & KING, *supra* note 196, at 2–24, 111–12; Finkelhor & Browne, *supra* note 196, at 55–60).

[199] *Id.* at 442.

[200] *Id.* at 443 (citing Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 47 (2000); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 529 (2005); Jodi A. Quas et al., *Repeated Questions, Deception, and Children's True and False Reports of Body Touch*, 12 CHILD MALTREATMENT 60, 61–66 (2007)).

[201] *Id.* at 444 (citing Rochelle F. Hanson et al., *Factors Related to the Reporting of Childhood Rape*, 23 CHILD ABUSE & NEGLECT 559, 564 (1999); Daniel W. Smith et al., *Delay in Disclosure of Childhood Rape: Results from a National Survey*, 24 CHILD ABUSE & NEGLECT 273, 278–79 (2000)).

[202] *Id.* at 445 (citing Tina B. Goodman-Brown et al., *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT 525, 527–28 (2003); Hanson et al., *supra* note 201, at 565–66; Smith et al., *supra* note 201, at 278–79)).

[203] *Id.* (citing Corey Rayburn, *Better Dead than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1159–60 (2004)).

In this same decision, the Court also offered its opinion about the effects of a death penalty sanction on a sex crime victim. Using Tina B. Goodman et al.'s study to suggest this view, the Court opined, "It is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator. . . ."[204] As the Court intimated, few studies exist that directly address this issue. To illustrate, Jodi A. Quas et al. noted that "[s]urprisingly, little is known from scientific research about how legal involvement . . . affects children's long-term mental health and legal attitudes."[205] Some accounts suggest that a significant proportion of sex crime victims "wanted the person they trusted or loved to get help, not for the offender to spend a mandated lengthy or life sentence behind bars."[206] In short, the Court offers a balanced assessment of the literature examining the effects of sexual victimization on children.

The Court also focused on the reliability of children's testimony: "Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement."[207] Research largely supports this claim. As C. J. Brainerd and V. F. Reyna averred in their review, suggestive questioning of children about sexual assaults "will yield answers that lead to criminal prosecutions . . . . [C]hildren's memories, especially young children's, are highly susceptible to distortion from suggestive questioning."[208]

In describing the prevalence of reporting among child sex abuse victims, the Court wrote: "Underreporting is a common problem with respect to child sexual abuse."[209] That assessment echoes the findings from many studies, which typically indicate that, compared to other types of crime, sexual abuse of minors is extensively underreported.[210] In Terry's review, it was estimated that only one-third of all sex crimes are reported to

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[204] *Id*. at 442 (later referencing Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC'Y RES. CHILD DEV. 1, 50, 62, 72 (1992); Brief of the National Ass'n of Social Workers et al. as Amici Curiae in Support of Petitioner at 17–21, *Kennedy*, 554 U.S. at 435 (No. 07-343)).

[205] Jodi A. Quas et al., *Childhood Sexual Assault Victims: Long-Term Outcomes After Testifying in Criminal Court*, 70 MONOGRAPHS SOC'Y RES. CHILD DEV. 1, 1 (2005).

[206] TRACY VELÁZQUEZ, VERA INST. OF JUSTICE, THE PURSUIT OF SAFETY: SEX OFFENDER POLICY IN THE UNITED STATES 8 (2008) (internal quotation marks and citation omitted).

[207] *Kennedy*, 554 U.S. at 443 (citing Ceci & Friedman, *supra* note 200, at 47; Gross et al., supra note 200, at 529; Quas et al., *supra* note 200, at 61–66).

[208] C. J. BRAINERD & V. F. REYNA, THE SCIENCE OF FALSE MEMORY 295 (2005).

[209] *Kennedy*, 554 U.S. at 444 (citing Hanson et al., *supra* note 201, at 564; Smith et al., *supra* note 201, at 278–79 (2000)).

