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Are Bills of Attainder the New Currency? Challenging the Constitutionality of Sex Offender Regulations that Inflict Punishment Without the “Safeguard of a Judicial Trial”

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I. INTRODUCTION

In January 2006, Wendy Whitaker and her husband bought their first home, an early 1900s bungalow on a quiet street in Harlem, Georgia, just outside Augusta.¹ However, their excitement would be short-lived. One month later, the police showed up at the Whitaker's front door and explained that Wendy would have to move or face arrest.² Her legal troubles were the product of a poor decision she made as a teenager: in 1997, when Wendy was a seventeen-year-old sophomore in high school, a fellow classmate propositioned that she perform oral sex on him during a class movie presentation.³ As the lights went dark, so did her future. They were caught, and the embarrassment and expulsion from high school that followed were the least of Wendy's problems. As the young man was just shy of his sixteenth birthday and the legal age of consent,⁴ Wendy found herself faced with sodomy⁵ charges under Georgia's harsh sex offender statutes.⁶

1. Scott Henry, *Life in the Shadows*, CREATIVE LOAFING, July 19, 2006, http://atlanta.creativeloafing.com/gyrobase/life_in_the_shadows/Content?oid=98753.

2. *Id.* Georgia's sex offender residency restriction prohibits individuals from residing "within 1,000 feet of any child care facility, church, school [includes designated school bus stops], or area where minors congregate." GA. CODE ANN. § 42-1-15(b) (Supp. 2009); see *infra* Part IV.B and notes 155-162 and accompanying text.

3. Henry, *supra* note 1. Generally, teenagers are not known for having the most sound judgment or grasp of the legal consequences of their actions, and yet most teenagers can stumble through adolescence so that they may as adults look back and marvel at their temporary period of foolishness. Research suggests the reason teenagers engage in risky behaviors is that their brain development is pre-mature to avoid this type of behavior. See Sharon Jayson, *Expert: Risky Teen Behavior is All in the Brain*, USA TODAY, Apr. 4, 2007, available at http://www.usatoday.com/news/health/2007-04-04-teen-brain_N.htm (explaining that teens are so susceptible to peer pressure because the adolescent brain is not fully developed until after age eighteen); see also Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives From Brain and Behavioral Science*, 16 ASS'N FOR PSYCHOL. SCI. 55-115 (Apr. 2007) (Steinberg, a Temple University psychologist, explains that "[a]dolescents are at an age where they do not have full capacity to control themselves.").

4. Whitaker says it never occurred to her that the boy being fifteen at the time could present legal problems because he was a few months shy of the age of legal consent. Henry, *supra* note 1. "Whitaker says, looking back at the incident[:] 'I'm not saying what I did wasn't wrong—it was—but when you're a teenager, you do stupid things.'" *Id.*; see *supra* note 3 and accompanying text.

5. "A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2(a)(1) (2007). Violation of the statute carries a mandatory sentence of no less than one year and not more than twenty years. *Id.* § 16-6-2(b)(1). Bizarrely enough, Georgia provides less extreme penalties for sexual acts such as bestiality, GA. CODE ANN. § 16-6-6(b) (2007), and necrophilia, GA. CODE ANN. § 16-6-7(b) (2007), which provide one to five year and one to ten year sentences, respectively.

6. Georgia has some of the harshest restrictions on sex offenders, along with Iowa and Maine. See GA. CODE ANN. § 42-1-15 (Supp. 2009); Jerry Harkavy, *Maine Supreme Court Takes Up Sex Offender Registry*, BOSTON.COM, Feb. 10, 2009, http://www.boston.com/news/local/maine/articles/2009/02/10/maine_supreme_court_takes_up_sex_offender_registry/ (discussing that Maine's lifetime registration requirement applies retroactively regardless of the sexual offense); Wendy Koch, *Sex-Offender Residency Laws Get Second Look*, USA TODAY, Feb. 25, 2007, available at

Her court-appointed attorney, having met her only minutes before her hearing, advised her to plead guilty.⁷ As a result, she was sentenced to five years probation, and, worst of all, she would be subject to Georgia's "one-size-fits-all" sex offender registry scheme for the rest of her life.⁸ Furthermore, putting this experience behind her has proved to be more difficult and complicated because of her sex offender status.⁹ People that Wendy knows have found her name and picture on the registry and "her neighbors . . . have shunned her since being alerted by sheriff's deputies of her conviction."¹⁰ Furthermore, if two methods of dissemination¹¹ were not enough, Wendy's mug shot and map to her home were shown on local television news during a segment which seeks to "keep tabs" on sex offenders in the area.¹²

http://www.usatoday.com/news/nation/2007-02-25-sex-offender-laws-cover_x.htm (noting that Georgia, along with Iowa, does not apply registration or residency requirements based on designated classifications among sex offenders; rather, they are applied universally regardless of the "sex crime" committed).

7. Henry, *supra* note 1. Wendy says it was not explained to her "that pleading guilty would place her on the sex-offender registry." *Id.* There is no evidence to suggest that a guilty plea results in a less severe sentence for a sex crime; in fact, it appears that sex offenders receive longer sentences upon conviction. *See, e.g.,* STATE OF WASHINGTON SENTENCING GUIDELINES COMMISSION, SEX OFFENDER SENTENCING 1 (2004), available at <http://www.sgc.wa.gov/PUBS/SSOSARreport.pdf> ("On average sex offenders serve longer terms in prison and jail than persons convicted of other felony offenses. In fiscal year 2003, the average sentence length for all felonies was 37.3 months, compared to 90.8 months for sex offenses.")

