Louisiana's "Megan's Law": The Need for a Principled Approach

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I. INTRODUCTION: WHAT IS "MEGAN'S LAW"?

A recent headline in the Baton Rouge Advocate read: "Supreme Court upholds Megan's Law sex offender ruling." The article went on to recount the recent the United States' Supreme Court's denial of certiorari in a case challenging the validity of "Megan's Law," a law that requires sex offenders to
register with police and to notify their neighbors of the crime in which they were convicted. The lower court’s ruling upheld the constitutional validity of the law, specifically holding that the requirements could apply retroactively without violating the *ex post facto* clause of the Constitution. While Louisiana’s highest court has yet to speak on this specific issue, the rule in Louisiana is that, in some cases, retroactive application of our version of “Megan’s Law” does violate *ex post facto* principles. This comment will attempt to reconcile these differing results by showing that Louisiana courts may have misconstrued the relationship between “Megan’s Law” and the *ex post facto* clause of the Constitution and, in effect, are restricting our law unnecessarily.

State legislatures across the country began to enact statutes requiring sex offender registration and notification in the early 1990’s. This followed several highly publicized cases of serial sex offenders who, once released from prison, subsequently committed another violent crime. The intense media coverage of these incidents created a wave of public pressure, forcing legislators to face the issue of recidivism among sex offenders, and the ensuing congressional investigations uncovered studies that contained alarming results. Not only were sex offenders more likely to repeat their crimes than other criminals, but evidence also indicated that treatment of these offenders was often ineffective.

2. One of the most well known cases was the rape and murder of seven-year old Megan Kanka. On July 29, 1994, Megan was savagely raped and murdered by her neighbor. Both the residents of her small Trenton suburb and communities all across the country were angered when it was discovered that Megan’s murderer, 33-year old Jesse Timmendequas, had already served six years in prison for aggravated assault and attempted sexual assault of a child. James Popkin et al., *Natural Born Predators*, U.S. News & World Rep., Sept. 19, 1994, at 64. See also Claire M. Kimball, *Note & Comment, A Modern Day Arthur Dimmesdale: Public Notification when Sex Offenders are Released Into the Community*, 12 Ga. St. U. L. Rev. 1187, 1188 (1996).
4. “Studies report that rapists recidivate at a rate of 7 to 35%; offenders who molest young girls, at a rate of 10 to 29%, and offenders who molest young boys, at a rate of 13 to 40%. Further, of those who recidivate, many commit their second crime after a long interval without offense. In cases of sex offenders, as compared to other criminals, the propensity to commit crimes does not decrease over time. . . . [I]n one study, 48% of the recidivist sex offenders repeated during the first five years and 52% during the next 17 years.” Doe v. Poritz, 662 A.2d 367, 374 (N.J. 1995). However, the statistics on recidivism rates are inconsistent. While some studies show recidivism rates as low as 20%, other studies estimate the recidivism rate at up to 80%. See Diane Brady, *Radical Treatment: A Special Program in Manitoba Seeks to Put Sex Offenders Back in Society*, Maclean’s, April 26, 1993, at 38 and Robert E. Freeman-Longo and Ronald V. Wall, *Changing a Lifetime of Sexual Crime: Can Sex Offenders Ever Alter Their Ways? Special Treatment Programs Provide Some Hope*, Psychology Today, March 1986, at 58. Some other studies find that the recidivism rate for sex offenders is no greater than the rates for other criminals. Mary Anne Kircher, *Note, Registration of Sexual Offenders: Would Washington’s Scarlet Letter Approach Benefit Minnesota?*, 13 Hamline J. Pub. L. & Pol’y 163, 164 (1992). It appears that no true rate of
In response to these findings, state lawmakers around the nation began to enact "sex offender registration and notification provisions." Although the detailed requirements of the statutes differ from state to state, registration laws generally require convicted sex offenders to provide local law enforcement officials with photographs, fingerprints, and personal information such as home and work addresses. Notification statutes take this one step further, requiring offenders to provide their neighbors with their name, address and conviction record. Together, these statutes have become known as "Megan's Law," named for Megan Kanka, whose tragic death was the catalyst for gathering public sentiment behind these enactments. Today, forty-seven states have sex offender registration requirements, and twenty states provide for community notification. Moreover, the force of the movement is so great that recidivism can accurately be determined because the risk of reoffense depends on a number of factors. These factors including the kind of offense committed, what is considered a reoffense, and whether or not the offender received treatment.


6. E.g., New Jersey Statutes Annotated 2C:7-8 requires all persons who complete a sentence for certain designated crimes involving sexual assault to register with local law enforcement if their conduct is "characterized by a pattern of repetitive and compulsive behavior." The registrant must provide the following information to the chief law enforcement officer of the municipality in which he resides: name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, address of legal residence, address of any current temporary legal residence, and date and place of employment. N.J. Stat. Ann. § 2C:7-4b(1) (West 1995). The registration agency then forwards the registrant's information, as well as any additional information it may have, to the prosecutor of the county that prosecuted the registrant. N.J. Stat. Ann. § 2C:7-4c to d (West 1995). The prosecutor, in turn, forwards the information to the Division of State Police, which incorporates it into a central registry and notifies the prosecutor of the county in which the registrant plans to reside. This information is available to law enforcement agencies of New Jersey, other states, and the United States. N.J. Stat. Ann. § 2C:7-5 (West 1995). The registration information is not open to public inspection. Law enforcement agencies are authorized to release "relevant and necessary information regarding sex offenses to the public when . . . necessary for public protection," but only in accordance with the notification procedures we describe below. Failure of the sex offender to comply with registration is a fourth-degree crime. Doe, 662 A.2d 380. See also Note, Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders, 109 Harv. L. Rev. 1711, 1713 (1996) [hereinafter Prevention].

7. The goal of notification is simple, to make people aware that violent sex offenders may be living in their neighborhood so that families can take the precautions they deem necessary to protect themselves. Elga A. Goodman, Megan's Law: The New Jersey Supreme Court Navigates Uncharted Waters, 26 Seton Hall L. Rev. 764, 771 (1996).

8. See Ryan A. Boland, Comment, Sex Offender Registration and Community Notification: Protection, Not Punishment, 30 New Eng. L. Rev. 183 (1995) ("Three months after the body of Megan Kanka was found, the governor of New Jersey, Christine Todd Whitman, signed one of the most comprehensive and stringent sex offender bills into law."). See also Christine M. Kong, The Neighbors are Watching: Targeting Sexual Predators with Notification Laws, 40 Vill. L. Rev. 1257, 1258 (1996).

Congress recently enacted federal legislation in an effort to provide additional protection from repeat sex offenders.  

Louisiana has also joined the effort with three interrelated provisions (hereinafter “Louisiana’s Megan’s Law”). Louisiana Revised Statutes 15:540-549 are the general provisions and affect any person convicted of an enumerated sex offense. Also, the legislature passed Act No 962 amending both Article


11. La. R.S. 15:542-549 (Supp. 1998); La. R.S. 15:574.4 (Supp. 1998); La. Code Crim. P. art. 895(4). Although there are three statutes that encompass Louisiana’s version of Megan’s Law, this comment will use the singular tense when referring to them collectively. When reference is made to a specific statute, its designation will be used.

12. Sub-section E of Section 542 states that “Sex offense” for the purpose of this Chapter means conviction for the perpetration or attempted perpetration of any provision of R.S. 14:92(A)(7), of Subpart C of Part II, Subpart B of Part IV, or Subpart A(1) or A(4) of Part V, of Chapter 1 of Title 14 of the Louisiana Revised Statutes of 1950, committed on or after June 18, 1992, or committed prior to June 18, 1992 if the person, as a result of the offense, is under the custody of the Department of Public Safety and Corrections on or after June 18, 1992. A conviction for any offense provided in this definition includes a conviction for the offense under the laws of another state which is equivalent to an offense provided for in this Chapter. Louisiana Revised Statutes 14:92(A)(7) is contributing to the delinquency of a juvenile “by performing any sexually immoral act.” Subpart C of Part II is Rape and Sexual Battery. Subpart B of Part IV includes criminal bigamy and incest. Subparts A(1) of Part V involves carnal knowledge of a juvenile, indecent behavior with juveniles, pornography involving juveniles, and molestation of a juvenile. Subpart (A)(4) includes both crime against nature and aggravated crime against nature.
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895(H) of the Code of Criminal Procedure and Louisiana Revised Statutes 15:574.4. The modified Article 895 specifically provides for community notification and registration as a condition of probation and the modified Louisiana Revised Statutes 15:574.4 requires registration and notification as condition of parole.13

Since its enactment in 1992,14 "Louisiana’s Megan’s Law" has been challenged by sex offenders and civil libertarians as a violation of constitutional rights.15 Generally, Louisiana courts have followed the rest of the nation in holding that “Louisiana’s Megan’s Law” violates neither procedural nor substantive due process, nor does it violate the Equal Protection clause.16 However, Louisiana has diverged from many other states by upholding challenges to the statute when the defendant argues that its retroactive application violates the ex post facto provisions of the state and federal constitutions.17 This variance between Louisiana and other jurisdictions results from the fact that other courts have found that “Megan’s Law” does not fall within the scope of the ex post facto clause. According to these decisions, “Megan’s law” is not “punishment” as far as the constitution is concerned, thus, the ex post facto clause does not factor into the analysis.18 In Louisiana, however, it is unclear whether the courts have concluded that our statute amounts to punishment.19

A strict reading of the cases in which “Megan’s Law” has been challenged reveals that Louisiana courts have been less than thorough in analyzing the purpose and effect of the statute—a necessary prerequisite in determining whether it meets the constitutional definition of “punishment."20 Whether this failure stems from the fact that the issue was never argued on appeal, or because

14. Louisiana Revised Statutes 15:540-549 were enacted by Act 1147, section 1, of 1997, and became effective on June 18, 1992. Louisiana Code of Criminal Procedure 895(H) and Louisiana Revised Statutes 15:574.4 were enacted by Act 962, section 1, and became effective August 21, 1992.
19. Without specifically examining the punitive nature of the statute, Louisiana cases have found it subject to the ex post facto clause.
the courts have just assumed that “Megan’s Law” amounts to punishment is unclear. What is clear is that Louisiana’s application of “Megan’s Law” leaves room for some sex offenders to avoid complying with the requirements. By failing to rule on the punitive nature of “Louisiana’s Megan’s Law,” the courts may have limited the scope of the statute further than the legislature intended.21

This comment will focus on the constitutionality of applying “Louisiana’s Megan’s Law” to sex offenders who committed their crimes prior to the enactment of the law. The question raised is whether retroactive application of “Megan’s Law” violates the ex post facto provisions of the state and federal constitutions—that is, whether the statute should be characterized as regulatory or criminal. Part II will briefly review the statutes that comprise Louisiana’s “Megan’s Law” and the jurisprudence interpreting these statutes. Part III will examine the “punishment” requirement as it relates to the ex post facto clause by delineating the scope of the clause and examining the United States Supreme Court’s approach to the “punishment” issue in various contexts. Part IV will review recent cases from other jurisdictions and describe how they have attempted to develop a principled approach to the punishment issue in the sex offender context. Part V will show why this principled approach should apply in Louisiana and how our courts should approach the problem.