[210] *See, e.g.*, David Finkelhor & Richard K. Ormrod, *Factors in the Underreporting of Crimes Against Juveniles*, 6 CHILD MALTREATMENT 219, 226 (2001).

authorities.[211] Studies comparing Uniform Crime Report (UCR) estimates of sex crime to NCVS estimates (albeit limited in measuring sexual victimization among those 12 and older) have found that only a minority of sexual offenses are reported to law enforcement.[212] More precisely, one large national survey (n = 5,015) relying on interviews with minor respondents and proxies (i.e., caregivers) found that only 30% of sexual abuse incidents among children (ages 0 to 17) were reported to law enforcement in 1999.[213]

In describing the factors contributing to underreporting, the Court stated: "[O]ne of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member."[214] The Court identified studies that have found nondisclosure to be prevalent when the perpetrator is a family member. The studies on which the Court relied provide support for this assessment, and so, too, do other studies.[215] For example, results from a study using NCVS data about individuals over the age of twelve who reported their sexual assaults to police indicate that victims were more likely to report the sexual abuse to police when the offenders were strangers (41%) than when they were family members or intimates (27%).[216] Studies of college students who have experienced sexual victimization as teens or young adults also identify fear of retaliation from the offender as a significant barrier to reporting abuse.[217]

Finally, and in contrast to the other evidence-based claims made in *Kennedy*, the Supreme Court discussed the application of the death penalty to rapists and whether such a punishment may remove a strong incentive for the rapist not to kill the victim.[218] The Court noted that "[a]ssuming the

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[211] TERRY, *supra* note 121, at 15.

[212] TIMOTHY C. HART & CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORTING CRIME TO THE POLICE, 1992-2000, at 4 (2003) (relaying that on average only 31% of sex offenses are reported to law enforcement annually).

[213] DAVID FINKELHOR ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, SEXUALLY ASSAULTED CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS 4, 5 (2008).

[214] *Kennedy*, 554 U.S. at 445 (citing Goodman-Brown et al., *supra* note 202, at 527–28; Hanson et al., *supra* note 201, at 565–66; Smith et al., *supra* note 201, at 283–84).

[215] *See generally* Finkelhor et al., *Police Reporting and Professional Help Seeking for Child Crime Victims: A Review*, 6 CHILD MALTREATMENT 17, 21 (2001) (identifying underreporting of child sexual abuse in cases where offenders are known).

[216] HART & RENNISON, *supra* note 212, at 5 tbl.6.

[217] BONNIE FISHER ET AL., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23, 26 (2000) (finding that 40% of women enrolled in colleges and universities do not report their sexual victimization because of "fear of reprisal by offender").

[218] *Kennedy*, 554 U.S. at 445.

offender behaves in a rational way, as one must to justify the penalty on grounds of deterrence, the penalty in some respects gives less protection to the victim, who is often the sole witness to the crime."[219] In this instance, the Court recognized the concept of marginal deterrence, relying on a specific passage from a law review article in which Corey Rayburn asserted: "When death is the penalty for rape and murder, a rapist has an increased incentive to kill the person he has raped."[220] Scholars have observed that such a theory, "for obvious reasons, would be extremely hard to prove," but nonetheless constitutes a "common-sense argument."[221] Notwithstanding that view, no empirical evidence directly bears on the Court's claim. There is, for example, no evidence that a penalty of death weighs more more or less heavily for sex offenders than a range of other factors when they decide to undertake a sex crime.

## VII. DISCUSSION AND CONCLUSION

This study extends prior research by examining the extent to which the U.S. Supreme Court, in its decisions on sex offenders, relies on social scientific evidence and does so in a manner that accurately accords with this evidence. The salience of this focus stems from the Court's role in affecting policy, the increasingly greater emphasis in recent decades on evidence-based policy, and the dramatic increase in state and federal legislation aimed at toughening the sanctions that can be applied to sex offenders. The findings can be summarized briefly. First, in all but one case on sex offenders decided during the past two decades, the Court included references to social science research. *Carr*, a case involving challenges to SORNA legislation, constituted the exception.[222] The remaining cases averaged approximately 3.3 citations to social scientific research per case, an estimate that falls within the range identified in prior studies that have focused on other types of criminal justice cases.[223]

Second, the Court typically not only provided references to social scientific research but also provided accurate summaries of it. At the same time, however, there were some instances in which the interpretations of research involved either incorrect claims or assertions that were misleading because they provided no relevant context. As a result, some claims and assertions made by the Court gave the misleading appearance of being

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[219] *Id.* (citing Rayburn, *supra* note 203, at 1159–60).

[220] Rayburn, *supra* note 203, at 1159.

[221] Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 105 n.189 (1997).

[222] Carr v. United States, 130 S. Ct. 2229 (2010).