8. Henry, *supra* note 1. Georgia law requires all sex offenders who are subject to the registry to stay registered with current information for the rest of the offender's life. GA. CODE ANN. § 42-1-12(f)(7) (Supp. 2009). Failing to comply with the requirements results in imprisonment for no less than ten and no more than thirty years. *Id.* § 42-1-12(n). A second violation of the registration requirement results in life imprisonment. *Id.*

9. *See* § 42-1-12 (detailing the requirements for registered sex offenders in Georgia). A general definition of "sex offender" is a person who has been criminally charged and convicted of a sex crime. *See* WIKIPEDIA, http://en.wikipedia.org/wiki/Sex_offender (last visited Feb. 20, 2010) (entry for "Sex Offender"); DICTIONARY.COM, <http://dictionary.reference.com/browse/sex%20offender> (last visited Feb. 20, 2010). The official definition varies by jurisdiction and statute, and is the subject of constant debate.

10. Henry, *supra* note 1. *See* § 42-1-12(i); *infra* note 12 and accompanying text.

11. *See* § 42-1-12(f), (i) (referring to the registry and community notification requirements).

12. Henry, *supra* note 1. Wendy expressed her shame and continued humiliation when she said, "I had to explain to people why I [was] on TV for something I did nine years ago." *Id.* According to the Georgia sex offender statute, registry information is private and is to be used for only specific "law enforcement" and government purposes. § 42-1-12(o). But the language of the statute is vague and lacks safeguards to protect sex offenders from the misuse of information. Especially problematic is the wide grant of discretion it bestows upon local authorities to "release such other relevant information collected under this Code section that is *necessary to protect the public.*" *Id.* (emphasis added).

Now twenty-nine, Wendy Whitaker¹³ has been on the sex offender registry for twelve years for engaging in a consensual sex act as a teenager.¹⁴ Unfortunately, Wendy Whitaker's story is not unique.¹⁵

Whether people like Wendy fit the "typical"¹⁶ description of a sex offender does not matter much; the label itself carries with it the power to

13. Wendy continues to fight against the harsh residency restrictions. The Law Office of the Southern Center for Human Rights, handling the *Whitaker* case, amended the complaint to attack the new version of the Georgia law SB 1. THE LAW OFFICE OF THE SOUTHERN CENTER FOR HUMAN RIGHTS, OVERVIEW OF *WHITAKER V. PERDUE*, CIVIL ACTION NO. 4:06-CV-140-CC (N.D. GA. 2006) 5 (2009), available at <http://www.schr.org/files/post/Whitaker%20Overview.pdf>. See *Mann v. Ga. Dep't of Corrections*, 653 S.E.2d 740 (Ga. 2007) (striking down a portion of Georgia's residency restrictions); see also *infra* Part IV.B and notes 155–162 and accompanying text (additional discussion on the ineffectiveness of the residency restrictions). In 2012, Wendy Whitaker will be eligible to petition the court to release her from the registry requirements. The determination will be based upon whether the court finds that Wendy "does not pose a substantial risk of perpetrating any future dangerous sexual offense." § 42-1-12(g)(1).

14. In 1998, three months after Wendy's conviction, the Georgia Supreme Court overturned its sodomy law. Henry, *supra* note 1. Chief Justice Robert Benham writing for the six-to-one majority said, "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998); see also Lisa Keen, *Georgia Repeals Sodomy Law: Notorious Law Meets Unceremonious End*, WASHINGTON BLADE, Dec. 4, 1998 available at <http://www.glapn.org/sodomylaws/usa/georgia/ganews21.htm>. Furthermore, as of July 1, 2006, under the adoption of Keen's Bill, the two-year age difference between Whitaker and her classmate would have spared her from the registry requirement under a narrow exemption for "Romeo and Juliet" convictions—laws that lessen or eliminate criminal penalties for young people close in age who have non-coercive sex with each other. H.B. 1059, 2005–06 Gen. Assem., Reg. Sess. (Ga. 2006), available at http://www.legis.ga.gov/legis/2005_06/search/hb1059.htm; see also HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US, Sept. 11, 2007, http://www.hrw.org/en/node/10685/section/8#_ftnref257. Despite the law immunizing future teens of legal consequences from engaging in the same consensual behavior as Whitaker, this provision does not help Wendy because the legislature voted not to apply the law retroactively to those already on the registry. H.B. 1059.

15. See HUMAN RIGHTS WATCH, *supra* note 14. There are countless stories of other teens that have been forced to register as sex offenders for engaging in underage consensual sex, for example, a sixteen-year-old boy who was convicted of statutorily raping his fourteen-year-old girlfriend who he eventually married. *Id.* at 73. The boy was essentially convicted for having pre-marital sex, and he is still subject to the sex offender registry requirement. See *id.* at 73–74. Another young man was forced to register for having consensual sex with his fourteen-year-old girlfriend when he was nineteen. *Id.* His mother recounts the law's effect on their family: "Our family has been devastated by this law that treats a young man in a consensual dating relationship the same as a violent rapist or a predator of young children." *Id.* Another teen that at the age of seventeen had consensual sex with a fifteen-year-old girl and is now in college and subject to the registry requirements for statutory rape describes their heavy burden:

I must register every 90 days. I must register between the hours of 8 and 5 Monday thru Friday before the 15th [of the] month. Right now I can handle that. I am a student, my hours are flexible, but once I start work, I will either have to work near the police office I register at to do it on my lunch hour or take time off from work.