II. LOUISIANA’S VERSION OF “MEGAN’S LAW”

A. Statutes

Louisiana’s sex offender legislation is contained in Chapter 3-A&B of Revised Statute 15, Louisiana Revised Statutes 15:540-549.22 The specific registration and notification requirements are found in Section 542, “Registration of sex offenders.”23 It provides that “[a]ny adult residing in this state who has plead guilty or has been convicted of any sex offense shall register with the sheriff of the parish of the person’s residence. Registration under this paragraph must occur within forty-five days of establishing residence in the state or thirty days after release from prison, whichever is later.24

Section 542 also contains the community notification provision. A person convicted of a sex offense must “[g]ive notice of the crime for which he was convicted, his name, and address to: (a) At least one person in every residence or business within a one mile radius in a rural area and a three square block area

21. See State v. Sorrell, 656 So. 2d 1045, 1047 (La. App. 5th Cir.), writ denied, 657 So. 2d 1035 (1995), where the court examined the language of the statute and stated “[f]rom a reading of La.R.S. 15:542E, we are of the opinion that the legislature clearly intended that La.R.S. 542 apply to all those persons convicted of sex offenses before the statute was enacted.”
24. Id.
25. Id.
in an urban or suburban area of the address where the defendant will reside upon release."26 The offender must also notify the superintendent of the school district who can, in turn, direct the offender to notify the principals of particular schools.27 These notification requirements must be met within forty-five days of establishing residence in the state or thirty days after release from prison, whichever is later.28 Section 542 also provides the court some discretion in the method of notification. Subsection (3) states that "[t]he court in which the defendant was convicted of the offense that subjects him to the duty to register may order any other form of notice which it deems appropriate, including but not limited to signs, handbills, bumper stickers or clothing labeled to that effect."29

Shortly after the enactment of Sections 540-549, the Legislature passed 1992 Act No. 962 which amended Article 895 of the Code of Criminal Procedure and Louisiana Revised Statutes 15:574.1.30 Article 895 now requires notification and registration as a special condition of probation when the defendant has been convicted of certain sex crimes and "probation is permitted by law."31 Similarly, Louisiana Revised Statutes 15:574.1 requires sex offenders, who are paroled or those released on "good behavior,"32 to comply with the registration and notification provisions. Both the notification and the registration requirements are the same under Section 574.4 and Article 895 as are required under Section 542, the only difference is that they specifically apply to parolees and probationers respectively.

B. Jurisprudence

While Louisiana courts have generally upheld these statutes, they have found their retroactive application unconstitutional.33 What constitutes "retroactive," however, varies depending on the statute under which the offender must register. For example, the critical time for determining whether "Louisiana's Megan's Law" is retroactive for an offender sentenced under the general statute (Section 542) or released on probation under Article 895, is the time he committed the offense.34 If the statute was enacted subsequent to the commission of the offense, utilization of "Megan’s Law" is unconstitutional.35 On the other hand,
when an offender is released from prison and registration is made a special
condition of parole under Section 574.4, the law in effect at the time of release
applies even if it had not been enacted at the time of the offense. 36

Louisiana first interpreted “Megan’s Law” in State v. Payne. 37 In that case,
the defendant claimed that application of the registration requirement was a
violation of the ex post facto provision of state and federal constitutions. 38 The
first circuit agreed, stating that, “registration as a sex offender pursuant to
Louisiana Revised Statutes 15:540-549 exposes the defendant to additional
penalties for his criminal conduct.” 39 The court reasoned that an additional
“punishment” was the penalty provision of Section 542 40 which applies if a
defendant fails to register. 41

The court found the record unclear as to whether the defendant had been
sentenced under Louisiana Revised Statutes 15:540-549, or whether the
registration was a special condition of probation under Article 895(H) of the
Code of Criminal Procedure. 42 In either case, the court said that the defend-
ant’s conduct occurred before either statute was enacted. Therefore, they are
both “unconstitutional as applied to this defendant.” 43 The result reached by the
court indicates that they found the statute to be “punishment.” However, this
was never stated conclusively, nor was any “punishment” analysis performed.

The first circuit reaffirmed Payne in State v. Babin. 44 The defendant, who
had been convicted of rape in 1992, claimed that application of 895(H) was
unconstitutional because the acts for which he was convicted were committed
prior to the statute’s enactment. 45 The court agreed saying that “[b]ecause the

36. Sorrell, 656 So. 2d at 1046. In distinguishing between the requirements of Louisiana
Revised Statutes 15:542 and 15:574.4, the Sorrell court noted that, unlike Louisiana Revised Statutes
15:542, Louisiana Revised Statutes 15:574.4 does not create a new offense for a sex offender’s
failure to comply. Rather, Louisiana Revised Statutes 15:574.4 creates an additional condition of
release on parole for diminution of sentence, such as a good time release. Sorrell, 656 So. 2d at
1047.
37. 633 So. 2d 701 (La. App. 1st Cir. 1993).
38. Id. at 702.
39. Id. at 703.
40. Louisiana Revised Statutes 15:542 provides in pertinent part: “(F)(1) A person who fails
to register as required by this Section shall, upon first conviction be fined not more than one
thousand dollars or imprisoned for not more than one year, or both. (2) Upon second or subsequent
convictions, whoever fails to register as required by this section shall be sentenced to imprisonment
for not more than three years without benefit of parole, probation, or suspension of sentence.”
41. Payne, 633 So. 2d at 703.
42. Id. At the time of the Payne decision, it was unclear whether the constitutional analysis
was the same under 895 as it was under 542.
43. Id.
44. 637 So. 2d 814 (La. App. 1st Cir.), writ denied, 644 So. 2d 649 (1994).
45. Id. at 824.
provisions of article 895 (H) were not in effect at the time of the commission of defendant’s crime, their application to defendant would be an unconstitutional violation of the ex post facto provisions of the U.S. and Louisiana Constitutions. 46 Again, conspicuously missing from the court’s opinion was any finding that “Louisiana’s Megan’s Law” amounts to punishment.

In State v. Sorrell, 47 the fifth circuit created an exception to the general rule that the ex post facto clause applies to “Louisiana’s Megan’s Law.” The court agreed with the defendant that application of Section 542 was unconstitutional based on Babin and Payne. 48 However, in Sorrell, the defendant was released under Louisiana Revised Statutes 15:574.4 which falls under the part of Title 15 providing for parole. 49 Section 574.4, as with Sections 542 and 895(H), requires that, upon release from custody, sex offenders must give notice to certain persons, including nearby residents, of his criminal history. 50 However, the statute differs from Sections 542 and 895(H) because it applies only to offenders who are paroled or released on good time credit. 51 The Sorrell court said that Section 574.4 did not violate the ex post facto clause because it did not create an additional offense after the defendant had already been convicted. All the statute did, according to the court, was to create an additional condition for release if the offender was discharged early. 52 The court distinguished this from a situation in which the legislature changed a parolee’s requirements after he had already been released. 53

From this trilogy of cases the application of “Louisiana’s Megan’s Law” can be summarized as follows. First, it is clear that registration and notification are required if the offender committed his crime after the legislation was enacted. Similarly, Sorrell requires that any person paroled or released on good time comply with “Louisiana’s Megan’s Law” even if the crime was committed before passage of the statute. 54 However, the courts will not allow the provisions to apply if the person committed the sex offense before the effective date of the

46. Id.
47. 656 So. 2d 1045 (La. App. 5th Cir.), writ denied, 657 So. 2d 1035 (1995).
48. Id. at 1047.
49. Id.
51. Id. Specifically, it states that a person “eligible for diminution of sentence for good behavior . . . convicted of one of the [enumerated] sex offenses . . .” shall comply with the parole conditions provided in Section 574.4.
52. Sorrell, 656 So. 2d at 1047-48.
53. Id. The Sorrell rationale was followed by the first circuit in Lee v. State. Lee v. State, 681 So. 2d 1020 (La. App. 1st Cir. 1996). The Lee court stated that when an offender is released from prison either on “good time,” or on parole, “the law in effect at the time of a prisoner’s release governs the terms of that release, rather than the law in effect at the time of the commission of the offense.” Lee, 681 So. 2d at 1023.
statute even if convicted after passage of the law unless he falls within the Sorrell exception.

The crux of the court’s reasoning in these cases appears to be to focus on the status of the defendant (i.e. probationer or parolee) as opposed to the language of the statute. Under this approach, an interesting situation can arise. Imagine two sex offenders who committed their offenses prior to the effective date of “Megan’s Law,” one who is subsequently released on “good time,” the other one serves his full sentence. Under the court’s current interpretation, the offender who is released on good time would be required to register based on Section 574.4. The other offender, arguably more dangerous since his prison behavior did not warrant “good time” credit, would not be required to register. Unusual as it may seem, the court’s current interpretation of the statute mandates this result.

The argument that has been upheld in some other states is that these registration and notification provisions should not be subject to the ex post facto limitation. These jurisdictions consider “Megan’s Law” regulation, not punishment. Obviously, Louisiana’s interpretation is not the only reasoned one. Moreover, given the sketchy arguments offered by Louisiana courts, one might wonder whether it is the correct one. What Louisiana courts have apparently failed to do is to apply their analysis in a step-by-step fashion. Before proceeding directly to an application of the ex post facto clause, the court should first delineate the breadth of the clause and determine whether the statute is even subject to this restriction. If the statute is subject to the clause, the limitation should be applied across the board without focusing on the defendant’s status. However, if the law does not come within the scope of the clause, it should be applied as written. The next section will examine how the Supreme Court has interpreted the scope of the ex post facto clause and how they have attempted to clarify what constitutes punishment under the constitution.

