PREVENTION VERSUS PUNISHMENT: TOWARD A PRINCIPLED DISTINCTION IN THE RESTRAINT OF RELEASED SEX OFFENDERS

The American criminal justice system has two dichotomous objectives — to punish wrongdoers and to prevent future harm.[1] Because the Constitution assumes that the exercise of legislative power in pursuit of punishment represents a greater threat to individual liberty than does preventive state regulation,[2] courts must determine which statutes serve each goal. In theory, the distinction is easily drawn.[3] In practice, however, innovative statutory responses to the burgeoning crime problem have "reopened the complex and often times highly emotional debate as to the correct boundary between legislative regulation and punishment."[4]

A recent spate of legislation purports to regulate released sex offenders by requiring them to register with local law enforcement officials,[5] notify community members of their presence,[6] undergo DNA testing,[7] and submit to civil commitment for an indefinite term.[8] Although many courts and commentators herald these laws as valid regulatory measures,[9] others reject them as punitive enactments that violate the rights of individuals who already have been sanctioned for

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[1] *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 9 (1968); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1332 (1991).

[2] *See* Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the* Lovett, Trop, Perez, *and* Speiser *Cases*, 34 IND. L.J. 231, 237 (1959) [hereinafter *Punishment*].

[3] *Cf.* Cheh, *supra* note 1, at 1536 n.170 ("Government's capacity to punish is thought to be distinct from its efforts to treat illness, provide compensation, or administer regulatory programs.").

[4] *Punishment*, *supra* note 2, at 231. "Countless examples could be given in which a major question . . . is whether what is being done is punishment or something else." PACKER, *supra* note 1, at 20; *see, e.g.*, De Veau v. Braisted, 363 U.S. 144, 160 (1960) (finding that a state law prohibiting convicted felons from holding union offices is not punitive); Barsky v. Board of Regents, 347 U.S. 442, 449 (1954) (rendering a state's suspension of a physician's medical license as a result of his misdemeanor conviction regulatory); Allen v. Attorney Gen., No. 95-2057, 1996 WL 124668, at *3 (1st Cir. Mar. 26, 1996) (holding that a state's suspension of an intoxicated driver's license "furthers a quintessentially remedial goal (public safety)").

[5] *See, e.g.*, N.J. STAT. ANN. §§ 2C:7-1 to -5 (West 1995); WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1996).

[6] *See, e.g.*, LA. REV. STAT. ANN. § 15:542(B)(1) (West Supp. 1996).

[7] *See, e.g.*, 1995 Me. Legis. Serv. 1391 (West); 46 PA. CONS. STAT. ANN. § 7651.306 (1995).

[8] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4606 (Supp. 1995); ILL. ANN. STAT. ch. 725, para. 205/1.01–/3.01 (Smith-Hurd 1993); WASH. REV. CODE ANN. § 71.09.060 (West 1992 & Supp. 1996).

[9] *See, e.g.*, Doe v. Poritz, 662 A.2d 367, 372–73 (N.J. 1995) (asserting that New Jersey's community notification law is a reasonable, regulatory option); Ryan A. Boland, Note, *Sex Offender Registration and Community Notification: Protection, Not Punishment*, 30 NEW ENG. L. REV. 183, 225 (1995).

their crimes.[10] Under existing doctrine, the constitutionality of sex offender statutes depends upon their characterization as essentially "preventive" rather than "punitive,"[11] yet courts have been unable to devise a consistent, coherent, and principled means of making this determination.

This Note critiques current judicial approaches to characterizing sex offender statutes and suggests a more principled framework for making the distinction between prevention and punishment. Part I outlines the range of sex offender statutes currently in force in several states. Part II examines the prevention/punishment jurisprudence that has developed both in general and in relation to specific sex offender laws. Part III argues that current attempts at differentiation in the context of sex offender legislation are misguided. Finally, Part IV offers a more principled basis for determining how sex offender statutes should be characterized. This Note maintains that, even in the face of understandable public outrage over repeat sexual predators, a principled prevention/punishment analysis evaluates the effect of the challenged legislation in a manner that reinforces constitutional safeguards against unfair and unnecessarily burdensome legislative action.

I. SEX OFFENDER STATUTES

A. *The Laws*

State legislators[12] these days have little tolerance for sex convicts. In the wake of several widely-publicized crimes at the hands of serial sex offenders, states have enacted numerous measures that burden released sex criminals for the good of society.[13] A convicted sex offender

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[10] *See, e.g.*, Doe v. Pataki, No. 96 CIV.1657(DC), 1996 WL 131859, at *9–*11 (S.D.N.Y. Mar. 21, 1996); Artway v. Attorney Gen., 876 F. Supp. 666, 688–92 (D.N.J. 1995); Michelle P. Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 VAND. L. REV 219, 245–50 (1995).

[11] The framework for analyzing challenges under the Eighth Amendment, Ex Post Facto Clause, Double Jeopardy Clause, and Bill of Attainder Clause requires courts to determine whether such laws impose "punishment" within the meaning of the Constitution. *See, e.g.*, United States v. Halper, 490 U.S. 435, 440 (1980) (Double Jeopardy Clause); Trop v. Dulles, 356 U.S. 86, 95–96, 98–99 (1958) (Eighth Amendment and Ex Post Facto Clause); U.S. v. Lovett, 328 U.S. 303, 315 (1946) (Bill of Attainder Clause). If sex offender statutes are regulations, then these constitutional provisions present no bar to their enactment or enforcement.

[12] This Note focuses on state legislation. For a discussion of federal laws that affect released sex offenders, see Tracy L. Silva, *Dial "1-900-PERVERT" and Other Statutory Measures that Provide Public Notification of Sex Offenders*, 48 SMU L. REV. 1961, 1969 (1995); and Boland, cited above in note 9, at 188, 196–97.

