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Not So Frightening
Not So High
~
Not "Sex Offenders"

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Today's Agenda: An Update

- Last year: We talked about "Frightening and High"—the Court's mistaken understanding in Smith v. Doe (2003) of sex crime statistics.
- That article exposed the questionable source of the Court's 80% re-offense rate claim, and the terrible legal legacy it left
- Today I'll talk about the progress since we wrote that, and about some pending cases I am involved in.
- But first back to the beginning: : Smith v. Doe

Smith v. Doe (2003)

- Held: Alaska's registry and website can be applied retroactively because it isn't punishment.
- It's a civil measure (like a building code) "reasonably designed" to protect public safety.
- Why is it "reasonable"?
- Because "*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.*"
- 2 key claims: 1. dangerous high rate, 2. as a class

Undoing Smith's Legacy

- Smith's two assumptions (high re-offense rates, thinking of sex offenders as a class) are the foundation of every bad rule that has followed since.
- We take them in turn. Along the way we'll also explore an important conceptual development in the cases.
- Recall the source of the 80% figure: A Justice Dept manual, which got it from Psychology Today, 1986
- David Feige recently found the authors of both pieces.
  - Robert Longo: wrote the Psych Today article,
  - Barbara Schwartz, wrote the Justice Dept manual citing him
- Let's be fair and hear what they have to say.

Opinion When Junk Science About Sex Offenders Infects the Supreme Court - The New York Times.mp4

So, has there been progress in judicial understanding of re-offense rate data?

I think so.

Judicial Progress: Does v Snyder (2016)

- 6th Circuit: Michigan's registry imposes punishment. Therefore no retroactive application. (term extensions, reporting requirements, and exclusion zones)
- Rejected key *Smith* assumptions, and more
  - Overall SO re-offense rate not so high
  - Restrictions arbitrarily imposed on all registrants, no individual risk assessment
  - And also, there was no evidence the restrictions advanced public safety anyway

Snyder: Missing *Smith* Sequel

- How the 6th Circuit dealt with Smith:
- "The *record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in Smith that [t]he risk of recidivism posed by sex offenders is 'frightening and high'.*"
- Michigan asked Supreme Court to review.
- But it said no. *cert. denied*, 138 S. Ct. 55 (2017).
- Why? Who knows, but
- The Federal government urged Court to deny review.
  - Apparently thought it better to sacrifice Michigan than to risk a wider defeat.
- Justice Kennedy in Packingham: post-parole restrictions on registrants are "troubling"

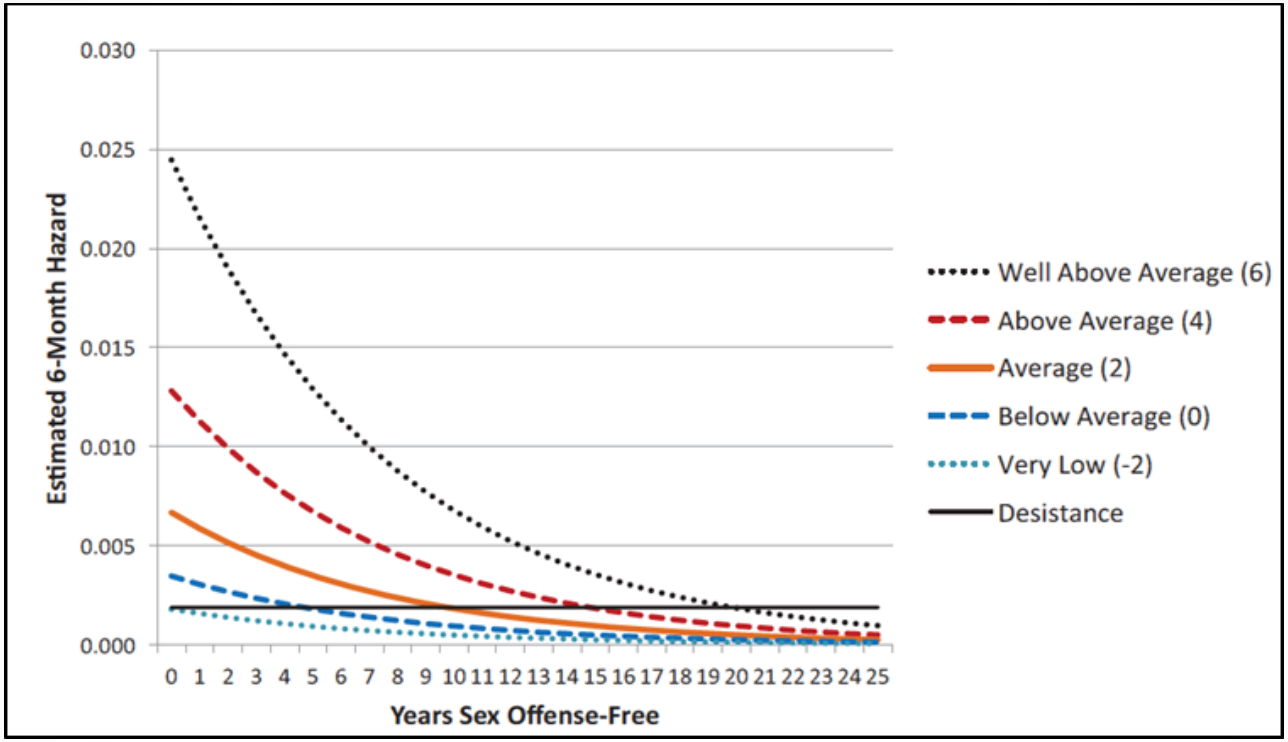
Next Chance At Supremes: Gundy v. U.S.