Id. at 74; see also Complaint at 7–20, *Whitaker v. Perdue*, No. 4:06-cv-140-CC (N.D. Ga. 2006) [hereinafter *Whitaker v. Perdue Complaint*], available at <http://clearinghouse.wustl.edu/chDocs/public/CJ-GA-0004-0005.pdf>.

16. Most people picture a sex offender as looking and acting a certain way. Binghamton University, Counseling: 20:1 Program—Sex Offender Dynamics, <http://www2.binghamton.edu/>

invoke feelings of revulsion, repugnance, anger, and fear.¹⁷ Media and pop culture have taken particular interest in portraying sex offenders as predators who will inevitably reoffend, despite modern research suggesting otherwise.¹⁸ Furthermore, when a child is abducted, sexually assaulted, and brutally murdered,¹⁹ there is a public demand for reform, whether or not appropriate or well thought out.²⁰ The United States Constitution exists for

counseling/20-1-program/20-1dynamics.html (last visited Feb. 20, 2010). The following is a common description given of sex offender: "He's mean looking, and he carries some type of weapon. He stalks his victims like a predator, attacking women at night in parks and dark streets, or breaking into their homes. He leaves them physically brutalized and emotionally scarred." *Id.* (internal quotation marks omitted).

17. These feelings are understandable. The crimes that many sex offenders commit are very destructive not only in the lives of the victims, but in society as a whole.

18. New research suggests that the majority of sex offenders are less likely to re-offend than most other criminals. *See, e.g., Sex Offenders Unlikely to Commit Second Crime*, NEW SCIENTIST, July 6, 2008, at 6, available at <http://www.newscientist.com/article/mg19926633.100-sex-offenders-unlikely-to-commit-second-crime.html%20%09S.O%20Stats>. According to new research from California, "[j]ust 3.2 percent of more than 4000 sex offenders released on parole in 2002 were re-imprisoned for another sex offence in the subsequent 5 years." *Id.* The figures in California are consistent with a 2007 comprehensive study from Minnesota, which found, between 1990 and 2002, a similar 3.2 percent recidivism rate among sex offenders three years after their release from prison. *Id.*

19. A case that received much media attention was the murder of Megan Kanka. In 1994, in a suburb of Trenton, New Jersey, Megan Kanka was sexually assaulted and murdered by a neighbor living across the street who, unbeknownst to the Kankas, was a convicted sex offender. Russ Flanagan, *Megan's Legacy: A Child's Death Serves as a Call to Action*, EXPRESS-TIMES, Feb. 26, 2004, available at http://www.pennlive.com/news/expresstimes/stories/molesters5_mainbar.html. As soon as Megan's story hit the news, thousands of dollars in donations began pouring into the Kanka home. *Id.* Two days after their daughter was murdered the Kankas formed the Megan Nicole Kanka Foundation, with the mission to expose convicted child molesters living undetected among the masses. *Id.* The result of this tragedy was Megan's law, a nationwide law requiring notification when a convicted sex offender moves into a neighborhood. *Id.*

20. "Passed hand-to-hand, over 400,000 citizens signed a petition demanding immediate legislative action on the law that had to be written—Megan's Law. Within an unprecedented eighty-nine days, the New Jersey State Legislature passed Megan's Law." Megan Nicole Kanka Foundation, *Our Mission*, <http://megannicolekankafoundation.org/mission.htm> (last visited Feb. 20, 2010). This is illustrative of the expediency that a nationwide call to action can generate in the legislature. While this law has been upheld against constitutional scrutiny and is no doubt beneficial to the protection of our nation's children, there are inherent risks to this kind of reaction. *See infra* Part IV. Following Megan's law, new proposed laws continue to go further than the previous versions, and the speed at which the bills are proposed and passed leave little time to properly weigh the potential negative consequences and to evaluate potentially less invasive yet still effective alternatives. *See infra* Part IV. Especially for sex offenders who, while unpopular, have, in the eyes of the law, paid their debt to society. *See infra* Part IV. Registration requirements, residency and employment restrictions, and applicable "Scarlet Letter" laws all apply after the sex offender leaves prison. Sunny Hostin, *Commentary: A Sex Offender's Scarlet Letter*, CNN.COM, <http://www.cnn.com/2008/CRIME/04/14/sunny.scarlet/index.html> (last visited Feb. 20, 2010). Imprisonment in the United States is punishment for the crime committed. *See, e.g., Punishment—Theories of Punishment*, <http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT>

these moments in society, when heated passions cloud judgment and lead to decisions that fly in the face of fundamental founding principles.²¹

This Comment explores a legal challenge that has been completely overlooked in the context of sex offender regulations. The Constitution's Bill of Attainder Clause²² has longstanding roots in protecting named individuals and identifiable groups against legislative punishment without a judicial trial; however, not until now has its application in the context of sex offender regulation been considered.²³

Part II will acquaint the reader with the nature of bills of attainder, their origins in England, and the purpose for prohibiting such legislative enactments in the United States.²⁴ Part III will discuss the United States Supreme Court's jurisprudence of the Bill of Attainder Clause, distinguishing prohibited use of legislative action from proper use of legislative powers.²⁵ Part IV reviews the current state of the law in the area of sex offender legislation, discussing the predominant influences and attitudes that underlie much of the legislation, as well as review the common constitutional challenges and the prevailing trend of their outcomes.²⁶ Part V first applies the bill of attainder analysis to common regulations affecting