[223] *See* Acker, *supra* note 26, at 10 tbl.3; Acker, *supra* note 86, at 72 tbl.1.

evidence-based and thus of supporting more general lines of argument with seemingly clear justification, such as the need for states to toughen their approaches to punishing and monitoring sex offenders. For example, in *Smith*, the Court asserted that it would be "conjecture" to argue that registered sex offender status results in employment discrimination or social stigma given that little evidence showed Alaska registrants were negatively affected.[224] Yet, at the time of the decision, scholarship existed to suggest that registered sex offenders faced significant employment discrimination as an obstacle to reentry.[225]

It perhaps should come as no surprise that some Supreme Court decisions rest on claims of questionable empirical veracity. Certainly, many criminal justice policies have been undertaken based on faulty assessments of the need for such policies and the theories underlying them.[226] At the same time, the Supreme Court's role in affecting state sex offender policies suggests cause for concern. For example, it underscores the problems, identified since *Daubert*,[227] attendant to judicial evaluation of competing social science claims when judges have little training or experience in research methodology. The findings here can be viewed as providing support for two opposing groups: those who view the Court as capable of sifting through the nuances of research and its salience for the constitutional issues involved in particular cases, and those who view the Court as at risk of undermining the legitimacy of its decisions by relying on research claims that are inaccurate or misleading.

One direction for future research is to investigate the extent to which this concern extends to lower court rulings. Given the controversial nature of many newer sex offender laws (e.g., residence restrictions, electronic monitoring, chemical castration, lifetime supervision), it is likely that new cases will arise in district and appellate courts that challenge their constitutionality and do so in part by making claims culled from the social scientific literature on sex offenders. Studies are needed to examine the use of research findings in these cases, measuring whether the cited research is representative, whether the presentation of the findings is accurate, and whether the implications derived from the findings are based on the provision of sufficient context for making evidence-based claims about need or effectiveness.

Another direction for research, one that may indirectly contribute to policy deliberations, is an investigation of how judges use social science

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[224] Smith v. Doe, 538 U.S. 84, 100 (2003).

[225] *See supra* note 191 and accompanying text.

[226] *See* MEARS, *supra* note 14, at 33–34.

[227] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

research in their decisions in sex offender cases and in court cases more generally. Threat theory argues that judges may intentionally avoid technical or complicated social science research since it represents a threat to their power and prestige.[228] The extent to which this argument is empirically supported, however, remains largely unknown. It also is unknown how judicial philosophy and political ideology can influence the way in which judges, including the Supreme Court Justices, interpret, weigh, and balance the research presented in testimony and briefs. Not least, future research ideally will examine "confirmation bias" in decisions—that is, the potential for judges to find or use research in ways that reinforce their beliefs.[229] Judges, of course, are human, and, as such, they are presumably as likely as others to allow preconceptions to guide their selection, weighting, and interpretation of scientific evidence. In medicine, for example, confirmation bias and other types of cognitive decisionmaking errors can influence medical decisions.[230] However, it remains unknown to what extent this problem affects the Judicial Branch.

Although the Court may be overlooked as a national policymaker, its decisions shape criminal laws.[231] In four of the cases examined in this study, the Court upheld controversial policies—civil commitment (*Kansas*[232]), registry/notification (*Connecticut Department of Public Safety*;[233] *Smith*[234]), and compulsory treatment for sex offenders (*McKune*[235]). In the remaining cases, the Court limited some aspects of these laws—virtual child pornography (*Ashcroft*[236]), a statute of limitation law (*Stogner*[237]), a law involving the death penalty for child rapists (*Kennedy*[238]), and a challenge to SORNA (*Carr*[239]). How these decisions may have been affected by different assessments of the social science literature constitutes a critical and promising avenue of scholarly inquiry.

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[228] Tanford, *supra* note 33, at 152.

[229] RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 192 (1980); *see* Acker, *supra* note 26, at 13.

[230] Daniel P. Mears & Sarah Bacon, *Improving Criminal Justice Through Better Decisionmaking: Lessons from the Medical System*, 37 J. CRIM. JUST. 142, 145 (2009).

[231] *See* STOLZ, *supra* note 1, at 4.

[232] Kansas v. Hendricks, 521 U.S. 346, 371 (1997).

[233] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 8 (2003).

[234] Smith v. Doe, 538 U.S. 84, 106 (2003).

[235] McKune v. Lile, 536 U.S. 24, 47 (2002).

[236] Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002).

[237] Stogner v. California, 539 U.S. 607, 632–33 (2003).

[238] Kennedy v. Louisiana, 554 U.S. 407, 447 (2008).

[239] Carr v. United States, 130 S. Ct. 2229, 2242 (2010).