- SORNA says it's a federal crime to fail to register.
- Congress told AG to decide whether to apply it to those whose registrable offense was before 2006.
  - Can Congress do that, or must it decide itself?
  - That's the technical issue in Gundy. ("non-delegation")
- But a factual question lurks behind the technical issue: Are those with old convictions dangerous anyway?
- Gov't wants Court to think they are, justifying the need for their non-registration to be a federal crime too.
- That gives us a chance to explain they aren't.

Gundy, continued

- Gundy's lawyer (Stanford Supreme Court Clinic, Jeff Fisher) is addressing the technical Q's.
- Asked me to write an "amicus brief" explaining the re-offense risk issue. (*amicus curiae=friend of court)*
- I signed up 15 experts on sex offending to the brief. Including Karl Hanson, Michael Seto, Frank Zimring, JJ Prescott, Wayne Logan, Catherine Carpenter
- Debevoise and Plimpton, big time NY firm, agreed to file it *pro bono.* Absorbed all costs.
- Filed 2 weeks ago. Oral argument this fall.
- A chance to educate the Court.

1. Registrant risk profiles vary enormously. Many are no threat from the start. All become no threat in the end.



Hanson, 2018

1. Average risk across all these folks has no useful meaning.
2. But most low risk within 10 years or less. All, within 20.

Gundy's Potential?

- It could be decided on technical grounds that make our brief irrelevant to the result.
- Or it might be important:
- if the government argues that the group at issue here are dangerous, even though most have been at liberty 10 or 20 years without reoffending.
- But either way, the brief will hopefully educate the Court for cases to come.

Smith to *Snyder*: A Forgotten Parallel Path

- 13 years from *Smith*, 2003, to *Snyder*, 2016. How did we get there?
- Not just time. Lots of steps in between. And hard work by Miriam Auckerman and Paul Rheingold building a trial court record
- But important groundwork also laid in state courts. Some may have missed that.
- Mr. Doe of *Smith v. Doe* didn't miss it. He knew.
- Because the first state court victory was his. *After* his loss in the Supreme Court.

Doe v. State, 189 P.3d 999 (Alaska 2008).

- Doe renews the same claim he lost in *Smith:* punishment imposed ex post facto.
- US Supremes: Not punishment. A civil measure justified by Alaska's interest in protecting people from sex offenders with high re-offense rates.
- Alaska Supreme court: In Alaska, it's punishment. *Alaska* constitution.
- Violated *Alaska's* Ex Post Facto clause. Doe wins
- From 2009 to 2015, similar results in the supreme courts of Indiana, Maine, Maryland, Ohio, New Hampshire, Kentucky, and Oklahoma

Lesson of Doe v. State, continued

- State courts matter: Recall Gay Rights battle
  - 4 federal Appeals Courts required gay marriage before US Supremes did
  - But the *first victories were in* state supreme courts: Vermont, Iowa, Massachusetts
- State Courts can't bind federal courts, but do create a favorable environment in both
  - Law : puts the claims in legal mainstream
  - World: gay marriage did not destroy families
- The 6th Circuit in *Snyder* cited these state court decisions, from Alaska on.