.html (last visited Feb. 20, 2010). The United States, along with other countries, seeks to punish criminals for their crimes. The U.S. Department of Justice's mission statement in part reads: "to seek just punishment for those guilty of unlawful behavior." U.S. Dep't of Justice, Our Mission Statement, <http://www.usdoj.gov/02organizations/> (last visited Feb. 20, 2010). There are basically two general theories of punishment: utilitarian and retributive. Punishment—Theories of Punishment, *supra*. "The utilitarian theory . . . seeks to punish offenders to discourage, or 'deter,' future wrongdoing. The retributive theory seeks to punish offenders because they deserve to be punished." *Id.* In the United States, the most widely accepted justification for punishment is retribution. *Id.* Criminal sentencing in the United States "is always, at least in part, a form of retribution." *Id.* Retributive punishment seeks to restore the balance caused by the wrongdoer and is thought of as necessary and justified to protect the legitimate rights of both society and the offender. *Id.* "Punishment . . . allows an offender to pay the debt to society and then return to society, theoretically free of guilt and stigma." *Id.*

21. Our Constitution does not protect only the popular or benevolent, but those that other civilizations have deemed unfit to survive or unworthy of dignity. See THE FEDERALIST NO. 51 (James Madison) ("In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as [such] . . . even the stronger individuals are prompted . . . to wish for a government which will protect all parties, the weaker as well as the more powerful."). American ideals are to treat our criminals more humanely than many other countries. See President Barak Obama, Speech to Congress (Feb. 24, 2009) (transcript available at [http://www.cbsnews.com/stories/2009/02/24/politics/main4826494.shtml?source=RSSat tr=Politics_4826494](http://www.cbsnews.com/stories/2009/02/24/politics/main4826494.shtml?source=RSSat%20tr=Politics_4826494)) ("To overcome extremism, we must also be vigilant in upholding the values our troops defend—because there is no force in the world more powerful than the example of America And that is why I can stand here tonight and say without exception or equivocation that the United States of America does not torture.").

22. "No bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3.

23. See *infra* Parts II–III, notes 30–116, and accompanying text.

24. See *infra* notes 30–50 and accompanying text.

25. See *infra* notes 51–116 and accompanying text.

26. See *infra* notes 117–166 and accompanying text.

sex offenders, and then discusses the interpretational issues raised therein.²⁷ Part VI explores a more serious problem than those supposedly caused by sex offenders, addresses its implications, and proposes possible alternatives to the current regulatory scheme.²⁸ Part VII will conclude this Comment.²⁹

II. THE HISTORICAL BACKGROUND OF BILLS OF ATTAINDER

A bill of attainder is a “legislative act which inflicts punishment without a judicial trial.”³⁰ The purpose for the inclusion of the Bill of Attainder Clause in the United States Constitution is best understood through an overview of its past.

A. *Origins and Early Use*

The bill of attainder has its roots as a parliamentary act that sentenced to death one or more specific persons.³¹ The act would declare a person to be “tainted,”³² and was used by the Monarch in England, during the sixteenth, seventeenth, and eighteenth centuries to deal “with persons who had attempted, or threatened to attempt, to overthrow the government” without having to endure the “inconvenience” of a trial.³³ “In addition to the death sentence, attainder generally carried with it a ‘corruption of blood,’ which meant that the attainted party’s heirs could not inherit [the condemned’s]

27. See *infra* notes 167–234 and accompanying text.

28. See *infra* notes 235–256 and accompanying text.

29. See *infra* notes 266–276 and accompanying text.

30. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866); see also *id.* at 290 (citing John Hamilton’s *History of the Republic of the United States*). “A bill of attainder is a legislative act which inflicts punishment without judicial trial.” *Cummings*, 71 U.S. (4 Wall.) at 323. It includes “legislative acts which take away the life, liberty, or property of particular named [or easily ascertainable] persons [or group of persons] because the legislature thinks them guilty of conduct which deserves punishment. *U.S. v. Lovett*, 328 U.S. 303, 317 (1946).

31. *United States v. Brown*, 381 U.S. 437, 441–42 (1965).

32. Issac M. McPhee, *The British Bill of Attainder: A British Law Enabling Conviction Without Trial*, SUITE101.COM, Feb. 11, 2008, http://law.suite101.com/article.cfm/the_bill_of_attainder. “[T]he word ‘attainder’ is derived from the middle English word ‘attainted,’ meaning, ‘having stigma imparted upon.’” *Id.*

33. *Brown*, 381 U.S. at 441 (citing the following as examples of these acts: “3 Jac. 1, c. 2; 10 & 11 Will. 3, c. 13; 13 Will. 3, c. 3; 9 Geo. 1, c. 15”). “Whereas Habeas Corpus guaranteed a fair trial by jury, a bill of attainder bypassed this. [Using this writ suspended] a person’s civil rights and guaranteed that the person would be found guilty of the crimes stated in the bill as long as the Royal Assent was gained.” Bill of Attainder Learning Site, <http://www.historylearningsite.co.uk/Bill-of-Attainder.htm> (last visited Feb. 20, 2010).

property.”³⁴ The bill of pains and penalties was functionally the same as the bill of attainder except that it “prescribed a penalty short of death,³⁵ e.g., banishment,³⁶ deprivation of the right to vote,³⁷ or exclusion of the designated party’s sons from Parliament.”³⁸

It was common for bills of attainder and bills of pains and penalties to “inflict their deprivations upon relatively large groups of people;”³⁹ some “named the parties to whom they were to apply,” while some “simply described them.”⁴⁰ Further, some left the targeted parties a way to escape the penalty, while others did not.⁴¹ While stemming from England, use of

34. *Brown*, 381 U.S. at 441 (quoting 3 EDWARD COKE, SYSTEMATIC ARRANGEMENT OF LORD COKE’S FIRST INSTITUTE OF THE LAWS OF ENGLAND 565 (Thomas ed. 1818); ZECHARIAH CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 96 (1956)). *But cf.* U.S. CONST. art. III, § 3, cl. 2. (“Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted,” thus not affecting the heirs of a traitor.).

