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Regulation as Punishment

HADASSA NOORDA 

Theorists of criminal law widely agree that state punishment involves harsh treatment and stigma and that states must therefore provide protections for targeted individuals. But certain regulatory measures can also be used to impose harsh treatment and stigma. This paper addresses the stigmatic impact of harsh regulatory measures. It argues that harsh regulatory measures that label targeted individuals as risky impose a stigma that has the potential to significantly affect these individual's personal and professional relationships. Such measures include area restrictions applied to alleged terrorists and registration requirements for convicted sex offenders. I recommend ways of implementing legal safeguards for targeted individuals against the stigma involved in the employment of such measures.

Keywords: Punishment, regulatory measures, anti-terrorism measures, sex offender registration, sex offender notification, imprisonment

I. Introduction

The increasing use of regulatory measures as an alternative to or in addition to the criminal law process has been applauded as a form of decriminalization that permits the state to fulfill its regulatory function in a

way that is quicker and more effective than the criminal law process and less burdensome for the targeted individual.¹ However, a number of scholars have critiqued such practices because the employment of regulatory measures by the state is not subject to the specific safeguards for individuals targeted with criminal punishment.² For example, in the Netherlands, the state has targeted terrorist sympathizers with area restrictions. Targeted individuals subjected to those measures cannot be prosecuted in a criminal court if

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they have not committed a criminal offence; however, the state perceives them as terrorists, based on their violent statements, and it forbids them from visiting particular areas.³

Similarly, lower-level protections are offered to convicted sexual offenders targeted with registration and community notification. In the United States and the United Kingdom, sex offenders who have served their sentences are forced to register with authorities upon changing their addresses, either for a specified period of time, or for the rest of their lives. The specific rules vary from jurisdiction to jurisdiction, but the general aim is to protect people from dangerous sexual predators. In the US, the public is allowed to know if their fellow citizens have been convicted of sexual offences. The information is maintained in a public database on the internet, which displays, among other information, offenders' names, photographs, dates of birth, addresses, physical descriptions, employment information, and crimes. Registrants are subject to criminal prosecution if they do not update their information, for example, if they move or make changes to their facial features, such as growing a beard.⁴ The sex offender registry was challenged before the the Supreme Court of the United States in *Smith v. Doe* in 2013, on the grounds that offenders' conduct prior to the existence of the registry was being held against them. However, the Court ruled that the ban on ex post facto legislation only prohibits ex post facto punishment, not the retroactive application of other measures, like a sex offender registry.⁵

In the UK, sex offender registration is a civil measure aimed at reducing the risk of re-offending

and at making communities safer; it is not regarded as a penalty inflicted upon the offender. Although there is no right to public access to the database, disclosure is at the discretion of the police, for example to other professionals, but sometimes also to members of the public if they are likely to be affected.⁶

I have addressed the impact of restrictions on suspected terrorists and of registries of convicted sexual offenders on individual liberty in my previous work.⁷ In this article, I address the stigmatic impact of these measures on the lives of targeted individuals. I understand the stigma of a state measure as a designation of some level of risk by the state that discredits labeled individuals, that condemns them socially, and that may result in discrimination and avoidance of those individuals by non-stigmatized individuals.⁸ I argue that the stigma of being risky created by certain regulatory measures has the potential to significantly affect one's personal and professional relationships, and that such discrediting effects, combined with harsh treatment, call for greater legal protection for targeted individuals.⁹ Furthermore, I offer suggestions for improving the situation of individuals targeted with such stigmatizing regulatory measures.

I proceed in the following steps: in section II, I address the distinctive legal structure of criminal punishment and the protections associated with it. In section III, I address the definition of punitive measures according to the The US Supreme Court in *Smith v. Doe* and the definition of a criminal charge according to the European Court of Human Rights (ECHR) in *Engel v. the Netherlands*. In section IV, I address the

stigmatizing effects of regulatory measures on targeted individuals and argue that such discrediting effects, combined with harsh treatment, call for greater legal protection for targeted individuals. Finally, in

section V, I address the implications of my argument for administrative anti-terrorism measures and for the registration requirement for convicted sex offenders, and I offer suggestions for their future use.