[13] Seven year-old Megan Kanka's rape and murder, which was committed by her twice-convicted pedophile neighbor, sparked campaigns to enact community notification statutes in her home state of New Jersey and elsewhere. *See* Lisa Anderson, *Demand Grows to ID Molesters*, CHI. TRIB., Aug. 15, 1994, at 1; *A Rush to Respond*, PHILA. INQUIRER, Sept. 2, 1994, at A26. Other heinous crimes were the impetus for other state sex offender statutes. *See, e.g.*, Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 735 (1994) (Washington statute); Clayton C. Skaggs, Note, *Kansas' Sexual*

today can expect to encounter four major restraints upon release from prison or parole: registration, community notification, DNA testing, and civil commitment.[14]

State registration statutes, which have been enacted in forty-seven states,[15] oblige convicted sex criminals to provide local law enforcement officials with photographs, fingerprints, and such information as their home addresses, social security numbers, dates and places of birth, crimes, and dates and places of conviction.[16] Armed with this valuable information, officials can "create a list of potential suspects . . . to pursue whenever a child [is] harmed or missing."[17]

Community notification statutes, which have been enacted in twenty states,[18] authorize law enforcement agents to distribute registration information to the general public.[19] Supporters of the public's right to know argue that notification "help[s] deter sex offenders from repeating their crimes by keeping a spotlight on them and by giving nearby residents the ability to warn and protect their families."[20]

Several states also require sex offenders to provide blood samples that are subsequently DNA tested, screened, and filed in the state's criminal justice data bank.[21] Because "investigations of murders and

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Predator Act and the Impact of Expert Predictions: Psyched Out by the Daubert *Test*, 34 WASHBURN L.J. 320, 320 (1995) (Kansas statute).

[14] Sex offender statutes vary widely across jurisdictions. For a detailed analysis, see Silva, cited above in note 12, at 1970–73; Boland, cited above in note 9, at 189–98; and Houston, cited above in note 13, at 734–46.

[15] *See* Don Van Natta Jr., *U.S. Judge Blocks State's Plan to Release Names and Addresses of Sex Offenders*, N.Y. TIMES, Mar. 8, 1996, at B6.

[16] *See, e.g.*, WASH. REV. CODE ANN. § 9A.44.130(2) (West Supp. 1996); *see also* Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 890–91 (1995) (describing the typical registration statute). In some states, sex offenders are required to update this information annually for a number of years after conviction or release. *See, e.g.*, N.J. STAT. ANN. §§ 2C:7-2e, :7-2f (West 1995); N.H. REV. STAT. ANN. § 632-A:14 (Supp. 1994).

[17] Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 795 (1996).

[18] *See* Van Natta, *supra* note 15, at B6.

[19] *See, e.g.*, FLA. STAT. ch. 775.225 (1995). Although the form and content of community notification laws vary, several notification provisions are modeled after New Jersey's "Megan's Law," which requires authorities to publicize registration data to particular segments of the community based on a given offender's risk of recidivism. *See* N.J. STAT. ANN. §§ 2C:7-6 to -11 (West 1995). Under this law, three tiers of notification correspond to three levels of risk: if the prosecutor finds that the individual offender's risk of recidivism is low, the law enforcement agencies that are likely to come into contact with the offender are notified; if the risk is moderate, community organizations such as schools, youth groups, and religious groups are given notice; and if the risk is high, everyone who is likely to encounter the offender is made aware of the registration information. *See id.* at § 2C:7-8(c)–(d).

[20] Robin Schimminger, *Law Would Publicize Sex Predators*, BUFFALO NEWS, Sept. 16, 1994, at 2 (statement by New York state legislator Schimminger seeking support for a proposed bill); *accord* Recent Legislation, 108 HARV. L. REV. 787, 787, 791 (1995).

[21] *See, e.g.*, CONN. GEN. STAT. § 54-102g (1995); OR. REV. STAT. §§ 137.076, 181.085 (Supp. 1994); VA. CODE ANN. § 19.2-310.2 (Michie 1995) .

sexual offenses are . . . likely to yield the type of evidence from which DNA information can be derived,"[22] DNA fingerprinting laws purportedly aid in the identification, apprehension, and prosecution of repeat sex predators.[23] In addition, because "sex offenders will be reluctant to commit other offenses out of fear that they will leave behind incriminating evidence that could be linked back to them," a DNA data bank may serve as a specific deterrent to the commission of future sex crimes.[24]

Finally, civil commitment statutes allow state officials to identify potentially dangerous sex offenders — whether they are in prison or in the community — and to commence proceedings to have them involuntarily and indefinitely confined.[25] By "permit[ting] child molesters and rapists to be held after their prison terms [expire] under civil court procedures like those used to commit the insane,"[26] commitment legislation literally immobilizes dangerous sexual deviants and, thus, presumably promotes both immediate and long-term public safety.

B. The Critics

Despite the potential public safety benefits of restrictive sex offender statutes, opponents argue that these laws are more punitive than preventive. In jurisdictions that have registration or DNA statutes, sex offenders have an affirmative obligation to surrender personal information to the state for years after they have been convicted, sentenced, and released.[27] Community notification subjects ex-convicts to stigmatization and ostracism, and puts them at the mercy of a public that is outraged by sex crimes.[28] Civil commitment sacrifices a funda-

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22 Rise v. Oregon, 59 F.3d 1556, 1561 (9th Cir. 1995).

23 *See* James P. O'Brien, Jr., Note, *DNA Fingerprinting: The Virginia Approach*, 35 WM. & MARY L. REV. 767, 796–98 (1994).

24 *Rise*, 59 F.3d at 1561.

25 *See, e.g.*, WASH. REV. CODE ANN. §§ 71.09.030–.060 (West 1992 & Supp. 1996). In several states, officials file a petition of commitment at the conclusion of an offender's sentence and, if "dangerousness" is found at a separate hearing or trial, a court may order a convicted sex offender to be re-confined as a "sexually violent predator." *Id.*; *see, e.g.*, TENN. CODE ANN. § 33-6-305 (1984 & Supp. 1995); WIS. STAT. §§ 980.02–.06 (1993 -1994).

26 Barry Meier, *"Sexual Predators" Finding Sentence May Last Past Jail*, N.Y. TIMES, Feb. 27, 1995, at B8.

27 The intrusion extends beyond the state's initial acquisition of data: on the basis of registration information, sex offenders are "continuous[ly] subject[ ] to questioning and 'command performances at lineups.'" Earl-Hubbard, *supra* note 17, at 818 (quoting *In re* Reed, 663 P.2d 216, 218 (Cal. 1983)).