35. Practically all bills of attainder referenced in the United States Constitution are actually bills of pains and penalties because they refer to legislative punishment that does not result in death. “The Constitution in prohibiting bills of attainder undoubtedly included bills of pains and penalties,” as explained in the majority’s holding in *Cummings v. Lovett*, 328 U.S. at 317 n.6.

36. “[B]anishment was an effective punishment because it contemplated that offenders leaving a settled community would necessarily wander in the wilderness, shamed by their loved ones and unwelcome in other settlements.” THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Banishment> (last visited Feb. 20, 2010); MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/banishment> (last visited Feb. 20, 2010). For a comparison to sex offender regulation see *infra* note 156 and accompanying text.

37. See generally WIKIPEDIA, http://en.wikipedia.org/wiki/Right_to_vote#Criminality (last visited Feb. 8, 2009) (entry for “Suffrage”) (“Many countries restrict the voting rights of convicted criminals. Some countries, and some U.S. states, also deny the right to vote to those convicted of serious crimes after they are released from prison.”); see Roger Clegg, Felon Disenfranchisement Is Constitutional, and Justified, NATIONAL CONSTITUTION CENTER, <http://ratify.constitutioncenter.org/education/ForEducators/Viewpoints/FelonDisenfranchisementIsConstitutional,AndJustified.shtml> (last visited Feb. 20, 2010).

38. *Brown*, 381 U.S. at 441 (footnotes omitted).

39. *Id.* at 461.

40. *Id.* at 442 (footnote omitted).

41. See *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 88 (1960) (referring to the fact that the members of the class affected by the statute could extricate themselves from the class at will as one factor that tended to show that the Act in question was not directed at a specific group of people but rather set forth a generally applicable definition). A number of court decisions have examined the factor of “escapability” to determine whether an act is punitive in nature and whether it singles out a particular group; different courts have, in doing so, differed regarding the amount of determinative weight the factor should be afforded. See *Am. Commc’n Ass’n v. Douds*, 339 U.S. 382 (1950) (finding the factor to be probative of whether the statute was punitive in nature); see also *Brown*, 381 U.S. at 457 n.32 (citation omitted) (finding that inescapability is not an “absolute prerequisite” to a finding of attainder, because “[s]uch an absolute rule would have flown in the face of explicit precedent as well as the historical background of the constitutional prohibition”). The precedent being referring to is the Supreme Court’s decision in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 324 (1866). “A number of ante-Constitution bills of attainder inflicted deprivations upon named or described persons or groups, but offered them the option of avoiding the deprivations, e.g., by swearing allegiance to the existing government.” *Brown*, 381 U.S. at 457 n.32 (citing Del. Laws c. 29b (1778); 1778 Mass. Acts c. 13; III JOHN C.

bills of attainder and bills of pains and penalties did not end there.⁴² During the American Revolution,⁴³ several state legislatures used bills of attainder to condemn British loyalists called Tories and confiscate their property.⁴⁴ The American version included the traditional abuse of procedure with a complete disregard of due process rights.⁴⁵ It was apparent very quickly that such legislative acts had great potential to do harm, especially against the weak and unpopular, and thus it was necessary to guard against such danger.

B. Prohibition in the United States Constitution

The Framers believed barriers had to be erected so that the legislature would not overstep its authority and perform functions of other branches of government, namely the judiciary.⁴⁶ The Bill of Attainder Clause was erected to be such a barrier.⁴⁷ Thus, while the Bill of Attainder Clause was to function as one means to accomplish the general principle of fractionalized power, it also “reflected the Framers’ belief that the Legislative Branch is not so well suited as politically independent judges and

HAMILTON, HISTORY OF THE REPUBLIC OF THE UNITED STATES 25 (1859)).

42. See *infra* notes 43–44 and accompanying text.

43. One of the motivations for the American Revolution itself was anger at the injustices of attainder. Bill of Attainder, <http://www.experiencefestival.com/a/bill%20of%20attainder/id/1932370> (last visited Feb. 20, 2010).

44. *Brown*, 381 U.S. at 442. See e.g., DWIGHT HOLBROOK, THE WICKHAM CLAIM: BEING AN INQUIRY INTO THE ATTAINDER OF PARKER WICKHAM (1986) (Wickham, an elected official who was well known for his pro-Loyalist views, was forced to forfeit all of his property without compensation and was banished from the state under threat of death in 1779 after New York’s Legislature passed a bill of attainder. Until the day of his death, he vigorously maintained his innocence and ultimately died without ever being granted a trial.).

45. “Bills of attainder are prohibited by the U.S. Constitution. BLACK’S LAW DICTIONARY 176 (8th ed. 2004).

46. THE FEDERALIST NOS. 47, 48, 49, 51 (James Madison), NO. 78 (Alexander Hamilton).

47. Alexander Hamilton, showing much foresight and vision, put it like this:

Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.