II. The Distinctive Legal Framework of Criminal Punishment

The state is required to apply special legal safeguards for individuals facing state punishment. The state does not need to apply these special safeguards when it employs other measures, including so-called regulatory or administrative measures. An examination of these special safeguards highlights the relevance of the question addressed in this article.¹⁰

Constraints on the infliction of punishment that do not apply to other forms of treatment by the state include that punishment is only permissible for wrongful, voluntary, and unexcused conduct and should be proportional to that conduct and to the individual's culpability. This way of thinking about punishment assumes that subjects are responsible, autonomous individuals who can fairly be held to account for wrongdoing. Autonomy is understood as the ability of individuals to guide their own behavior. In most jurisdictions, the mentally ill, who cannot control their own behavior, or who cannot comprehend the consequences of their actions, are not held responsible for their conduct because they do not have the capacity for autonomous agency. This means that, in certain circumstances, such individuals can be institutionalized without conviction of a criminal offence. However, if individuals can guide their own behavior, at least to

a certain level, the state should respect their autonomy.

This perception of punishment has implications for defining criminal offences: criminal offences are based on the idea that human beings are capable of guiding their own behavior. This has implications for the employment of risk assessments in criminal proceedings. In general, individuals are punished for what they have done, and in cases in which risk assessments are justifiable, such as those involving pre-trial detention, the measure should be applied temporarily and the assessment should take into account each individual's risk.¹¹

Another right applicable in the criminal law and related to individuals' ability to guide their own behavior is the right not to be subjected to retroactive laws. According to this right, conduct that occurred before the entry into force of a particular criminal law cannot be held against individuals. This enables individuals to plan their lives and allows them to foresee the consequences of their actions in accordance with the criminal law. This *ex post facto* clause rules out the retroactive application of criminal laws, but not the retroactive application of other types of measures, such as sex offender registries.

The perception that the subject of punishment is a responsible,

autonomous individual also has implications for the time frame of the application of punishment, possibilities for revision, and shortening and termination of punishment. The duration of criminal punishment is limited by considerations of the seriousness of the offence for which the subject has been convicted. However, the duration of regulatory measures usually bears some relationship to a compelling interest of the state, which is balanced against the rights of the targeted individual. The state operates on the assumption that, unless the measure is applied, the individual will pose a risk, and the measure is aimed at reducing or averting that risk.¹²

Another protection available in criminal proceedings is the right to be informed of the charges in question. This protection is meant to ensure that the accused receives a fair trial. However, under legal frameworks other than the criminal law, access to information about the reasons for applying various measures is not guaranteed. For example, those targeted with administrative anti-terrorism measures in the Netherlands do not have access to relevant information on their cases if this information includes

details provided by the General Intelligence and Security Service of the Netherlands.¹³

As mentioned, the presumption of innocence is one of the most important protections available under the criminal law, but it is not available to individuals who may be targeted for non-criminal measures. It is widely accepted that it serves as a procedural safeguard against wrongful conviction and helps to protect defendants against their accusers. This safeguard requires the prosecution to prove to a high standard that the defendant committed a crime, which in common law countries equates to 'beyond a reasonable doubt.' The idea is that individuals have the right to be free from punishment before a proper determination of guilt.¹⁴

The criminal law thus includes a set of protections that are regarded as appropriate limits on punishment. While, in principle, these protections do not apply to other unwanted burdens that can be applied to individuals by the state, including regulatory measures, a court may find that non-criminal measures are punitive and then require application of similar safeguards for targeted individuals, as I will address next.

III. Punitive Measures

In *Smith v. Doe*, the US Supreme Court ruled that forced registration for sex offenders is a civil measure rather than a punitive one. Similarly, many measures against terrorism are not regarded as punitive. Both the US Supreme Court and the ECHR have attempted to address what constitutes a punitive measure according to two criteria: the intention of the

authority that applies the measure, and the character of the measure.