III. “PUNISHMENT” UNDER THE FEDERAL CONSTITUTION

The phrase “ex post facto laws” is a term of art that was used in the legal community long before it was used in the Constitution. As it is used in the Constitution, the phrase is generally understood to relate exclusively to criminal or penal statutes, and not to retrospective legislation of any other type. In other words, this prohibition is intended to limit the powers of states only with

57. See Bankers’ Trust Co., 260 U.S. 647, 43 S. Ct. 233; Board of Comm’rs v. Forbes Pioneer Boat Line, 86 So. 199 (Fla. 1920).
regard to their ability to impose "punishment." This section will examine the scope of the Supreme Court's *ex post facto* doctrine and how the court has tried to define what actually constitutes "punishment." By extracting the principles that the court uses in these cases, it will be easier to make a reasoned evaluation of sex offender legislation as a whole, and particularly "Louisiana's Megan's Law."

A. Scope of the Ex Post Facto Clause

The United States Constitution provides that "[n]o State shall . . . pass any . . . *ex post facto* Law." This is generally understood to prohibit the application of a law to conduct that occurred before the law was enacted. Such laws are generally deemed unfair, because . . . the person . . . can have no notice, when the behavior took place, of such an after-made law which applies to it.

The first real controversy over the proper interpretation of this clause came during the Virginia ratifying convention in 1788. During the debates, James Madison and Patrick Henry argued over the definition of *ex post facto* law.

58. See United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.13, 97 S. Ct. 1505, 1515 n.13 (1977); Kentucky Union Co. v. Kentucky, 219 U.S. 140, 153, 31 S. Ct. 171, 177 (1911). However, the idea that the Constitution's prohibition against *ex post facto* laws only applies to criminal laws was called into question in several early Supreme Court decisions. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810), where the seizure of a property by legislative pronouncement would constitute an *ex post facto* law even though the property was seized for past conduct. This and other decisions have led some Supreme Court Justices to observe that the Constitution's ban on *ex post facto* laws should not be, and indeed has not been, confined to enactment's strictly criminal in nature. So far, however, these justices have been in the minority. See Justice Douglas, dissenting in *Marcello v. Bonds*, 349 U.S. 302, 319, 75 S. Ct. 757, 766 (1955). In *Lehmann v. United States*, 353 U.S. 685, 690, 77 S. Ct. 1022, 1025 (1957), Justice Black, in a separate opinion in which Justice Douglas concurred, stated that the definition which confines the operation of the *ex post facto* clause of Article I, section 9 to penal legislation which imposes or increases criminal punishment, is no longer valid because of a line of decisions in which the Court has refused to limit the protections of the clause to criminal cases and criminal punishments as those terms were defined in earlier times. Cited in support of this statement were *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), and *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). See also *Burgess v. Salmon*, 97 U.S. 381 (1878), in which the court held that the constitutional prohibition against *ex post facto* legislation applied to prevent the retroactive operation of an act of Congress, enforceable by civil suit, to collect a tax penalty. The Court found that the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal. Had the proceeding been taken by indictment instead of by a civil suit for the excess of the tax, and the one was equally authorized with the other, the proceeding would have certainly fallen within the description of an *ex post facto* law.

59. U.S. Const. art 1, § 10.


62. Id. at 547-48.

63. Id. at 547.
Henry's fear was that the clause would be interpreted as synonymous with retrospective law and would therefore be applicable to every act of the legislature. Henry contended that if the terms were equivalent, a plethora of problems could arise. Madison tried to quell Henry's hostility to the clause by commenting that "in the Convention at Philadelphia, ex post facto laws had been interpreted as relating to criminal cases solely." Madison's comment illustrates that, whatever the initial framers thought an ex post facto law was, from the beginning it was believed that regulatory statutes should not be within its scope.

The ex post facto clause was first interpreted by the Supreme Court in *Calder v. Bull.* In *Calder*, the Court had to decide whether a Connecticut law that allowed decisions by probate courts to be appealed violated the ex post facto clause. The plaintiff claimed that the law was a violation because, in his case, the probate court's decision had been issued before the law's passage. The Court denied the plaintiff's claim, interpreting the clause as limited to crimes, pains and penalties that were affected by subsequent laws. A much later court emphasized the important role of punishment in ex post facto challenges, providing that "[u]nder the Ex Post Facto Clause, the government may not apply a law retroactively that 'inflicts a greater punishment, than the law annexed to the crime, when committed.'"

The *Calder* rule seemed unquestioned until 1898 when the court appeared to move away from using punishment as the critical element. In *Thompson v. Utah*, the Utah legislature had enacted a provision that changed the size of juries in non-capital cases from twelve to eight persons. The plaintiff claimed that his conviction by the eight person jury was an ex post facto violation since his indictment occurred before the statute was passed. The court, without citing *Calder*, upheld the plaintiff's claim, stating that the test for whether a statute is an ex post facto law, is whether the retroactive application "alters the situation to [the defendant's] disadvantage."

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64. Id.
65. Henry's main concern involved the change-over from state currency to a national currency. He wanted to ensure that the states received full value for the money already in print. *Id.* at 547.
66. *Id.* at 549 (internal quotes omitted).
67. *Id.* at 550.
69. *Id.* at 386.
70. *Id.*
71. *Id.* at 391.
73. 170 U.S. 343, 18 S. Ct. 620 (1898).
74. *Id.* at 344, 18 S. Ct. at 620.
75. *Id.*
76. *Id.* at 351, 18 S. Ct. at 623.
The lower courts followed this fundamental shift until Collins v. Youngblood. The Collins Court specifically overruled Thompson stating that it was inconsistent “with the understanding of the term ex post facto law at the time the constitution was adopted.” Thus, the Court set out to clarify the scope of the ex post facto clause. According to the test developed in Collins, a law violates the ex post facto clause if 1) it punishes as a crime an act previously committed, which was innocent when done, 2) makes more burdensome the punishment for a crime, after its commission, or 3) deprives one charged with a crime of any defense available according to law at the time when the act was committed.

Calder and Collins indicate that an operative factor in determining whether a law falls within the scope of the ex post facto clause is whether the law can be considered “punishment.” Thus, the ex post facto ban has been held not to prevent retrospective impairment of property rights. Courts have additionally ruled that statutes authorizing annulment and divorce for acts antecedent to the legislation were not ex post facto violations. The question in the “Megan’s Law” context, is whether registration and notification statutes are punishment and subject to this constitutional restriction. To determine this, it is necessary to examine the Supreme Court’s rulings on “punishment” and try to derive some concrete factors against which to compare this legislation.

B. The Supreme Court’s Punishment Jurisprudence

At first blush, it seems that determining whether a law is “punishment” should be simple. And, insofar as it was connected to the distinction between civil and criminal laws, it once was. The idea that “classifications of ‘civil’ and

77. See Cases v. United States, 131 F.2d 916 (1st Cir. 1992); American Power & Light Co. v. Securities and Exch. Comm’n, 141 F.2d 206 (1st Cir. 1944); United States v. Gosciniak, 142 F.2d 240 (7th Cir. 1944); Voorhees v. Cox, 140 F.2d 132 (8th Cir. 1944); Chandler v. Johnston, 133 F.2d 139 (9th Cir. 1943); Stroud v. Hohnston, 139 F.2d 171 (9th Cir. 1943); Landay v. United States, 108 F.2d 698 (6th Cir. 1939); Balistreri v. United States, 100 F.2d 928 (9th Cir. 1938); Leon v. Torruella, 99 F.2d 851 (1st Cir. 1938); United States ex rel. Feuer v. Day, 42 F.2d 127 (2d Cir. 1930); Howard v. United States, 26 F.2d 698 (D.C. Cir. 1928); Tyomics Pub. Co. v. United States, 211 F. 385 (6th Cir. 1914); Erbaugh v. United States, 173 F. 433 (8th Cir. 1909); Johnson v. Southern Pac. Co., 117 F. 462 (8th Cir. 1902).


79. Id. at 47, 110 S. Ct. at 2722.

80. Id.

81. Id. at 42, 110 S. Ct. at 2719.


'criminal' can be an inclusive, accurate, and mutually exclusive description of all positive law might well have fitted the economic and legal life of the early eighteenth century.\textsuperscript{4} Today, however, we are faced with a government which, for better or worse, regulates a great deal of our life.\textsuperscript{5} To this extent, it is sometimes very difficult to distinguish between statutes that have compensation as their goal and those whose purpose is to punish.\textsuperscript{6} As laws that attempt to regulate conduct have become more complex, so has the Supreme Court's jurisprudence on where the line is between laws that "punish" and those whose purpose is merely "regulation." 

Over the years the Supreme Court has struggled with the issue of whether other types of governmental action constituted punishment, not only in the context of the \textit{ex post facto} clause but also in the contexts of the double jeopardy clause,\textsuperscript{87} the excessive fines clause,\textsuperscript{88} and both the Fifth and Sixth Amendment safeguards for individuals subjected to proceedings of a punitive nature.\textsuperscript{89} The Supreme Court's first real articulation of a standard for answering the "punishment" question came in the 1963 decision \textit{Kennedy v. Mendoza-Martinez}.\textsuperscript{90} Although the \textit{Kennedy} test has for the most part been rejected,\textsuperscript{91} it is a helpful starting point to help place the Court's recent jurisprudence in proper perspective.\textsuperscript{92}

\begin{itemize}
  \item \textsuperscript{84} 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, 273 (1959).
  \item \textsuperscript{86} See Mann, supra note 85, at 1798.
  \item \textsuperscript{87} U.S. Const. amend. V.
  \item \textsuperscript{88} U.S. Const. amend. VIII.
  \item \textsuperscript{89} 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, 1330 (1991).
  \item \textsuperscript{90} 372 U.S. 144, 83 S. Ct. 554 (1963).
  \item \textsuperscript{91} Post-Kennedy cases reveal that the Court applies the seven-factor analysis 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, 509 U.S. 602, 611, 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]"); see also Schopf, supra note 5, at 132 (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, 109 S. Ct. 1892, 1901-02 (1989), \textit{Kennedy}'s significance in making the former determination does not ensure its appropriateness in making the latter.
  \item \textsuperscript{92} Also, some recent decisions imply that while \textit{Kennedy} may not be a valid test, its factors may be considered in analyzing the punitive effects of a statute. Therefore, \textit{Kennedy} remains quite relevant in certain contexts. Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997).\end{itemize}
1. The Rise and Fall of the Kennedy Test