III JOHN C. HAMILTON, HISTORY OF THE REPUBLIC OF THE UNITED STATES 34 (1859) (quoting Alexander Hamilton).

juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons.”⁴⁸ Inclusion of the Bill of Attainder Clause in the United States Constitution was intended, “not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, [and] a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.”⁴⁹ After its inclusion, the United State Supreme Court began to interpret the Framers’ intent in order to lay out workable analysis to determine what legislative action constituted a forbidden bill of attainder.⁵⁰

III. DEVELOPMENT OF BILL OF ATTAINDER CASE LAW IN THE UNITED STATES

Since the Civil War, the Court has taken up the issue of attainder a number of times; and in doing so, it has often focused on the right to practice a profession, the ability to escape the levied legislative punishment,⁵¹ and the relationship, or lack thereof, between the enactment and a targeted individual’s fitness in those “pursuits and professions.”⁵² Furthermore, the Court has developed a uniquely American imprimatur in its decisions, invalidating as bills of attainder legislation barring specified persons or groups from pursuing various professions, especially where employment bans were permanent.⁵³ The cases that follow show the maturation of the court’s analysis, culminating with the blueprint for applying the bill of attainder analysis.

A. *Cummings v. Missouri*

In December 1866, the Court decided a pair of cases which established present day precedent for what constitutes a violation of the Bill of Attainder Clause.⁵⁴ *Cummings v. Missouri* involved a provision of the Missouri

48. *Brown*, 381 U.S. at 445.

49. *Id.* at 442. See THE FEDERALIST NO. 47, at 373–74 (James Madison) (Clinton Rossiter ed., 1961). James Madison wrote: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” *Id.*

50. See *infra* Part III.

51. See *supra* note 41 and accompanying text.

52. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 319 (1866) (discussing the lack of connection between Mr. Cummings being unable to take loyalty oath and his fitness to perform the duties of his profession as a minister); *infra* note 55 and accompanying text.

53. See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 474–75 (1977).

54. *Cummings*, 71 U.S. (4 Wall.) at 277; *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866). *Ex Parte Garland* also was based on a similar oath to *Cummings*, prohibiting the practice of law without taking the loyalty oath, and the Court held the same way. *Ex Parte Garland*, 71 U.S. (4 Wall.) at 398. Neither case has been overruled.

Reconstruction Constitution, which required persons to take an Oath of Loyalty as a prerequisite to practicing a profession.⁵⁵ In invalidating the Missouri constitutional provision as a prohibited bill of attainder,⁵⁶ the caselaid the foundation for the “proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.”⁵⁷ More specifically, the Court declared that one of the fundamental and usual characteristics of a bill of attainder is the deprivation of a person or group of their profession or livelihood, especially when permanent, and without the safeguards of a judicial trial.⁵⁸

B. United States v. Lovett

In *Lovett*, the Court added depth to its understanding of the role that legislative intent and context surrounding the proposed legislation plays in the bill of attainder analysis.⁵⁹ Based on United States House of Representatives agenda to weed out people it considered “subversives,”⁶⁰ Congress passed the Urgent Deficiency Appropriation Act of 1943, which

55. 71 U.S. (4 Wall.) at 288. Cummings was convicted of practicing as a Christian minister without taking the oath. *Id.* The oath required an applicant to affirm that he had never given aid or comfort to persons engaged in hostility to the United States and had never “been a member of or connected with any order, society, or organization, inimical to the government of the United States.” *Id.* at 282. The Court discussed the inherent problems with the fact that at one time the State of Missouri had been “engaged in hostility” against the government of the United States as it was a member of the Confederate States during the Civil War. *Id.* at 315. The Court then appropriately noted that “an oath which requires a party to swear that he has committed no act of hostility against the State government, and no act of hostility as against the government of the United States, is an oath which . . . [is] impossible”; because if the individual supported the Union while in a confederate state, he has acted in “hostility” against the state. *Id.*

56. *Id.* at 329–31.

57. *United States v. Lovett*, 328 U.S. 303, 315–16 (1946). What the Court meant by punishment “without a judicial trial” raises some interpretational questions that are taken up *infra* Part V and note 230 and accompanying text.

58. See 41 RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 622 (1792). Additionally, the *Cummings* Court determined that the oath had “no possible relation to [an individual’s] fitness for those pursuits and professions,” which was another factor the Court considered. *Cummings*, 71 U.S. (4 Wall.) at 315.

59. See *Lovett*, 328 U.S. at 303.

60. *Id.* at 311 n.3 (quoting H. Rep. No. 448, 78th Cong., 1st Sess., p. 5) (The Act defines “subversive activity” as “conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all. Such activity may be open and direct as by effort to overthrow, or subtle and indirect as by sabotage.”).

permanently prohibited specifically named individuals from receiving any further compensation from their government jobs, and prevented them from further employment in government service, other than as soldiers or jurors.⁶¹ To evaluate the true legislative nature of the Act,⁶² the Court explored not only the Congressional Record, but also the larger context over the eight years leading up to the Urgent Deficiency Appropriation Act, which was at issue.⁶³ The Court found an extensive legislative history, which revealed that the true purpose of the legislation was to “purge” government agencies of government employees that Congress deemed “unfit.”⁶⁴ In part, what the Court found most troubling were the solemn reservations that many legislators raised in protest of the Act.⁶⁵ Despite having signed the bill, President Roosevelt felt compelled to voice his objection saying, “I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.”⁶⁶ Ultimately, in holding that the Act was a bill of attainder prohibited by the Constitution, the Court focused on traditional factors that the Act imposed: punishment⁶⁷ on specifically named individuals⁶⁸ without a judicial trial.⁶⁹

61. *Id.* at 305. Section 304 of the Urgent Deficiency Appropriation Act of 1943 is what was at issue in the case. *Id.* at 305–06. The Act, by way of an amendment, said in relevant part that after November 15, 1943, no further salary or compensation would be paid to named respondents, who were workers in various government agencies, and thereafter the only role in the government they could serve were as jurors or soldiers. *Id.* at 305.

