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NOTE

CONSTITUTIONAL CHALLENGES TO CIVIL COMMITMENT LAWS: AN UPHILL BATTLE FOR SEXUAL PREDATORS AFTER *KANSAS V. HENDRICKS*

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The Supreme Court long has recognized that the United States Constitution forbids a state from punishing its citizens twice for a single offense¹ or attaching new punitive measures to crimes already committed.² While

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1. See U.S. CONST. amend. V. The Double Jeopardy Clause provides that “[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.” *Id.*; see also *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (recognizing the applicability of the Double Jeopardy Clause to the states via the Fourteenth Amendment). The Supreme Court has interpreted the Clause to afford criminal defendants protection not only from multiple trials for the same crime, but also from multiple punishments for the same crime. See Michele M. Jochner, *The Unjustified Expansion of the Double Jeopardy Doctrine to Civil Asset Forfeiture Proceedings*, 84 ILL. B.J. 70, 71 (1996); see also *Witte v. United States*, 515 U.S. 389, 396 (1995) (noting that the Double Jeopardy Clause forbids states from punishing or attempting to punish a criminal defendant twice for the same crime) (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)); *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (stating that where a “single act” offends two distinct laws, separate prosecutions under each law will not constitute double jeopardy “if each statute requires proof of an additional fact which the other does not”) (citing *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871)). *But see* *United States v. Ursery*, 116 S. Ct. 2135, 2152 (1996) (Scalia, J., concurring) (asserting that the Double Jeopardy Clause only protects against “successive prosecution, not successive punishment”). Although the Double Jeopardy Clause guards against multiple punishments for the same offense, it does not prevent a state from prosecuting several crimes in a single proceeding. See *Ohio v. Johnson*, 467 U.S. 493, 500 (1984). Commentators have noted, however, that courts have been flooded with double jeopardy challenges based on the prohibition against punishing a defendant twice in separate proceedings. See Jochner, *supra*, at 71-72 (noting that proceedings with both civil and criminal components are particularly susceptible to double jeopardy challenges); see also *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (holding that the imposition of a drug tax in a civil proceeding following a criminal conviction for the same offense constituted a second punishment in violation of the Double Jeopardy Clause); *United States v. Halper*, 490 U.S. 435, 449-50 (1989) (rejecting a civil penalty that was disproportionately high in relation to the government’s damages following a criminal prosecution for the same offense as violative of the Double Jeopardy Clause).

2. See U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1. The first Ex Post Facto Clause of

the Double Jeopardy and Ex Post Facto Clauses of the Constitution substantially curtail a state's ability to castigate its citizens, a state may regulate individual activity under its *parens patriae* and police powers.³

the Constitution states that "[n]o . . . ex post facto Law shall be passed." *Id.* § 9, cl. 3. The second Ex Post Facto Clause states that "[n]o State shall . . . pass any . . . ex post facto Law." *Id.* § 10, cl. 1. The first Ex Post Facto Clause applies to the federal government and the second applies to the states. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 428 (5th ed. 1995). Read together, the Ex Post Facto Clauses prohibit the states and the federal government from punishing individuals for an act that was lawful when committed but subsequently deemed unlawful. See Gregory Y. Porter, Note, *Uncivil Punishment: The Supreme Court's Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517, 545 (1997) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)). Moreover, the Ex Post Facto Clauses forbid governments from increasing the penalty for a crime already committed and applying it retroactively. See NOWAK & ROTUNDA, *supra*, at 428; see also *California Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995) (explaining that not all legislative enactments amending the punishment for a completed crime violate the Ex Post Facto Clause); *Calder*, 3 U.S. (3 Dall.) at 390 (standing for the proposition that a statute violates the ex post facto prohibition when it "inflicts a greater punishment, than the law annexed to the crime, when committed"); *Doe v. Pataki*, 940 F. Supp. 603, 604 (S.D.N.Y. 1996) (holding that retroactive application of certain provisions of the state's sex offender law violated the Ex Post Facto Clause), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1066 (1998); cf. *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (concluding that a statute must operate retrospectively in order to violate the Ex Post Facto Clause).

3. See *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905) (noting that a state may restrict individual liberty through its police power in order to preserve the safety and health of its citizens); *In re Halko*, 54 Cal. Rptr. 661, 663 (Cal. Ct. App. 1966) (stressing that laws enacted pursuant to a state's public health police power are generally immune from constitutional attack); Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1716-17 (1996) [hereinafter *Prevention Versus Punishment*]. Although the constitutionality of laws circumscribing individual freedoms often rests on both *parens patriae* and police power principles, a subtle distinction exists between the two. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (noting a state's dual purpose in civilly confining the mentally ill: to provide care pursuant to the state's *parens patriae* power to those who cannot care for themselves, and to protect society under its police power from the violent propensities of the mentally ill). Historically, laws protecting the public from infectious diseases represented the most common type of police power. See Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 334 (1989) (describing the State of Pennsylvania's 1798 police power restriction on travel between New York and Philadelphia in order to thwart the spread of yellow-fever); see also *Philadelphia v. New Jersey*, 437 U.S. 617, 631 (1978) (Rehnquist, J., dissenting) (arguing that New Jersey's ban on the importation of out-of-state solid waste was analogous to quarantine laws and, therefore, should be upheld as a legitimate exercise of the state's power to protect the health and safety of its citizens); *Robinson v. California*, 370 U.S. 660, 664-65 (1962) (stating that laws regulating drug use were valid measures aimed at protecting the general health and welfare of the public even though such laws may restrict individual freedom).

The Court also has acknowledged that the Commerce Clause grants the federal government similar "police" authority. See GERALD GUNTHER, CONSTITUTIONAL LAW 106 (12th ed. 1991). The Commerce Clause vests Congress with singular power to regulate interstate commerce. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) (interpret-

The Supreme Court has consistently upheld laws infringing on personal liberty as legitimate exercises of a state's power to protect public health and safety.⁴ When a state punishes an offender by enacting legislation

ing Congress's commerce power as absolute); *see also* *Houston E. & W. Tex. Ry. Co. v. United States* (the *Shreveport Rate Case*), 234 U.S. 342, 351, 355 (1914) (stressing that Congress's authority to regulate interstate commerce extended to intrastate activities "having such a close and substantial relation to interstate commerce"). Despite the Court's recognition of Congress's broad economic regulatory commerce powers, interpretations of Congress's authority to control local activities perceived as both economically and morally deleterious fluctuated. *Cf.* GUNTHER, *supra*, at 106; *see also* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964) (upholding under the Commerce Clause a federal Act that prevented motel owners from discriminating against minorities). Although the primary purpose of the Act in *Heart of Atlanta* was to "vindicate the deprivation of personal dignity" caused by racial discrimination, the Court sustained the regulation as a legitimate exercise of Congress's commerce authority because of the burdens that racial discrimination placed on interstate commerce. *See id.* at 250, 261-62. The statute at issue in *Heart of Atlanta*, however, did not mark Congress's first attempt to use the Commerce Clause as a means to control local activities that affected public welfare and morals. *See* *Hoke v. United States*, 227 U.S. 308, 322-23 (1913) (upholding a federal law that prevented the interstate transportation of prostitutes as a legitimate exercise of Congress's commerce power). *But see* *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that Congress exceeded its commerce power by regulating guns in school zones because the possession of guns in or near schools was not an economic activity which would "substantially affect any sort of interstate commerce").

4. *See* *United States v. Salerno*, 481 U.S. 739, 750-51 (1987) (holding that the Bail Reform Act of 1984 did not violate an individual's due process rights because pretrial detention based on an assessment of a defendant's future dangerousness was a regulatory measure designed to meet "the greater needs of society"). The *Salerno* Court further stated that the government's interest in safeguarding the community from dangerous individuals released on bail outweighed a defendant's interest in being free from bodily restraint. *See id.*; *see also* *Schall v. Martin*, 467 U.S. 253, 281 (1984) (upholding the constitutionality of a New York law providing for the pretrial detention of juveniles when a "serious risk" existed that the juvenile would commit a crime if released on bail); *United States v. Edwards*, 430 A.2d 1321, 1324, 1332 (D.C. 1981) (sustaining a District of Columbia statute authorizing pretrial detention as a valid non-punitive measure aimed at protecting the public); Thomas C. French, Note, *Is It Punitive or Is It Regulatory?* *United States v. Salerno*, 20 U. TOL. L. REV. 189, 193, 197 (1988) (describing various judicial positions used to justify pretrial detention, and reasoning that a District of Columbia detention statute "marked a substantial departure from the traditional rationale underlying pretrial detention"). Courts have advanced two rationales in support of pretrial detention, both of which were aimed at protecting the integrity of the judicial process. *See* French, *supra*, at 193. Courts usually order pretrial detention when there exists a risk that a defendant will jump bail or tamper with the jury or witnesses. *See id.*

The regulatory powers of both the federal and state governments to detain individuals for the health and safety of society are broad. *See* *Greenwood v. United States*, 350 U.S. 366, 375 (1956) (upholding a federal Act that provided for the indefinite commitment of a defendant found to be both mentally incompetent to stand trial and dangerous); *In re Halko*, 54 Cal. Rptr. at 663 (asserting that the State of California possessed broad discretion in deciding whether to quarantine an individual suffering from a contagious disease). *See generally* Richards, *supra* note 3, at 338-39 (commenting that the Supreme Court has recognized a state's authority under its police powers to confine individuals in order to control criminal behavior). *But see* *Jackson v. Indiana*, 406 U.S. 715, 731 (1972) (invali-

that also appears to regulate anti-social behavior, courts must decide if the legislation is sufficiently punitive in nature to trigger constitutional safeguards reserved for criminal defendants under the Double Jeopardy and Ex Post Facto Clauses.⁵ Furthermore, a judicial determination that a

dating a state procedure authorizing the indefinite commitment of a defendant based solely on his mental incapacity to stand trial). Commentators have argued that society generally disapproves of any form of preventive detention regardless of the chances that an individual may commit a violent crime. See Robert Teir & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 414 (1997). Civil commitment of the dangerously insane has been the one exception. See *id.* The justification for accepting civil commitment as constitutionally less offensive than other forms of preventive detention is the notion that the mentally ill lack the ability to think rationally, and, therefore, actually appreciate a reduced amount of individual liberty. See *id.*

5. See generally 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, 1329-30 (1991) (noting that the Bill of Rights affords more procedural protections to defendants in criminal cases than in civil cases). The main goal of the criminal justice system is to exact retribution from the offender through incarceration. See Cheh, *supra*, at 1332; see also Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1543 (1997) (describing a "criminal" sanction as one that punishes the offender through imprisonment, criminal fines, and probation). A civil or regulatory statute, however, seeks primarily to compensate the plaintiff and deter future illegal conduct. See Green, *supra*, at 1542. But see Cheh, *supra*, at 1354 (commenting that many criminal and civil proceedings promote similar goals such as "compensation, deterrence, rehabilitation, treatment and protection, coercion to perform specific acts, and retribution"). Moreover, the characterization of a statute as "civil" or "criminal" will determine whether the Double Jeopardy and Ex Post Facto Clauses even apply. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2085 (1997) (emphasizing that an essential prerequisite to both double jeopardy and ex post facto claims is the determination of whether a law is punitive in nature); see also Stephen R. McAllister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419, 454-55 (1997) (recognizing that the central question concerning the constitutionality of sex offender commitment statutes is whether such laws are characterized as "criminal" or "civil"); *Prevention Versus Punishment*, *supra* note 3, at 1712 (recharacterizing the distinction as the classification between "preventive" and "punitive"). Not only is the characterization of a law as punitive or preventive crucial to a determination of whether double jeopardy and ex post facto protections apply, but it also may generate an inquiry into the availability of other constitutional safeguards in a judicial proceeding. See *United States v. Ward*, 448 U.S. 242, 253-55 (1980) (addressing whether a civil penalty was sufficiently punitive in nature to trigger the Fifth Amendment's guarantee against self-incrimination); see also *In re Winship*, 397 U.S. 358, 363, 368 (1970) (holding that juvenile delinquency proceedings required the reasonable doubt standard of proof guaranteed by the Due Process Clause for an adult defendant in a criminal case); *In re Gault*, 387 U.S. 1, 27-28 (1967) (concluding that juveniles were entitled to due process protections in delinquency proceedings due to the risk of incarceration following such proceedings); Cheh, *supra*, at 1329-30 (noting that civil proceedings do not implicate the full panoply of constitutional protections required in criminal prosecutions); Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 902 (1995) (commenting that the various constitutional challenges to sex psychopath statutes generally have failed due to judicial determinations that these laws are preventive rather than punitive in na-

statute is merely preventive or regulatory, rather than punitive, necessarily precludes any claim based on double jeopardy or ex post facto principles.⁶

Only a legislative enactment that is punitive will support double jeopardy and ex post facto claims.⁷ Courts, however, have encountered difficulty in developing a uniform and workable method for making such determinations.⁸ State autonomy considerations, recognized in police

ture).

6. See *Hendricks*, 117 S. Ct. at 2085-86 (declining to reach the merits of the defendant's double jeopardy and ex post facto claims due to the non-punitive nature of the Kansas Sexually Violent Predator Act); see also G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1643 (1995) (commenting that if community notification statutes are not found to impose an additional punishment on released sex offenders, then they "simply represent[] a collateral consequence of an offender's conviction" and do not violate the Constitution). Although a determination that a law is non-punitive bars further inquiry along double jeopardy or ex post facto lines, a punitive characterization does not always translate into a constitutional violation. See *Hendricks*, 117 S. Ct. at 2091 (Breyer, J., dissenting) (explaining that a punitive finding does not necessarily render a civil statute criminal for constitutional purposes). Justice Breyer acknowledged that similarities between civil commitment and criminal confinement laws—such as the goals of confinement and incapacitation—were not enough to turn a civil commitment into criminal punishment. See *id.*; see also *Ursery*, 116 S. Ct. at 2149 (noting that sufficient grounds did not exist to render civil forfeiture statutes punitive within the meaning of the Double Jeopardy Clause merely because they had some connection to criminal activity); *Allen v. Illinois*, 478 U.S. 364, 371-72 (1986) (stating that involuntary civil commitment does not automatically guarantee the entire range of procedural protections guaranteed to criminal defendants).

7. See *Hendricks*, 117 S. Ct. at 2085; see also *Helvering v. Mitchell*, 303 U.S. 391, 402-04 (1938) (indicating that laws which impose criminal sanctions raise double jeopardy issues, but that "civil enforcement of a remedial sanction" does not); Daniel L. Feldman, *The "Scarlet Letter Laws" of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1085 (1997) (explaining that the applicability of the ex post facto prohibition to sex offender laws depends on whether the community notification requirements constitute punishment); Elga A. Goodman, Comment, *Megan's Law: The New Jersey Supreme Court Navigates Uncharted Waters*, 26 SETON HALL L. REV. 764, 782 (1996) (noting that the constitutionality of the registration and community notification provisions of the state's sex offender statute hinges on a resolution of the law's punitive nature).