In *Kennedy*, the court was asked to determine the constitutionality of provisions of the Nationality Act of 1940 and the Immigration and Nationality Act of 1952. These statutes mandated the loss of citizenship for leaving or remaining outside the country in order to evade military service.93 The plaintiffs argued that the statutes imposed punishment without due process because they were not accorded rights guaranteed by the Fifth and Sixth Amendments, including notice, compulsory process, confrontation, trial by jury and assistance of counsel.94 In upholding the plaintiffs’ claim, the court stated that “the 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 . . . .”95 The factors the *Kennedy* court found applicable were:

1) whether the sanction involves an affirmative disability
2) whether it has historically been regarded as a “punishment,”
3) whether it comes into play only on a finding of scienter,
4) whether its operation will promote the traditional aims of “punishment”—retribution and deterrence,
5) whether the behavior to which it applies is already a crime,
6) 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.96

The *Kennedy* Court made it clear, however, that it would use this multi-factor or comparative approach only if there was real doubt about whether the legislature intended a proceeding to be civil or criminal.97 As the Court has stated repeatedly: “whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction.”98 Only if there is marked uncertainty over what the legislature intended, or if the defendant provides “clear proof” that “the statutory scheme [was] so punitive either in purpose or effect as to negate [the State’s] intention,” will the court engage in the factor analysis.99 Indeed, the *Kennedy* court did not rely on these factors because the “congressional purpose indicate[d] conclusively” that the measure was punitive.100

94. *Id.* at 148, 83 S. Ct. at 557.
95. *Id.* at 168, 83 S. Ct. at 567.
96. *Id.* at 168-69, 83 S. Ct. at 567-68.
100. *Kennedy*, 372 U.S. at 169, 83 S. Ct. at 568. The *Kennedy* Court itself admitted that the
Since the Kennedy decision, courts have implied that there are problems with using this test to determine whether a statute has a punitive or regulatory effect. First, there is no evidence that the Supreme Court intended the Kennedy factors to be a "test." In Kennedy, the court . . . simply listed various factors . . . 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. The New Jersey Supreme Court asserted that "[t]he [Kennedy] 'test' is really not used as a 'test' at all even in those cases where it is properly considered." Another problem with applying Kennedy is that many Post-Kennedy Supreme Court decisions call into question the propriety of this approach when it is the nature of the sanction, not the nature of proceeding, that is in dispute. Noting this, it has been said that "[t]he clear thrust of repeated Supreme Court decisions is that the [Kennedy] test has been rejected in all contexts other than those that present the question whether the proceedings are civil or criminal" and, therefore, whether the Fifth and Sixth Amendment's are implicated. "Because the criminal/civil distinction is different from the punitive/regulatory determination, Kennedy's significance in making the former determination does not ensure its appropriateness in making the latter."

2. Development of a Principled Approach

In cases involving the type of sanction imposed, the Supreme Court has abandoned the Kennedy approach in favor of a case-by-case analysis of "punishment." Lower courts that have rejected Kennedy have tried to formulate a test structured around certain factors derived from these ad hoc factors "may often point in differing directions," id., and comparative analysis of court evaluations suggests that, in the context of sex offender statutes, they most certainly have. See Abril R. Bedarf, Examining Sex Offender Community Notification Laws, 83 Cal. L. Rev. 885, 913-14 (1995) (stating that "despite [judges'] use of the same seven-factor test, courts are split fairly evenly in the conclusions they reach"). Notwithstanding subsequent lower court decisions that have applied the Kennedy test, there is some doubt as to whether the Court intended it to be used in every factual situation that might arise. Since the Court never actually relied upon it in Kennedy itself, or in any subsequent decision, the language can only be termed dicta.

101. See Prevention, supra note 6, at 1717.
102. Id. at 1721.
103. Id.
105. See Prevention, supra note 6, at 1721 n.90.
107. See Prevention, supra note 6, at 1721 n.90.
COMMENTS

decisions. The following section will review these leading cases focusing on the principles that the Supreme Court finds relevant in determining the punitive character of a particular statute. These principles include: 1) the actual or stated legislative purpose behind the statute; 2) the objective purpose; 3) the historical nature of the sanction, and 4) the overall effect of the statute.

a. Actual Purpose—De Veau v. Braisted

In De Veau v. Braisted, the Supreme Court adopted a test focusing on the actual legislative purpose. In that case, the plaintiff challenged, on bill of attainder and ex post facto grounds, a law prohibiting unions from employing felons. The law barred convicted felons from working on the New York and New Jersey waterfront. In ruling that there was no punishment the Court said “[t]he question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the qualifications of a profession.”

De Veau stands for the idea that “punishment,” is a matter of legislative intent. However, this intent is not always easy to determine because a legislature acts as a collective body, each individual’s purpose may be vastly different from that of the whole. However, there are different methods for making this determination. Generally, if the statute contains a “purpose” or a “finding” section, the legislative purpose can be derived from the language of the statute. Also, the legislative purpose can be derived by examining transcripts from debate hearings. If it is still unclear, the design and placement of the statute can also be helpful in making this determination. For example, a statute that is enacted as part of a state’s criminal code might indicate a punitive aim.
The language in *De Veau* might suggest that the subjective intent of the legislature is always controlling. However, subsequent Supreme Court cases make it clear that this is not so.\textsuperscript{118} Even though the actual or stated purpose of the legislature may denote a non-punitive goal, a statute will be considered punishment if its *objective* purpose is to punish.

\textit{b. Objective Purpose through Proportionality—United States v. Halper}

The Court has expressed two different methods for determining the objective purpose of a particular statute. The first is the proportionality of the penalty, i.e. whether the sanction is too harsh to be considered regulatory. The second is by examining the historical nature of the penalty.

In *United States v. Halper*,\textsuperscript{119} the Court articulated an “objective” legislative intent test.\textsuperscript{120} The question in *Halper* was whether a civil fine could be so large that it could constitute “punishment” and, therefore, be a violation of the double jeopardy clause.\textsuperscript{121} The Court first looked at whether the statute served the purposes of “punishment,” including retribution and deterrence or instead, satisfied a remedial purpose.\textsuperscript{122} The Court conceded that “a civil as well as a criminal sanction [could] constitute ‘punishment.’”\textsuperscript{123} The question was whether the statute served the twin aims of retribution and deterrence.\textsuperscript{124} If the civil sanction could only be explained by these goals, it should be considered “punishment.”\textsuperscript{125}

The *Halper* Court found that the fine had “no rational relation” to the legitimate remedial purpose of compensating the government.\textsuperscript{126} Therefore, the double jeopardy clause was implicated to “to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.”\textsuperscript{127}

Based on the *Halper* logic, a court can determine the objective purpose of the legislature by examining whether the measure is narrowly tailored to a remedial goal, i.e. one that is not based on deterrence or retribution. *Halper*’s significance was described by the Third Circuit in *Artway v. Attorney General of New Jersey*\textsuperscript{128} as, “depart[ing] from the practice of placing talismanic significance on the legislative labels affixed to the disputed provision and

\begin{itemize}
  \item \textsuperscript{118} E.g., supra authority note 109.
  \item \textsuperscript{119} 490 U.S. 435, 109 S. Ct. 1892 (1989).
  \item \textsuperscript{120} Id. at 453, 109 S. Ct. at 1904 (Kennedy, J., concurring).
  \item \textsuperscript{121} Id. at 447, 109 S. Ct. at 1901.
  \item \textsuperscript{122} Id. at 448, 109 S. Ct. at 1902.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Id. at 449, 109 S. Ct. at 1902.
  \item \textsuperscript{127} Id. at 448-49, 109 S. Ct. at 1902.
  \item \textsuperscript{128} 81 F.3d 1235 (3d Cir. 1997).
\end{itemize}
searching for the frequently unknowable and nondispositive subjective intent of the legislative body.\textsuperscript{129}

c. Objective Purpose through History—Austin v. United States

In \textit{Austin v. United States},\textsuperscript{130} the Court purported to apply \textit{Halper} by focusing on the historical nature of the sanction. The question in \textit{Austin} was whether a civil penalty could be so excessive as to violate the Eighth Amendment.\textsuperscript{131} The statute in question was a forfeiture provision that allowed for seizure of a person's property if convicted of a drug offense.\textsuperscript{132} The government argued that the forfeiture statute served the remedial purpose of compensating the government for its costs in investigating and prosecuting these offenses.\textsuperscript{133} The court cited \textit{Halper}, but instead of looking at the proportionality of the fine—whether it was too excessive—the court examined the statute in a historical context.\textsuperscript{134} The \textit{Austin} Court concluded that the language and legislative history of the statute as a whole indicated that the forfeiture statute served a punitive purpose, regardless of the proportionality of the particular forfeiture to the government's costs.\textsuperscript{135}

d. The History Exception—Department of Revenue v. Kurth Ranch\textsuperscript{136}

After deciding \textit{Austin}, the Court faced a double jeopardy challenge based on a state tax on illegal drugs.\textsuperscript{137} In \textit{Department of Revenue v. Kurth Ranch}, the defendant claimed that a Montana law, which taxed illegal drugs, was unconstitutional because it was "a concoction of anomalies, too far removed in crucial respects from a standard tax assessment to escape characterization as 'punishment' for the purpose of Double Jeopardy analysis."\textsuperscript{138}

Under \textit{Halper}'s "purpose" test, the tax could fairly be characterized as punitive.\textsuperscript{139} But, because the sanction was a tax, it did not fall within \textit{Austin}'s historical test since taxes have historically been used for the purpose of raising revenue.\textsuperscript{140} The Court looked at whether this particular tax operated in a

\textsuperscript{129} \textit{Id.} at 1256.
\textsuperscript{130} 509 U.S. 602, 113 S. Ct. 2801 (1993).
\textsuperscript{131} "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.
\textsuperscript{132} 509 U.S. at 605, 113 S. Ct. at 2801.
\textsuperscript{133} \textit{Id.} at 620, 113 S. Ct. at 2816.
\textsuperscript{134} \textit{Id.} at 610, 113 S. Ct. at 2806.
\textsuperscript{135} \textit{Id.} at 617-23, 113 S. Ct. at 2810-12.
\textsuperscript{136} 511 U.S. 767, 114 S. Ct. 1937 (1994).
\textsuperscript{137} \textit{Id.} at 769-78, 114 S. Ct. at 1941.
\textsuperscript{138} \textit{Id.} at 783, 114 S. Ct. at 1948.
\textsuperscript{139} \textit{Id.} at 775, 114 S. Ct. at 1944.
\textsuperscript{140} \textit{Id.} at 779-80, 114 S. Ct. at 1946.
manner different than other taxes, concluding that this tax was different than both revenue-raising taxes and mixed-motive taxes. The Court felt that pure revenue-raising taxes are not "punishment," because they are imposed despite their negative effect, not because of it. Mixed-motive taxes are not "punishment" because the government feels the revenue-raising aspect of the law outweighs the harm. However, when the activity that is taxed is illegal, "the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction." The Court felt that because this tax was essentially just a fine with another name, the historically non-punitive purposes of taxes could not insulate it from being considered "punishment."