62. Congress was not necessarily explicit or forthright about their intent and put forth its main defense that the Act was nothing more than of an appropriations nature, which was well within the rights of the Congress to pass under the Constitution. *Id.* at 306; U.S. CONST. art. I, § 8, cl. 1, cl. 18, and § 9, cl. 7 (sections which empower Congress to “lay and collect Taxes . . . to pay the Debts and provide for the common Defense and general Welfare of the United States,” and in that pursuit grants Congress the power to make certain appropriations by law).

63. *Lovett*, 328 U.S. at 308. In its analysis, the Court traced some of the events that led up to current legislation at issue: in May 1938, the Committee on Un-American Activities (“which became known as the Dies Committee, after its Chairman Congressman Martin Dies”) was formed, with the express purpose to make “lists of people and organizations it [deemed] ‘subversive’”; following the creation of the Dies Committee, other acts were passed that had the same function as the Act in *Lovett*—namely to prohibit anyone who “was a member of a political party or organization that advocated the overthrow of our constitutional form of Government” from holding a government job. *Id.* at 308 (citing § 9A of the Hatch Act, 53 Stat. 1148, 1149; §§ 15(f) and 17(b) of the Emergency Relief Appropriation Act of 1941, 54 Stat. 611). Furthermore, the Court looked at the nature of statements made in past hearings as well as those made in the context of the current legislation. *Id.*

64. *Id.* at 313–14.

65. *Id.* at 309. According to the Congressional Record, debate over the “appropriations” bill spanned several days because members of Congress had numerous doubts and concerns. 89 CONG. REC. 474, 479–86 (1943). All who participated in the debates agreed the charges brought against the individuals were serious and carried vast consequences. *Id.* at 651. During the debates, some legislators referred to the proposed bill as “legislative lynching,” comparing the procedure to that used in the French Chamber of Deputies, during the Reign of Terror. *Id.* at 651–54.

66. *Lovett*, 328 U.S. at 313 (quoting H. Doc. No. 78-264 (1st Sess. 1993)).

67. *Id.* at 313. Not only was the legislation designed to get rid of all existing employees that

C. United States v. Brown

In *Brown*, the Court's analysis goes further to expand the concept of punishment and specificity in finding a bill of attainder.⁷⁰ The statute⁷¹ at issue made it a crime for a member of the Communist Party to serve as an officer or employee of a labor union.⁷² Instead of laying out particular acts that would disqualify a person from specific employment, Congress made the determination that members of the Communist Party possessed certain feared but un-enumerated characteristics, which made them more likely to "initiate political strikes" against the U.S. Government.⁷³ "The command of the Bill of Attainder Clause [is] that a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics."⁷⁴ Moreover, there needs to be a "demonstrable

were deemed "subversives," but also to permanently bar other federal employing agencies from hiring them in the future. *Id.* at 313–14. The Court relied on precedent set forth in *Cummings* regarding the deprivation, especially in perpetuity, of one's right to practice in a certain profession at the hands of the Government as a form of punishment. *Id.* at 316; *supra* note 57 and accompanying text. The Court infers that to leave respondent's without judicial remedy after congressional action inflicted serious harm to their reputation and earning capacity would also be punishment and most certainly outside of the Framers's intent. *Id.* at 314; *see supra* notes 49, 69 and accompanying text.

68. *Lovett*, 328 U.S. at 316 n.4. This is one of the usual characteristics of bills of attainder. *See* WOODDESON, *supra* note 57 and accompanying text.

69. *Lovett*, 328 U.S. at 317–18. Bills of Attainder were proscribed because the framers of the Constitution and the Bill of Rights saw too clearly the risks to liberty that legislative trials and punishment would create in the land of freedom that they envisioned. *Id.* at 314, 318 ("[A] limited constitution . . . [is] one which contains certain specified exceptions to the legislative authority; such . . . as that it shall pass no bills of attainder, [or] *ex post facto* laws Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to . . . the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." (quoting THE FEDERALIST NO. 78 (Alexander Hamilton))).

70. *United States v. Brown*, 381 U.S. 437 (1965).

71. 29 U.S.C. § 504 (1958 & Supp. IV).

72. *Brown*, 381 U.S. at 440.

73. *Id.* at 450. The Court found that the Act was not exempted from being a bill of attainder just because it inflicted its deprivation "upon the membership of [a group] rather than upon a list of named individuals . . ." *Id.* at 461.

74. *Id.* at 454 n.29. The Court rejected Congress's argument that they did no more than insert in place of a list of characteristics the "semantically equivalent" shorthand of "membership in the Communist Party." *Id.* at 455 ("The designation of Communists as those persons likely to cause political strikes is not the substitution of a semantically equivalent phrase . . ."). "In a number of decisions, [the Supreme] Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics." *Id.* Nevertheless, the Court did not intimate that a legislature could never use "a shorthand phrase to summarize the characteristics with

relationship” between the aims Congress sought to avoid, the individuals who would carry out those aims, and the characteristics of the target group.⁷⁵ The Court determined that no legitimate relationship existed because even if Congress had good reason to believe that some Communists would use their positions in unions to bring about political upheaval, “it can[not] automatically be inferred that *all* members share their evil purposes or participate in their illegal conduct.”⁷⁶ Further, in support of the Court’s determination that no legitimate relationship existed, it drew contrast between the current case and *Board of Governors of Federal Reserve System v. Agnew*,⁷⁷ a case where the Act in question was trying to prevent a fiduciary conflict of interest.⁷⁸ As such, *Agnew* illustrated a meaningful distinction from section 504, which inflicted its deprivation “upon the members of a political group thought to present a threat to the national

which it is concerned,” but confined it to specific circumstance; for example:

[A] legislature might determine that persons afflicted with a certain disease which has as one of its symptoms a susceptibility to uncontrollable seizures should not be licensed to operate dangerous machinery. In enacting a statute to achieve this goal, the legislature could name the disease instead of listing the symptoms, for in doing so it would merely be substituting a shorthand phrase which conveys the same meaning.