8. See, e.g., *Doe v. Pataki*, 940 F. Supp. 603, 629-30 (S.D.N.Y. 1996) (finding that although the retroactive notification provisions contained in New York's sex offender statute were sufficiently punitive to violate the Ex Post Facto Clause, the registration requirements within the same statute were preventive and, therefore, constitutional), *aff'd in part, rev'd in part*, 120 F.3d 1263, 1285 (2d Cir. 1997) (reversing the district court's holding regarding the constitutionality of the retroactive notification provisions), *cert. denied*, 118 S. Ct. 1066 (1998). In *Ursery*, the Supreme Court reversed two circuit court decisions and held that civil forfeiture did not constitute punishment within the meaning of the Double Jeopardy Clause. See *Ursery*, 116 S. Ct. at 2138-39, *rev'g* 59 F.3d 568 (6th Cir. 1995), and *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994). Moreover, conflicting decisions regarding the constitutionality of sex offender statutes represent additional proof that courts have failed to formulate a reliable test for determining whether a

power jurisprudence, clash with constitutional limitations on punishment embodied in the Double Jeopardy and Ex Post Facto Clauses.⁹ In fact, the conflict between a state's authority to regulate individuals under its police powers and constitutional restraints on punishment has been nowhere more pronounced than in the area of repeat sex offender legisla-

sanction is punitive for double jeopardy, and ex post facto purposes. See, e.g., *Young v. Weston*, 898 F. Supp. 744, 754 (W.D. Wash. 1995) (invalidating the state's sexually violent predator law on the grounds that it was punitive within the meaning of the Due Process, Ex Post Facto and Double Jeopardy Clauses); *Rowe v. Burton*, 884 F. Supp. 1372, 1380 (D. Alaska 1994) (concluding that the retroactive public dissemination provisions of the state's sex offender Registration Act constituted an ex post facto punishment); *Artway v. Attorney Gen. of N.J.*, 876 F. Supp. 666, 692 (D.N.J. 1995) (finding the registration provisions of the state's sex offender statute constitutional, but holding that the notification provisions imposed punishment in violation of the Ex Post Facto Clause), *aff'd in part, vacated in part on other grounds*, 81 F.3d 1235 (3d Cir. 1996); *State v. Noble*, 829 P.2d 1217, 1223-24 (Ariz. 1992) (en banc) (upholding as preventive rather than punitive a statute requiring released sex offenders to register their name and address with the police); *Doe v. Poritz*, 662 A.2d 367, 404 (N.J. 1995) (holding that retroactive application of the public notification provision of the state's sex offender statute did not violate the Ex Post Facto Clause); *State v. Ward*, 869 P.2d 1062, 1072 (Wash. 1994) (en banc) (rejecting an ex post facto attack on the public notification provisions of the state's sex offender law); *Prevention Versus Punishment*, *supra* note 3, at 1711-12 (noting that jurisdictional splits on the constitutionality of sex offender registration and notification statutes stemmed from the courts' lack of a comprehensive means of determining whether the laws were punitive). The Supreme Court's punitive/preventive jurisprudence has been severely criticized because tests developed under the doctrine were unreliable and produced inconsistent results. See Daniel A. Allen, Note, *To Punish or To Remedy—That Is the Constitutional Question: Double Jeopardy Confusion in State v. Hansen*, 30 CREIGHTON L. REV. 235, 235-36 (1996) (discussing the confusion among states concerning which test to apply when analyzing the punitive nature of a statute); see also *infra* Part I (discussing various tests developed by the Supreme Court to resolve whether a statute is "criminal" or "civil").

9. See *Richards*, *supra* note 3, at 338. While a state may enact laws encroaching on individual liberty in order to prevent future harm, it may not punish an individual pursuant to its police powers. See *id.*; see also *Doe v. Pataki*, 120 F.3d 1263, 1266 (2d Cir. 1997) (addressing whether the public notification scheme of the state's sex offender law, designed to safeguard the public from future sex crimes, constituted punishment in violation of the Ex Post Facto Clause), *cert. denied*, 118 S. Ct. 1066 (1998); *Iowa v. Pickens*, 558 N.W.2d 396, 400 (Iowa 1997) (classifying the state's sex offender registration law as a legitimate police power measure and not an ex post facto law); *Allen*, *supra* note 8, at 236, 270 (analyzing whether administrative license revocation statutes, enacted as a means to protect the public from drunk drivers, inflicted punishment within the meaning of the Double Jeopardy Clause); Lawrence Taylor, *Make It a Single: DUI Dual Punishment May Be Unconstitutional*, L.A. DAILY J., Mar. 7, 1995, at 7 (discussing various state court decisions barring criminal prosecutions for DUI under the Double Jeopardy Clause when administrative sanctions already had been imposed). A state's *parens patriae* and police powers are derived from the Tenth Amendment to the Constitution which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.; see also *Blacher*, *supra* note 5, at 901 (asserting that the Tenth Amendment is the source of a state's *parens patriae* and police powers).

tion.¹⁰ In response to public outrage and panic surrounding violent sex

10. See Michele L. Earl-Hubbard, Comment, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 814-15 (1996) (noting that a state's authority to regulate certain released sex offenders through child sex offender registration laws is limited by "guaranteed individual rights enumerated in the Constitution"); *supra* note 8 and accompanying text (discussing various decisions regarding the punitive nature of sex offender laws); see also Brief for Respondent and Cross Petitioner at 25, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (arguing that the state's sexual predator law attempted to undermine the "ex post facto and double jeopardy prohibitions by cloaking an incapacitative purpose behind the State's *parens patriae* power to provide treatment"); Feldman, *supra* note 7, at 1083 (noting that the constitutionality of sex offender notification laws has encountered acute criticism from courts and legal scholars); Teir & Coy, *supra* note 4, at 412 (explaining that the majority of the constitutional challenges to registration and community notification provisions embodied in sex offender laws spring from allegations that they constitute impermissible punishment); Eva M. Rodriguez, *Court Reviews Sex Offenders' Fate*, LEGAL TIMES, Dec. 2, 1996, at 10 (noting that criminal defense lawyers have argued that civilly confining sexual predators after they have served their prison sentences is merely a ploy to punish them twice).

Recently, states and the federal government have mixed civil and criminal sanctions to provide a check on antisocial behavior. See Cheh, *supra* note 5, at 1325 (explaining that the idea of combining civil and criminal laws to prohibit criminal behavior, although not new, never before has been advanced to such lengths). States have employed civil sanctions in order to curb "domestic violence, drug trafficking, weapons possession, and racial harassment." *Id.* at 1326; see also Jay A. Rosenberg, Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390, 391 (1988) (commenting that law enforcement agencies favor the use of civil forfeiture actions particularly in drunk driving and drug trafficking cases). Commentators have argued that punishing criminal behavior through civil rather than criminal sanctions offers significant advantages to police and prosecutors. See PETER FINN & MARIA O'BRIEN HYLTON, U.S. DEP'T OF JUSTICE, USING CIVIL REMEDIES FOR CRIMINAL BEHAVIOR: RATIONALE, CASE STUDIES, AND CONSTITUTIONAL ISSUES 2-3 (Oct. 1994) (noting that the advantages of punishing offenders through the civil justice system include the fact that fewer procedural protections are offered to defendants in civil proceedings than in criminal proceedings, making trials easier and quicker); see also Cheh, *supra* note 5, at 1329. Evidence of this trend toward avenging criminal behavior through civil laws exists in a majority of the states which now have some form of sex offender registration and notification law. See *Child Molester's Suicide Rouses Little Sympathy Among Lawmen*, STAR-LEDGER (Newark, N.J.), Feb. 16, 1998, at 2 (reporting that all fifty states have laws requiring sex offenders to register with law enforcement agencies); Robert Schwaneberg, *Megan's Law Takes Many Diverse Paths*, STAR-LEDGER (Newark, N.J.), Feb. 25, 1998, at 1 (noting that only Kentucky, Nebraska, and New Mexico do not provide for community notification of a sex offender's whereabouts). Although specific provisions of such laws differ from state to state, they all require a released sex offender to register his address with the local police. See Earl-Hubbard, *supra*, at 791. Moreover, in May 1996, Congress enacted a federal sex offender registration and notification law and mandated that the states enact similar statutes or lose state funds reserved for crime prevention. See Megan's Law of 1996, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (amending § 170101(d) of the Violent Crime Control and Law Enforcement Act of 1994) (to be codified as amended at 42 U.S.C. § 14071(d)); see also Earl-Hubbard, *supra*, at 799 (noting that under the federal guidelines, state laws must allow the police to release a sex offender's registration information when it is necessary for the pro-

crimes perpetrated by released sexual predators,¹¹ states have passed laws, under the guise of their *parens patriae* and police powers, aimed at safeguarding the community from the dangers of repeated sexual violence.¹² As a result of the trend toward more stringent laws restricting the freedom of released sex offenders, courts have been forced to address whether these laws violate the limitations on criminal punishment in the Double Jeopardy and Ex Post Facto Clauses.¹³

tection of the community); Feldman, *supra* note 7, at 1083 (discussing the requirements of the federal scheme).

11. See Sarah H. Francis, Note, *Sexually Dangerous Person Statutes: Constitutional Protections of Society and the Mentally Ill or Emotionally-Driven Punishment?*, 29 SUFFOLK U. L. REV. 125, 125-26 (1995) (stating that intense media coverage of violent sex crimes, combined with public outcries for greater police protection from released sex offenders, encouraged state legislatures to enact "sexually dangerous persons" laws). In Washington State, public anger following the rape of a seven-year old boy by a released sex offender exerted pressure on the state legislature to take steps to minimize the chances of a reoccurrence of this type of crime. See James Popkin et al., *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 64, 66 (describing the events leading up to the enactment of Washington State's sex offender law).

12. See McAllister, *supra* note 5, at 419-21 (noting that state legislatures have attempted to address the problem of released recidivist sex offenders through three different measures: imposing "longer sentences for first-time and repeat sex offenders;" providing for community notification and registration laws for released sex offenders; and enacting involuntary civil confinement laws). In response to the brutal rape and murder of seven-year old Megan Kanka, New Jersey enacted the first sexual offender notification act, commonly referred to as "Megan's Law." See N.J. STAT. ANN. §§ 2C:7-1 to 11 (West 1995) (requiring that released sex offenders register their whereabouts with police, who in turn, notify the community that a convicted sex offender lives in their neighborhood); see also Robert Schwaneberg, *Megan's Law Clears Last Hurdle: Supreme Court Declines to Hear Challenge*, STAR-LEDGER (Newark, N.J.), Feb. 24, 1998, at 1 (noting that the rape and murder of Megan acted as the impetus for the enactment of Megan's Law). Megan's confessed rapist and murderer, Jesse Timmendequas, lured Megan into his house and then strangled her with a belt. See Rafshoon, *supra* note 6, at 1633 n.1; see also Jan Hoffman, *New Law Is Urged on Freed Sex Offenders*, N.Y. TIMES, Aug. 4, 1994, at B1 (describing the circumstances surrounding Megan's rape and murder). Believing that their daughter's murder may have been prevented had they known that a convicted sex offender resided across the street, Megan's parents lobbied the state and federal legislatures to pass laws that would notify the public when a repeat sex offender moved into their community. See Schwaneberg, *supra*, at 1. Other states have enacted legislation similar to New Jersey's Megan's Law. See N.Y. CORRECT. LAW § 168-c (McKinney Supp. 1997) (requiring released sex offenders to register with local law enforcement agencies, followed by community notification of the offender's neighborhood address); see also ALASKA STAT. § 12.63.010 (Michie 1996); CONN. GEN. STAT. ANN. § 54-102r (West Supp. 1997); LA. REV. STAT. ANN. § 15:574.4(h) (West Supp. 1997); MASS. GEN. LAWS ANN. ch. 22C, § 37 (West 1994); OKLA. STAT. ANN. tit. 57, §§ 581-87 (West Supp. 1998); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1997).

13. See *Hendricks*, 117 S. Ct. at 2086 (concluding that the Kansas Sexually Violent Predator Act did not constitute punishment and, thus, did not violate the Double Jeopardy or Ex Post Facto Clauses); see also *supra* note 8 and accompanying text (discussing conflicting judicial decisions regarding the constitutionality of sex offender laws under the Double Jeopardy and Ex Post Facto Clauses); *supra* note 12 and accompanying text (de-

In an effort to reconcile the constitutional tensions created by laws intertwining punishment and prevention, the Supreme Court developed a two-pronged test to determine whether a statute was more punitive than preventive.¹⁴ Under the first prong, the Court examined whether the legislature intended to create a civil rather than a criminal law.¹⁵ Under the second prong, the Court evaluated the statute in light of seven criteria traditionally utilized to calculate a law's punitive effect.¹⁶ Initially, the

scribing state sex offender registration and notification statutes).

14. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (noting that the Court would consider two criteria when analyzing whether a statute was punitive or regulatory in nature: whether the legislature intended to create a punitive sanction and whether the sanction actually had the effect of punishing the offender). If the legislature clearly evinced a punitive intent, the Court would regard the statute as punitive and decline to examine the statute's effects under the second prong of the test. See *id.* Where, however, the legislature intended to create a civil sanction, the Court would apply the second prong of the test to determine whether the law actually amounted to punishment. See *id.*; see also *Hudson v. United States*, 118 S. Ct. 488, 493 (1997) (asserting that where the legislature intended to establish a civil sanction, the Court would ask whether the sanction "was so punitive either in purpose or effect as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty") (internal quotations omitted); *Ursery*, 116 S. Ct. at 2147 (stating that when resolving whether a sanction is punitive or preventive, courts must inquire into the legislature's purpose in enacting the law and the law's effect on offenders); *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (commenting that despite the legislature's intention to impose a civil penalty on offenders, the Court would nonetheless consider the law punitive if it inflicted punishment); *Prevention Versus Punishment*, *supra* note 3, at 1719-21 (analyzing decisions in which courts have characterized laws as punitive or preventive based on an examination of legislative intent and the statute's punitive effects).

15. See *Hendricks*, 117 S. Ct. at 2081-82 (1997) (considering first whether the Kansas legislature intended to provide a civil non-punitive penalty); *Ward*, 448 U.S. at 248 (emphasizing that the Court must first examine whether the legislature intended to enact a civil or criminal penalty); *Kennedy*, 372 U.S. at 146, 169 (finding that Congress clearly intended to punish draft-dodgers through a law stripping them of their citizenship); *Pataki*, 940 F. Supp. at 604-05 (examining whether the legislature merely intended to protect the public from certain released sex offenders through a law providing for community notification of the offender's whereabouts or also desired to punish such offenders).

16. See *Kennedy*, 372 U.S. at 168-69. The *Kennedy* Court required an evaluation of these seven factors when doubt existed as to whether the legislature contemplated a punitive or merely regulatory law. See *id.*; *infra* Part I (listing the seven factors of *Kennedy*); see also *Artway v. Attorney Gen. of N.J.*, 876 F. Supp. 666, 672 (D.N.J. 1995) (stating that a court must analyze the effects of a statute by applying the criteria prescribed in *Kennedy* "even if the stated purpose of the legislation is a regulatory or procedural one"), *aff'd in part, vacated in part on other grounds*, 81 F.3d 1235, 1250 (3d Cir. 1996); *Earl-Hubbard*, *supra* note 10, at 817 n.197 (noting that the seven factors of *Kennedy* "are still an appropriate source of information when weighing a law's purpose and its effect"). But see *Ward*, 448 U.S. at 249 (stating that the seven factors provided in *Kennedy* are not dispositive, but may be useful in determining the remedial or punitive nature of the law); *Doe v. Poritz*, 662 A.2d 367, 402 (N.J. 1995) (rejecting the use of the seven factors to determine whether a law constitutes punishment); *Feldman*, *supra* note 7, at 1087-89 (criticizing the application of the seven factors to determine the punitive nature of a sanction).

Court applied this two-pronged punitive/preventive test to limit states' rights to regulate their citizens under general police powers. Under this application, the Court rejected the concept that a legislature's own determination that a statute was "civil" provided conclusive evidence that the law was non-punitive in nature.¹⁷ Later decisions by the Court, however, signified a transformation of the two-pronged test.¹⁸ Under this version of the test, the Court employed an approach which was more deferential to the legislature's own characterization of its statute as non-punitive.¹⁹

17. Compare *Kennedy*, 372 U.S. at 168-69 (examining the legislative history of both the challenged statute and past citizenship forfeiture laws to determine if the legislature intended a punitive law), with *Ward*, 448 U.S. at 248 (stating that the determination of whether a statute is civil or criminal is a matter of "statutory construction," and a legislature's preference for a civil "label" is strong evidence that the law is non-punitive); see also *Pataki*, 940 F. Supp. at 604-05 (regarding certain statements made by legislators concerning the passage of the state's sex offender notification law indicative of a legislative intent to punish sex offenders despite the law's civil label); Porter, *supra* note 2, at 552 (noting the distinction between the *Kennedy* Court's focus on Congress's intent to punish offenders in determining whether a law was "civil" or "criminal," and the *Ward* Court's mere acceptance of a civil "label" attached to a law as sufficient evidence that the legislature did not intend to punish).