28 *See* Edward Martone, *No: Mere Illusion of Safety Creates Climate of Vigilante Justice*, A.B.A. J., Mar. 1995, at 39 (asserting that "arson, death threats, slashed tires and loss of employment" are "inevitable and unavoidable" consequences of community notification); G. Scott Rafshoon, Note, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1658–59 (1995); Monte Williams, *Sex Offenders Law Prompts Privacy Debate in New York*, N.Y. TIMES, Feb. 24, 1996, at A1 *passim*.

mental right — freedom — *indefinitely*, based solely upon unreliable assessments of the convict's predilection to commit future sex crimes.[29]

The controversy over the characterization of sex offender statutes has enormous constitutional implications.[30] "Although pragmatically a detainee may care little whether he is [restrained] for punishment or to prevent future harm, jurisprudentially the difference is profound."[31] The next Part considers the profound jurisprudential difference between regulatory and punitive legislation and examines lower courts' specific attempts to distinguish prevention and punishment when reviewing sex offender statutes.

II. PREVENTION/PUNISHMENT DISTINCTION

A. *"The Jurisprudence of Prevention"*[32]

States have long been considered the primary promoters of the general health, safety, and welfare of American citizens.[33] A state legislature's prerogatives unquestionably extend to enacting laws that seek to prevent harm to the general public, even if such statutes effectively restrict individual liberty.[34] Because states often exercise their "police power" in pursuit of public safety, courts "have developed consistent standards for what is an acceptable exercise of public health authority":[35] a state is generally free to impose restrictions that are rationally related to the public safety goal.[36]

Recently, states have begun to enact and enforce public-safety measures that seek to prevent *crime* by "regulating" criminal defendants. Employing traditional public health analysis, the Supreme Court has established the "jurisprudence of prevention" — a deferential view of quasi-criminal efforts to restrain potentially dangerous individuals for

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[29] The touchstone of civil commitment is a prediction of "dangerousness," a judgment that is scientifically unreliable, *see* Robert C. Boruchowitz, *Sexual Predator Law—The Nightmare in the Halls of Justice*, 15 U. PUGET SOUND L. REV. 827, 835–36 (1992); Skaggs, *supra* note 13, at 330–31, and grounded in an assertion of abnormal behavior as evidenced by the convict's prior misconduct, *see* James D. Reardon, M.D., *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849, 852 (1992).

[30] *See infra* pp. 1716–17.

[31] Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 330 (1989).

[32] *Id.* at 329.

[33] *See In re* Slaughterhouse, 83 U.S. 36, 62 (1872); Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 203 (1824).

[34] *See* Robinson v. California, 370 U.S. 660, 666 (1962) (asserting that a state may impose "a compulsory treatment, involving quarantine, confinement, or sequestration" to promote the general welfare); Barsky v. Board of Regents of the Univ. of State of N.Y., 347 U.S. 442, 449 (1954); Whipple v. Martinson, 256 U.S. 41, 45 (1921).

[35] Richards, *supra* note 31, at 338.

[36] *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 486–88 (1955); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-7, at 582 (2d. ed. 1988) (describing the Court's deferential approach to regulatory enactments "in furtherance of public goals").

the good of society.[37] In *Schall v. Martin*,[38] for example, the Court upheld a New York law authorizing pretrial detention for juveniles when there is a "'serious risk' that the juvenile, if released, would commit a crime prior to his next court appearance."[39] Similarly, in *United States v. Salerno*,[40] the Court upheld a federal law allowing judges to deny pre-trial bail to incarcerated suspects when "no release conditions will reasonably assure . . . the safety of . . . the community."[41] Rejecting the notion that detention is necessarily punitive,[42] the Supreme Court has adopted the view that liberty restrictions based on predictions of future dangerousness may "fall[ ] on the regulatory side of the dichotomy" between prevention and punishment.[43]

B. The Prevailing View of Punishment

Although states generally may regulate individuals (even criminally culpable ones) for the good of society, the U.S. Constitution places formidable constraints on each state's ability to *punish* its citizens. For example, the constitutional prohibition against bills of attainder[44] prevents state legislatures from acting adjudicatively by passing laws that punish specified individuals.[45] Similarly, the Constitution prohibits ex post facto legislation,[46] including legislative enactments that impose new punishments for old crimes.[47] Moreover, the Fifth and Sixth Amendments catalog a number of procedural hurdles that states must overcome before they may punish culpable persons,[48] and the Eighth Amendment protects individuals from punishments that, although im-

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37 Richards, *supra* note 31, at 330.

38 467 U.S. 253 (1983).

39 *Id.* at 278.

40 481 U.S. 739 (1987).

41 *Id.* at 741.

42 *See id.* at 745.

43 *Id.* at 747. "Central to all the prevention decisions is the unbundling of punishment and deprivation of liberty in ostensibly criminal law cases." Richards, *supra* note 31, at 338. Although "the Supreme Court has allowed the disassociation of punishment and prevention in criminal law," *id.* at 331, it has not developed clear criteria by which to determine in the first instance whether a particular law should be characterized as "punitive" or "preventive."

44 *See* U.S. CONST. art. I, § 10, cl. 1.

45 *See Punishment*, *supra* note 2, at 236.

46 *See* U.S. CONST. art. I, § 10, cl. 1.

47 In *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), the Supreme Court established that a law violates the Ex Post Facto Clause when it "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Id.* at 390. Thus, if sex offender statutes are deemed "punitive," their application to previously-convicted offenders violates the Ex Post Facto Clause.