Alaska's Doe: A Closer Look

- Alaska held the registry punishment, could not be applied retroactively (*ex post facto*).
- But why is it punishment? Not b/c it feels like it.
- The law uses a checklist to distinguish a civil regulation from punishment, for this purpose.
- The registry flunked a key checklist item: the purported civil regulation had *no rational connection with any non-punitive purpose*.
- That means it must be punishment (which needn't be rational).
- "no rational connection" a powerful seed.

Why Did Alaska Registry Lack Rational Connection To Non-Punitive Purpose?

- What is registry's purported Non-Punitive purpose?
  - *Public Safety*
- Registry has no rational connection to this purpose if it is *applied to people who pose no risk.*
- Which it did, Alaska said, because
  - It applied to wide array of crimes
  - Once on, you can't get off, not "even on the clearest determination of rehabilitation"
- You can't treat "sex offenders" as a class because the net is cast too broadly, and no one can ever escape it.

The Power of "No Rational Connection"

- So the second idea from *Smith* is put in doubt: "sex offenders as a class".
- Rules that lump them all together, ***permanently***, may flunking a rationality test
- That puts the registry in question for everyone
- 6th Circuit in *Snyder* understood that potential.
  - That court was only asked to bar ex post facto application,
  - but it also said the broader claim was "far from frivolous". It effectively invited it.

What About Calif Supreme Court?

- Remember *Taylor*: State cannot apply residency restrictions against *all* state *parolees* on registry.
- They must be justified case by case, not by group
- The group residency rule unconstitutional b/c
  - *"infringed [the parolees'] liberty and privacy interests*
  - *"while bearing no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators,*
  - *"and has violated their basic constitutional right to be free of unreasonable, arbitrary, and oppressive official action".*

Building on Taylor: Mathews v. Becerra

- Therapists must report clients they believe pose imminent threat to a child
- New law replaced the therapist's case by case judgment with unchallengeable *group* judgment: all lookers must be reported.
- This *law by label* means that therapists must report individuals they ***don't*** think are a threat to children.
- California Sup Ct will hear therapist challenge.
- Our amicus brief here was filed by Arnold and Porter, another big firm, that absorbed all costs.

What the Data Says

- "Lookers" are low risk for contact offenses
- Data from **long-term** follow up studies by
  - US Sentencing Commission,
  - US Bureau of Prisons,
  - Seto and Hanson meta-analysis.
- About 2% commit a contact offense. Or, 98% don't.
  - Therapists can distinguish the few who present higher risk
- This claim follows on *Taylor* because again the state seeks to impose restrictions on a group, not case by case, when the data doesn't support it.

Mathews' Potential

- Imagine Mathews embraces two points
  - Lookers are low risk
  - And therefore this group can't be subject to rules that burden their liberties
- But then: can any low risk people be placed on the website—or the registry?
- If not, then consider eventually *everyone* who has not re-offended.

Sex Offenders "As A Class"

- Back to *Smith*'s "dangerousness of sex offenders **as a class**".
- The very term "sex offenders" is itself pernicious.
  - *Pernicious: "causing insidious harm or ruin; ruinous; injurious; hurtful"*
- It's pernicious because it communicates the false idea that this group of people all share some common character flaw, a defect that's embedded, inherent, permanent.
- It says it's ok to treat them as group, not individuals—a group you can't leave
- Not only ignores differences among people—but also changes over time for each person.

Sex Offenders As Class, cont.

- So it's not only that 80% is wrong
- *Any* number is wrong if you think it applies to every registrant at any time.
- SO is a legal category, not a psychological diagnosis.
- I urge lawyers to avoid the term in the briefs.
- An alternative: "registrant"
- It correctly identifies the group by the one trait they do share: the burden of being on the registry
- A legally imposed trait, not a psychological one

Closing Thoughts

- Maybe F&H is really in a death spiral. Not even Longo believes it. Courts coming around too.
- We do better when courts think about people, not “sex offenders”.
  - Mr Doe in Alaska regained custody of his minor daughter after the court found him rehabilitated, posing "a very low risk of re-offending."
- Big changes usually come in small steps. Decades of small steps to gay marriage and the end of legal segregation.

Closing thoughts continued

- I've focused on successes. We haven't won every case decided the last few years. But not so long ago, we never won.
- And there are some other interesting cases in the pipeline.

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- So maintain good cheer.
- And persevere.