Even though the court found this measure "punishment," it is important to note that it was neither the high rate of tax nor the "obvious deterrent purpose" that made the tax "punishment," but rather the fact that it did not operate in the usual manner consistent with its historical purpose. Thus, Kurth Ranch sets up a narrow exception to Austin. The court also pointed out that "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the sting of punishment." By disallowing this subjective view of punishment, what the court essentially does is to set up an objective, or "reasonable person" standard for making a punishment determination.

e. Effects—California Department of Corrections v. Morales

In California Department of Corrections v. Morales, the Court added another element to the "punishment" analysis. The plaintiff in Morales brought an ex post facto challenge to a California statute that decreased a prisoner's entitlement to parole eligibility hearings. At the time the defendant committed his crime, the law provided for parole suitability hearings every year after a prisoner's initial parole determination. The statute was subsequently amended to give the board more discretion in conducting the pre-parole hearings. The complaint was brought by a prisoner who had his first parole

141. *Id.* at 781, 114 S. Ct. at 1947.
142. *Id.* at 782, 114 S. Ct. at 1947.
143. *Id.*
144. *Id.*
145. *Id.* at 780, 114 S. Ct. at 1946.
146. *Id.*
147. *Id.* at 777, 114 S. Ct. at 1945 n.14.
149. *Id.* at 509, 115 S. Ct at 1603.
150. *Id.* at 504, 115 S. Ct. at 1600.
151. *Id.* at 503, 115 S. Ct. at 1600.
152. *Id.*
hearing under the prior law, but had subsequent hearings shelved under the amendment.\textsuperscript{153}

The court rejected the claim that application of this law was an \textit{ex post facto} violation, holding that the legislative measure did not constitute "punishment."\textsuperscript{154} The court declared that the "legislation at issue . . . effects no change in the definition" of the defendant's crime.\textsuperscript{155} The court conceded that if the result of the statute was the extension the defendant's sentence, the act would constitute punishment.\textsuperscript{156} However, in this case, the requirements contained in the new law effectively limited the possibility of extending a prisoner's sentence.\textsuperscript{157} The court stated that the statute "creates only the most speculative and attenuated [risk] . . . of increasing the measure of punishment for the covered crimes. . . ."\textsuperscript{158}

Under \textit{Morales}, a law can constitute unconstitutional "punishment" merely based on the effect it has on the defendant. It is possible that a statute could have such a harsh effect on those that it is intended to sanction, that it can only be considered "punishment" regardless of the legislature's purpose. If \textit{Morales} is applied in conjunction with \textit{De Veau} and \textit{Halper}'s "intent based" tests, it can act as a bar to harsh results that could occur if the analysis was limited to intent.

\textbf{C. The State of Punishment Jurisprudence}

These cases suggest that whether a statute is punishment or not is based on two overriding factors. First, the intent of the legislature. This determination requires an examination of both the text of a particular statute and other factors indicative of legislative intent. Secondly, the Court will examine the effect the statute has on the defendant from an objective point of view. This "principled" or "multi-factored" analysis is how a majority of the lower courts are handling this question when examining "Megan's Law."

The Supreme Court has not ruled on whether "Megan's Law" is punishment or not. Until they do, lower courts are left with the current "punishment" jurisprudence to try and develop a test for answering this critical question. Whether a court chooses to apply the \textit{Kennedy} analysis, or to formulate their own test based on the principles articulated above, it is imperative that the court classifies the statute as either "punishment" or "regulation" so that it is clear what constitutional limits apply.

\footnotesize
\begin{itemize}
\item \textsuperscript{153.} \textit{Id.}
\item \textsuperscript{154.} \textit{Id.} at 505, 115 S. Ct. at 1601.
\item \textsuperscript{155.} \textit{Id.}
\item \textsuperscript{156.} \textit{Id.}
\item \textsuperscript{157.} \textit{Id.} at 507, 115 S. Ct. at 1602.
\item \textsuperscript{158.} \textit{Id.} at 509, 115 S. Ct. at 1603.
\end{itemize}
IV. Is "Megan's Law" "Punishment?"—Application of a Principled Approach

Even though the Supreme Court has not spoken directly on the constitutionality of sex offender legislation, the foregoing cases suggest that a proper "punishment" analysis, no matter what the context, should focus on certain factors. These factors include both subjective and objective intent of the legislature, whether this type of restriction has historically been considered punishment, and whether the effects of the statute are so harsh that it must be characterized as punishment.

There has been very little consistency among lower courts, both state and federal, in interpreting sex offender legislation. Nevertheless, three distinct approaches can be derived from the jurisprudence. The first method can best be described as the "intuitive approach." Generally, these courts either fail to ask the punishment question, or merely ask whether the sanction looks like "punishment." While this inquiry is certainly the simplest method, it fails to give proper deference to law makers, and it fails to provide any consistency or predictability. This approach has fallen into disuse and can only be found in a few Louisiana cases.

The other two approaches that are being applied by the courts are the Kennedy test, and a test formulated from the De Veau-Halper principles. As discussed earlier, the Kennedy approach has several problems and has been implicitly rejected by the Supreme Court and explicitly rejected by many lower courts. Recently, De Veau-Halper principles have emerged as the favored tools for analyzing the punitive nature of "Megan's Law." This section will look at how courts have taken these principles into account in developing their own punishment test when interpreting sex offender notification statutes. This section should illustrate how this principled approach works and why it should be used to interpret Louisiana's version of "Megan's Law."

A. Creation of a Principled Approach: Doe v. Poritz

The De Veau-Halper method was first used in the sex offender context by the New Jersey Supreme Court in Doe v. Poritz. In a long and detailed opinion, the court upheld the "Megan's Law" requirements stating that

The Registration and Notification Laws are not retributive laws, but laws designed to give people a chance to protect themselves and their

159. See supra authority note 95.
160. Unfortunately, Louisiana seems to be the only state that falls within this category. See supra text accompanying notes 34-57.
161. See supra text accompanying notes 33-34.
children. They do not represent the slightest departure from [New Jersey's] or our country's fundamental belief that criminals, convicted and punished, have paid their debt to society and are not to be punished further. They represent only the conclusion that society has the right to know of their presence not in order to punish them, but in order to protect itself.\textsuperscript{164}

The court first examined the purpose of the statute stating that "[t]he provisions of New Jersey's sex offender registration and community notification law are clearly designed to further the permissible, public safety purpose of the law, not to punish on the basis of past acts. Megan's Law is intended and tailored to serve this permissible, nonpunitive regulatory purpose."\textsuperscript{165} Commenting on the possible punitive impact on offenders, the court said "[t]he fact that some deterrent punitive impact may result does not, however, transform those provisions into 'punishment' if that impact is an inevitable consequence of the regulatory provision, as distinguished from an impact that results from excessive provisions, provisions that do not advance the regulatory purpose."\textsuperscript{166}

This case is important for two reasons. First, it was the first clear articulation of why the Kennedy factors were inapplicable in the sex offender context holding that "the test is not applied at all by the Supreme Court in \textit{ex post facto} or double jeopardy (multiple punishment) cases to determine whether a sanction constitutes punishment." Secondly, this case was the first to group De Veau, Halper, Austin, and Morales into a cohesive test examining the punitive characteristics of "Megan's Law." While the Doe approach has been slightly modified in subsequent cases, its basic framework continues to constitute the majority approach.

B. Expansion: Artway's "Punishment" Analysis

In \textit{Artway v. Attorney General of New Jersey}\textsuperscript{167} and \textit{EB v. Verniero},\textsuperscript{168} the same New Jersey statute analyzed in \textit{Poritz} was challenged in Federal Court. In Artway, the District Court upheld a challenge on \textit{ex post facto} grounds and the state appealed the case to the Third Circuit. The Artway court developed a test based on the \textit{De Veau-Halper} principles and applied it to the registration provision of the statute. Because the Artway plaintiffs had not been affected by the notification provision, the court found the challenge to this portion of the statute was not justiciable.\textsuperscript{169} However, the court said that the same punish-

\begin{itemize}
  \item \textsuperscript{164} \textit{Id.} at 372-73.
  \item \textsuperscript{165} \textit{Id.}
  \item \textsuperscript{166} \textit{Id.} at 390.
  \item \textsuperscript{167} 81 F.3d 1235 (3d Cir. 1996).
  \item \textsuperscript{168} 119 F.3d 1077 (3d Cir. 1997).
  \item \textsuperscript{169} The \textit{Artway} court limited its analysis to the registration provisions contained in the statute. The court found that the challenge to the notification provision was not ripe. \textit{Artway}, 81 F.3d at
\end{itemize}
ment analysis would apply if an appropriate challenge was brought against the notification provision. Shortly after Artway, EB v. Verniero arrived in the same court bringing with it a justiciable claim against the notification provision. Thus, the Third Circuit was able to answer the questions left open by the Artway decision.

The plaintiffs in both cases were sex offenders who were convicted of their offenses prior to the enactment of "Megan's Law." The plaintiffs claimed that, since the law was passed after their conviction, the registration and notification requirements violated the ex post facto and double jeopardy protections. The court applied the De Veau line of cases to develop a three-prong analysis—(1) stated purpose, (2) objective purpose, and (3) effect. The Artway court, in defense of its formulation, noted the disagreement among courts that have faced the "punishment" question stating that "[w]e realize, however, that our synthesis is by no means perfect," and that "[o]nly the Supreme Court knows where all the pieces belong." To determine the actual purpose of the statute, the Artway court looked at the stated legislative intent contained in the purpose statement in the act itself. The court had no trouble finding that protecting the public and preventing future crimes are regulatory, not punitive, purposes. Both the Artway and Verniero courts noted that, according to De Veau, "[p]rotecting the public and preventing crimes are the types of purposes [the Supreme Court has] found 'regulatory' and not punitive." The court divided the objective purpose inquiry into three questions: whether the law purpose was remedial, whether the statute was analogous to other historical forms of punishment, and finally, whether the statute contained any incidental deterrent effects.