48 The Fifth and Sixth Amendments apply to "criminal" cases. *See* U.S. CONST. amends. V, VI. Although the nature of the proceeding cannot be ascertained solely from an evaluation of the sanction, *see* U.S. v. Halper, 490 U.S. 435, 447–448 (1989), the Supreme Court has established that at least in the Fifth Amendment context, a constitutional violation "can be identified [solely] by assessing the character of the actual sanctions imposed." *id.* at 447.

posed by the judiciary in accordance with due process, are nonetheless "cruel and unusual."[49]

Because "[t]he state may not punish a person under its public health police powers,"[50] courts must determine whether challenged legislation imposes "punishment" within the meaning of the Constitution. The prevailing method of making the prevention/punishment determination derives from the Supreme Court's opinion in *Kennedy v. Mendoza-Martinez*.[51] In *Kennedy*, the Court held that federal statutes that divested draft-dodgers of national citizenship for departing the United States during a time of war were unconstitutionally punitive.[52] Writing for the majority, Justice Goldberg reasoned that "[t]he punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character."[53] The tests traditionally applied were:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[54]

Although many lower courts use the *Kennedy* factors, great disagreement persists about when and how to apply them in evaluating laws that burden released sex offenders.[55] Several courts have chosen to use means other than the *Kennedy* analysis to characterize such legislation.

C. *Sex Offender Statutes: Prevention or Punishment?*

The growing demand for more stringent sex offender regulation challenges both lawmakers and courts: legislatures must "devise a solu-

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[49] U.S. CONST. amend. VIII.

[50] Richards, *supra* note 31, at 338.

[51] 372 U.S. 144 (1963).

[52] *See id.* at 165–66.

[53] *Id.* at 168.

[54] *Id.* at 168–69 (citations omitted). The *Kennedy* Court did not rely on these factors in reaching its decision. Instead, the Court found, "[the] objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive," and concluded that a "detailed examination" of the factors was unnecessary. *Id.* at 169. Thus, although the *Kennedy* Court set forth criteria for distinguishing punitive from regulatory enactments, it also established that they need only be considered "[a]bsent conclusive evidence of congressional intent as to the penal nature of a statute." *Id.*

[55] In the absence of a clear legislative admission that a law punishes, there is considerable judicial discord over how to make the prevention-or-punishment determination. *See infra* part II.C; *cf.* Maria Foscarinis, Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1667, 1670–78 (1980) (examining the various ways that courts have sought "to determine what punishment is").

tion generally designed to remedy the [sex crime] problem without unnecessarily penalizing those who are its source,"[56] and courts must review that legislative response, necessarily deciding how to differentiate punitive and regulatory enactments.[57] The few courts that have characterized sex offender laws have taken different approaches and, not surprisingly, have reached different conclusions. Consider the following examples.

In *Rise v. Oregon*,[58] the Ninth Circuit upheld an Oregon law requiring convicted murderers and sex offenders to surrender blood samples for the state's DNA data bank.[59] Felons subject to the law brought a lawsuit alleging that the forced blood submissions violated, inter alia, the constitutional prohibition against ex post facto punishments.[60] In determining whether the statute was punitive or preventive, the federal court focused only on the legislature's regulatory intent[61] and concluded that, because the "obvious purpose" of the Oregon statute was to aid law enforcement officials, the statute was constitutional.[62]

In *Artway v. Attorney General*,[63] a federal district court assessed several constitutional challenges to New Jersey's registration and community notification statute.[64] Artway argued that the statute violated the Constitution's prohibitions against cruel and unusual punishment, ex post facto laws, and bills of attainder, among others.[65] Although the legislature claimed a regulatory purpose for the act, the court found that judges should "reach an independent conclusion as to its true nature"[66] by engaging in an "analysis . . . in the manner prescribed by the Supreme Court in *Kennedy*."[67] Applying the *Kennedy*

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[56] Doe v. Poritz, 662 A.2d 367, 387 (N.J. 1995).

[57] *See supra* note 11 and accompanying text. Courts may also seek to determine whether sex offender legislation comports with constitutional provisions that do not rely on a "punitive" or "regulatory" characterization, such as the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *In re* Hendricks, No. 73,039, 1996 WL 87472, at *5 (Kan. Mar. 1, 1996).

[58] 59 F.3d 1556 (9th Cir. 1995).

[59] *See id.* at 1564.

[60] *See id.* at 1558.

[61] *See id.* at 1562 ("Legislation may lawfully impose new requirements on convicted persons if the statute's 'overall design and effect' indicates a 'non-punitive intent.'" (quoting United States v. Huss, 7 F.3d 1444, 1447 (9th Cir. 1993))).

[62] *Id.* It is unclear from the opinion whether the court looked at the text of the statute, legislative history, or some other source in making its determination that the law's purpose is "to assist in the identification, arrest, and prosecution of criminals, not to punish." *Id.*

[63] 876 F. Supp. 666 (D.N.J. 1995).

[64] *See id.* at 668.

[65] *See id.*

[66] *Id.* at 673.

[67] *Id.*

factors, the court concluded that the public notification provisions of the statute were unconstitutional.[68]

The Supreme Court of New Jersey examined the same registration and community notification law in *Doe v. Poritz*.[69] Instead of deferring to legislative intent or employing the *Kennedy* factors,[70] however, the court set forth yet another test for determining whether the statute was punitive. Under the *Poritz* court's reasoning, "a statute that can fairly be characterized as remedial"[71] only constitutes punishment if the punitive impact of the law is "excessive."[72] Though the statute may "affect, potentially severely, some of those subject to its provisions,"[73] only if the law contains provisions that "cannot be justified as regulatory" will it be deemed punishment for the purpose of the constitutional inquiry.[74] Applying its regulatory-unless-excessively-punitive test to Megan's Law, the *Poritz* court upheld the statute as a valid exercise of the state's power to prevent public harm.[75]

III. THE DISTINCTION DISSECTED

The *Rise*, *Artway*, and *Poritz* opinions are generally representative of the analyses of the few courts that have evaluated sex offender laws.[76] Although each approach squarely confronts the prevention/punishment dilemma, the analyses offer incoherent and unprincipled explanations for the courts' conclusions. Courts have relied too heavily on the legislatures' intent, have mistakenly applied the *Kennedy* factors, and have erroneously emphasized "excessiveness" in assessing the nature of sex offender statutes for constitutional purposes.

A. *The* Rise *Rationale: Relying on Legislative Intent*

In *Rise*, the Ninth Circuit suggested that a "non-punitive intent" is the benchmark for determining whether a legislature seeking to estab-

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[68] *See id.* at 692. The court found that public notification involves an affirmative disability, has historically been regarded as punishment, and furthers one of the traditional aims of punishment. *See id.* at 688–91. Even though in the court's opinion the scienter factor "weighs in favor" of a regulatory characterization, *id.* at 690, the court reasoned that the law applies only to behavior that constitutes a crime, does not further regulatory objectives, and appears excessive in relation to its stated goals, *see id.* at 691–92.