18. See *Ward*, 448 U.S. at 248-49 (stating that under the first prong, the Court would defer to Congress's preference for a civil label as proof of a non-punitive intent, and, under the second prong, the Court would regard the seven factors of *Kennedy* as merely "helpful" in determining whether a sanction had a punitive effect). The *Ward* Court declined to search a putatively civil sanction's legislative history for an unexpressed legislative intent to punish. See *id.*; see also *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1218 (9th Cir. 1994) (asserting that under the *Ward* test, "[i]f Congress indicated a preference that the proceeding be denominated 'civil' rather than 'criminal,' the Court would defer to that preference except in extraordinary circumstances."), *rev'd*, *United States v. Ursery*, 116 S. Ct. 2135 (1997). Moreover, the *Ward* Court increased the burden on the moving party under the second prong to show that a law had the actual effect of punishing offenders despite the legislature's intention to the contrary. See *Ward*, 448 U.S. at 248-49 (stating that, under the second prong, "only the clearest proof" of a statute's punitive purpose or effect would suffice to transform a civil sanction into a criminal sanction) (internal quotations omitted); Porter, *supra* note 2, at 548 & n.161 (describing this modified test as placing a heavy burden on defendants to establish that a civil sanction was actually criminal); see also *Ursery*, 116 S. Ct. at 2148 (noting that the civil forfeiture statute would fail under the second prong only if the Court found the "clearest proof" that the law was so punitive in effect to override Congress's non-punitive intent); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66 (1984) (employing the deferential two-pronged test used in *Ward* to determine whether a civil law was punitive).

19. See *Ward*, 448 U.S. at 249. Rather than question whether Congress intended to enact a punitive sanction by examining a law's legislative history, the *Ward* Court simply deferred to the "civil" label attached to the law as conclusive evidence that Congress meant to create a non-punitive sanction. Compare *id.* (finding a civil label indicative of Congress's non-punitive intent), with *Kennedy*, 372 U.S. at 169 (examining the legislative history of forfeiture of citizenship laws to determine if an underlying legislative purpose to punish existed). Moreover, in order for the seven *Kennedy* factors to lead to a punitive

Despite its adoption of the two-pronged approach as the primary framework by which to test a statute's penal nature,²⁰ the Supreme Court altered its analysis when the challenged legislation was a civil involuntary commitment statute.²¹ Rather than rely on the legislature's "civil" classi-

finding, the factors had to establish by the "clearest proof" that the law was punitive. See *Ward*, 448 U.S. at 249; see also Jochner, *supra* note 1, at 72 (discussing the deferential test utilized by the Court to analyze whether a penalty was punitive or preventive in nature); Porter, *supra* note 2, at 552 (arguing that the test under *Kennedy* is considerably less deferential to the state legislature than the *Ward* test). The deferential statutory construction, originating from a 1938 Supreme Court double jeopardy case, focused on Congress's intent as the benchmark for determining the civil or criminal nature of a sanction. See Jochner, *supra* note 1, at 72. "As a result of employing this deferential test, the Court had never invalidated a legislatively authorized successive punishment as violative of the double jeopardy clause." *Id.* This early deferential statutory construction test eventually evolved into the *Ward* and *Kennedy* two-pronged punitive/preventive test. See *id.*

Although the Court frequently has applied the *Kennedy-Ward* two-pronged test to assess the punitive or non-punitive nature of a law, the Court also has developed other tests for this same purpose. See *United States v. Halper*, 490 U.S. 435, 448 (1989) (stating that in determining whether a civil sanction constituted punishment for double jeopardy purposes, courts must ask whether the sanction served either a retributive or deterrent purpose or solely a remedial one); see also *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 800 (1994) (Scalia, J., dissenting) (arguing that before the *Halper* decision, the Court had never struck down a legislatively authorized second punishment as a double jeopardy violation); *Austin v. United States*, 509 U.S. 602, 621-22 (1993) (reaffirming the *Halper* test and holding that a civil forfeiture proceeding that was not solely remedial comprised punishment); *\$405,089.23 U.S. Currency*, 33 F.3d at 1218 (noting that the Court's decision in *Halper* signified a rejection of the *Ward* test), *rev'd*, *United States v. Ursery*, 116 S. Ct. 2135 (1996). Despite the fact that many courts have applied the *Halper* punitive/preventive test to analyze whether a statute violated either double jeopardy or ex post facto principles, the Court has discredited this test. See *Hudson v. United States*, 118 S. Ct. 488, 494 (1997) (regarding the *Halper* approach as an "unworkable" test for double jeopardy purposes); see also *Ursery*, 116 S. Ct. at 2143-46 (1996) (restricting the applicability of the *Halper* test to statutes involving fixed monetary civil penalties); Allen, *supra* note 8, at 262-65 (arguing that Nebraska's administrative license revocation statute should be analyzed according to the *Kennedy-Ward* two-pronged punitive/preventive test rather than the *Halper* test, as *Halper* did not apply outside the context of monetary penalties); David G. Savage, *Double Trouble*, A.B.A. J., Feb. 1998, at 39, 40 (discussing the *Hudson* Court's rejection of the *Halper* test).

20. See *Hudson*, 118 S. Ct. at 493, 495-96 (applying the *Ward* two-pronged test to determine whether the imposition of a monetary penalty on the defendant for bank fraud constituted punishment); *Ursery*, 116 S. Ct. at 2142 (reaffirming the two-pronged analysis developed in *Ward*); see also Allen, *supra* note 8, at 264-65 (discussing the *Ursery* holding and concluding that "[t]he two-step *Kennedy-Ward* test applies to a relatively wide variety of cases").

21. Cf. *Allen v. Illinois*, 478 U.S. 364, 369 (1986) (discussing the role of treatment of individuals confined under involuntary commitment proceedings as an indication of the non-punitive goal of the statute); see also *Addington v. Texas*, 441 U.S. 418, 426, 428 & n.4 (1979) (emphasizing that when a state offers treatment to individuals committed under an involuntary commitment law, it is not exercising its *parens patriae* and police powers in a punitive sense). In *Addington*, the Court recognized that a state may commit a mentally ill and dangerous individual against his or her will pursuant to its *parens patriae* and police

fication of a statute as the hallmark of a truly non-punitive intent, the Court applied a new analysis.²² Under this analysis, the Court regarded involuntary commitment treatment provisions more indicative of a legislature's non-punitive intent.²³

In *Kansas v. Hendricks*,²⁴ the Supreme Court applied the deferential two-pronged punitive/preventive test to determine the constitutionality of a sex offender commitment statute.²⁵ The Court specifically addressed the application of the Kansas Sexually Violent Predator Act²⁶ to a repeat sex offender, Leroy Hendricks, who was nearing the end of a ten-year prison term.²⁷ In order to prevent Hendricks's release, the State of Kan-

powers. See *Addington*, 441 U.S. at 426. Moreover, the Court recognized that such civil commitment proceedings were distinct from criminal prosecutions because the state was not exercising these powers in a punitive manner. See *id.* at 428. In order to determine whether proceedings under the involuntary commitment statute were non-punitive for the purpose of implicating procedural due process safeguards, the Court highlighted the importance of the role of treatment in the punitive/preventive analysis. See *id.* at 428 & n.4.

22. See *Allen*, 478 U.S. at 367, 369-70 (agreeing with the Illinois Supreme Court's determination that the essential aim of the Illinois sexual predator act was to provide treatment, not punishment, to those who were involuntarily committed); *State v. Turner*, 556 S.W.2d 563, 566 (Tex. 1977) (recognizing several distinctions between proceedings for civil commitment and criminal incarceration, including the fact that involuntarily committed patients are entitled to treatment and may be released when they are deemed not dangerous to society, whereas convicted criminals are committed for a set term); McAllister, *supra* note 5, at 455-56 (discussing the *Allen* Court's reliance on treatment as the principal basis upon which it found the Act non-punitive); *Prevention Versus Punishment*, *supra* note 3, at 1727 (arguing that commitment laws must be scrutinized to determine whether their "primary effect is treatment of the affected individual, or satisfaction of the societal interest in locking sex offenders up and throwing away the key"). But see *Kansas v. Hendricks*, 117 S. Ct. 2072, 2084-85 (1997) (noting that a state may civilly confine an individual who is both mentally ill and dangerous for the purpose of continued incapacitation and not for the purpose of providing treatment).

23. See *Allen*, 478 U.S. at 369-70; see also *Baxstrom v. Herold*, 383 U.S. 107, 113-14 (1966) (maintaining that there are significant distinctions between institutions administered by the Department of Corrections and a state's civil mental hospital); Richards, *supra* note 3, at 374 (noting that when a law provides for treatment in addition to confinement, the law cannot be "wholly punitive"). But see *Hendricks*, 117 S. Ct. at 2084 (stating that a need for treatment did not have to represent a state's "overriding" objective in civilly confining sexually violent predators).

24. 117 S. Ct. 2072 (1997).

25. See *id.* at 2081-82.

26. KAN. STAT. ANN. §§ 59-29a01-17 (Supp. 1997). The Act defines a "sexually violent predator" as a person "who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility." *Id.* § 59-29a02(a). Examples of what the statute considers "a sexually violent offense" include: rape, aggravated indecent liberties with a child, sodomy, aggravated indecent solicitation of a child, sexual exploitation of a child, and aggravated sexual battery. See *id.* § 59-29a02(e)(1)-(9).

27. See *Hendricks*, 117 S. Ct. at 2076 (noting that the first time Kansas used the Act

sas successfully petitioned the district court to civilly confine Hendricks as a sexually violent predator.²⁸

On appeal to the Kansas Supreme Court, Hendricks claimed that the Act violated the Federal Due Process, Double Jeopardy, and Ex Post Facto Clauses.²⁹ The Kansas Supreme Court held that the Act violated Hendricks's substantive due process rights because it provided for the civil commitment of individuals who were not mentally ill.³⁰ The Su-

was to commit Hendricks). Hendricks was serving time on a 1984 conviction for taking "indecent liberties" with two thirteen-year-old boys. *See id.* at 2078. The Act was adopted at the "urging of an Ad Hoc Sexual Offender Task Force" led by the grieving parents of Stephanie Schmidt, a Kansas college student who was raped and murdered in 1993 by a convicted rapist who had been released from jail. *See In re Hendricks*, 912 P.2d 129, 140 (Kan. 1996) (Larson, J., dissenting) (describing the impetus behind the enactment of the Kansas Sexually Violent Predator Act), *rev'd*, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997); *see also* McAllister, *supra* note 5, at 419-20 (describing the factual events leading up to the enactment of the Kansas Sexually Violent Predator Act).

28. *See Hendricks*, 117 S. Ct. at 2078-79. Under the Act, the Kansas Attorney General, after receiving notice of the impending release of a potential sexually violent predator, has seventy-five days to file a petition seeking additional confinement. *See* KAN. STAT. ANN. § 59-29a04 (Supp. 1996). After the petition is filed, the district court has sixty days to hold a trial to determine whether the individual is a "sexually violent predator" within the meaning of the Act. *See id.* § 59-29a06. If the jury finds beyond a reasonable doubt that the person is a sexually violent predator, then the person is "committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." *Id.* § 59-29a07(a). At Hendricks's trial, he testified to his repeated acts of child sexual molestation and abuse. *See Hendricks*, 117 S. Ct. at 2078. Hendricks revealed that he had begun molesting children in 1955 when he exposed himself to two adolescent girls. *See id.* Since that time, the state convicted and jailed Hendricks three more times for criminal sexual conduct towards children. *See id.* Also, while Hendricks was incarcerated, the state attempted to treat him for his sexual deviance. *See id.* After his release from a psychiatric hospital in 1965, however, Hendricks molested again resulting in yet another conviction and further incarceration. *See id.* Hendricks refused all treatment offered to him for his pedophilia. *See id.* Nonetheless, Kansas again released him and while on parole Hendricks molested his stepdaughter and stepson. *See id.* In response to Hendricks's repeated sexual misconduct, Kansas sought involuntary civil confinement. *See id.* Hendricks admitted at trial that when not confined, he abuses children. *See id.* at 2078. He stated that "the only sure way he could keep from sexually abusing children in the future was 'to die.'" *Id.* A jury found that Hendricks was a sexually violent predator and therefore, qualified for commitment under the Act. *See id.* at 2079.

29. *See id.*

30. *See In re Hendricks*, 912 P.2d at 138. The Supreme Court of Kansas reasoned that the statute ran afoul of the well-established principle that commitment of an individual under a civil statute must be premised on proof that the individual is both mentally ill and dangerous. *See id.*; *see also* *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992) (explaining that a state only may civilly confine a person who is both mentally ill and dangerous). The *Foucha* Court reasoned that the Constitution did not permit the state to civilly confine the defendant based on his "antisocial personality" and his dangerousness to himself or others. *See Foucha*, 504 U.S. at 78; *see also* *Jones v. United States*, 463 U.S. 354, 366 (1983)

preme Court granted certiorari to resolve Hendricks's constitutional claims.³¹ The Court reversed the decision of the Kansas Supreme Court and held that the Act did not violate Hendricks's substantive due process rights.³² The Court also rejected Hendricks's double jeopardy and ex post facto challenges, finding that the Act was non-punitive in nature.³³ By concluding that the Act was non-punitive in nature, the Court adhered to the deferential two-pronged punitive/preventive test established in earlier cases.³⁴ The Court, deferring to the Act's "civil" label, concluded that the Kansas legislature intended to create a non-punitive scheme for the confinement of sexually violent predators.³⁵ Moreover, in

(holding that a verdict of guilt by reason of insanity satisfied the necessary requirements that the person sought to be committed was both mentally ill and dangerous); *Addington v. Texas*, 441 U.S. 418, 433 (1979) (stating that the clear and convincing evidence standard is "constitutionally adequate" for determining whether the person sought to be committed is mentally ill and dangerous). *But see Hendricks*, 117 S. Ct. at 2080 (asserting that Kansas's requirement that an individual suffer from a "mental abnormality" or "personality disorder" fulfilled the "mental illness" prerequisite under *Foucha*).

31. *See id.* at 2076.

32. *See id.* at 2076, 2081 (holding that a diagnosis of Hendricks as a pedophile qualified as a "mental abnormality" under the Act and, therefore, commitment did not violate Hendricks's due process rights). Both the majority and dissenting opinions in *Hendricks* found that Hendricks's substantive due process rights had not been violated through application of the Act's pre-commitment requirement that he suffer from a "mental abnormality." *See id.* at 2081; *id.* at 2087-88 (Breyer, J., dissenting). Acknowledging that a finding of dangerousness alone was not enough to justify involuntary civil commitment, the Court noted that dangerousness coupled with a "mental abnormality" or "personality disorder" provided a sufficient basis for involuntary civil commitment. *See id.* at 2080. The Court further noted that the states had the power to define "terms of a medical nature that have legal significance." *Id.* at 2081.

33. *See id.* at 2085-86 (explaining that because the Act was non-punitive in nature, the Court did not need to reach the substance of Hendricks's double jeopardy and ex post facto claims); *see also In re Hendricks*, 912 P.2d at 153-54 (Larson, J., dissenting) (arguing that due to the Act's civil nature, it did not violate either double jeopardy or ex post facto principles). Hendricks advanced a three-part argument for why the Act was punitive and therefore violated the Double Jeopardy and Ex Post Facto Clauses: his confinement under the Act could be indefinite; the proceedings established under the Act more closely resembled criminal proceedings; and the Act did not provide any treatment for pedophiles. *See Hendricks*, 117 S. Ct. at 2083; *see also* Paul Butler, *It's Hard to Object to Committing Sexual Predators, But a Lot of the Rest of Us Are Abnormal Too*, LEGAL TIMES, July 14, 1997, at S43 (detailing Hendricks's argument).

34. *See Hendricks*, 117 S. Ct. at 2081-83 (stating that the Court must first determine the legislature's expressed intent in creating the penalty, and if such intent was "civil," the Court must then determine whether clear proof existed to eviscerate the legislature's intent) (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1980)); *see also* Porter, *supra* note 2, at 552 (commenting that the punitive/preventive test developed in *Ward* is substantially more deferential than earlier applications of the test).

35. *See Hendricks*, 117 S. Ct. at 2082 (noting that "[n]othing on the face of the statute suggest[ed] that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm").

a concurring opinion, Justice Kennedy highlighted the treatment provisions contained in the Act as evidence that the law served non-punitive goals.³⁶

In a dissenting opinion, Justice Breyer reasoned that the Act violated the Ex Post Facto Clause of the Constitution.³⁷ Finding that the treatment provisions embodied in the Act veiled an underlying intent to punish Hendricks a second time, the dissent concluded that Kansas had created a punitive penalty.³⁸

This Note first examines the Supreme Court's development of a two-pronged test to determine whether a statute is punitive within the meaning of the Constitution. Next, this Note traces the Court's shift, under both prongs of the punitive/preventive test, in favor of a more deferential stance toward legislative labels. This Note then discusses the Court's emphasis on the role of treatment as an essential ingredient in the punitive/preventive doctrine's application to involuntary civil commitment statutes. Finally, this Note analyzes the majority, concurring, and dissenting opinions in *Kansas v. Hendricks* and concludes that the Court has extended the application of the deferential two-pronged test to civil involuntary commitment laws.