The case law of the ECHR sets out these criteria in what has been called the 'Engel test.' This test was developed by the ECHR in *Engel v. The Netherlands* in order to determine whether the right to a fair trial applies. The criterion of whether the measure is intended to be punitive

is first applied to the domestic classification of the proceedings. The question is whether the application of a measure follows the ordinary process of a conviction in domestic law. If the answer is yes, it is considered punitive, as it is punitive by intention.¹⁵

In a similar vein, the first condition applied by the US Supreme Court to distinguish punitive from other kinds of measures, such as preventive or reparatory measures, which was first set out in *Kennedy v. Mendoza-Martinez* and applied to convicted sex offender registration in *Smith v. Doe*, addresses whether the measure is intended to be punitive before addressing other criteria relating to the character of the measure. If the measure is intended to be punitive, it is considered punitive.¹⁶

The question, then, is whether authorities want to confront the hurdles imposed by the legal channels of punitive measures. The state is not always willing to bind itself to these legal protections for targeted individuals. Particularly in cases of terrorism and sex offences, in which society generally calls for greater security against potential offenders, the state may be tempted to work through legal channels that set lower evidentiary bars and fewer procedural obstacles than the criminal law.

For example, criminal prosecution of terrorist sympathizers is not possible, because sympathies are not punishable. But some jurisdictions have introduced administrative measures as alternatives to or additions to the criminal law process to safeguard society against terrorism, such as in the Dutch case described above. In the Netherlands, administrative measures against terrorism are being sought under the Temporary

Law on Counterterrorism Administrative Measures. The explicit purpose of this law is to target terrorist sympathizers who have not yet committed criminal offences. This law allows the state to interfere with its targets' lives by making it impermissible for them to visit particular places and by requiring them to report to authorities regularly.

However, the ECHR can treat a measure as punitive even if it is not criminalized in domestic law by assessing the nature of the offence and the severity of the penalty in accordance with the Engel test.¹⁷ The Engel test used by the ECHR determines whether a penalty is applied to the public generally or instead to an identifiable group. Even rather modest penalties, such as fines, are regarded as punitive if applied to the general public.¹⁸ The severity of the penalty is also considered.¹⁹ Short-term confinement or arrest does not count as a severe measure according to the ECHR.²⁰ The criteria of the nature of the offence, and the nature and degree of severity of the possible penalty are not necessarily cumulative, but can be regarded as alternative. If the ECHR cannot arrive at a clear conclusion as to the existence of a criminal charge by an alternative approach, a cumulative approach may be applied.²¹

On the basis of this test, it remains unclear which measures can be qualified as punitive by nature. Many anti-terrorism measures—including travel bans and asset freezes—impose far-reaching restrictions on the possibility of living normal lives, and although the ECHR recognizes the severity of such consequences, there seems to be no qualification of these measures as punitive measures in its case law.²² Scholars have criticized the ECHR because, in the

absence of an independent and impartial tribunal, the existing procedures of listing an individual on a terrorist list, travel bans, and asset freezes do not entail an effective remedy, de-listing is difficult, and there is no apparent limit on extensions. In some cases, individuals have been listed for over ten years as terrorists.²³

Area bans applied as part of the Netherlands Temporary Law on Counterterrorism Administrative Measures have been subject to similar critique. For example, legal scholars have criticized area bans with respect to the case of Imam Fawaz Jneid of the As-Soenna Mosque in The Hague. Jneid was said to encourage people to engage in terrorism in his lectures. In response, the Minister of Justice and Security of the Netherlands imposed an area ban on Jneid on August 15, 2017. For six months, he was denied access to two neighborhoods, where he had given lectures in The Hague. He challenged the measure before the District Court of The Hague and the Administrative Jurisdiction Division of the Council of State, but his appeal was denied. He then submitted the case to the ECHR, where it is still ongoing. Scholars have criticized the application of this area ban because, among other reasons, the law was applied retroactively; Jneid made his statements before the law came into force, which means that it would have been impossible for him to foresee that his actions would run afoul of it.²⁴

Like the ECHR, the US Supreme Court considers the punitive effects of a measure as a condition that overlaps with the intent requirement. In *Smith v. Doe*, the Supreme Court applied this test to the registration requirement