[69] 662 A.2d 367 (N.J. 1995).

[70] The court rejected the *Kennedy* factors as inapposite because they are "useful only in determining the underlying nature of the proceeding, not the question of whether punishment is imposed by a civil sanction." *Id.* at 402.

[71] *Id.* at 388.

[72] *See id.* at 390.

[73] *Id.* at 388.

[74] *Id.* at 390.

[75] *See id.* at 422–23.

[76] *See, e.g.*, Rowe v. Burton, 884 F. Supp. 1372, 1378–79 (D. Alaska 1994) (applying the *Kennedy* factors); State v. Carpenter, 541 N.W.2d 105, 112–13 (Wis. 1995) (looking for extraneous, punitive effects); State v. Costello, 643 A.2d 531, 533 (N.H. 1994) (relying on legislative intent).

lish a DNA data bank can act to "impose new requirements on convicted persons."[77] Other jurists have also found the purported purpose of a sex offender statute dispositive of its nature. For example, in *People v. Adams*,[78] the Illinois Supreme Court decided that a detailed analysis of the "severity of the disability" imposed by the registration statute is necessary only "when conclusive evidence of legislative intent is unavailable."[79]

Fastidiously focusing on legislative intent when characterizing sex offender statutes is problematic for two primary reasons. First, it may not be possible to discern the true intentions of a legislative body.[80] Although the legislature may announce that its intent is merely to protect the community, the actual motivations of elected officials who enact burdensome provisions may be difficult to ascertain.[81] Moreover, the legislative history of a statute is often indeterminate,[82] and savvy politicians may "inject statements intended solely to influence later interpretations of the statute."[83]

Second, even if the statements accompanying the passage of a sex offender law express the lawmakers' true motivations, making those intentions dispositive "encourage[s] hypocrisy and unconscious self-deception."[84] The prevention/punishment dilemma is a constitutional conflict between the state and the burdened individual. "A definition of punishment that render[s] an individual's constitutional rights dependent on the subjective motive of his punisher [is] inconsistent with the function of the Constitution in protecting individual rights."[85] It makes little sense for a court to fixate on the state's interest in regulating sex convicts when the real issue is whether a particular provision can rightly be deemed "regulation" at all.

B. The Artway *Approach: Overvaluing the Kennedy Factors*

Some judges eschew in depth examinations of the legislature's intent and instead purport to "focus on the practical purpose and effect of the statute"[86] by applying the factors that the Supreme Court identified in *Kennedy*.[87] Although the attempt to focus on effects is com-

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77 Rise v. Oregon, 59 F.3d 1556, 1562 (9th Cir. 1995) (internal quotation marks omitted).

78 581 N.E.2d 637 (Ill. 1991).

79 *Id.* at 640–41; *accord Costello*, 643 A.2d at 533.

80 *See* Foscarinis, *supra* note 55, at 1672.

81 *See* Bedarf, *supra* note 16, at 923.

82 Various legislators may express different intentions with respect to the proposed legislation. *See* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1019 (1992).

83 *Id.* at 1016.

84 PACKER, *supra* note 1, at 33.

85 Foscarinis, *supra* note 55, at 1673.

86 Artway v. Attorney Gen., 876 F. Supp. 666, 673 (D.N.J. 1995).

87 For a listing of the *Kennedy* factors, see page 1717 above.

mendable,[88] courts have attached far too much significance to the *Kennedy* factors in assessing sex offender laws.

In the first place, there is little evidence in the *Kennedy* opinion that the Supreme Court intended the factors to be applied as a litmus test by which to characterize legislation. In *Kennedy*, the Court:

> simply listed various factors, the tests, each of which had been used by itself in reaching a determination of whether a statute was penal (criminal) or regulatory (civil), and each of which therefore might be relevant in the future in making that determination, whether alone or in conjunction with the others.[89]

Moreover, the Supreme Court's post-*Kennedy* opinions indicate that the Justices did not view *Kennedy* as a means of determining the punitive or regulatory nature of a law.[90]

Second, even if *Kennedy* sets forth the seven elements of a punitive enactment, the list is far too open-ended to yield consistent results, especially as applied to sex offender statutes.[91] For example, the Supreme Court of Arizona used the *Kennedy* factors to uphold Arizona's registration provision as regulatory,[92] while the Supreme Court of California employed the same criteria to strike down a substantially similar version of the California registration statute as unconstitutionally punitive.[93] Further, using the *Kennedy* factors, federal courts in Alaska and New Jersey have found that community notification laws

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[88] *See infra* part IV.

[89] Doe v. Poritz, 662 A.2d 367, 399 (N.J. 1995).

[90] Cases subsequent to *Kennedy* reveal that the Court views the seven-factor analysis as applicable only when the nature of the *proceeding* (i.e., criminal versus civil) is at issue, and not when the nature of the *sanction* (i.e., punitive or regulatory) is in question. *See e.g.*, Austin v. United States, 113 S. Ct. 2801, 2806 n.6 (1993) (considering the criminal or civil nature of forfeiture proceedings and finding that "[i]n addressing the separate question whether punishment is being imposed, the Court has *not* employed the tests articulated in [*Kennedy*]") (emphasis added); *see also* Simeon Schopf, *"Megan's Law": Community Notification and the Constitution*, 29 COLUM. J.L. & SOC. PROBS. 117, 132 (1995) (arguing that "the bulk of recent case law suggests" that application of the *Kennedy* criteria to determine whether community notification constitutes punishment would be "inappropriate"). Because the criminal/civil distinction is different from the punitive/regulatory determination, *see* United States v. Halper, 490 U.S. 435, 447–48 (1989), *Kennedy*'s significance in making the former determination does not ensure its appropriateness in making the latter.