I. THE PUNITIVE/PREVENTIVE DOCTRINE: EVOLUTION OF THE TWO-PRONGED TEST

The Supreme Court's punitive/preventive jurisprudence evolved in the context of a variety of constitutional challenges.³⁹ Although the Court

36. *See id.* at 2087 (Kennedy, J., concurring). Justice Kennedy also warned that if Kansas had adopted the treatment provisions as a "sham or mere pretext," then a finding that the Act was punitive would necessarily follow. *See id.*

37. *See id.* at 2087-88 (Breyer, J., dissenting) (agreeing with the majority that the Act's definition of mental abnormality did not offend substantive due process, but nonetheless interpreting the Act as punitive and, therefore, violative of the Ex Post Facto Clause).

38. *See id.* at 2088; *see also* Brief for Respondent and Cross Petitioner at 25, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (arguing that Kansas attempted to circumvent ex post facto and double jeopardy limitations on punishment by disguising its law as a *parens patriae* measure designed to provide treatment).

39. *See, e.g., Hendricks*, 117 S. Ct. at 2085-86 (analyzing the constitutionality of the Kansas Sexually Violent Predator Act under the Ex Post Facto and Double Jeopardy Clauses); *United States v. Halper*, 490 U.S. 435, 437, 452 (1989) (determining that the imposition of a civil penalty for the filing of false medicare claims, following a criminal conviction for the same offense, constituted punishment for double jeopardy purposes); *DeVeau v. Braisted*, 363 U.S. 144, 145, 160 (1960) (finding that a state law preventing convicted felons from holding union offices was non-punitive, and, therefore, did not amount to an unconstitutional ex post facto law or bill of attainder); *Trop v. Dulles*, 356 U.S. 86, 97, 101 (1958) (examining whether a federal statute that penalized convicted war

has recognized that states may regulate the conduct of their citizens for the good of society under their *parens patriae* and police powers, it also has interpreted the Constitution to restrict a state's ability to punish individuals.⁴⁰ In order to maintain such a delicate balance, the Court has attempted to develop an analytical framework which respects both the states' authority to regulate individuals and the constitutional guarantees against certain kinds of punishment.⁴¹

A. The Role of Legislative Intent and the Seven-Factors Test in the Punitive/Preventive Inquiry: Kennedy v. Mendoza-Martinez

The punitive/preventive doctrine emerged in response to legislative attempts to punish individuals through civil sanctions.⁴² Early in the evolution of the doctrine, the Supreme Court expressly recognized that it was called upon to balance two competing interests: Congress's power to regulate citizens and constitutional restraints on Congress's ability to punish through the civil law system.⁴³ The Court embraced a puni-

deserters by stripping them of their citizenship violated the Eighth Amendment); *United States v. Lovett*, 328 U.S. 303, 313-15 (1946) (concluding that a federal law barring certain individuals from government employment due to their political beliefs was punitive within the meaning of the Bill of Attainder Clause).

40. See *O'Connor v. Donaldson*, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring) (asserting that when a state exercises its *parens patriae* power to protect society from persons deemed mentally ill and dangerous, "an inevitable consequence . . . is that the ward's personal freedom will be substantially restrained"); see also *supra* notes 3-6, 9 and accompanying text (noting that although the states and the federal government maintain broad power to regulate individuals, the Constitution protects citizens from governmental encroachments upon specific enumerated fundamental freedoms).

41. See *McAllister*, *supra* note 5, at 458 (commenting that traditionally the Court has respected the states' choices in blending the civil commitment and criminal justice systems); see also *Cheh*, *supra* note 5, at 1327 (identifying areas of the law which favor the dual use of civil and criminal sanctions to redress criminal conduct); Lynn C. Hall, Note, *Crossing the Line Between Rough Remedial Justice and Prohibited Punishment: Civil Penalty Violates the Double Jeopardy Clause—United States v. Halper*, 109 S. Ct. 1892 (1989), 65 WASH. L. REV. 437, 452 (1990) (discussing the inherent difficulties in combining the civil and criminal systems). Justice Kennedy, concurring in *Hendricks*, questioned the propriety of using the civil system rather than the criminal system to further confine sexually violent predators when such confinement could be for life. See *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring). At least one commentator has argued that decisions under the Court's modern punitive/preventive jurisprudence have broadened a state's power to restrict individual liberty for the common good. See *Richards*, *supra* note 3, at 331.

42. See *supra* note 39 and accompanying text (discussing the constitutional issues presented when the civil justice system operates as a vehicle to control criminal behavior).

43. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163-64 (1963) (analyzing whether two federal Acts, imposing the penalty of forfeiture of citizenship on war deserters, violated the Fifth and Sixth Amendments). Writing for the majority, Justice Goldberg stated:

tive/preventive analysis that favored a broad application of constitutional prohibitions on Congress's authority to enact punishment.⁴⁴

In *Kennedy v. Mendoza-Martinez*,⁴⁵ the Supreme Court developed a two-pronged test to determine whether two federal statutes were primarily penal in nature, therefore, triggering procedural due process protections guaranteed by the Constitution.⁴⁶ *Kennedy* stemmed from the application of the Nationality Act of 1940⁴⁷ and the Immigration and Nationality Act of 1952⁴⁸ to two male citizens who lived outside of the United States in order to avoid military service during wartime.⁴⁹ As punishment for violating provisions that made it a crime to remain outside the country for the purpose of evading the draft, the government stripped both men of their United States citizenship.⁵⁰ The Supreme

We have come to the conclusion that there is a basic question in the present cases, the answer to which obviates a choice here between the powers of Congress and the constitutional guarantee of citizenship. That issue is whether the statutes here, which automatically—without prior court or administrative proceedings—impose forfeiture of citizenship, are essentially penal in character, and consequently have deprived the appellees of their citizenship without due process of law

Id.

44. Compare *id.* at 160, 167 (engaging in an exhaustive examination of the legislative history of citizenship forfeiture laws to determine whether the law at issue was punitive), with *United States v. Ward*, 448 U.S. 242, 248 (1980) (explaining that the question of whether a statute is civil or criminal depended, in part, upon which label Congress chose to place on the face of the law). But see Porter, *supra* note 2, at 548 (commenting that in practice the Court has ignored the long recognized rule that a “legislature[] cannot . . . deny a defendant the constitutional protections” by merely labeling a criminal law “civil”).

45. 372 U.S. 144 (1963).

46. See *id.* at 164 (stating that if the statutory provisions were found to be penal in nature, then the Fifth and Sixth Amendments required the application of procedural due process protections); see also Porter, *supra* note 2, at 550-52 (noting that under the *Kennedy* two-pronged test, the Court first asked whether Congress intended to punish and, then, absent strong evidence of a punitive intent, the Court examined whether the statute had punitive effects in light of seven factors); Simeon Schopf, “*Megan’s Law*”: *Community Notification and the Constitution*, 29 COLUM. J.L. & SOC. PROBS. 117, 129 (1995) (describing the *Kennedy* two-pronged test for determining if a statute was sufficiently punitive to trigger constitutional protections).

47. Ch. 418, § 1, 58 Stat. 746 (1944) (repealed 1952).

48. 8 U.S.C. § 1481(a)(10) (1952) (repealed 1976).

49. See *Kennedy*, 372 U.S. at 147-52.

50. See *id.* at 148, 151-52. In *Kennedy*, the Court consolidated two district court cases for review. See *id.* at 149, 152. *Mendoza-Martinez*, the appellee in the first case, moved to Mexico in 1942 in order to avoid military service during the war. See *id.* at 147. Upon his return to the United States after the war, *Mendoza-Martinez* was convicted of draft evasion in violation of the Selective Training and Service Act of 1940 and sentenced to a year and a day in jail. See *id.* Five years after his release from prison, however, the government attempted to deport *Mendoza-Martinez*, claiming that by fleeing the United States during

Court found both statutory provisions unconstitutional because the laws permitted the government to inflict criminal punishment on the petitioners without affording them constitutional safeguards.⁵¹

In concluding that the challenged statutes were penal rather than regulatory in nature, the Court employed a newly-created two-pronged test.⁵² Under the first prong, the Court examined whether Congress manifested a clear intent that the sanctions should operate as criminal penalties.⁵³ Within this prong, the Court examined both the legislative history of the statutes at issue and the legislative history of predecessor statutes.⁵⁴ In the case before it, the Court found that Congress clearly intended to punish draft-dodgers.⁵⁵

wartime, he had lost citizenship under the Nationality Act of 1940. *See id.* at 148. Cort, the appellee in the second case, having refused to return from living abroad in the early 1950s in order to fulfill his military obligations, desired to reenter the United States in 1959. *See id.* at 149-51. The government, however, denied his request for a new United States passport on the grounds that he had forfeited his citizenship under the Immigration and Nationality Act of 1952 by remaining outside the United States for the purpose of evading military service. *See id.* 151-52.

51. *See id.* at 167 (holding that because the citizenship forfeiture laws were punitive in nature, defendants were guaranteed the procedural protections of the Constitution).

52. *See id.* at 168-69 (describing that the Court would first look to Congress's intent in enacting the statute and then, absent a clear finding of a punitive intent, the Court would apply seven factors to determine whether, nonetheless, evidence of a punitive intent existed); *see also* Goodman, *supra* note 7, at 784-85 (noting that if the Court found that the legislature intended to punish, the Court automatically would consider the law punitive and disregard the second prong of the test).

53. *See Kennedy*, 372 U.S. at 169 (finding, under the first prong, a clear expression of Congress's punitive intent).

54. *See id.* at 170-84 (comparing the 1865 congressional floor debates regarding the constitutionality of a forfeiture of citizenship law to the 1944 congressional debates concerning the statutes at issue to determine whether Congress intended the sanctions to function as punishment); *see also* *Kansas v. Hendricks*, 117 S. Ct. 2072, 2093 (1997) (Breyer, J., dissenting) (noting that statements made by supporters of the Kansas Sexually Violent Predator Act indicated that the purpose behind the law was to further punish sex offenders); *Doe v. Pataki*, 940 F. Supp. 603, 621 (S.D.N.Y. 1996) (finding that statements made by New York State legislators concerning the passage of a sex offender registration statute "vividly show[ed] the passion, anger, and desire to punish" sex offenders), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1066 (1998). The *Kennedy* Court determined that the Nationality Act of 1940 originated from a Civil War era act that punished deserters and draft evaders by requiring relinquishment of their American citizenship and expulsion from the United States. *See Kennedy*, 372 U.S. at 170. Moreover, in researching the floor debates of 1865, the Court found that both Houses of Congress agreed that divesting a draft evader of his right of citizenship constituted punishment. *See id.* at 173-74. The Court also reasoned that because Congress modeled the present statutes after the 1865 act, further evidence of a legislative intent to punish existed. *See id.* at 180.

55. *See Kennedy*, 372 U.S. at 184.

The *Kennedy* Court stated, however, that in the face of an ambiguous legislative intent to punish under the first prong, the second prong in the punitive/preventive analysis must be considered.⁵⁶ Under this second prong, the Court outlined the following seven criteria as relevant to a determination of whether a law was penal or regulatory in character:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned⁵⁷

56. See *id.* at 169 (emphasizing the importance of the second prong when the application of the first prong has failed to reveal the punitive nature of a law); see also *Artway v. Attorney Gen. of N.J.*, 876 F. Supp. 666, 677 (D.N.J. 1995) (noting that where the legislative purpose behind a statute is ambiguous, the Court must apply the *Kennedy* factors to determine whether a law is actually punitive), *aff'd in part, vacated in part on other grounds*, 81 F.3d 1235 (3d Cir. 1996); *State v. Noble*, 829 P.2d 1217, 1221 (Ariz. 1992) (en banc) (stating that “[i]f the legislative aim was punitive, we treat the registration requirement as a punishment”); Goodman, *supra* note 7, at 785 (commenting that a finding of regulatory intent on the part of the legislature would require a further analysis by the court of the law’s punitive “purpose or effect”). Courts and commentators have been extremely critical of the effectiveness of the seven-factors test in the punitive/preventive inquiry. See, e.g., *Doe v. Portiz*, 662 A.2d 367, 399-400 (N.J. 1995) (noting that later cases have rejected the use of the “so-called” *Kennedy* test); Cheh, *supra* note 5, at 1358 (doubting whether courts will ever regard the *Kennedy* factors as important in the punitive/preventive analysis because the factors have never rendered a law punitive “for all constitutional purposes”); *Prevention Versus Punishment*, *supra* note 3, at 1725-26 (advocating the abandonment of the *Kennedy* factors and urging the adoption of a test that assesses the deterrent or retributive impact of sex offender statutes on individuals).

57. *Kennedy*, 372 U.S. at 168-69 (internal footnotes omitted). The seven criteria outlined by the Court are rooted in the Court’s own punitive/preventive jurisprudence. See, e.g., *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (holding that a federal act providing for the termination of social security benefits for deported aliens did not impose an “affirmative disability or restraint”); *Trop v. Dulles*, 356 U.S. 86, 95-96 (1958) (considering whether a certain statute would promote the traditional aims of criminal punishment—retribution and deterrence); *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956) (concluding that a civil monetary sanction was not so excessive or unreasonable as to qualify as a criminal penalty); *United States v. Constantine*, 296 U.S. 287, 295 (1935) (considering whether certain behavior subject to a statutory civil sanction also could be considered criminal); *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922) (recognizing that a civil tax sanction resembled punishment more so than a civil tax remedy); *Child Labor Tax Case*, 259 U.S. 20, 36-37 (1922) (determining that the government’s imposition of a civil tax penalty required a finding of *scienter*); *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896) (noting that imprisonment and hard labor historically had been regarded as punishment).

Although the *Kennedy* Court found it unnecessary to engage in a detailed analysis of these factors, the Court stated that such an examination would lead to the conclusion that the statutes at issue were in fact punitive.⁵⁸

The Court's two-pronged test operated as a check on Congress's power to punish citizens under the guise of a "civil" non-punitive law.⁵⁹ By scrutinizing the legislature's intent under the first prong and measuring the statute against the seven factors for further evidence of a punitive aim under the second prong, the Court formulated a punitive/preventive analysis that limited Congress's ability to regulate its citizens under its police powers.⁶⁰

*B. Deferring to the Legislature on the Punitive/Preventive Question
Under United States v. Ward*

Subsequent decisions by the Court limited the impact of the *Kennedy* decision by shifting the emphasis under both the first and second prongs of the punitive/preventive test.⁶¹ Years after *Kennedy*, the Court chose to reformulate the two-pronged test, thereby signaling its unwillingness to scrutinize a legislature's actual intent in establishing a putatively civil statute.⁶²

58. See *Kennedy*, 372 U.S. at 169; see also Porter, *supra* note 2, at 551 (noting that the *Kennedy* Court did not rely on the seven factors because in analyzing the legislative history of the law the Court found that Congress clearly intended the sanction to operate as a punishment).

59. See *supra* notes 18-19 and accompanying text (discussing the less deferential nature of the *Kennedy* two-pronged punitive/preventive test as compared with later versions of the test).

60. See *supra* notes 17-19 and accompanying text (comparing the *Kennedy* Court's formulation of the two-pronged test with the *Ward* Court's version of the test); see also Porter, *supra* note 2, at 552 (arguing that the *Kennedy* Court took a less deferential stance than the *Ward* Court concerning a state's authority to punish its citizens through the civil law).

61. See *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (limiting the first prong to a "statutory construction" test, and arguing that the second prong must establish the "clearest proof" that a law was punitive before the Court could declare it unconstitutional); see also *Hudson v. United States*, 118 S. Ct. 488, 491, 493 (1997) (applying the two-pronged test developed in *Ward* to determine whether a civil monetary penalty imposed on a defendant constituted punishment within the meaning of the Double Jeopardy Clause); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363-65 (1984) (employing the *Ward* two-pronged test in analyzing the punitive nature of a civil forfeiture sanction); *Doe v. Poritz*, 662 A.2d 367, 400 (N.J. 1995) (describing the *Ward* Court's transformation of the second prong of the punitive/preventive test).