for convicted sex offenders, and concluded that this measure was not punitive either in intent or in effect.²⁵ With regard to its effects, the Court asked whether the law entailed public shaming of targeted individuals, but the majority concluded that the stigma experienced by targeted individuals resulted from the dissemination of accurate and mostly already public criminal records or was a collateral consequence of it. It also concluded that the law did not constitute an 'affirmative disability or restraint' sufficient to qualify as punishment because it did not imprison individuals, which the majority concluded was the paradigmatic punitive constraint. It also dismissed the significance of the requirement that 'registrants must inform the authorities after they change their facial features,' saying that registrants did not require permission to do so.²⁶ Furthermore, according to the majority, the severe and lasting impact of the availability of the information did not come from registration and dissemination but from the conviction, which was already included in public records.²⁷ It also ruled that individual risk assessment was not required to categorize convicted sex offenders for registration and community notification because the majority regarded the measure as minor and necessary to balance the risk of recidivism posed by offenders as a broad category by allowing the public 'to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions.²⁸ Similarly, potential lifetime registration and the use of the internet to distribute such information worldwide was not regarded as excessive, given that most re-offences occur many years later and people are mobile.²⁹

Scholars have addressed how state control over individuals, through community notifications and registration requirements, has intensified and expanded in the US, particularly after the Supreme Court's decision in *Smith v. Doe* in 2013. Registrants are under constant state control because they are required to provide identifying information and to verify and update the accuracy of this information frequently and potentially for their lifetimes under threat of criminal prosecution.³⁰ Erin Murphy has compared such technological restraints with their physical counterparts, and has argued that they enable the regulation of greater numbers of individuals for longer periods of time and under fewer legal safeguards.³¹ In addition, as noted by Justice Ginsburg (and supported by Justice Breyer) in dissent to the majority decision in *Smith v. Doe*, such requirements 'exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism.'³²

The UK courts have followed a similar reasoning as the US courts in relation to sex offender registration. The registration requirement in the UK is not regarded as a punitive measure, but instead as a crime preventive or regulatory measure. In a case considered by the European Commission of Human Rights, the argument was made that registrants may *feel* that registration is punitive but that that is not the same as a measure having a punitive nature or purpose.³³ Thus, it is not regarded as a punitive measure, and safeguards, like the ban on retroactive legislation, do not apply.³⁴

The UK's policy of discretionary disclosure of information about convicted sex offenders to particular individuals is less likely to stigmatize targeted individuals publicly than is a community notification. However, scholars have argued that while the registration started as a civil or administrative measure for public safety, it has become increasingly similar to punishment and offers a form of control unconstrained by criminal law safeguards.³⁵ To date, it includes, among other measures, annual verification visits by registrants to police stations, at which they can be photographed and fingerprinted, and required to provide their national insurance numbers.³⁶ Scholars have argued that these measures merge with the criminal law, because judges are allowed to impose prison sentences based on a finding of 'dangerousness,' which is explained in terms of posing 'a significant risk to members of the public.'³⁷ It has been argued that, as a consequence of the strengthening of the policy, the media portrays sex offender registration as a punitive measure: Terry Thomas provides the example of the newspaper *News of the World*, which published the names and photographs of sex offenders in the absence of a publicly accessible registry. The newspaper began its campaign with the headline 'Named, Shamed.' In so doing, it referred to the stigma element of punishment, rather than to community protection.³⁸ In the next part of this article, I argue that some measures that are considered to be non-punitive measures in fact stigmatize individuals.

IV. Marked as Risky

When the state applies a measure to a targeted individual, it may put the rights of that person at risk. This is the case in every legal domain, but criminal punishment and, as I argue here, certain other measures also stigmatize individuals as threats to society; they discredit them and express society's condemnation.

Erving Goffman famously defined stigma as an 'attribute that is deeply discrediting' and that reduces a person in the view of the non-stigmatized 'to a tainted and discounted one.'³⁹ More specifically, Goffman explains that a stigmatized individual possesses a particular attribute defined by others and often based on stereotypes, such as the quality of being suspected of contributing to terrorism, and that that attribute is perceived as a negative characteristic of the person. This may result in discrimination and avoidance of the stigmatized person by others.⁴⁰ Avoidance and discrimination make stigma visible; they color interactions and create tensions between individuals. Stigma can be invisible but may be revealed in personal or professional interactions. For example, the stigma of a past conviction may be revealed when a person is applying for a job.