[91] The *Kennedy* Court itself admitted that the factors "may often point in differing directions," *Kennedy*, 372 U.S. at 169, and comparative analysis of court evaluations suggests that, in the context of sex offender statutes, they most certainly have. *See* Bedarf, *supra* note 16, at 913–14 (finding that "despite [judges'] use of the same seven-factor test, courts are split fairly evenly in the conclusions they reach").

[92] *See* State v. Noble, 829 P.2d 1217, 1221–24 (Ariz. 1992).

[93] *See In re* Reed, 663 P.2d 216, 218–20 (Cal. 1983). Although the California Supreme Court invalidated the registration law only as applied to sex offenders convicted of misdemeanor disorderly conduct, *see id.* at 222–23, it used the *Kennedy* analysis to conclude that the general practice of registering sex offenders constitutes punishment, *see id.* at 218–20.

constitute "punishment,"[94] while the Supreme Court of Washington has found that the Washington registration and notification statute is a regulation.[95] Whatever the reason for the disparate outcomes when various courts apply the same *Kennedy* factors to similar sex offender laws,[96] such differences suggest that the test does not provide a consistent means of making the prevention/punishment determination.

Finally, because some of the *Kennedy* concerns are patently inapplicable to sex offender laws, the *Kennedy* "test" is not well-suited to the evaluation of sex offender statutes. For example, *Kennedy* requires an evaluation of "whether [the sanction] comes into play only on a finding of scienter."[97] Scienter is ambiguous in the context of sex offender statutes, however, because although the sex offender laws themselves do not require criminal culpability, they apply only to individuals who have been found criminally culpable for sexual misconduct.[98] Considering "whether the behavior to which [the sanction] applies is already a crime"[99] presents a similar difficulty. Although the underlying sexual offense is certainly criminal, "one could argue that the . . . statutes only relate to the behavior of moving from place to place and entering a city's borders, behavior that is *not* a crime for most individuals."[100] Such ambiguities should preclude casual reliance on the *Kennedy* factors in evaluating sex offender statutes.

C. *The* Poritz *Position: Erroneously Emphasizing "Excessive" Effects*

The New Jersey Supreme Court has found that the proper inquiry in determining whether Megan's Law should be deemed "punitive" is whether the statute's "punitive impact comes from aspects of the law unnecessary to accomplish its regulatory purposes."[101] The *Poritz* ra-

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[94] *See* Artway v. Attorney Gen., 876 F. Supp 666, 688–92 (D.N.J. 1995); Rowe v. Burton, 884 F. Supp. 1372, 1377–80 (D. Alaska 1994).

[95] *See* State v. Ward, 869 P.2d 1062, 1069 (Wash. 1994).

[96] Some of the discrepancy is substantive. *Compare Reed*, 663 P.2d at 218, 219–20 (finding that sex offender registration imposes an affirmative disability, that it has not been historically regarded as punishment, and that it is excessive vis-à-vis its nonpunitive purposes) *with Noble*, 829 P.2d at 1222, 1224 (concluding that sex offender registration does not impose a disability, has been traditionally regarded as punishment, and is not excessive). The remainder may be the result of differences in the application of the factors. *Compare Noble*, 829 P.2d at 1224 (asserting that "our task is not simply to count the factors on each side, but to weigh them" based on their significance) *with Artway*, 876 F. Supp. at 692 (finding that most of the factors lead toward a punitive characterization).

[97] *Kennedy*, 372 U.S. at 168 (emphasis omitted).

[98] In applying the *Kennedy* criteria, some courts simply ignore the scienter criteria, *see, e.g.*, *Noble*, 829 P.2d at 1221–24, while others attempt to make sense of it, *see, e.g.*, *Artway*, 876 F. Supp. at 689–90.

[99] *Kennedy*, 372 U.S. at 168.

[100] Earl-Hubbard, *supra* note 17, at 819–20.

[101] Doe v. Poritz, 662 A.2d 367, 390 (N.J. 1995). This approach follows the Supreme Court's analysis in cases such as United States v. Salerno, 481 U.S. 739 (1987), which collapses the multi-

tionale requires the judge to find a regulatory purpose, to discern the law's punitive effects, and to evaluate the "excessiveness" of the punitive effects of the sex offender statute in relation to the statute's remedial goals.[102] Although the *Poritz* position attempts to balance the punitive and preventive aspects of sex offender statutes, it also invites unwarranted and illogical deference to legislative desires, is difficult to apply in the sex offender context, and ignores the crux of the prevention/punishment determination.

Like the prevention/punishment analysis that considers legislative intent dispositive, the excessive-punitive-effects rationale maintains that "the purpose and the intent of the . . . sanction is the touchstone that determines the sanction's characterization."[103] In the *Poritz* court's view, if the state has a legitimate regulatory purpose for its sex offender statute and the statutory burden bears some reasonable relationship to that purpose, then its effects are not excessive, and the law should be characterized as a "regulation." This reliance on regulatory intent not only unwisely assumes that a clear legislative purpose is ascertainable,[104] but also allows the legislature to justify arguably punitive statutory provisions by selecting sweeping regulatory goals.[105] Because "[a]lmost *any* restriction on a [convict's] liberty interests can be found to have some rational relation to the legislative interest in promoting community safety,"[106] the excessive-punitive-effects rationale is a "toothless standard" that defers almost entirely to the will of the legislature and "provid[es] the [sex convict] with virtually no protection against the 'punitive effect[s]'" of the legislation.[107]

Even if one overlooks the problems associated with relying on legislative intent, the "excessiveness" rationale is difficult to apply when

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factor *Kennedy* analysis into two considerations: "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." *Id.* at 747 (quoting *Kennedy*, 372 U.S. at 168–69) (alterations in original) (internal quotation marks omitted).

102 *See Poritz*, 662 A.2d at 390.

103 *Id.* at 394.

104 *See supra* part III.A.

105 Consider Justice Marshall's hypothetical example which posits a congressional intent to reduce violent crime:

> After investigation, Congress determines (not unrealistically) that a large proportion of violent crime is perpetrated by persons who are unemployed. It also determines, equally reasonably, that much violent crime is committed at night. From amongst the panoply of "potential solutions," Congress chooses a statute which permits, after judicial proceedings, the imposition of a dusk-to-dawn curfew on anyone who is unemployed. Since this is not a measure enacted for the purpose of punishing the unemployed, and since the majority finds that preventing danger to the community is a legitimate regulatory goal, the curfew statute would, according to the majority's analysis, be a mere "regulatory" detention statute . . . .