62. See *supra* note 61 and accompanying text (describing the new two-pronged test established in *Ward*); see also Allen, *supra* note 8, at 250-51 (discussing the "two-step" test developed in *Ward*).

*United States v. Ward*⁶³ involved the imposition of a civil penalty on an oil and gas company for an oil spill that the company reported to the Environmental Protection Agency.⁶⁴ Pursuant to the Federal Water Pollution Control Act (CWA),⁶⁵ the Coast Guard assessed a \$500 fine against the company.⁶⁶ The company appealed, claiming that the Act's reporting requirements violated the company's Fifth Amendment privilege against self-incrimination because of the punitive nature of the sanction.⁶⁷ Contrary to the *Kennedy* Court's examination of congressional intent under the first prong of its analysis,⁶⁸ the *Ward* Court embarked on a cursory statutory construction analysis to determine whether Congress either expressly or impliedly intended the statute to serve civil or criminal purposes.⁶⁹ As proof of Congress's intent to establish a civil penalty under the CWA, the Court first reviewed the language Congress used to describe the sanction in the Act.⁷⁰ The Court determined that the use of the word "civil" to describe the sanction and the separation of civil and criminal penalties within the statute evidenced an unambiguous intent to create a non-punitive civil penalty.⁷¹ Unlike the *Kennedy* Court's analy-

63. 448 U.S. 242 (1980).

64. *See id.* at 246.

65. *See* Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), 33 U.S.C. § 1321(b)(3), (5)-(6) (1994) (prohibiting the discharge of oil into navigable waters and providing that failure to report such a spill subjects the responsible individual to a fine or imprisonment).

66. *See Ward*, 448 U.S. at 246-47.

67. *See id.* at 247.

68. *See* Porter, *supra* note 2, at 551 (describing the *Kennedy* Court's review of the statute's legislative history to determine whether the law embodied a punitive intent).

69. *See Ward*, 448 U.S. at 248; *see also* Cheh, *supra* note 5, at 1353-54 (discussing the advantages and disadvantages of the legislative label approach). *But see* Kansas v. Hendricks, 117 S. Ct. 2072, 2091 (1997) (Breyer, J., dissenting) (emphasizing that merely because the Kansas legislature labeled a statute as civil does not prove that the law is, in practice, non-punitive); Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 793 (1994) (O'Connor, J., dissenting) (stating that "the Constitution constrains the States' ability to denominate proceedings as 'civil' and so dispense with the criminal procedure protections embodied in the Bill of Rights"). One of the major disadvantages to the legislative label approach is that it may lead to legislative abuse. *See* Cheh, *supra* note 5, at 1353-54. For example, a legislature might label a clearly criminal sanction as "civil" in order to bypass constitutional protections guaranteed to criminal defendants. *See id.* Moreover, when addressing civil statutes that involve incapacitation, at least one commentator has warned against using the legislative label approach. *See* French, *supra* note 4, at 223 (arguing that it is short-sighted of courts to rely solely on the face of a statute when categorizing the statute as civil or criminal because incapacitation involves both punitive and preventive elements).

70. *See Ward*, 448 U.S. at 249.

71. *See id.* (stressing that the "civil" label demonstrated Congress's non-punitive intent especially since criminal penalties were set out in the preceding paragraph); *see also*

sis of congressional intent,⁷² the *Ward* Court simply deferred to the manner in which Congress labeled the statute as evidence that Congress intended a civil, rather than criminal, sanction.⁷³

Although the Court found that Congress's express use of the word "civil" in the statute satisfied the first prong of the inquiry, the *Ward* Court chose to proceed and apply the second prong of the *Kennedy* analysis.⁷⁴ The *Ward* Court stated, however, that while the *Kennedy* factors aided in the punitive/preventive inquiry, the Court was not bound to consider all of the factors.⁷⁵ Moreover, the Court placed a heavy burden on the moving party to establish, by the "clearest proof," that the punitive purpose or effect of the statute eviscerated Congress's non-punitive intention.⁷⁶ Ultimately, the Court found that the plaintiff failed to provide such proof.⁷⁷

Although adhering to the general framework of the punitive/preventive analysis established by *Kennedy*, the *Ward* Court limited both prongs of the test.⁷⁸ *Ward* suggested that Congress's intent repre-

Hendricks, 117 S. Ct. at 2082 (finding that Kansas meant to create a civil commitment scheme based on the placement of the Act in the probate code rather than the criminal code, and the legislature's description of the Act as civil); Porter, *supra* note 2, at 550 (interpreting *Ward* as suggesting that courts can infer legislative intent when an unlabeled sanction is positioned next to a sanction labeled "criminal").

72. See *supra* note 54 and accompanying text (describing the *Kennedy* Court's exhaustive review of a statute's legislative history to decipher whether the legislature evidenced a punitive intent).

73. See *Ward*, 448 U.S. at 248-51; see also *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1218 (9th Cir. 1994) (noting that the punitive/preventive test under *Ward* "focused heavily on the label Congress had attached to a particular sanction"), *rev'd*, 116 S. Ct. 2135 (1996); *supra* notes 71-73 and accompanying text (discussing the *Ward* Court's use of the legislative label approach on the issue of congressional intent).

74. See *Ward*, 448 U.S. at 249.

75. See *id.* (declining to apply all but the fifth *Kennedy* factor to determine whether a monetary civil penalty constituted punishment); see also *Doe v. Poritz*, 662 A.2d 367, 400-01 (N.J. 1995) (noting that *Ward* weakened the importance of the *Kennedy* factors in the punitive/preventive analysis).

76. See *Ward*, 448 U.S. at 251.

77. See *id.* As to the fifth *Kennedy* factor, "whether the behavior to which [the penalty] applies is already a crime," the respondent argued that an earlier federal law already made his conduct a crime. See *id.* at 249-50 (alteration in original). The Court, however, disregarded this argument reasoning that Congress could inflict both a criminal and civil penalty for the same act. See *id.* at 250.

78. Compare *id.* at 249-51 (focusing on legislative labels under the intent prong and applying only one of the seven factors under the second prong), with *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167-69 (1963) (examining legislative history under the intent prong and stressing application of the seven factors under the second prong). The Court reaffirmed the application of the *Ward* test in *United States v. Ursery*, 116 S. Ct. 2135, 2147-48 (1996). In *Ursery*, the Court reviewed two civil forfeiture proceedings to determine whether they constituted criminal punishment or merely civil sanctions. See *id.* at

sented the most significant factor in determining whether legislation was more punitive than regulatory in nature.⁷⁹ In characterizing Congress's intent, the *Ward* Court deferred to the label that Congress had assigned to the statute.⁸⁰ Additionally, the Court narrowed the viability of the seven-factors test by requiring that such factors elicit the "clearest proof" of a statute's punitive aim.⁸¹

The two-pronged test which emerged in *Ward* conveyed the Court's reluctance to override Congress's prerogative to regulate citizens under its police power.⁸² The Court greatly reduced the likelihood that the application of the two-pronged test would result in a determination that a statute was more punitive than regulatory.⁸³ In so doing, the Court applied a punitive/preventive analysis that substantially deferred to the legislature's own characterization of a statute as civil and non-punitive.⁸⁴ Under this reformulated test, the Court considered a "civil" label attached to a law as prima facie evidence of the statute's non-punitive nature.⁸⁵ In adopting this more deferential test, the Court effectively broadened legislative authority to regulate individuals under its police powers.⁸⁶

2138. In finding that the statutes were non-punitive in nature, the Court applied the modified two-pronged test from *Ward*. See *id.* at 2147-48; see also *Hudson v. United States*, 118 S. Ct. 488, 491 (1997) (applying the *Ward* test to determine whether the imposition of certain civil monetary penalties constituted punishment under the Double Jeopardy Clause).

79. See *Ward*, 448 U.S. at 248. But see *Prevention Versus Punishment*, *supra* note 3, at 1720 (stating that one of the difficulties with the legislative intent approach is that this approach often fails to reveal the true motivations of the legislature in enacting a given statute).

80. See *Ward*, 448 U.S. at 249. But see *Ursery*, 116 S. Ct. at 2163 (Stevens, J., concurring in part, dissenting in part) (criticizing reliance by courts on legislative labels when determining double jeopardy issues).

81. See *Ward*, 448 U.S. at 249.

82. See *supra* notes 18-19 and accompanying text (discussing the deferential nature of the *Ward* two-pronged test).

83. Cf. *Ward*, 448 U.S. at 249 (deferring to Congress's stated intent to create a civil sanction under the first prong and referring to the *Kennedy* criteria under the second prong as "helpful" but "neither exhaustive nor dispositive"); see also *Porter*, *supra* note 2, at 552 (stating that "the Supreme Court has never invalidated a sanction based on these factors").

84. See *Ward*, 448 U.S. at 248-49; see also *Porter*, *supra* note 2, at 552 (describing the *Ward* test as more deferential than the *Kennedy* test because the *Ward* Court did not question whether Congress intended to punish but only whether Congress chose a "civil" or "criminal" label).

85. See *Ward*, 448 U.S. at 248-49; see also *supra* note 73 and accompanying text (describing the dominance of legislative labels in the punitive/preventive analysis under *Ward*).

86. See *supra* notes 17-19 and accompanying text (drawing distinctions between the *Kennedy* and *Ward* tests to demonstrate the latter's deferential nature).

C. *The Role of Treatment in the Punitive/Preventive Test as Applied to Involuntary Civil Commitment Statutes*

Following the decision in *Ward*, the Court developed a less deferential test to apply in cases challenging civil involuntary commitment statutes.⁸⁷ Although retaining both prongs of the *Kennedy* and *Ward* tests, the Court no longer considered civil labels as the strongest evidence of a legislature's non-punitive intent.⁸⁸ Looking beyond civil labels, the Court focused instead on a statute's goal of providing treatment and care to institutionalized individuals as key evidence of a legislature's non-punitive intent.⁸⁹

*Allen v. Illinois*⁹⁰ centered around the application of the Illinois Sexually Dangerous Persons Act to a defendant charged with committing sex offenses.⁹¹ Pursuant to the Act, the State of Illinois initiated civil proceedings against the defendant to have him committed to a psychiatric institution as a sexually dangerous person.⁹² The Act required the defendant to submit to two psychiatric evaluations administered by the state, after which the examining psychiatrists testified at the sexually dangerous person proceedings.⁹³ Arguing that the sexually dangerous person

87. See *Allen v. Illinois*, 478 U.S. 364, 368-69 (1986) (stating that "civil label[s] [are] not always dispositive" when determining whether a law is punitive for self-incrimination purposes); see also *Addington v. Texas*, 441 U.S. 418, 427 (1979) (asserting that civil designations would not prevail where such a fundamental liberty interest as an individual's interest in being free from bodily restraint is at stake); *In re Winship*, 397 U.S. 358, 365-66 (1970) (stressing that for the purpose of resolving whether juvenile proceedings required the "beyond a reasonable doubt" standard of proof, the Court would not allow the state's "civil labels and good intentions [to] . . . obviate the need for criminal due process safeguards in juvenile courts").

88. See *Allen*, 478 U.S. at 368-70 (analyzing the punitive nature of the Act in light of the *Ward* two-pronged test); see also *supra* note 87 and accompanying text (discussing the Court's reluctance to rely on legislative labels to determine a civil commitment law's punitive nature).

89. See *Allen*, 478 U.S. at 369-70 (finding that Illinois sought to provide treatment—an essentially non-punitive aim—to individuals committed under the Act); see also *Richards*, *supra* note 3, at 374 (noting that the treatment aspect of the Illinois Sexually Dangerous Persons Act led the *Allen* Court to conclude that the law was non-punitive); Brief for Respondent and Cross Petitioner at 17, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (noting that, unlike the Kansas Act, the Illinois Act provided for treatment in lieu of punishment).

90. 478 U.S. 364 (1986).

91. See *id.* at 365. The State charged the defendant with the crimes of unlawful restraint and deviant sexual assault. See *id.*

92. See *id.* at 365-66. The State initially had charged the defendant criminally, but the trial court dismissed those charges for lack of probable cause. See *id.* Following the dismissal of the criminal charges, the State petitioned to have the defendant declared a sexually dangerous person under the Act. See *id.*

93. See *id.* at 366. After interviewing the defendant, the psychiatrists testified that the

proceedings were criminal rather than civil in nature, the defendant claimed that the requirement that he be evaluated by the psychiatrists violated his Fifth Amendment privilege against self-incrimination.⁹⁴

In finding the Act essentially civil in nature, the Supreme Court applied a less deferential version of the two-pronged test.⁹⁵ Regarding the first prong, the Court noted that Illinois expressly had enacted a civil statute.⁹⁶ The Court, however, asserted that a “civil label [was] not always dispositive” on the issue of legislative intent.⁹⁷ Rather, the Court regarded the legislature’s concern for treatment as convincing evidence of non-punitive intent.⁹⁸ The Court stated that the law at issue placed a “statutory obligation” on the State of Illinois to provide treatment for individuals committed under its statute.⁹⁹ Moreover, the Court noted that, although commitment occurred in an institution under the authority of the State Corrections Department, the defendant’s confinement conditions were not inconsistent with the state’s goal of treatment.¹⁰⁰ Further, the Court noted that the state “disavowed any interest in punishment” by allowing for release as soon as the individual was no longer mentally ill.¹⁰¹

defendant was “mentally ill and had criminal propensities to commit sexual assaults.” *Id.* As a result of the testimony of the psychiatrists and the testimony of the defendant’s victim, the trial court found that confinement under the Act was warranted. *See id.*

94. *See id.* at 368.

95. *See id.* at 368-69 (applying the *Ward* two-pronged test but specifically noting that the Court would look beyond the civil label); *supra* notes 87-88 and accompanying text (rejecting the idea that a “civil label” alone indicated a legislature’s non-punitive intent in enacting a civil involuntary commitment statute).

96. *See Allen*, 478 U.S. at 368 (noting that the legislature stated that the proceedings under the Act should be “civil in nature”).

97. *See id.* at 369.

98. *See id.* at 369-70; *see also Kansas v. Hendricks*, 117 S. Ct. 2072, 2085 (1997) (noting that the Kansas Sexually Violent Predator Act, like the Act in *Allen*, imposed a “statutory obligation” on the state to provide care and treatment); *State v. Turner*, 556 S.W.2d 563, 566 (Tex. 1977) (stating that civil confinement of mental patients in Texas may be imposed only for the purposes of care and treatment); *supra* note 89 and accompanying text (discussing the Court’s focus on treatment in the punitive/preventive analysis).

99. *See Allen*, 478 U.S. at 369.

100. *See id.* at 373; *see also Baxstrom v. Herold*, 383 U.S. 107, 114 (1966) (stating that although a state’s corrections department is free to commit dangerously insane persons, classifications of these individuals cannot be “wholly arbitrary”); Brief for Respondent and Cross Petitioner at 18, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (noting that the statute at issue in *Allen* allowed for treatment to be administered in a variety of facilities and not simply in a secure facility); Francis, *supra* note 11, at 150-51 (commenting that Minnesota’s civil sex offender commitment statute is non-punitive under *Allen* because the confinement conditions are distinct from the criminal confinement conditions and consistent with the statute’s goal of treatment).

101. *See Allen*, 478 U.S. at 370.

Under the second prong, the Court looked to one *Kennedy* factor to scrutinize whether the statute was truly non-punitive.¹⁰² The Court found that the statute did not promote retribution and deterrence, the traditional aims of punishment, because the law provided for care and treatment of confined individuals.¹⁰³ The Court also held that the use of evidence of prior criminal conduct in the sexually dangerous person proceeding served only to determine the mental condition and dangerousness of the individual, and not to punish past crimes in and of themselves.¹⁰⁴

In finding the Illinois act civil rather than criminal in nature, the Court concluded that individuals committed under the statute could not avail themselves of the Fifth Amendment's privilege against self-incrimination.¹⁰⁵ The *Allen* Court determined that legislative labels were not controlling in the punitive/preventive analysis.¹⁰⁶ The Court rather adopted a legislative goal of treatment as the benchmark for determining whether an involuntary civil commitment statute was "so punitive either in purpose or effect as to negate [the State's] intention."¹⁰⁷ Although the Court retained the basic two-pronged structure, the Court tailored the test in the context of civil confinement laws.¹⁰⁸ By requiring such laws to contain meaningful treatment provisions in order to pass constitutional standards, the Court advanced a more conservative approach to a state's right to regulate dangerous individuals through civil confinement.¹⁰⁹

102. *See id.*

103. *See id.*

104. *See id.* at 371.