I reflect on two cases in which the state has marked individuals as posing a risk to society: the sex offender registry, and anti-terrorism measures. The stigma of a conviction for a sex offence designates targeted individuals as risky. This marker of being risky may become a dominant identity marker for these individuals, and may impact perceptions of their

respectability, trustworthiness, and abilities, thus creating power imbalances between stigmatized individuals and others.⁴¹ Those who do not know the stigmatized individuals personally but know them only through the registry or the media coverage may form an image of them based on a selection of facts that do not present the full picture.⁴²

The impact of such images on the lives of registrants has proved devastating.⁴³ The reintegration of past sex offenders into society is difficult because, when people learn that a sex offender lives in their neighborhood, they may become fearful and may exclude, harass, or discriminate against the targeted individual.⁴⁴ The stigma associated with sex offences also significantly affects individuals' opportunities on the job market, as well as their housing options.⁴⁵ A US study conducted by Richard Tewksbury and Matthew Lees on the collateral consequences experienced by past sex offenders using qualitative interviews cites Jon, who is on the sex offender registry:

They have a list of places that will hire ex-cons. But, if you're an ex-con and a sex offender, they won't. And they tell you straight up. Several places will hire ex-convicts, but all of them say no to sex offenders. All of them.⁴⁶

This study shows that the sense of stigmatization expressed by registrants is strong. Registrants report feeling that they will never escape this label, which makes rehabilitation nearly impossible. The study cites Emily, convicted of rape. She says, 'Even if it's ten years down the road

and it's not in the front of my head any more, it will always be there.⁴⁷ However, sex offender registration is regarded as being a non-punitive measure; the aim of the measure is to reduce the risk that convicted sex offenders may pose to the community.

A house search as a measure to prevent terrorism may also constitute a mark of discredit for targeted individuals, which may result in negative ramifications with respect to their interactions with others. Although this measure may not meet the definition of state-imposed criminal punishment sketched in this article, those involved may be labeled as risky, and thus may suffer negative consequences.

The following example sheds light on the stigmatizing effects of measures that were imposed during the state of emergency declared by the French government after the attacks in Paris on November 13, 2015. The state of emergency allowed French authorities to impose, at their own discretion, a range of measures that would normally require judicial authorization. These measures include assigned residences, restrictions on public assemblies, and searches of locations, including houses and places of worship. Amnesty International interviewed targeted individuals in a report on the impact of France's state of emergency. Some of those quoted in the report raised concerns that the searches led to their being stigmatized in their everyday lives. Orlando, who lives in a small town in France and whose house was searched, reported:

I live in a village of 5000 people. I now feel like people see me as 'the terrorist.' Quite a few people supported me, but I think the search changed my neighbours' perceptions. Also, some local media covered the search.

A journalist called my ex-wife at work and asked her what she thought about me, asked if she was worried about the kids, about how I practiced my religion... that made me furious, they didn't have any right to do that.⁴⁸

The search of Orlando's house communicated to the public that he was being censured in relation to the attacks in Paris, and stigmatized him and his family as terrorists or terrorist sympathizers that pose a risk to society. Nevertheless, French authorities consider measures imposed under a state of emergency to be regulative. Individuals subjected to administrative anti-terrorism measures are not accused of criminal acts and are not entitled to a criminal trial, in which they are presumed innocent until proven guilty and in which their rights to a fair criminal trial are respected. However, the stigmatizing effects of such measures can and do affect their lives.

Being targeted with a regulatory measure can impose a stigma of being risky, albeit one that allows for differences of degree. Non-stigmatized individuals do not consider all individuals subjected to measures, such as house searches, to be equally dangerous. Similarly, not all convicted criminals are considered to be equally dangerous. Someone convicted of a sex offence may be regarded as posing a high risk to society, while someone charged with shoplifting may be deemed to pose a much lower risk.

The level of stigma involved in targeting individuals through the use of legal measures depends on the conduct the measure is meant to punish, prevent, or regulate, but also on the level of deprivation, the duration for which it is imposed, and the

distribution of information about targeted individuals' (supposed) conduct. With respect to levels of deprivation, measures that allow individuals to keep their jobs and maintain contact with their relatives may impose a relatively minor stigma in comparison to measures that restrict targeted individuals from participating in society. Someone who is not allowed to visit one particular place is less likely to experience severe stigmatizing consequences than someone who is subjected to house arrest.

In relation to the duration of legal measures, someone who is subjected to a house arrest for a few days may not be as stigmatized as someone who is subjected to the same measure for months or years; as the duration increases, the marker of being risky may become more visible. Over time, the marker of risk may reach a wider audience.