Salerno, 481 U.S. at 760 (Marshall, J., dissenting).

106 Thomas C. French, Note, *Is It Punitive or Is It Regulatory?* United States v. Salerno, 20 U. TOL. L. REV. 189, 225 (1988) (emphasis added).

107 *Id.*

the challenged statute imposes a nonpecuniary burden. "Excessiveness" evaluations most effectively assess the character of statutes that impose monetary compensation for past harms.[108] To the extent that sex offender statutes are not compensatory, and the burden they impose is not quantifiable, the attempt to evaluate the "excessiveness" of the punitive effects of such statutes is both unavailing and misleading.[109]

Most importantly, by focusing on the extent to which the punitive effects of the statute exceed the state's regulatory purpose, the excessive-effects rationale ignores the fact that, at its core, the prevention/punishment evaluation considers whether sex offender laws are a constitutionally appropriate means of pursuing concededly legitimate state ends. The "excessive burden" analysis characterizes statutes based on the *fit* between means and end,[110] rather than on the properties of legislation that should be deemed to make it more or less "punitive" within the meaning of the Constitution. Whether the state is doing what it must (and thus the punitive effects are not "excessive" in relation to the law's purpose) simply does not address whether what the state is doing should be deemed "punishment."[111] In making the prevention/punishment determination, judges must ask whether the law should be characterized as "punitive," not whether the state must act punitively to accomplish its regulatory goals.

A critical examination of sex offender statute jurisprudence "illustrate[s] the complexities, intricacies, and contradictions involved when courts attempt to set standards or evolve a formula to differentiate between punishment and regulation."[112] Admittedly, "[t]he distinction between unconstitutional punishment and permissible state regulatory actions is a fine one."[113] Nevertheless, courts should recognize the

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108 *See* Cheh, *supra* note 1, at 1378 (concluding that "[f]or monetary penalties" the excessive effects approach "gives us a useful albeit broad formula: the government is entitled to rough remedial justice" and "[a]nything beyond this generously phrased allowance will be equivalent to [punishment]").

109 *See id.* (suggesting that applying "excessiveness" analysis to "adverse actions that are not measured in currency" is problematic).

110 The *Poritz* court upheld Megan's Law because "that which is allegedly punitive, the knowledge of the offender's record and identity, is precisely that which is needed for the protection of the public." Doe v. Poritz, 662 A.2d 367, 404 (N.J. 1995).

111 An evaluation of the state's *need* for a particular course of action is fundamentally different from a determination of the *character* of its conduct. Consider the constitutional prohibition against unreasonable searches and seizures. *See* U.S. CONST. amend. IV. Whether the police have affected a "seizure" within the meaning of the Constitution is assessed without regard to the state's interest in detaining the individual. *See, e.g.*, California v. Hodari D., 499 U.S. 621, 628 (1991); Michigan v. Chesternut, 486 U.S. 567, 573 (1988). Similarly, whether a law imposes "punishment" should not be determined by focusing on the state's interest in burdening the individual. Although constitutional analysis may ultimately reveal that the state's end justifies the means, the character of the means cannot be ascertained with reference to the legitimacy of the end.

112 *Punishment*, *supra* note 2, at 287.

113 French, *supra* note 106, at 218.

flaws in the current analytic framework and move toward developing a more principled means of distinguishing prevention and punishment when evaluating sex offender laws.

IV. TOWARD A MORE PRINCIPLED POSITION

Two major premises underlie a more principled approach to making the prevention/punishment determination. First, a principled analysis recognizes that there is no *inherent* property that makes a statute, by nature, "punitive" or "preventive." Unquestionably punitive statutes share traits with laws that are universally accepted as regulatory.[114] A particular statute may have both punitive and nonpunitive attributes;[115] and, to some extent, whether a law is "punitive" or "regulatory" depends upon one's vantage point.[116] Rather than adhering to the notion that punishments and regulations are inherently distinguishable in any meaningful sense, the principled judiciary thus seeks to identify statutory traits that *should* serve as the basis for classification within the meaning of the Constitution.[117]

Second, the principled approach postulates that the normative determination of which characteristics should make a statute "punitive" within the meaning of the Constitution should be tied to the constitutional foundations that give rise to the prevention/punishment problem. The current analyses of sex offender statutes are unprincipled precisely because the statutory criteria selected — legislative intent, the state's prevailing interest in enacting the law, and to a lesser extent, the *Kennedy* factors — are unrelated to the interests that the Constitution is designed to protect. Courts determine the "punitive" or "regulatory" nature of a statute, not as an isolated inquiry, but against the backdrop of a system of government in which state interests are subordinate to individual rights. Because the Constitution stands as a bulwark against government encroachment on individual liberty, courts should employ a classification standard that "safeguards the humane interests for the protection of which the [Constitution] was written."[118] This Note argues that "[i]n a democracy, where safeguards are

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[114] For example, both imprisonment and quarantine statutes involve forced restraint of the targeted individuals.

[115] *See* Trop v. Dulles, 356 U.S. 86, 96 (1958); Rafshoon, *supra* note 28, at 1667.

[116] *See* United States v. Halper, 490 U.S. 435, 447 n.7 (1989) ("[F]or the defendant even remedial sanctions carry the sting of punishment.").

[117] The courts' task is normative rather than descriptive. For example, instead of finding as a descriptive matter that "punitive" laws impose burdens and "regulatory" ones do not, courts must determine whether, given the existence of a burden, a particular law *should* be deemed "punitive" for the purpose of constitutional analysis.