105. *See id.* at 375.

106. *See id.* at 369.

107. *Id.* (internal quotations omitted) (alteration in original); *see also* *Kansas v. Hendricks*, 117 S. Ct. 2072, 2092 (1997) (Breyer, J., dissenting) (noting that the *Allen* Court regarded treatment as a "touchstone" in the punitive/preventive analysis).

108. *See Allen*, 478 U.S. at 369-70 (finding the Act non-punitive because Illinois had provided treatment to those committed under the Act); *see also* *Kansas v. Hendricks*, 117 S. Ct. 2072, 2098 (1997) (Breyer, J., dissenting) (warning that where an individual's liberty interest is at stake, legislatures cannot cut constitutional corners but must "tailor the statute to fit the nonpunitive civil aim of treatment"); *supra* note 95 and accompanying text (discussing the less deferential two-pronged test in the context of civil commitment laws).

109. *See supra* note 87 and accompanying text (comparing the *Ward* test to the *Allen* test and concluding that the *Allen* test is less deferential); *see also* Blacher, *supra* note 5, at 913 (stating that "[p]reventive detention without treatment is asserted then to be punitive and thus the invasion of the offender's liberty interest is not justified by the state's *parens patriae* power").

II. KANSAS V. HENDRICKS: APPLYING THE DEFERENTIAL WARD TEST TO THE PUNITIVE/PREVENTIVE ANALYSIS OF INVOLUNTARY CIVIL COMMITMENT STATUTES

In *Kansas v. Hendricks*,¹¹⁰ the Supreme Court applied the *Ward* Court's deferential two-pronged test to the Kansas Sexually Violent Predator Act in order to determine whether the Act was punitive in nature and thus violated the Double Jeopardy and Ex Post Facto Clauses of the Constitution.¹¹¹ The Court also found that the statute's treatment provisions constituted additional, yet persuasive, evidence that the legislature intended the statute to be non-punitive.¹¹²

In 1984, the state district court sentenced Hendricks to five to twenty years in prison for taking indecent liberties with two teenage boys.¹¹³ Just prior to Hendricks's parole date, the State of Kansas petitioned to have him involuntarily committed as a sexually violent predator pursuant to the Kansas Sexually Violent Predator Act.¹¹⁴ A jury unanimously found Hendricks to be a sexually violent predator within the meaning of the Act, and the district court committed Hendricks to the custody of the State Secretary of Social and Rehabilitation Services.¹¹⁵

Hendricks appealed to the Supreme Court of Kansas arguing that the Act violated the Due Process, Double Jeopardy, and Ex Post Facto Clauses of the Constitution.¹¹⁶ The court found the Act invalid on substantive due process grounds,¹¹⁷ and the State of Kansas appealed to the United States Supreme Court.¹¹⁸ Hendricks filed a cross-petition on appeal reasserting his double jeopardy and ex post facto claims.¹¹⁹ The Su-

110. 117 S. Ct. 2072 (1997).

111. *See id.* at 2081 (explaining that categorization of a proceeding as civil or criminal is a question of statutory construction).

112. *See id.* at 2084. The Court stated, however, that providing treatment to individuals confined under the Act need not be the "primary" purpose of the law in order to characterize it as non-punitive. *See id.*

113. *See id.* at 2078; *In re Hendricks*, 912 P.2d 129, 130 (Kan. 1996), *rev'd*, 117 S. Ct. 2072 (1997); *see also* Rodriguez, *supra* note 10, at 10 (chronicling Hendricks's criminal history and noting that he had admitted to forcing his own stepchildren to perform oral sex on him). Hendricks's own mother abused him as a child by making him wear girls' clothing and underwear. *See* Rodriguez, *supra* note 10, at 10.

114. *See Hendricks*, 117 S. Ct. at 2078.

115. *See id.* at 2078-79 (finding persuasive Hendricks's admission that he would molest again if released from prison in determining his status as a sexually violent predator within the meaning of the Act); *see also supra* notes 27-28 (describing the relevant provisions of the Act as applied to Hendricks).

116. *See Hendricks*, 117 S. Ct. at 2079.

117. *See In re Hendricks*, 912 P.2d at 138.

118. *See Kansas v. Hendricks*, 116 S. Ct. 2522 (1996).

119. *See Hendricks*, 117 S. Ct. at 2081.

preme Court granted certiorari to determine whether the Act violated Hendricks's rights under all three constitutional challenges.¹²⁰

A. The Majority Opinion: Reaffirming the Two-Pronged Test and Redefining the Role of Treatment in the Punitive/Preventive Analysis

In *Hendricks*, the Supreme Court held that the Kansas Sexually Violent Predator Act did not violate the Due Process, Double Jeopardy, or Ex Post Facto Clauses.¹²¹ In characterizing the Act as non-punitive in nature, the majority applied the deferential two-pronged *Ward* test.¹²² In so doing, the majority rejected the concept that care and treatment must be the primary aim of a civil commitment statute in order to classify the law as non-punitive for constitutional purposes.¹²³

1. Reaffirming the Ward Two-Pronged Test

The *Hendricks* majority began its inquiry into whether the Act established criminal or civil proceedings by first reviewing the Kansas legislature's intent.¹²⁴ In ascertaining whether the legislature intended the statute to establish civil non-punitive proceedings, the majority applied the first prong of the punitive/preventive analysis formulated in *Ward*.¹²⁵ As in *Ward*, the majority deferred to the legislature's choice of a civil label as evidence of the legislature's "manifest intent" to provide a civil rather than criminal penalty.¹²⁶ The majority further relied on other factors, such as the legislature's placement of the Act in the probate code as opposed to the criminal code, as additional evidence of the statute's non-punitive purpose.¹²⁷ By applying the deferential intent prong of *Ward*,

120. *See id.* at 2076.

121. *See id.* at 2086.

122. *See id.* at 2081-82 (looking at civil labels under the first prong as evidence of the legislature's non-punitive intent and stating that under the second prong only "the clearest proof" that "the statutory scheme [was] so punitive either in purpose or effect" would override the legislature's non-punitive intent) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980); *see also* Porter, *supra* note 2, at 552 (describing the deferential nature of the *Ward* test).

123. *See Hendricks*, 117 S. Ct. at 2084 (finding that an ancillary purpose of treatment would suffice to render a statute non-punitive).

124. *See id.* at 2081-82 (stating that "[n]othing on the face of the statute suggests that the legislature sought to" enact a punitive commitment scheme).

125. *See id.*

126. *See id.* at 2082; *see also* Goodman, *supra* note 7, at 785 & n.133 (noting that when legislative intent was ambiguous, the Court would accept a "civil" label as establishing a non-punitive intent).

127. *See Hendricks*, 117 S. Ct. at 2082; *see also Ward*, 448 U.S. at 249 (relying on the juxtaposition of a plainly labeled "civil" penalty with a penalty labeled "criminal" as additional evidence of the non-punitive nature of the law); *supra* note 71 (discussing the non-

the majority acknowledged Kansas's authority to regulate and protect its citizens under its general police powers.¹²⁸

Even though the majority found that the legislature intended to create a non-punitive commitment scheme, the Court still applied the second prong, recognizing that "a civil label is not always dispositive."¹²⁹ The majority stated that it would ignore the legislature's non-punitive intent, signified by a civil label, only in cases where the defendant presented compelling evidence of a contrary legislative intent or purpose to punish.¹³⁰

In applying the second prong of the deferential *Ward* punitive/preventive analysis, the majority looked to the seven factors listed in the *Kennedy* decision.¹³¹ The *Hendricks* Court determined that commitment proceedings under the Act did not involve either retribution or deterrence—the two principal aims of criminal punishment.¹³² Moreover, the Court found that commitment under the Act did not depend on an individual's criminal intent.¹³³ Although the majority recognized that the law involved an affirmative restraint on an individual's liberty, the majority noted that this fact alone did not render the statute punitive.¹³⁴ The Court also stated that involuntary civil commitment laws historically have been regarded as non-punitive.¹³⁵

punitive inference that arises when a civil statute is placed next to a criminal statute).

128. See *Hendricks*, 117 S. Ct. at 2083 (stating that involuntary confinement to protect the community from dangerous individuals is a legitimate exercise of a state's police power); see also Richards, *supra* note 3, at 338 (noting that the Court has acknowledged that detention for the purpose of protecting the public is not punishment per se).

129. *Hendricks*, 117 S. Ct. at 2082 (internal quotations omitted).

130. See *id.*

131. Cf. *id.* Although the Court does not refer to these criteria as deriving from *Kennedy*, reference to *Kennedy* establishes the origin of these factors. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (outlining the seven factors traditionally used to determine the punitive nature of a law where the legislative intent is ambiguous).

132. See *Hendricks*, 117 S. Ct. at 2082 (finding that "[t]he Act's purpose is not retributive because it does not affix culpability for prior criminal conduct"). The Court also found that the Act did not function as a deterrent because persons suffering from a mental disorders are unlikely to be deterred by the threat of confinement. See *id.*; see also *Kennedy*, 372 U.S. at 168 (stating that a law may be considered punitive if it promotes retribution and deterrence).

133. See *Hendricks*, 117 S. Ct. at 2082 (finding that the Act did not require scienter); see also *Kennedy*, 372 U.S. at 168 (noting that a scienter requirement in the sanction evidences a punitive intent).

134. See *Hendricks*, 117 S. Ct. at 2082; see also *Kennedy*, 372 U.S. at 168 (requiring an analysis of whether a law involves an affirmative disability or restraint in determining a law's punitive nature).

135. See *Hendricks*, 117 S. Ct. at 2083 (noting that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment") (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)).

In finding the Act civil rather than criminal, the majority reaffirmed the validity of the *Ward* two-pronged test in the punitive/preventive inquiry.¹³⁶ In addition, this application of the deferential *Ward* test signified the Court's desire to allow states freely to formulate methods by which to address the growing threat that released sex offenders pose to society.¹³⁷

2. Redefining the Role of Treatment

Despite the Court's earlier reasoning that a civil commitment statute's lack of comprehensive treatment provisions could render a law punitive,¹³⁸ the *Hendricks* majority de-emphasized treatment as a critical part of the punitive/preventive analysis.¹³⁹ The majority concluded that despite the Kansas Supreme Court's recognition of the Act's treatment provisions as "somewhat disingenuous," this finding did not offer the "clearest proof" that the legislature intended to create a punitive sanction.¹⁴⁰

The *Hendricks* Court noted that the incapacitation of dangerously insane individuals constituted a sufficiently legitimate non-punitive goal to sustain the statute's "civil" label, despite the fact that treatment remained merely "ancillary" to the overall purposes of the statute.¹⁴¹ The Court further asserted that even if adequate treatment did exist for *Hendricks*, and the State simply chose not to provide it to him, the Court

136. See *id.* (applying the two-pronged test of *Ward* to determine the Act's punitive nature).

137. Cf. *id.* at 2082 (suggesting that the *Ward* two-pronged test rarely rendered an ostensibly civil statute as actually criminal); see also Teir & Coy, *supra* note 4, at 413 (noting that community notification and registration statutes do not offer as much protection to society against the dangers of sexual predators as do civil commitment laws); *supra* note 4 and accompanying text (discussing the regulatory powers of the states and the federal government to protect the health and welfare of society).

138. See *Allen v. Illinois*, 478 U.S. 364, 370 (1986) (finding the Illinois Sexually Dangerous Persons Act non-punitive, in part, because of its goal of providing treatment); see also McAllister, *supra* note 5, at 455 (stating that the *Allen* Court relied on the legislature's concern for care and treatment to conclude that the law was non-punitive); Francis, *supra* note 11, at 131 (interpreting the *Allen* Court's decision as requiring civil commitment laws to contain treatment provisions in order to find them non-punitive).

139. See *Hendricks*, 117 S. Ct. at 2084 (noting that a statutory obligation for the state to provide care and treatment sufficed to render the Act non-punitive); see also Butler, *supra* note 33, at S49 (arguing that the *Hendricks* Court "lessened the importance of treatment" in determining whether civil confinement is punitive or non-punitive).

140. See *Hendricks*, 117 S. Ct. at 2084; see also *In re Hendricks*, 912 P.2d 129, 136 (Kan. 1996) (noting that the goal of the Act was to continue incarceration), *rev'd*, 117 S. Ct. 2072 (1997).

141. See *Hendricks*, 117 S. Ct. at 2084 (stating that treatment did not have to be the state's overriding concern).

would remain reluctant to classify the Act as punitive.¹⁴² In affording extreme deference to the Kansas legislature, the majority reasoned that since the language of the Act imposed an obligation on the State to provide Hendricks with treatment, the Court would not question whether he actually received any.¹⁴³

In rejecting an earlier focus upon treatment as an important indicator of a civil commitment law's non-punitive nature, the Court scaled back the role that treatment previously had occupied in the punitive/preventive analysis.¹⁴⁴ In particular, the Court indicated that where a

142. See *id.* (interpreting the Kansas Supreme Court decision as implying that although Hendricks suffered from a treatable condition, the State did not treat him during his confinement); see also *id.* at 2096 (Breyer, J., dissenting) (noting that the State decided that Hendricks was amenable to treatment, but refused to provide it to him). Although the Constitution does not explicitly guarantee a right to treatment for mentally ill persons involuntarily confined to institutions, courts have interpreted the Constitution to grant such a right. See, e.g., *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966) (implying that the Constitution guarantees a right to treatment for mentally ill individuals who are involuntarily committed); *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971) (holding that institutionalized mental patients have a constitutional right to receive treatment); ROBERT M. LEVY & LEONARD S. RUBENSTEIN, *THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 205 (1996) (addressing whether a constitutional right to treatment exists for individuals with mental disabilities). Furthermore, the Supreme Court acknowledged that institutionalized mental patients have a right to minimally adequate treatment. See *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982). Although the Constitution requires treatment as a precondition for civil confinement in cases where an individual suffers from a treatable mental illness, debate exists as to whether a state could constitutionally confine a mentally ill and dangerous individual for whom no treatment existed. See *Hendricks*, 117 S. Ct. at 2084, 2090; *O'Connor v. Donaldson*, 422 U.S. 563, 583-84 (1975) (Burger, J., concurring) (acknowledging that the Constitution may not prevent a state from confining a mentally ill individual unamenable to treatment). Both the majority and dissent in *Hendricks* reasoned that if the psychiatric community had not yet developed effective treatment methods for pedophilia, Hendricks's confinement could remain constitutional. See *Hendricks*, 117 S. Ct. at 2084, 2090. The Justices, however, noted that Kansas conceded that the state could provide Hendricks with treatment. See *id.*; see also *The Supreme Court, 1996 Term—Leading Cases*, 111 HARV. L. REV. 259, 262-63 (1997) (discussing the majority's interpretation of Kansas's ability to commit Hendricks absent a treatable mental illness).

143. See *Hendricks*, 117 S. Ct. at 2084-85 (commenting that because treatment provisions were written into the statute, the Court would assume that treatment was being provided).

144. Compare *id.* at 2084 (requiring only the possibility that treatment constitute an ancillary aim of a civil involuntary commitment law in order for the Court to view the law as non-punitive), with *Allen v. Illinois*, 478 U.S. 364, 369-70 (1986) (finding a civil involuntary commitment law non-punitive based on the law's primary purpose of providing treatment to committed individuals); see also *Butler*, *supra* note 33, at S49 (commenting that the *Hendricks* Court de-emphasized the role of treatment as a condition of civil commitment); John W. Parry, *Executive Summary and Analysis*, 21 MENTAL & PHYSICAL DISABILITY L. REP. 435, 436 (1997) (stating that following the *Hendricks* decision, the role of treatment in the civil commitment context "will be subject to new interpretations").

statutory promise to provide care and treatment existed, the actual structure of the treatment program, if any, played no part in the punitive/preventive analysis.¹⁴⁵ Under this analysis, the majority evinced a sensitivity to a state's need to protect its citizens from future harm at the hands of sexual predators.¹⁴⁶

B. *The Concurrence: Revisiting the Role of Treatment*

Justice Kennedy, in a concurring opinion, focused on whether the Act was punitive by analyzing the legislature's goal in creating the treatment provisions.¹⁴⁷ Justice Kennedy agreed with the majority that Kansas's intention to provide treatment for individuals committed under the Act was sufficient to render the law non-punitive.¹⁴⁸ Justice Kennedy stressed, however, that if the Kansas legislature had created the treatment provisions as a "mere pretext" for continued punishment, the law would have violated the ex post facto prohibition.¹⁴⁹ Justice Kennedy cautioned that, in the absence of a true goal to afford treatment, "the practical effect of the Kansas law may be to impose confinement for life."¹⁵⁰ In light of the reality that pedophilia treatment schemes were not very advanced, Justice Kennedy expressed concern as to the wisdom of

But see McAllister, *supra* note 5, at 455 (predicting that the Hendricks Court would find the Kansas Act constitutional because of the Act's focus on care and treatment of sexual predators).