1252. However, in Verniero the court was able to analyze the notification provisions. Verniero, 119 F.3d at 1087.
170. Artway, 81 F.3d at 1243; Verniero, 119 F.3d at 1081.
171. Artway, 81 F.3d at 1247; Verniero, 119 F.3d at 1087.
172. Artway, 81 F.3d at 1254; Verniero, 119 F.3d at 1093.
173. Artway, 81 F.3d at 1263.
174. The statute stated:
1. The Legislature finds and declares:
a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.
b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.
175. Artway, 81 F.3d at 1264; Verniero, 119 F.3d at 1097.
176. Artway, 81 F.3d at 1264; Verniero, 119 F.3d at 1097.
177. Artway, 81 F.3d at 1264-68; Verniero, 119 F.3d at 1097.
First, the court said “we must discern whether the law can be explained solely by a remedial purpose.”\(^{178}\) This language clearly comes from *Halper.*\(^{179}\) Building on this *Halper* reference, the court said that the “remedial purpose of helping law enforcement agencies keep tabs on these offenders fully explains requiring certain sex offenders to register,”\(^{180}\) and that “registration and law enforcement notification only—is not excessive in any way.”\(^{181}\) The *Verniero* court stated that “[t]he relevant issue [under this prong] is whether these provisions are ‘reasonably related’ to a legitimate goal.”\(^{182}\) In other words, “If a reasonable legislator motivated solely by the declared remedial goals could have believed the means chosen were justified by those goals, then an objective observer would have no basis for perceiving a punitive purpose in the adoption of those means.”\(^{183}\)

The court found that goal of “identifying potential recidivists, notifying those who are likely to interact with such recidivists to the extent necessary to protect public safety, and helping prevent future incidents of sexual abuse”\(^{184}\) could be reasonably accomplished through notification.\(^{185}\) The idea that notification to persons likely to encounter the offender, like those who live nearby, could help protect the public was, in the courts words, “not an unreasonable premise.”\(^{186}\) Additionally, the court felt that “these goals have not been pursued in a way that has imposed a burden on registrants that clearly exceeds the burden inherent in accomplishment of the goals.”\(^{187}\) In other words, the court found a “reasonable ‘fit’ between the end[s] and means” of the statute.\(^{188}\)

Next, the court looked at history to see if registration and notification have been traditional methods of “punishment.”\(^{189}\) The *Artway* court dismissed the plaintiff's claim that registration should be considered “shaming” saying that registration alone was insufficient to equal a modern day “scarlet letter.”\(^{190}\) The court did note however, that notification was a much harder case.\(^{191}\) In *Verniero* the court distinguished “public shaming,” “humiliation,” or “banishment” from mere dissemination of information.\(^{192}\) The court said that “these colonial practices inflicted punishment because they either physically held the

178. *Artway,* 81 F.3d at 1264.
180. *Artway,* 81 F.3d at 1265.
181. *Verniero,* 119 F.3d at 1097.
182. *Id.*
183. *Id.* at 1098.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 1099.
189. *Artway,* 81 F.3d at 1265; *Verniero,* 119 F.3d at 1101.
190. *Artway,* 81 F.3d at 1265.
191. *Id.*
192. *Verniero,* 119 F.3d at 1099.
The fact that this information causes some "sting" to the defendant does not render it punishment. The effect it has on the defendant does not come from the state placing the defendant up for ridicule, but from the dissemination of accurate information about past criminal activity—information that is a matter of public record. The court said this is an important distinction because, "[d]issemination of information about criminal activity has always held the potential for substantial negative consequences for those involved in that activity." However, it has never been considered punishment when made in pursuit of a legitimate, non-punitive goal.

The conclusion reached by the majority on this prong of the Artway test was strongly criticized by the dissent in Verniero. Judge Becker stated that adopting the Artway standard was the correct approach. However, he felt that the court mischaracterized the importance of "shaming" as a historical analog to notification. Important in this mischaracterization was the majority's failure to focus on the fact that the dissemination of information under the New Jersey statute was "state directed." He said that the deliberate decision to propagate the information in this way changes the focus of the history analysis. In his view, the court "must look to measures in which the dissemination of criminal history information is state-run, not to measures in which the dissemination occurs independently from state action."

That the form of dissemination under Megan's Law (written notice) is different from the form of dissemination of the shaming punishments (public display of the offender) is immaterial. Public display in modern society simply would not accomplish the goals of notification; not all those "likely to encounter" the released offender would be notified by public display.

193. Id.
194. Id.
195. New Jersey law specifically guarantees public access to all court records, including those concerning criminal prosecutions. See Doe, 662 A.2d 367, 407 (N.J. 1995) (citing Executive Order No. 123). Moreover, as the New Jersey Supreme Court noted in Doe, any person, under New Jersey law, "may obtain a complete criminal history from the State Police by providing a name and either date of birth or social security number and paying a fifteen dollar fee."
196. Verniero, 119 F.3d at 1099.
197. Id. at 1099-1100.
198. Id. at 1112.
199. Id.
200. Id. at 1114.
201. Id. at 1115.
202. Id.
203. Id.
204. Id. at 1115 n.3.
This history element of the test is where there is the most disagreement among courts applying a De Veau/Halper type analysis. There are strong arguments on both sides as to the significance these early forms of punishment have with regard to “Megan’s Law” so it is difficult to come to a conclusive determination. But, this disagreement does raise several questions about the importance of this “history element” that may ultimately have to be resolved by the Supreme Court.

First, how important a part does history play in determining whether a statute constitutes punishment? If all other factors indicate that the statute is regulatory, will a historical analog subject the statute to the constitution’s “punishment” limitations? Second, what “history” should a court examine? Cases that have applied a history test all seem to examine colonial America. However, the history of punishment may be different in different states. For example, the legal history of punishment in Louisiana is very different because of the strong French and Spanish influence as opposed to the English influence in the colonies. Should the standard be that of the colonies, or of the particular state? It appears that until some of these questions are answered, results under this prong may remain unpredictable.

The third factor in determining the objective purpose under the Artway standard is examining whether there is any incidental deterrent effects. The court characterized this element as a “savings provision.”

Even if the remedial purpose of a measure cannot fairly be said to justify all of its aspects, it will nevertheless be found nonpunitive if measures of this type, like taxes, have traditionally served both remedial and deterrent purposes and the particular measure before the court serves such purposes in a manner consistent with its analogous antecedents.

The court found that there were not incidental deterrent effects, so resort to this exception was unnecessary.

The final prong of the Artway test examines the effect of the statute. The court reiterated that “[w]hile even a substantial ‘sting’ will not render a measure ‘punishment,’ . . . at some level the ‘sting’ will be so sharp that it can only be considered punishment regardless of the legislators’ subjective thoughts.” From the court’s language, this is a very high standard to meet and is considered “in the light of the importance of any legitimate governmental interest served.” The Artway court said that the registration provision had little

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205. Id. at 1101.
206. Id.
207. Id. (emphasis added).
208. Id.
209. Id. (citing Artway v. Attorney Gen. of N.J., 81 F.3d 1235 (3d Cir. 1996)).
210. Id.
impact on the plaintiff because "[m]ost of the information is already available in
the public record. . . . Therefore, this impact, even coupled with the registrant's
inevitable kowtow to law enforcement officials, cannot be said to have an effect
so draconian that it constitutes 'punishment' in any way approaching incarcera-
tion." 211

The Verniero court said that "[t]he direct effects of Megan's Law clearly do
not rise to the level of extremely onerous burdens that sting so severely as to compel a conclusion of punishment. All Megan's Law mandates is registration
and notification." 212 However, the court did characterize the indirect effects as extremely harsh. 213 The court noted that the registrants had suffered
isolation, harassment, and loss of employment opportunities. 214 The court
divided these indirect effects into two groups. 215 First the court said that isolation and loss of employment opportunities are considered reputational
interests and are constitutionally protected. 216 These interests, however, must be balanced against the state's interest in protecting the public. 217 The court
cites the recent Supreme Court decision Hendricks, for the proposition that a fundamental right may be violated if the state's interest is sufficiently impor-
tant. 218 Therefore, "[g]iven that something less than a fundamental interest is implicated, the impact of Megan's Law on the registrants' reputational interests is necessarily insufficient alone to constitute 'punishment.'" 219

The second indirect effect that the court worried about was retributive attacks from the community. 220 The court did note that there was evidence some offenders faced hostility, vandalism and assault from neighbors who received notification about sex offenders living nearby. 221 While the court could understand the concern over these acts of violence, they were not persuaded that "the magnitude of the risk . . . require[d] classification of [Megan's Law] as punishment." 222 Additionally, the court noted that these incidents of violence were relatively rare and that the plaintiffs were not faced with a greater risk of harm than anyone else who had committed a reprehensible crime. 223

211. Artway, 81 F.3d at 1267.
212. Verniero, 119 F.3d at 1102.
213. Id.
214. Id.
215. Id.
216. Id.
217. Id.
218. Id. at 1103.
219. Id. at 1104.
220. Id.
221. Id.
222. Id.
223. Id.
C. "Megan’s Law" as "Punishment": Pataki

In *Doe v. Pataki*, the United States District Court of New York used the *De Veau-Halper* analysis in determining that New York’s statute did amount to punishment. The *Pataki* court’s version of this test contains four prongs: 1) the legislative intent, 2) the design of the statute, 3) whether the requirements contained in the statute have been historically considered “punishment”, and 4) the effects of the statute.

In examining the legislative intent, the court did not give the stated legislative purpose the deference given by the *Artway* and *Verniero* court. The *Pataki* court stated that “the legislature’s description of a statute as civil does not foreclose the possibility that it has a punitive character.” Therefore, along with the objective purpose, the legislative intent must be examined subjectively. After a thorough examination of the legislative debates, the court concluded that “there are strong indications that, both subjectively and objectively, the legislature also intended to punish sex offenders.” The court said that the debate transcripts illustrate a “passion, anger, and desire to punish.”

Next, the court examined the design of the statute. This prong is based on whether the statute is narrowly designed to achieve a non-punitive result. The court implied that a sex offender statute could be sufficiently narrow to be considered regulatory, but in the instant case it was not. New York’s statute allowed for excessive disclosure of the registration information and “[i]t covered a broad group of individuals, including first time offenders as well as individuals who do not even engage in sexual conduct.” Therefore, the court concluded that the statute was "designed in such a fashion as to suggest that it is punitive."