Not all ways of distributing information that identify individuals as targeted are equally accessible to the public. Criminal records may be confidential, as in the case of juveniles in many jurisdictions, or may be publicly accessible on the internet, as in the case of convicted sex offenders in the US. If the information is maintained in a public database on the internet and includes details, such as offenders' photographs, names, dates of birth, and addresses, the stigma may be much more burdensome than if the information is confidential or only accessible in certain circumstances or by certain parties, as is the case for convicted sex offenders in the UK. Moreover, information that is publicly accessible for a long period of time generates a harsher stigma than information that is only accessible for a short time, after which the target can attempt to reintegrate in society.

V. Implications

Under the criminal law, punishment requires justification because it is a form of power over individuals; it is a special form of power because it not only imposes harsh treatment but also stigmatizes individuals as potential threats to society. In the above I sought to show that certain regulatory measures that impose harsh treatment can also be used to stigmatize individuals. For example, sex offender notification and registration, and anti-terrorism measures—including house searches and area restrictions—may have severe stigmatizing effects. Targets must comply with such measures by informing authorities upon changing their addresses, allowing their houses to be searched, or avoiding particular

places, which may have an impact on their relationships and their employment, primarily if applied for a long period of time and/or when these measures accumulate.

Anti-terrorism measures may result in stigmatization of targeted individuals because a particular mark of disgrace is associated with the quality of being subjected to that particular measure and, in time, this quality may become increasingly visible to others. When others become aware that a person has been subjected to such measures, negative repercussions on that person's reputation may follow. It may color their interactions with others and may result in discrimination and avoidance.

Similarly, convicted sex offenders who are required to register with authorities upon changing their addresses, either for a certain period of time or for the rest of their lives, may experience stigmatization. When their information is available in a public database on the internet—which allows neighbors, colleagues, and others to become aware of their convictions for sexual offences—or their information is available to certain parties, registrants may experience avoidance and discrimination, and may face difficulties in finding and maintaining employment and housing. This calls for greater legal protections for targeted individuals.

First, I suggest that courts should put more weight on stigmatization of individuals subjected to regulatory measures. As I addressed in section III, most jurisdictions allow the court to regard a measure as punitive, based on the character of the charge and its severity, even if the law does not classify the measure as such. Although the court has reclassified some measures as punitive, in most cases, the court approves the initial classification of the legislator. However, in view of the stigmatizing effects of anti-terrorism measures and measures to prevent sex offences, it is worth considering a more critical stance of the court towards the classification of a measure as non-punitive.

Second, regardless of the fact that a particular measure is regulatory, the stigmatic impact of regulatory measures is a matter of sufficient concern in itself to command greater legal protections. Legal protections for targeted individuals that should apply if a measure is likely to be severely stigmatizing include the prohibition of retroactive legislation.

This requirement has been addressed in the courts with regard to anti-terrorism measures and sex offender registrations. It requires that conduct that occurred before a particular law came into force ought not to be held against individuals, i.e. people should not be subjected to measures that stigmatize them to a high degree if they could not have reasonably foreseen the consequences of their actions, and thus planned their lives accordingly. Thus, Jneid ought not to have been banned from entering particular neighborhoods based on statements he made before the Temporary Law on Counterterrorism Administrative Measures came into force. At the time he made those statements, he could not have foreseen their consequences. Similarly, the ban on retroactive legislation should have been applied in cases of sex offender registrations, for example *Smith v. Doe*.

For similar reasons, preventive measures with a highly stigmatizing impact should only be applied for short periods of time and should be subject to periodic reviews. The basis for preventive regulations may be that persons subject to regulatory measures may be found guilty and not that they are presumed to be guilty. However, the application of such measures may result in marking an individual as risky and may have significant consequences for the target's interpersonal and professional relationships. When targeted individuals are subjected to preventive regulations, they are subject to constraints that are not based on their conduct, which is problematic if the measure stigmatizes them. Like pre-trial detention, short-term measures that severely stigmatize individuals could be applied as a last resort but only for as

long as is reasonably required for investigations. In the case of Jneid, a short-term area restriction could have been applied as part of an investigation, but not as a long-term preventive measure aimed at regulating his behavior.