145. *See Hendricks*, 117 S. Ct. at 2084-85 & nn.4 & 5 (acknowledging that although treatment remained essentially lacking for Hendricks for close to a year after his commitment, Kansas had broad discretion in formulating the treatment regimen).

146. *See supra* notes 19 & 124-37 and accompanying text (discussing the *Ward* Court's deferential two-pronged punitive/preventive analysis and the *Hendricks* Court's application of that test); *cf.* Green, *supra* note 5, at 1542 n.10 (stating that after the Supreme Court's holdings in *Hendricks* and *Ursery*, "it is now harder than ever to distinguish the 'criminal' from the 'civil'").

147. *See Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring) (noting that the Act did not violate the Ex Post Facto Clause because the care and treatment provisions under the Act were a legitimate goal of the State and not "a sham or mere pretext"). *But see* Brief for Respondent and Cross Petitioner at 21-22, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (calling the Act "a thinly-veiled attempt to seek an additional term of incarceration against a defendant it believes it may have treated too leniently more than a decade ago").

148. *See Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring).

149. *See id.*

150. *Id.* (noting the importance of an effective treatment scheme to a non-punitive determination); *see also* James R. Covington, III, *Preventive Detention for Sex Offenders*, 85 ILL. B.J. 493, 501 (1997) (interpreting Justice Kennedy's concurrence in *Hendricks* to require that states offer legitimate medical treatment to sexually violent predators in order for the offenders' confinement to remain non-punitive).

allowing the civil system rather than the criminal system to confine an individual for life.¹⁵¹

Although he recognized a state's police power authority to confine mentally ill and dangerous individuals, Justice Kennedy nonetheless warned of the potential threats to individual rights when the civil and criminal systems are combined to effect the common goal of incapacitation.¹⁵² Justice Kennedy noted that once the civil system is used to exact retribution and deterrence, goals reserved for the criminal justice system, the law has crossed the constitutional line.¹⁵³ Justice Kennedy asserted that where involuntary civil commitment statutes lack effective treatment provisions, "an indication of the forbidden purpose to punish" exists.¹⁵⁴ Thus, Justice Kennedy followed the principle that treatment was a benchmark in distinguishing punitive from preventive state involuntary commitment laws.¹⁵⁵

C. *The Dissent: Elevating the Role of Treatment in the Punitive/Preventive Analysis*

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented with respect to the majority's interpretation of the Act's non-punitive nature in light of the Ex Post Facto Clause.¹⁵⁶ The dissent, following the Court's focus on treatment in earlier cases, concluded that treatment must be a civil commitment law's overriding goal in order to characterize the law as non-punitive for constitutional purposes.¹⁵⁷

In searching beyond the Act's civil label and examining the legislature's concern for treatment, the dissent found that treatment was not a primary goal of the statute.¹⁵⁸ The dissent agreed with the state court's

151. See *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring).

152. See *id.*

153. See *id.* (cautioning that, "while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone").

154. *Id.*

155. See *id.*; see also Francis, *supra* note 11, at 156 (noting that laws providing for the civil confinement of sexual predators escape a punitive categorization because of their goal to treat the offenders).

156. See *Hendricks*, 117 S. Ct. at 2090-92 (Breyer, J., dissenting) (applying the *Ward* two-pronged test initially, but resting its analysis primarily on the legislature's concern for treatment).

157. See *id.* at 2092-93 (stressing that the Act was punitive because the State had not provided for any treatment at the time of Hendricks's commitment); see also *Rouse v. Cameron*, 373 F.2d 451, 452 (D.C. Cir. 1966) (stating that "[t]he purpose of involuntary hospitalization is treatment, not punishment").

158. See *Hendricks*, 117 S. Ct. at 2091-93; Thomas J. Foltz, *Review of High Court*

categorization of the treatment provisions of the Act as “somewhat disingenuous.”¹⁵⁹ The dissent relied on both the trial court record and the legislative debate surrounding the law’s enactment, concluding that the legislature’s main purpose was the continued incarceration of sexually violent predators.¹⁶⁰ The dissent regarded statements made by sponsors of the Act particularly persuasive to a punitive finding.¹⁶¹

The dissent also noted that although Kansas had committed Hendricks under the Act, no treatment was forthcoming.¹⁶² Justice Breyer concluded that Kansas’s failure to treat Hendricks combined with the Act’s lack of a treatment scheme, evinced the legislature’s punitive intent.¹⁶³ Additionally, because the legislature deferred both diagnosis and treatment of Hendricks until only weeks prior to his release, the dissent found this indicative of the Act’s intent to punish.¹⁶⁴ The dissent noted that this delay in treatment was incompatible with the legislature’s own acknowledgment that sexual predators required long-term treatment.¹⁶⁵ Finally, the *Hendricks* dissent compared the Act’s treatment provision with the treatment provisions embodied in other states’ sex offender statutes and

Cases, 12 CRIM. JUST. 34, 36 (1997) (noting that the *Hendricks* dissent followed the *Allen* Court’s focus on treatment in finding the Kansas Act punitive in nature).

159. *See Hendricks*, 117 S. Ct. at 2093 (Breyer, J., dissenting).

160. *See id.* (describing the views of those who supported the Act); *see also* Brief for Respondent and Cross Petitioner at 5-8, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (arguing that statements from the sponsors of the Kansas legislation strongly evinced the legislature’s punitive intent). Kansas State Attorney General Carla Stovall stated, “We cannot open our prison doors and let these animals back into our communities.” Brief for Respondent and Cross Petitioner at 6, *Hendricks* (No. 95-1649). Stovall further asserted that the law “would allow us to keep the sexually violent offenders locked up indefinitely.” *Id.*; *see also Prevention Versus Punishment, supra* note 3, at 1727 (arguing that in determining whether a sex offender commitment law is punitive, courts must decide “whether [the law’s] primary effect is treatment of the affected individual, or satisfaction of the societal interest in locking sex offenders up and throwing away the key”).

161. *See Hendricks*, 117 S. Ct. at 2093 (Breyer, J., dissenting). Justice Breyer argued that supporters of the legislation hoped that the Act would have the effect of confining sexually violent predators for life. *See id.*; *see also Doe v. Pataki*, 940 F. Supp. 603, 621 (S.D.N.Y. 1996) (stating that an examination of legislative intent must extend beyond the text of the preamble and into the legislative debates surrounding the enactment of the state’s sex offender registration law), *aff’d in part, rev’d in part*, 120 F.3d 1263 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1066 (1998).

162. *See Hendricks*, 117 S. Ct. at 2093 (Breyer, J., dissenting) (stating that the director of the commitment program affirmed that Hendricks received no treatment).

163. *See id.*

164. *See id.* at 2093-94 (arguing that an act intending only to confine logically would not focus on beginning treatment sooner).

165. *See id.* at 2094.

found that those statutes offered treatment soon after the individual's arrest.¹⁶⁶

Although the dissent recognized that a state, pursuant to its police powers, may commit those who are dangerous and mentally ill for treatment, the dissent asserted that Kansas, at the time it committed Hendricks, had no intention of providing any real treatment for him.¹⁶⁷ The dissent emphasized that where an individual's liberty interest is at stake, a state cannot "cut corners," but must craft its law, in both purpose and effect, to suit the non-punitive goal of treatment.¹⁶⁸ Although the *Hendricks* dissent essentially endorsed the use of the two-pronged test, the dissent concluded that the majority's application of the test wrongfully failed to examine beyond the civil label and that the absence of an effective treatment plan rendered the Act unconstitutional.¹⁶⁹

III. REFORMULATING THE PUNITIVE/PREVENTIVE DOCTRINE

Although the Court in *Hendricks* applied the two-pronged punitive/preventive analysis developed by *Ward*,¹⁷⁰ the Court failed to apply the test to involuntary civil commitment statutes in accordance with *Allen*.¹⁷¹ The majority disregarded the *Allen* Court's emphasis on treatment as the primary standard against which to measure a civil commitment law's punitive nature.¹⁷² As a result, the majority reformulated the puni-

166. *See id.* at 2095 (stating that the Kansas Act, when compared to the sexually violent predator laws of ten other states, appears punitive); *see also* Blacher, *supra* note 5, at 912 (noting that constitutional problems arise when a state seeks to confine a person after criminally punishing him for the same offense).

167. *See Hendricks*, 117 S. Ct. at 2093 (Breyer, J., dissenting) (noting that Kansas did not have to postpone Hendricks's treatment until after he had served his prison sentence).

168. *See id.* at 2098.

169. *See id.*; *see also* Doe v. Pataki, 120 F.3d 1263, 1275 n.14 (2d Cir. 1997) (noting that Justice Breyer found the Kansas Act at issue in *Hendricks* punitive because of the law's lack of an effective treatment scheme for the defendant), *cert. denied*, 118 S. Ct. 1066 (1998).

170. *See supra* note 122 and accompanying text (describing the majority's reliance on the *Ward* punitive/preventive test).

171. *See Hendricks*, 117 S. Ct. at 2085 & n.5 (acknowledging that although Kansas did not even offer Hendricks treatment at the time of his confinement, his confinement nonetheless remained non-punitive); *see also* Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks at 16, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (arguing that the Kansas statute lacked a sincere interest in treating Hendricks, unlike the Illinois law at issue in *Allen* where the very structure of the law promoted treatment); *supra* notes 138-40 and accompanying text (describing the *Hendricks* Court's disregard for treatment as a crucial indicator of a civil commitment law's non-punitive aim).

172. *See Hendricks*, 117 S. Ct. at 2084 (commenting that treatment did not have to be the state's overriding concern). The majority ignored the state court's finding that treat-

tive/preventive analysis for civil commitment statutes.¹⁷³ As Justice Breyer recognized in his dissent, the holding in *Hendricks* effectively stripped away the *Allen* Court's focus on treatment in the punitive/preventive analysis.¹⁷⁴ Thus, the *Hendricks* majority essentially expanded a state's police power authority to confine dangerous sex offenders under civil commitment statutes.¹⁷⁵

A. *The Hendricks Court Correctly Applied the Ward Two-Pronged Test*

The *Hendricks* Court appropriately employed the two-pronged test established by *Ward*.¹⁷⁶ By first considering legislative intent and then applying the *Kennedy* factors, the majority adhered to precedent setting forth the general framework within which to test a law's punitive nature.¹⁷⁷

As in *Ward*, the majority in *Hendricks* first examined whether the legislature intended to create a civil non-punitive sanction.¹⁷⁸ The majority properly considered the Act's "civil" label as rebuttably presumptive evidence that the legislature contemplated a non-punitive law.¹⁷⁹ In ac-

ment was not the goal of the statute. *See id.*; *see also supra* notes 139-45 and accompanying text (discussing the majority's interpretation of the role of treatment in the punitive/preventive analysis in light of *Allen*).

173. *See supra* notes 138-45 (discussing the majority's application of the deferential two-pronged test and its rejection of the *Allen* Court's reliance on treatment as an essential element of a truly non-punitive civil commitment law).

174. *See Hendricks*, 117 S. Ct. at 2097 (Breyer, J., dissenting) (stating that if the Court followed the *Allen* Court's analysis, it would have determined that the law was punitive); *see also* Butler, *supra* note 33, at S49 (asserting that the *Hendricks* Court de-emphasized the significance of treatment as an important qualification for involuntary confinement).

175. *See* Brief for Leroy Hendricks Cross-Petitioner at 25, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (contending that the Kansas legislature had attempted to expand its police powers by disguising the criminal nature of its law with a hollow promise to provide treatment); *see also* Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks at 8, *Hendricks* (No. 95-1649) (stating that the Act signifies an impermissible extension of the state's *parens patriae* power); *cf.* Richards, *supra* note 3, at 331 (commenting that the Supreme Court gradually had expanded a state's authority to restrict the liberty of individuals under its police powers).

176. *See supra* notes 122-35 and accompanying text (discussing the majority's application of the *Ward* two-pronged test); *see also supra* notes 14-19 (explaining how the *Kennedy-Ward* test has evolved into the primary method against which to judge a law's punitive nature).

177. *See supra* notes 19-20 and accompanying text (describing the *Ward* two-pronged test as the mode of analysis when confronted with punitive/preventive issues).

178. *See Hendricks*, 117 S. Ct. at 2081-82 (stating that the issue of whether a proceeding is punitive or preventive is a question of "statutory construction").

179. *See id.* at 2082; *see also* Porter, *supra* note 2, at 550-51 (describing the *Ward* Court's position that a "civil" label established a rebuttable presumption that the legislature intended the law to be non-punitive).

cord with an earlier decision, as well, the majority noted that “a civil label is not always dispositive” when analyzing the punitive nature of civil commitment statutes.¹⁸⁰

Under the second prong, the majority considered the seven factors first delineated by the *Kennedy* Court and later adopted by the Court in *Ward*.¹⁸¹ These factors, however, rarely offered the clear proof required to override a legislature’s intention to create a civil law.¹⁸² Therefore, the majority argued that these factors, as applied to the Kansas statute, did not render the Act punitive.¹⁸³

The dissent disagreed with the majority, contending that the evidence indicated that the Act constituted punishment.¹⁸⁴ Unlike the *Ward* Court, which stated that the seven factors were helpful but not binding in the punitive/preventive analysis, the dissent considered the factors more determinative in such an analysis.¹⁸⁵ The dissent thus ignored firmly rooted precedent signaling the non-binding nature of the *Kennedy* factors when it stated that the factors actually added up to a punitive determination.¹⁸⁶ Although historically the *Kennedy* factors had failed to yield punitive findings, the dissent gave the factors greater weight than the Court had in previous decisions.¹⁸⁷

180. See *Hendricks*, 117 S. Ct. at 2082 (internal quotations omitted); see also *Allen v. Illinois*, 478 U.S. 364, 369 (1986) (stating that a civil label is not always controlling on the issue of legislative intent).

181. See *Hendricks*, 117 S. Ct. at 2082 (stating that the Kansas law neither required a finding of scienter nor functioned as a deterrent to future criminal conduct); see also *supra* notes 131-35 and accompanying text (discussing the Court’s use of the *Kennedy* factors in its analysis). But see *Hendricks*, 117 S. Ct. at 2097 (Breyer, J., dissenting) (stressing that if the Act were tested against the factors set forth in *Kennedy*, a punitive determination would result).

182. Cf. *Hendricks*, 117 S. Ct. at 2082 (analyzing the Act in light of the *Kennedy* factors but noting that they failed to meet the heavy burden of establishing by the “clearest proof” the punitive nature of the Act); see also *supra* note 56 and accompanying text (criticizing the *Kennedy* factors for producing inconsistent results).

183. See *Hendricks*, 117 S. Ct. at 2082 (applying the third and fourth *Kennedy* factors); *supra* notes 131-36 and accompanying text (describing the *Hendricks* majority’s application of the *Kennedy* criteria).

184. See *Hendricks*, 117 S. Ct. at 2098 (Breyer, J., dissenting) (arguing that the Act was punitive in light of the seven factors test).

185. See *id.*

186. See *id.*; see also *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (stating that once the legislature has indicated a non-punitive intent, such intent only will be set aside upon a showing of the “clearest proof” of a law’s punitive nature); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (commenting that the seven factors are “all relevant to the inquiry, and may often point in differing directions”).