The *Pataki* court found that there were “two types of analogous measures that suggest that community notification is punitive: stigmatization and..."
banishment." After reviewing the history of colonial America and the works of Blackstone, the court stated that "[p]ublic notification is the modern-day equivalent of branding and shaming." The court rejected the argument that "the purpose of the Act is not to humiliate or draw public ridicule but to protect." The court again cited the legislative debates which indicate a "punitive" purpose. Also, the court said that the legislative purpose is not the sole consideration, and that "common sense dictates, and the cases clearly hold, that other factors must be considered as well.

The court also analogized the statute to “banishment” stating that “[n]otifica-
tion statutes have resulted in the banishment of sex offenders both literally and psychologically. Not only have sex offenders literally been forced to relocate to different towns and even different states, public notification has made it difficult if not impossible for them to reintegrate into society.

Finally, the court looked at the overall effect of the statute. The court agreed “that an otherwise regulatory law is not rendered punitive merely because it imposes unpleasant consequences.” However, the court also felt that the converse must be true, that is, that a punitive statute could also have regulatory effects. The court concluded that, because of the restraint placed on the offender, the effect that notification has on rehabilitation, and because the statute served “the traditional aims of punishment—retribution and deterrence,” it has the effect of punishing sex offenders. The court’s final conclusion was that “the legislative intent, the design of the Act, the historical treatment of comparable measures, and the Act’s effects provide the ‘clearest proof’ that the notification provisions of the Act are punitive in nature.

D. An Intent-Effects Test: Russell v. Gregoire

The most recent case using the principled approach to examine “Megan’s Law” comes from the United States Court of Appeals for the Ninth Circuit. In Russell v. Gregoire, two convicted sex offenders were ordered to register and notify under Washington’s version of “Megan’s Law.” The plaintiffs had

236. Id. at 624.
237. Id. at 625.
238. Id.
239. Id.
240. Id. at 626.
241. Id.
242. Id.
243. Id.
244. Id. at 627.
245. Id.
246. Id. at 628 (citing Kennedy v. Mendoza-Martinez, 372 U.S. at 168-69, 83 S.Ct. at 567-68).
247. Id. at 629.
248. 124 F.3d 1079 (9th Cir. 1997).
249. Id. at 1081; see Wash. Rev. Code Ann. § 9A.44.130(1) (West Supp. 1998).
been convicted in 1989 and the statute in question was enacted in 1990. Therefore, they brought a civil rights action against various state officials claiming that the registration and notification provisions of the Act, inter alia, violated the ex post facto clause of the Federal Constitution.

The Russell decision is helpful in developing a principled approach in Louisiana for two reasons. First, it is the most recent pronouncement on this issue and, therefore, has the benefit of some of the Supreme Court latest interpretations on the punishment issue. Second, as an analysis of Washington's version of "Megan's Law," it has important persuasive authority because Louisiana's sex offender legislation is modeled after Washington's. Indeed, Louisiana's legislation even adopts "the Washington Acts' findings and information release provision, almost verbatim."

The court first noted that neither they nor the Supreme Court had developed a clear test to determine what constitutes punishment under the ex post facto clause. Next, the court recounted the Kennedy test saying that it is helpful at analyzing the issue, but certainly neither exhaustive nor dispositive. The test the court did find applicable was the one articulated in two recent Supreme Court decisions, United States v. Ursery and Kansas v. Hendricks. In Ursery, the Supreme Court held that "civil forfeitures . . . do not constitute 'punishment' for purposes of the Double Jeopardy Clause" even when the value of the property forfeited is excessive when compared to the harm suffered by the government from the conduct giving rise to the forfeiture. Hendricks involved a Kansas statute that provided for the civil commitment of "sexually violent predators." Under the statute, a person convicted or charged with a violent sexual offense and suffering from a "mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence," could be confined to state custody until the person's mental abnormality or personality disorder no longer made him dangerous to the public.

Russell described the Ursery-Hendricks test as an "intent-effects" analysis. The "intent" prong of the test looks to the stated legislative goal as well

250. Russell, 124 F.3d at 1081.
251. Id. at 1082.
253. Id. at 1084.
254. Id. at 1084 (citing United States v. Ward, 448 U.S. 242, 249, 100 S. Ct. 2636 (1980)).
as the structure and design of the statute.261 The “effects” prong requires the challenging party to provide the “the clearest proof” that the statute is so punitive in effect that it negates the State’s nonpunitive intent.262 The court also revived the Kennedy factors saying that, while it should not be the only inquiry, they should be examined in assessing the effects of the act.263

Applying this to the Washington statute, the court noted that the stated legislative purpose, as declared in the act itself, was clearly non-punitive.264 The court found the statement evidence of “unequivocal regulatory motivation.”265 Regarding the notification provision, the court said that “[t]he language of section 116 makes clear that the legislature intended the notification provision to prevent future attacks by recidivist sex offenders.” Even though law may have a deterrent as well as a remedial purpose,266 “[n]either of these purposes would result in an ex post facto violation.”267 Additionally, the court noted that the act contained sufficient protection to “prevent notification in cases where it is not warranted and to avoid dissemination of the information beyond the area where it is likely to have the intended remedial effect.”268 As far as the registration provision was concerned, the court believed that the legislative intent was clearly regulatory stating, “[r]egistration does no more than apprise

261. Id. at 1087.
262. Id. at 1088.
263. Id. at 1084.
264. Id. at 1087. The legislature finds that sex offenders pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is a paramount governmental interest. The legislature further finds that the penal and mental health components of our justice system are largely hidden from public view and that lack of information from either may result in failure of both systems to meet this paramount concern of public safety. Overly restrictive confidentiality and liability laws governing the release of information about sexual predators have reduced willingness to release information that could be appropriately released under the public disclosure laws, and have increased risks to public safety. Persons found to have committed a sex offense have a reduced expectation of privacy because of the public’s interest in public safety and in the effective operation of government. Release of information about sexual predators to public agencies and under limited circumstances, the general public, will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals. Therefore, this state’s policy as expressed in Section 117 of this act is to require the exchange of relevant information about sexual predators among public agencies and officials and to authorize the release of necessary and relevant information about sexual predators to members of the general public. 1990 Wash. Laws, ch. 3, § 116.
266. “Although registration arguably has a deterrent effect, Ursery declared that deterrence can serve both civil and criminal goals. Ursery also noted that the fact that a sanction may be tied to criminal activity alone is insufficient to render the sanction punitive.” Id. See Hendricks, 117 S. Ct. at 2082.
267. Russell, 124 F.3d at 1090.
268. Id.
law enforcement officials of certain basic information about an offender living in the area."\textsuperscript{269}

Regarding the "effects" prong, the court discounted the plaintiff's argument that the statute was punitive because failure to register could invoke additional penalties.\textsuperscript{270} The court said that

The fact that a prior conviction for sexual misconduct is an element of the "failure to register" offense is of no consequence. It is hornbook law that no ex post facto problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as long as the other relevant conduct took place after the law was passed.\textsuperscript{271}

For this additional sanction, the conduct is the failure to register, not the initial conviction of the sex offense.\textsuperscript{272}

The court also examined the historical nature of notification and registration as part of the effects prong.\textsuperscript{273} According to the court, a historical analysis is not dispositive in making a "punishment" determination.\textsuperscript{274} The best that this approach can do is try and "draw an analogy between the Act and the punishments of yesteryear."\textsuperscript{275} In any case, the court said that "historical shaming punishments like whipping, pillory, and branding generally required the physical participation of the offender, and typically required a direct confrontation between the offender and members of the public."\textsuperscript{276} The court then quoted the Verniero court for the proposition that "public shaming, humiliation and banishment all involve more than the dissemination of information. . . ."\textsuperscript{277} The court concluded that potential "ostracism and opprobrium" may result from notification, but "humiliation alone does not constitute punishment. A law imposing punishment has other ingredients—most importantly, an intent to punish."\textsuperscript{278}

In Russell, the court made a point of distinguishing itself from Artway and Verniero.\textsuperscript{279} However, it is unclear in what ways the analysis differs. Argu-

\textsuperscript{269} Id. at 1087.
\textsuperscript{270} Id. at 1088.
\textsuperscript{271} Id. at 1088-89. See also United States v. Watts, 117 S. Ct. 633 (1997).
\textsuperscript{272} Russell, 124 F.3d at 1084.
\textsuperscript{273} Id. at 1091.
\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} Id.
\textsuperscript{277} Id. (citing EB v. Verniero 119 F.3d 1077, 1099-1100 (3d Cir. 1997)).
\textsuperscript{278} Id. at 1092 (citing Doe v. Poritz, 931 F. Supp. 1199, 1217 (D.N.J. 1996)).
\textsuperscript{279} Id. at 1084 n.5. The court stated that "Prior to Ursery, the Third Circuit formulated a test for punishment under the Ex Post Facto Clause in Artway v. Attorney General of New Jersey, 81 F.3d 1235 (3rd Cir. 1996) based largely on the Halper-Austin-Kurth Ranch trio of cases. Artway involved an ex post facto challenge to New Jersey's 'Megan's Law,' which provided for registration and community notification for certain convicted sex offenders. Because the Supreme Court in
ably, the *Russell* court did not examine the objective purpose because it did not explicitly state it as a separate factor. However, it appears that the court looked at the legislative intent as including an objective element. In any case, the two tests appear very similar. The real difference is probably that the stated legislative purpose is given more deference in *Russell* than in either *Artway*, *Verneiro*, or *Pataki* since *Russell* requires "clear proof" by the plaintiff to overcome the presumption that the stated non-punitive purpose is incorrect. Nonetheless, these cases make it clear that when "Megan's Law" is challenged as a violation of the *ex post facto* clause, each court must examine the specific provision and determine if it is "punishment" and, therefore, even subject to the clause. To sufficiently comply with an act of the legislature, it is important for the courts to apply the law as written, providing its application remains within constitutional limitations.

E. Principled Approach

As is evident in the previous section, the majority view is to examine certain factors when making a "punishment" determination. This "principled approach" has an advantage over the "intuitive approach" applied by Louisiana courts because it provides concrete factors that a court can apply when the nature of a statute is in question. These factors are: 1) the subjective legislative intent; 2) the objective legislative intent; 3) the design of the statute; 4) whether the sanction has historically been considered punishment; and 5) whether the effects of the statute are disproportionate to its non-punitive aim.

This type of approach also accounts for the different notification and registration statutes' requirements that a particular state may adopt. It allows a court to particularize any state's version of "Megan's Law" and still maintain analytical consistency. The language of a statute is important, and this type of approach will help to factor in the punitive nature of each individual sanction.