Furthermore, preventively stigmatizing individuals should only be permissible if such constraints are based on individualized risk assessments. Measures that preventively rule out groups or classes of persons should not be permitted. This implies that sex offender registration should not be applied to the broad category of convicted sex offenders because it disrespects their ability to guide their own behavior. In the US, the majority of states use a non-individualized approach, in which registration and notification measures are determined solely by the nature of an individual's criminal record.⁴⁹ Instead, states should perform individualized assessments of each offender's risk of recidivism.

Disagreement with my proposal may come from those who argue that it is the purpose of these regulatory measures to protect society. For example, the purpose of sex offender registration and notification is to alert others of individuals who's conduct threatens the safety of others. However, they should note that I propose the application of legal safeguards for targeted individuals, instead of prohibiting the use of measures that impose stigma that leads others to distinguish between the targeted individuals and others.

The argument that lies at the foundation of this proposal is that regulations in domains outside of

the criminal law can impose harsh treatment and a grave stigma on targeted individuals. I recognize that the effects of regulatory measures on the target's life vary in degree. Some measures merely annoy the targeted individual or stigmatize her to a minor degree. Nevertheless, constraints that are less likely to have severe stigmatizing effects may also adversely affect the individual's life.

Regarding constraints that are less likely to have severe stigmatizing effects, such as short-term restrictions on entering particular places, the state should be permitted to balance security interests against individual rights. For example, from a security perspective, it may not be desirable to inform individuals subjected to anti-terrorism measures of the reasons for targeting them directly. However, changes could be implemented with respect to accessing information regarding the reasons for applying particular measures. With respect to administrative anti-terrorism measures in the Netherlands, those targeted do not have access to relevant information on their cases because administrative law does not require authorities to share their motivations if they include information of the General Intelligence and Security Service of the Netherlands. The appointment of a third party—such as a special lawyer representing those targeted—could improve the situation in cases where information regarding the reasons for targeting cannot be shared with the target of the measure.

VI. Conclusion

It is easier for the state to control individuals with regulatory measures than with the slower and more burdensome punitive measures of the criminal law. However, as I argue in this article, the stigmatizing effects of some of these measures call for limits on their use. Regulatory processes that label targeted individuals as risky impose a stigma that has the potential to negatively affect people's lives, such as in the case of a life-long registration requirement that includes the public availability of information about a sex offence and the dissemination of biographical information on the internet. I recommend ways of implementing legal safeguards for individuals against the stigma involved in the

employment of such regulatory measures.

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Notes

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1 For analyses, see Duff, "Perversions and Subversions"; Weigend, "Criminal Law and Administrative Penal Law"; Bianchi, "UN Security Council's Anti-Terrorism Measures"; Thomas, "When Public Protection Becomes Punishment?"

2 See e.g. Murphy, "Paradigms of Restraint"; Carpenter and Beverlin, "Evolution of Unconstitutionality"; Logan, *Knowledge as Power*; Thomas, "When Public Protection Becomes Punishment?"; Thomas, *Registration and Monitoring*; Galli,

"The Freezing of Terrorists' Assets"; Brouwer and Schilder, "Gebiedsverbod."

3 See The Netherlands Temporary Law on Counterterrorism Administrative Measures [Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding], February 10, 2017. <https://wetten.overheid.nl/BWBR0039210/2017-03-01>; Brouwer and Schilder, "Gebiedsverbod". On the UK's Terrorism Prevention and Investigation Measures that replaced the Control Order, which restricted the activities of persons believed to be involved

in terrorism, see Ashworth and Zedner, *Preventive Justice*, 178, 186–89.

4 See Logan, *Knowledge as Power*, 9–84, 109.

5 See *Smith v. Doe* 538 U.S. 84 (2003), p. 89–91, 101–2.

6 See Thomas, “When Public Protection Becomes Punishment?,” 341.

7 See Noorda, “Preventive Deprivations of Liberty”; Noorda, “Criminal Trials for Preventive Deprivations”; Noorda, “Exprisonment.”

8 My understanding of stigma is based on Erving Goffman’s classic study *Stigma*, which continues to influence the way scholars conceptualize stigma in current debates. The state imposes various types of stigma. I address cases in which the state labels individuals as risky for society.