[118] Marcus v. Hess, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring).

built in to protect human dignity, the *effect* of the sanction rather than the reason for imposing it must necessarily be [that] criterion."[119]

Once it is established that the courts' function is to make a normative assessment of the "punitive" or "regulatory" character of the legislation, and that "the relevant criteria . . . should be the concerns of individuals threatened with criminal sanctions" rather than the purpose or intentions of the state,[120] judicial classification of sex offender laws will turn in a more principled direction: toward evaluating the *impact* of the challenged legislation in a manner that is consistent with constitutional protections against government encroachment on individual rights. Although courts will have to develop precise, objective criteria by which to evaluate the effects of sex offender laws over time, this Note suggests that judges focus, first, on the nature of the disability imposed, and second, on whether the statute has retributive or general deterrent effects. Simply stated, if a sex offender statute deprives an offender of an otherwise-established legal right and primarily operates to affect retribution or general deterrence, it should be deemed "punitive" for constitutional purposes.

Focusing on the nature of the disability — and reserving the "punitive" classification for burdens that amount to "a deprivation or suspension of civil or political rights"[121] — emphasizes the effect of sex offender legislation as the constitutional touchstone for the characterization of such statutes. Because citizens face myriad civil disabilities imposed by the states (many of which undoubtedly seem punitive to those who must endure them), requiring that "punitive" statutes amount to a deprivation of rights promotes consistency by giving judges a "standard for determining the degree of hardship necessary to render an action punitive."[122] Moreover, because only statutes that infringe upon the rights of citizens implicate constitutional provisions, only a deprivation of such rights should give rise to the constitutional protections associated with a "punitive" characterization.

The second inquiry — whether the sex offender statute has retributive[123] or general-deterrent effects — requires judges to consider the

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119 Victor S. Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213, 217–218 (1959) (emphasis added); *see also* Doe v. Pataki, No. 96 CIV.1657(DC), 1996 WL 131859, at *1 (S.D.N.Y. Mar. 21, 1996) ("[N]o matter how compelling the reasons, no matter how pure the motive, constitutional protections for individuals — even unsympathetic ones — cannot be cast aside in the name of the greater good.").

120 Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at* Kennedy v. Mendoza-Martinez, 32 U. CHI. L. REV. 290, 299 (1965).

121 Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 322 (1867). The *Cummings* Court found that "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment." *Id.* at 322.

122 Foscarinis, *supra* note 55, at 1675.

123 Properly conceived, retribution is both "naked vengeance," *Kennedy*, 372 U.S. at 189 (Brennan, J., concurring), and "a moral condemnation by society of an offender's behavior," Bedarf, *supra* note 16, at 925. It should be noted that a statute may be retributive in spite of — rather

impact of the statute on the targeted individuals and society. Acknowledging that sex offender statutes are likely both to influence individual behavior *and* to promote societal interests in retribution and general deterrence, the judge would determine whether the legislation serves *primarily* to facilitate individual reformation or rehabilitation, on the one hand, or to display moral opprobrium or make an example of the offender, on the other. Of course, the question of which effects predominate "is not ordinarily answered through an analysis that suggests precision and consequently that results in certainty."[124] Nevertheless, because individuals need constitutional protection far more when state actions achieve retribution or general deterrence than when its acts accomplish individual reformation or rehabilitation, an analysis that classifies sex offender statutes accordingly is a principled means of evaluating these laws.[125]

The characterization of any particular sex offender law depends upon the statute's particular provisions and, thus, is beyond the scope of this Note. Nevertheless, illustrating the application of the proposed principles in the context for which they are offered is informative. Thus, in a jurisdiction in which sex offenders have no privacy right in registration information or blood samples, and therefore, no political or civil right is infringed by the state's registration or DNA data bank requirements, a court would find that sex offender registration and DNA data bank laws are "regulations" for constitutional purposes. If, on the other hand, a community notification statute deprives the offender of his right to mobility or bodily integrity, and if it makes him the "target of widespread community rejection, antipathy, and scorn"[126] in a manner that is more retributive than rehabilitative, then it should be considered "punishment." Commitment legislation must be examined carefully, for although it clearly sacrifices the offender's fundamental right to freedom, courts must determine whether its primary effect is treatment of the affected individual, or satisfaction of the societal interest in locking sex offenders up and throwing away the key.[127]

In each case, "the Court's task is to predict fairly the actual effect of the statutory requirements"[128] in terms of the nature and severity of

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than because of — the legislature's purpose in enacting it. *See Kennedy*, 372 U.S. at 189 (Brennan, J., concurring) (arguing that "an exaction of retribution would not lose that quality because it was undertaken" for regulatory reasons).

[124] Doe v. Poritz, 662 A.2d 367, 398 (N.J. 1995).

[125] When legislation primarily satisfies societal interests in retributive or deterrent "justice," individual rights are most in jeopardy, and a "punitive" characterization is most warranted.

[126] *Poritz*, 662 A.2d at 439–40 (Stein, J., dissenting). Although individual retaliation may not be considered government action for the purpose of the Constitution, notification "exposes [offenders] to society's disapprobation," and the resulting stigma may amount to "state-induced condemnation," which is a significant retributive effect. Bedarf, *supra* note 16, at 925.

[127] *See, e.g.*, Young v. Weston, 898 F. Supp. 744, 753 (W.D. Wash. 1995).

[128] *Poritz*, 662 A.2d at 438.

the deprivation and the impact on the individual and the society at large. Though far from perfect, this approach to making the prevention/punishment distinction is principled because it "places primary emphasis on the 'punished' individuals"[129] and stresses the constitutional safeguards that should be the basis for judicial judgments about the "punitive" or "regulatory" nature of state sex offender laws.

V. CONCLUSION

In the current climate of fear, hatred, and revenge associated with the release of convicted sex criminals, courts must be especially attentive to legislative enactments that "use[ ] public health and safety rhetoric to justify procedures that are, in essence, punishment and detention."[130] Judges should abandon the prevention/punishment analyses that rely on legislative intent, that routinely apply the *Kennedy* factors, and that assess the "excessiveness" of a sex offender statute's punitive effects in favor of a more principled approach to characterization. Although "[a precise] analytical solution is almost impossible to construct,"[131] this Note suggests that such a principled approach involves assessing the impact of sex offender statutes and deeming the laws "punitive" to the extent that they operate to deprive sex criminals of a legal right in a manner that primarily has retributive or general-deterrent effects.

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[129] Foscarinis, *supra* note 55, at 1682.

[130] Richards, *supra* note 31, at 386.

[131] *Punishment*, *supra* note 2, at 273.