187. See *Hendricks*, 117 S. Ct. at 2098 (Breyer, J., dissenting) (asserting that the *Kennedy* factors are “neither exhaustive nor dispositive,” but nonetheless stating that an application of the factors to the Kansas Act favored a punitive finding) (quoting *Ward*, 448

The majority, by issuing a non-punitive finding, impliedly agreed with the *Ward* Court's deferential test.¹⁸⁸ Reluctant to second guess the Kansas legislature's motivation in enacting the law, the majority deferred to the legislature's "civil" label as sufficient proof for a non-punitive finding.¹⁸⁹ Moreover, because the *Kennedy* factors led to ambiguous results in earlier cases, the majority correctly predicted that the factors would likewise fail to render the Kansas Act punitive.¹⁹⁰ The dissent, inconsistent with the *Ward* decision,¹⁹¹ aligned itself with the *Kennedy* Court and interpreted the seven factors as having a substantial impact on the punitive/preventive analysis.¹⁹²

B. Misinterpreting the Role of Treatment in the Punitive Preventive Analysis

Despite the majority's appropriate use of the two-pronged *Ward* punitive/preventive analysis, it nonetheless erred when it declined to consider seriously the role of treatment in its analysis of civil commitment stat-

U.S. at 249). *But see* Cheh, *supra* note 5, at 1358 (doubting the ability of the *Kennedy* factors to add up to a punitive finding).

188. *See Hendricks*, 117 S. Ct. at 2085; *see also supra* notes 17-20 and accompanying text (discussing the deferential nature of the *Ward* test).

189. *See Hendricks*, 117 S. Ct. at 2081-82 (explaining that the Court would "ordinarily defer" to the legislature's stated intent on the question of whether its law was civil or criminal). The majority also noted that *Hendricks* failed to provide the "clearest proof" required to override the legislature's non-punitive intent. *See id.*

190. *See id.* at 2082; *supra* note 56 and accompanying text (discussing the barrage of criticism which the *Kennedy* factors have received as being ineffective and inconsistent in the punitive/preventive analysis); *see also Kennedy*, 372 U.S. at 168-69 (acknowledging that a determination of whether a law is punitive or preventive under the factors is sometimes difficult). *But see* *Artway v. Attorney Gen. of N.J.*, 876 F. Supp. 666, 692 (D.N.J. 1995) (concluding that under the sixth *Kennedy* factor the court "must find" that the notification provisions of New Jersey's registration and community notification statute were punitive and therefore unconstitutional), *aff'd in part, vacated in part on other grounds*, 81 F.3d 1235 (3d Cir. 1996); *Roe v. Office of Adult Probation*, 938 F. Supp. 1080, 1091 (D. Conn. 1996) (relying on the *Kennedy* factors in finding that the state's sex offender notification statute constituted punishment in violation of the ex post facto clause).

191. *See Hendricks*, 117 S. Ct. at 2098 (Breyer, J., dissenting) (stating that the *Kennedy* factors as applied to the Kansas Act "argue[] here in favor of a constitutional characterization as 'punishment'"). *But see* *United States v. Ward*, 448 U.S. 242, 248-51 (1980) (stating that the *Kennedy* factors must provide the "clearest proof" of a civil law's punitive nature in order to override the legislature's stated non-punitive goal).

192. *See Hendricks*, 117 S. Ct. at 2098 (Breyer, J., dissenting) (arguing that the Act was punitive in light of the *Kennedy* factors); *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) (establishing the importance of the seven factors in a punitive/preventive analysis when the Court could not decipher a clear legislative intent). *But see supra* note 56 and accompanying text (presenting the legal criticism against the seven factors).

utes.¹⁹³ Consequently, the Court failed to accord the *Allen* Court's reasoning its proper weight in the punitive/preventive analysis.¹⁹⁴

Both the majority and concurrence departed from the *Allen* Court's reliance on treatment as determinative of the punitive/non-punitive nature of a statute.¹⁹⁵ The majority initially argued that no treatment even existed for Hendricks, because the psychiatric community had not yet learned enough about pedophilia to provide comprehensive treatment.¹⁹⁶ If in fact no treatment program existed for sexual predators at the time of confinement, the majority asserted that Hendricks's confinement under the Act would nonetheless remain non-punitive.¹⁹⁷ Clearly, the majority disregarded Kansas's unambiguous acknowledgement that pedophilia was a treatable mental disorder at the time of Hendricks's confinement.¹⁹⁸ Furthermore, the Court concluded that even if Hendricks did

193. See *Hendricks*, 117 S. Ct. at 2085 (stating that a statutory obligation to provide treatment was sufficient to render the Act non-punitive); *supra* notes 138-39 and accompanying text (discussing the role of treatment in the punitive/preventive analysis).

194. Compare *Hendricks*, 117 S. Ct. at 2084 (noting that treatment did not have to be the overriding goal of the statute), with *Allen v. Illinois*, 478 U.S. 364, 369, 373 (1986) (finding that treatment was a crucial factor in distinguishing punitive from preventive civil commitments).

195. Compare *Hendricks*, 117 S. Ct. at 2084 (finding it sufficient that treatment was merely an "ancillary," rather than a primary, goal of the Act), with *Allen v. Illinois*, 478 U.S. 364, 368-69 (1986) (finding the Illinois statute non-punitive based on the legislature's overriding concern for treatment). Although Justice Kennedy appeared to regard treatment as an important indicator of a civil commitment law's non-punitive nature, he nonetheless agreed with the majority's finding that Kansas had effectively provided Hendricks with treatment simply by writing treatment provisions onto the face of the law. See *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring); see also *supra* notes 138-39 and accompanying text (discussing the Court's characterization of treatment in the punitive/preventive analysis).

196. See *Hendricks*, 117 S. Ct. at 2084 (arguing that the decision of the Kansas Supreme Court could be read as finding that no appropriate treatment schemes existed for Hendricks at the time of his confinement). The majority recognized, however, that where an individual suffers from a treatable mental illness, involuntary civil commitment must be accompanied by some form of treatment. See *id.*; cf. *Youngberg v. Romeo*, 457 U.S. 307, 326 (1982) (Blackmun, J., concurring) (asserting that due process prevents a state from denying treatment to an individual whom the state has involuntarily committed for "care and treatment"); Parry, *supra* note 144, at 436 (interpreting the *Hendricks* concurrence and dissent as finding that treatment cannot act as the basis for civil commitment but then be denied to committed individuals).

197. See *Hendricks*, 117 S. Ct. at 2084 (stating that "we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others"); see also Foltz, *supra* note 158, at 36 (noting that the majority's proposition that the Constitution permitted a state to confine civilly an untreatable, yet dangerous individual, rested on a 1902 decision regarding the confinement of an individual suffering from an untreatable, highly contagious disease).

198. See *Hendricks*, 117 S. Ct. at 2090 (Breyer, J., dissenting) (stating that Kansas admitted at oral argument that treatment existed for individuals like Hendricks who suffered

suffer from a treatable mental disorder, the undisputed fact that he did not receive or benefit from any treatment program had no impact on the Court's analysis.¹⁹⁹

In accordance with *Allen*, the majority should have looked beyond the language of the Act to determine whether the legislature actually intended to provide treatment to sexual predators.²⁰⁰ Instead, the *Hendricks* majority required only that the Act's language contain treatment provisions, regardless of whether Kansas ever provided treatment to confined individuals.²⁰¹ Similar to the deferential statutory construction approach utilized in *Ward*, the *Hendricks* majority found that as long as treatment remained a requirement of the Act in name, the Court would consider the law to be consistent with *Allen*.²⁰²

The dissent, however, pointed out that in addition to any statutory labels, the Court historically had considered the highest state court's interpretation of the purpose of its own law as an important element in the constitutional analysis.²⁰³ In dissent, Justice Breyer noted that the major-

from pedophilia). Moreover, the fact that individuals committed under the Act were receiving "31.5 hours of treatment per week" at the time of oral argument before the Court, supports the conclusion that Kansas not only regarded pedophilia as a treatable mental disorder, but also had the resources to provide such statutorily promised treatment. *See id.* at 2085. *But see* Ariel Rosler, M.D. & Eliezer Witztum, M.D., *Treatment of Men with Paraphilia with a Long-Acting Analogue of Gonadotropin-Releasing Hormone*, 338 NEW ENG. J. MED. 416, 416 (Feb. 12, 1998) (noting that treatment of male pedophiles through the use of "[s]urgical castration, psychotherapy, and pharmacotherapy" often fails).

199. *See Hendricks*, 117 S. Ct. at 2084-85 & n.5 (acknowledging that although *Hendricks* received no treatment at the time of his confinement, his confinement remained non-punitive because the State provided him with treatment ten months later).

200. *See id.* at 2084-85 (finding that the State's "statutory obligation" to provide treatment sufficed for a non-punitive finding); *see also* Cheh, *supra* note 5, at 1362-63 (noting that in looking beyond a civil label, the *Allen* Court found that the defendant did not provide the "clearest proof" of the punitive nature of the statute); Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks at 11, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (stating that the "Court has [] insisted on looking beyond labels in determining the criminal or civil character of a state imposition").

201. *See Hendricks*, 117 S. Ct. at 2085 (noting that at the time of *Hendricks*'s incorporation into the treatment program, the State had not yet implemented its planned treatment procedures); *see also* Brief for the American Civil Liberties Union et al. as Amicus Curiae at 4-5, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (arguing that treatment under the Kansas Act is merely a "pretext" for prolonged punishment).

202. *See Hendricks*, 117 S. Ct. at 2084 (commenting that because the law placed an "obligation" on the State Secretary of Social and Rehabilitative Services to provide treatment, such stated obligation was "critical" in demonstrating the Act's non-punitive nature).

203. *See id.* at 2092 (Breyer, J., dissenting) (stating that the Court usually deferred to the findings of the state and lower courts when determining the intent or purpose behind a legislative enactment).

ity had disregarded the Kansas Supreme Court's determination that the Act's treatment provisions were "somewhat disingenuous."²⁰⁴ The dissent reasoned that the Kansas legislature was more interested in confinement than in treatment.²⁰⁵ The fact that the prison delayed Hendricks's treatment until he had served most of his prison sentence was a factor on which the dissent relied to argue that treatment was not a real aim of the statute.²⁰⁶ Additionally, the dissent stressed that the Act's failure to provide for a less restrictive alternative to commitment, such as post-release supervision or halfway houses, strongly indicated a legislative objective of continued punishment of repeat sex offenders.²⁰⁷

The dissent's emphasis on a law's treatment goals, which it considered a significant indicator of a civil commitment law's non-punitive intent, is consistent with the most recent case on the subject.²⁰⁸ The *Hendricks* dissent advocated a less deferential stance than the majority in considering the state legislature's characterization of the Act as civil and non-punitive.²⁰⁹ The dissent closely aligned itself with the *Allen* Court by considering more than the legislature's stated intent when evaluating whether the primary purpose of the statute was consistent with the expressed non-punitive intent.²¹⁰

By deemphasizing the role of treatment in the two-pronged test as applied to civil involuntary commitment statutes, the majority broadened a state's police powers to regulate individual behavior for the benefit of the whole of society.²¹¹ Disagreeing with the majority's analysis, the dis-

204. *See id.* at 2093.

205. *See id.* (highlighting the fact that at the time Hendricks was confined the State had not funded any treatment program); *see also* Brief for Respondent and Cross Petitioner at 20, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (No. 95-1649) (contrasting the Kansas Act with the Illinois Act at issue in *Allen* and finding that unlike the Illinois law, the confinement conditions under the Kansas Act closely resembled the regimen imposed on convicts).

206. *See Hendricks*, 117 S. Ct. at 2093 (Breyer, J., dissenting) (noting that other states provide treatment to individuals while incarcerated).

207. *See id.* at 2094; *see also* LEVY & RUBENSTEIN, *supra* note 142, at 32, 33 (noting that a state must consider whether a "least restrictive alternative" to civil commitment is appropriate before confining an individual).

208. *See Allen v. Illinois*, 478 U.S. 364, 367 (1986) (regarding treatment as the benchmark in determining the punitive nature of an involuntary civil commitment statute).

209. *See Hendricks*, 117 S. Ct. at 2098 (Breyer, J., dissenting) (arguing that when referring to involuntary civil commitment, states must "hew to the Constitution's liberty-protecting line" and "tailor the statute to fit the nonpunitive civil aim of treatment").

210. *See Hendricks*, 117 S. Ct. at 2092; *supra* notes 156-63 and accompanying text (discussing the dissent's analysis of Kansas's intent to provide treatment to individuals committed under the Act).

211. *See supra* note 175 (asserting that the Court expanded a state's authority to civilly confine pursuant to its police powers by de-emphasizing the role of treatment in the puni-

sent viewed a state's authority to confine defendants under civil commitment statutes as more limited.²¹² The dissent's approach appears to be the correct one in applying a less deferential two-pronged test when analyzing the punitive nature of a civil involuntary commitment statute.

C. *The Impact of the Deferential Two-Pronged Test on Lower Courts*

The *Hendricks* holding will have a significant impact on the states' ability to deal with the dangers posed by sexual predators.²¹³ Legislatures are presently considering enacting civil involuntary commitment laws similar to the Kansas Sexually Violent Predator Act.²¹⁴ Such laws co-exist with sex offender registration and community notification laws, Megan's Laws, and are the next step in the fight against repeat sex crimes.²¹⁵ Not only will lower courts be quick to ratify their states' sexual predator civil involuntary commitment statutes, but they also will resolve any challenges to Megan's Laws in favor of a non-punitive finding.²¹⁶

Based on the *Hendricks* decision, upholding the involuntary confinement of sexual predators after serving most of a prison term, courts will have little difficulty ratifying less intrusive laws, such as registration and notification statutes, designed to attack the high recidivism rate prevalent among released sex offenders.²¹⁷ States that currently do not have civil commitment laws for sexual predators, will be encouraged to enact such

tive/preventive analysis).

212. See *Hendricks*, 117 S. Ct. at 2098 (Breyer, J., dissenting) (noting that the Constitution requires the states to provide treatment to civilly confined individuals); *supra* notes 206-08 and accompanying text (noting that the dissent correctly analyzed the act in using a less deferential test based on a consideration of the treatment provisions embodied in the law).

213. See Carol L. Kunz, Comment, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 AM. U. L. REV. 453, 481 (1998) (predicting that civil involuntary commitment as a method of protecting society against sexually violent predators is "expected to gain acceptance nationwide").

214. See *id.* at 481 & n.209 (noting that forty-five states filed briefs with the Court supporting Kansas's civil commitment measure); see also *Sex Offender's Confinement Beyond Term Troubles Court*, BALTIMORE SUN, Dec. 11, 1996 at 1A (stating that many other states that were considering enacting civil commitment laws similar to Kansas's anxiously awaited the Court's decision in *Hendricks*).

215. See Teir & Coy, *supra* note 4, at 413 (stressing the increased level of protection that civil commitment laws offer to society from sexually violent predators); *supra* notes 10-11 and accompanying text (noting that all fifty states and the federal government now have some form of sex offender registration law).

216. See McAllister, *supra* note 5, at 465-66 (arguing that because the Court found Kansas's sexual predator act constitutional, then the Court likely would find the less intrusive notification and registration laws constitutional as well).

217. See *id.* at 466.

legislation after *Hendricks*.²¹⁸ Public pressure, combined with a constitutional green light for the civil involuntary commitment of sexual predators, all but ensures that many states will follow Kansas's initiative.²¹⁹

IV. CONCLUSION

In relying on the deferential two-pronged test of *Ward*, the *Hendricks* majority essentially stripped the *Kennedy* and *Allen* tests of any influence those decisions had on the punitive/preventive analysis. Sensitive to the recent public outcry over crimes committed by released sex offenders, the majority desired to give states wide latitude in combating the threat that these individuals pose to communities. The majority went too far, however, in sacrificing individual liberty for the common good. Kansas easily could have avoided any ex post facto or double jeopardy challenges if the State simply had delivered on its promise to provide Hendricks with bona fide treatment. In upholding the Kansas Act, however, the majority chose to take the state's word that Hendricks would receive treatment. By ignoring the reality that Hendricks, in fact, received no treatment for almost one year following his commitment, the majority effectively excised the role of treatment from the punitive/preventive analysis.

218. See Butler, *supra* note 33, at S43 (noting that “[a]lthough the Court’s 5-4 decision appears close, it actually represents a ringing endorsement of the constitutionality of these laws”).

219. See *supra* notes 217-18 and accompanying text (predicting that the states will rush to pass sexual predator legislation similar to the Kansas law).