V. WHY LOUISIANA SHOULD ADOPT A PRINCIPLED APPROACH

As noted earlier, Louisiana courts have not attempted to make a "punishment" determination when interpreting "Megan's Law." Instead, it appears that our state courts have assumed that the *ex post facto* clause applies to the statute and may, in effect, be giving the statute a more narrow reading than is necessary. However, Louisiana courts have applied this analysis in a distinct, but related, area. In *State v. Johnson*, the Supreme Court was asked to determine whether a civil forfeiture made in accordance with the state's drug

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*Ursery* has cast doubt on the application of *Halper, Austin, and Kurth Ranch* in this context, we decline to adopt *Artway's* test for punishment."  

280. See supra text accompanying notes 157-275.  
281. See supra authority in note 18.  
The court used Halper/Austin principles in determining whether the statute was punitive or regulatory. In Johnson, the court framed the issue by stating that when "analyzing a case to determine whether [the double jeopardy clause] has been violated, it is necessary to resolve whether the particular sanction imposed upon a person for the same conduct constitutes 'punishment' for this purpose." The court said that the precepts applicable to this test could be found in Halper, Austin, and Kurth Ranch. After reviewing these cases, the court said the test was whether

1. the sanction imposed is overwhelmingly disproportionate to the damages the offender has caused and
2. the sanction bears no rational relation to the goal of compensating the government for the costs it has incurred in investigating and prosecuting the violation. However, to the extent that a remedial purpose is served, the civil sanction does not constitute "punishment" within the meaning of the double jeopardy clause, unless the sanction is in effect so disproportionate to the government's losses that it can be explained only as serving deterrent or retributive purposes.

As one can see, this test is very similar to those described in the previous section. Even though Johnson can be distinguished because the court was interpreting the double jeopardy and not the ex post facto clause, this test could easily be used in analyzing "Megan's Law." In fact, some cases indicate that double jeopardy "punishment" is no different than ex post facto "punishment" and that Johnson is not only relevant when interpreting "Megan's law," but binding on the lower courts. Under this interpretation there is a clear inconsistency between the state supreme court's handling of the punishment issue and the way "Megan's Law" has been handled by the lower courts thus far. This inconsistency, coupled with the fact that Louisiana now stands alone as the only state that does not apply a multi-factored analysis when interpreting "Megan's

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283. Id. at 511.
284. Id. at 514-16.
285. Id. at 514.
286. Id.
287. Id. at 518.
288. See generally Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344 (1990). For the proposition that double jeopardy "punishment" is the same as ex post facto "punishment," see United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1219 (9th Cir. 1994), where the Ninth Circuit held that punishment means punishment no matter which clause is involved, specifically holding that Austin's finding of "punishment" in the excessive fines context fully applied to the same sanction in the double jeopardy context; see also United States v. Certain Funds at Hong Kong, Shanghai Bank, 96 F.3d 20, 26-27 (2d Cir. 1996), where the Second Circuit held that its analysis was "equally applicable" to the issue in the context of the ex post facto clause.
"Megan's Law," shows why the courts should reevaluate the statute by applying a "principled approach."

Whether the use of such a principled approach will change the result is debatable. As the earlier cases indicate, the multi-factor approach depends a great deal on the wording of the statute. Also, as Pataki illustrates, it is not unreasonable for a court to decide, based on these multiple factors, that "Megan's Law" is punishment. However, even if the multiple factor analysis would achieve the same result as the current jurisprudence, it is still very important to reexamine the issue, even if only to correct the inconsistency with Johnson. The state supreme court has clearly authorized the use of a principled approach in the double jeopardy context. By not clarifying the interpretation of "Megan's Law," the court leaves room for the argument that the state's ex post facto clause encompasses laws that are not punitive. The court should take the first chance to rectify this disparity so that it does not cause a problem in another context.

How should Louisiana's test look? In addition to the Johnson test, an appropriate model for Louisiana to apply would be the Russell test applied by the United States Ninth Circuit. The Russell test is important because it is the most current analysis of "Megan's Law" by any United States Court of Appeals. Therefore, it takes into account recent Supreme Court cases such as Ursery and Hendricks that contain the Court's latest statements on the "punishment" issue. Another reason the Russell analysis is relevant is that the statute at issue is very similar to our statute. This is evidenced by Louisiana's adoption of the Washington Act's findings and information release provision almost verbatim. Also, "Louisiana seems to have adopted a public notification provision based solely on the Washington model. The Washington and Louisiana provisions for the release of information to the public are practically identical."

293. Russell v. Gregoire, 124 F.3d 1079, 1084 (9th Cir. 1997).
295. For example, both provisions state that law enforcement agencies "are authorized to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection." La. R.S. 15:546(A) (Supp. 1998); Wash. Rev. Code Ann. § 4.24.550(1) (West Supp. 1998). Both provide immunity for elected public officials, public employees, and law enforcement agencies for "discretionary decision[s] to release relevant and necessary information," unless that person "acted with gross negligence or in bad faith." La. R.S. 15:546(B) (Supp. 1998); Wash. Rev. Code Ann. § 4.24.550(2) (West Supp. 1998). Both authorize immunity for the release of information regarding: (1) a person convicted of a sex offense; (2) a person found not guilty of a sex offense by reason of insanity; and (3) a person found incompetent to stand trial for a sex offense and subsequently committed. La. R.S. 15:546(B) (Supp. 1998); Wash. Rev. Code Ann. § 4.24.550(3) (West Supp. 1998). Finally, both provisions state that nothing in the provision "shall impose any liability upon a public official, public employee, [or law enforcement agency] for failing to release information as provided" in the provision. La. R.S. 15:546(C) (Supp.
Should a state court undertake an application of a multi-factored test as this paper suggests, it will have to distinguish the *ex post facto* provision under the state constitution from its federal counterpart. If the *ex post facto* clause contained in the Louisiana Constitution is given the same interpretation as the Federal Constitution then the *Russell* or *Johnson* test should apply. However, since a state can provide more protection through its constitution than is provided by the Federal Constitution, it is conceivable that the courts could interpret Louisiana’s *ex post facto* provision as not strictly limited to “punishment.”

*State v. Loyd*297 is the Louisiana Supreme Court’s most recent interpretation of the state *ex post facto* provision. In *Loyd*, the defendant was found guilty of murder and sentenced to death.298 However, during the pendency of the penalty phase of the trial, the legislature enacted Louisiana Code of Criminal Procedure article 905.2(B) which required the judge to instruct the jury that commutation was available.299 Loyd complained that the use of the instruction violated the *ex post facto* clause of both the state and Federal Constitutions.300

The court dismissed the federal constitutional argument stating that United States Supreme Court decisions such as *Collins* and *Morales* hold that “retrospective measures which only have an attenuated relationship with an increase in the severity of punishment are not ex post facto laws.”301 The court noted that *Collins* illustrated a change in the Supreme Court’s *ex post facto* jurisprudence302 stating that *Collins* “narrowed the scope of the Ex Post Facto Clause’s application and returned to the traditional understanding of the Ex Post Facto Clause as set forth in *Calder v. Bull*.”303

Regarding the State Constitution, however, the court was more equivocal. The court said the current law could be found in *State ex rel. Glover*.304 Glover held that an *ex post facto* law is one passed “after the commission of an offense which in relation to that offense or its punishment alters the situation of a party to his disadvantage.”305 The *Loyd* court said “to qualify under *Glover* as an ex post facto law, the suspect legislation: (1) must be passed after the date of the offense, (2) must relate to the offense or its punishment, and (3) must alter

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296. See generally Sibley v. Board of Supervisors of Louisiana State University, 477 So. 2d 1094 (La. 1985).
297. 689 So. 2d 1321 (La. 1997).
298. *Id.* at 1323.
299. *Id.*
300. *Id.*
301. *Id.* at 1326.
302. *Id.* at 1326.
303. *Id.* at 1324.
304. 660 So. 2d 1189, 1200 (La. 1995).
305. *Id.* at 1200.
the situation of the accused to his disadvantage."306 However, the Loyd court did not say that this was the law. Instead they avoided having to overrule Glover by stating: "[w]e have not yet addressed the question of whether, in light of Collins, the Ex Post Facto Clause of the Louisiana Constitution will be interpreted to provide broader protection than that of the federal constitution . . . [and] . . . we do not need to decide that issue in this case."307

It is difficult to understand why the court refused to answer this question, however, the answer may have come recently in State v. Johnson308 (discussed above). When the Johnson court was asked to decide if the double jeopardy clause of the state constitution was, like its federal counterpart, limited to "punishment," they said that in light of "the language of these provisions and the constitutional history of the state provision, we conclude that the drafters and ratifiers of the state constitution did not intend for this court to define 'punishment' for purposes of double jeopardy analysis any more broadly . . . than 'punishment' has been construed by the United States Supreme Court. . . ."309

Whether this view can be used in the ex post facto context is debatable. However, if punishment under the ex post facto clause is given the same interpretation as it is under double jeopardy clause the court would really have no choice but to interpret the clauses the same.310

VI. CONCLUSION

The question of what to do with sex offenders after they have served their sentences is one of which few are without opinion. It is an emotional issue which pits the rights of defendants against the safety of children. Because of the statistical data, it is not unreasonable for lawmakers to believe that these criminals require special legislation to control their recidivist tendencies. Whether sex offender legislation is appropriate, in the sense that it will be effective in controlling these tendencies, is debatable. However, the enactment of "Megan's law" shows that the legislature feels that these measures are proper under the circumstances. For this reason, the courts should attempt to apply the statute as the lawmakers intended unless that application would violate the constitution. The problem is that Louisiana courts, in attempting to comply with the state and federal constitutions, may have unduly limited the statute by applying ex post facto principles.

The majority view in interpreting these statutes is to apply a "principled approach" to determine if the statute is punitive in nature or merely regulatory. However, Louisiana courts have failed to line themselves up with this majority when interpreting our version of "Megan's Law." Even if the result in Louisiana

306. Loyd, 689 So. 2d at 1326.
307. Id.
308. 667 So. 2d 510 (La. 1996).
309. Id. at 513.
310. See generally Note, Constitutional Stare Decisis, supra note 288.
would be the same under a multi-factor examination, it is important to interpret “Megan’s Law” under a principled approach to bring Louisiana in line with other jurisdictions’ interpretations of “Megan’s Law” and make this state’s jurisprudence on the punishment issue consistent.

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