9 Most definitions of punishment include harsh treatment or deprivation of liberty, censure or stigma, and a motivational component. For definitions of punishment that include censure or stigma, see e.g., Hirsch, *Censure and Sanctions*; Husak, “Lifting the Cloak”; Duff, *Answering for Crime*; Ashworth, Zedner, *Preventive Justice*. Also, the European Court of Human Rights held in the Jussila case that the weight of a criminal charge depends on the stigma attached to the sanction (ECHR, 23 November 2006, *Jussila v. Finland*, App. 73053/01). See Moor-van Vugt, “Administrative Sanctions in EU Law,” 5–41, 22. Joel Feinberg, in his famous exposition of “The Expressive Function of Punishment,” argues that what distinguishes punishment from other kinds of measures is their condemnatory character.

10 For analyses of processes of regulation in comparison with criminal law processes, see Dubber, “Regulatory and Legal Aspects of Penalty,” 19–49.

11 For implications for the debate in the legislature, see Noorda, “Law Reform.”

12 See e.g. Schulhofer, “Two Systems of Social Protection,” 83–84.

13 Other protections available in criminal proceedings that are more robust than those on offer to the accused in legal proceedings and that are regarded as non-punitive measures include a fair hearing,

the right to confidential access to a lawyer, and the right to remain silent.

14 In European domestic law, this principle is reinforced by article 6(2) of the European Convention on Human Rights. See also Clayton and Tomlinson, *Fair Trial Rights*, 85, 113. The US Supreme Court sets out a similar requirement in its case law. See *Smith v. Doe*.

15 See ECHR, June 8, 1976, *Engel v. Netherlands* (No 1) 1976, 1 EHRR 647, par. 82, 83.

16 See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Smith v. Doe*, 97.

17 See *Engel v. Netherlands*, par. 82.

18 See *Ozturk v. Germany* (1984) 6 EHRR 409.

19 See The Netherlands Temporary Law on Counterterrorism Administrative Measures, n 3 above.

20 See Clayton and Tomlinson, *Fair Trial Rights*, 85, which refers to a case about five days of arrest in a civil prison: *Eggs v. Switzerland* 1978, 15 DR 35, 65, European Commission of Human Rights.

21 See *ibid.*

22 For an analysis of the application of article 6 of the European Convention on Human Rights to counter-terrorist policies, see Eckes, *EU Counter-Terrorist Policies*, especially 150.

23 See *ibid.*, 150, 165.

24 See Brouwer and Schilder, “Gebiedsverbod.”

25 See *Smith v Doe*, 97.

26 *Ibid.*, 101.

27 See *ibid.*, 97–102.

28 *Ibid.*, 104.

29 See *ibid.*, 104–5.

30 See e.g. Logan, *Knowledge as Power*.

31 See Murphy, “Paradigms of Restraint,” especially 1367–68.

32 *Smith v Doe*, 115.

33 See Thomas, *Registration and Monitoring of Sex Offenders*, 77. Thomas refers to

ECHR, *Ibbotson v. U.K.*, App. 40146/98, 1999.

34 See *ibid.*, 77, 84.

35 See e.g. Thomas, "When Public Protection Becomes Punishment?"

36 See *ibid.*, 346.

37 See e.g. *ibid.*, 349.

38 See *ibid.*

39 Goffman, *Stigma*, 2, 3.

40 See *ibid.*, 70.

41 See, analogously, Goffman, *Stigma*, 70; Uggen et al., "Edge of Stigma"; Wiley et al., "Unintended Consequences."

42 See, analogously, on convicted offenders and the media, Goffman, *Stigma*, 71.

43 Empirical research has shown that the consequences reported by sex offenders are similar to those reported for other felons, but registration and public access to sex offender registrations promotes these challenges. See Tewksbury and Lees, "Perceptions of Sex Offender Registration," 314.

44 See Zevitz and Farkas, "Sex Offender Community Notification."

45 See Levenson and Cotter, "Effect of Megan's Law"; Tewksbury and Lees, "Perceptions of Sex Offender Registration."

46 Tewksbury and Lees, "Perceptions of Sex Offender Registration," 320.

47 *Ibid.*, 329.

48 Amnesty International, *Upturned Lives*.

49 See Janus, *Failure to Protect*, 66.

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