Id. at 454 n.29. Congress oversteps its authority when it engages in the “forbidden fact-finding” about individuals and groups that the Constitution reserves for the judiciary. *Id.* at 464 (White, J., dissenting) (“The legislature may focus on a particular group or class only when . . . it is common knowledge that all, not just some, members of the group possess the feared characteristics and thus such legislative designation would require no legislative fact-finding about individuals.”).

75. *Id.* at 456. A compelling factor for the Court in making its decision that 29 U.S.C. § 504 was a bill of attainder was that it inflicted its “deprivation upon all members of [an ideological organization] without regard to whether there exist[s] any demonstrable relationship between the characteristics of the person involved and the evil Congress sought to eliminate.” *Id.* The Court in part relied on direction from *Aptheker v. Secretary of State*, 378 U.S. 500, 505 (1964) (following the proposition that Constitutional violations can result when an act “too broadly and indiscriminately” restricts constitutionally protected freedoms).

76. *Brown*, 381 U.S. at 456 (quoting *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 246 (1957)) (emphasis added).

77. 329 U.S. 441 (1947). The Court distinguished section 504 at issue in this case from section 32 of the Banking Act of 1933, the subject of *Agnew*, which the Court in that case held was not a bill of attainder. *Brown*, 381 U.S. at 453–56. *Agnew* was a suit to review or enjoin the action of the Board of Governors of the Federal Reserve System in removing respondents from office as directors of a national bank on the ground that they were employees of a firm “primarily engaged” in underwriting within the meaning of section 32 of the Banking Act of 1933. *Agnew*, 329 U.S. at 441; see also *infra* notes 78–79 and accompanying text.

78. *Brown*, 381 U.S. at 453. Section 32 of the Banking Act of 1933 stated that a person must not be primarily engaged

in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, and at the same time serve as an employee or officer of a member bank, unless by special exemption by the Board of Governors of the Federal Reserve System.

12 U.S.C. § 78 (1964) (emphasis added). The purpose of the legislation, as the *Brown* Court characterized it, was as a type of conflict of interest law, which had as its primary purpose to protect against undue influence over the investment policies of the member banks or the investment advice it gave its customers. *Brown*, 381 U.S. at 453.

security.”⁷⁹ Furthermore, the Court, believing that it would be antiquated to limit punishment to only a retributive purpose, found it appropriate to expand the meaning of punishment in order to “serve several purposes; retributive, rehabilitative, deterrent—and preventative.”⁸⁰ In doing so, the Court relied on historical considerations that many English and early American bills of attainder were enacted for preventative purposes.⁸¹ This Court, like the one in *Lovett*, took the combination of factors together to determine section 504 to be a prohibited bill of attainder.⁸²

79. *Brown*, 381 U.S. at 453. *Agnew* was further distinguished because section 32 incorporated no judgment censuring or condemning any person or group of people, rather Congress relied upon “its general knowledge of human psychology” to formulate its conclusion that “concurrent holding of the two designated positions would present a temptation to *any* [person]—not just certain [people] or members of a certain political party.” *Id.* at 454. This type of target group was typical of English and early American bills of attainder. *Id.* at 453; see also WOODDESON, *supra* note 57 and accompanying text. Moreover, it was common for traditional English bills of attainder to inflict deprivation on named individuals, as well as upon large groups, by description rather than by name. *Brown*, 381 U.S. at 461 (citing the following examples: “12 Car. 2, c. 30; 19 Geo. 2, c. 26; 11 Geo. 3, c. 55”). The Court follows the principle that because an act deprives a group, like the Communist Party in this instance, as opposed to a list of named individuals does not take it out of the category of a bill of attainder. *Id.* (This is consistent with earlier Supreme Court decisions in *Cummings* and *Garland* where the same type of Act—the denials affected a whole group and not named persons—was struck down.).

80. *Brown*, 381 U.S. at 458. Some are critical of those who would suggest that prevention is punishment, believing that, because prevention purports to serve a public safety purpose, it is somehow less than punishment; however, the *Brown* Court expressly states the contrary. *Id.* “[T]he legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble . . . and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event. *Id.* at 458–59. Further, one of the very justifications for imprisonment (which is punishment) in our society is to prevent future re-offenses and harm by the convicted during their time of incarceration. See *id.*; see also Punishment—Theories of Punishment, *supra* note 20 and accompanying text (“[L]aws that specify punishment for criminal conduct should be designed to deter future criminal conduct General deterrence means that the punishment should prevent other people from committing criminal acts. The punishment serves as an example to the rest of society, and it puts others on notice that criminal behavior will be punished. Specific deterrence means that the punishment should prevent the same person from committing crimes. Specific deterrence works in two ways. First, an offender may be put in jail or prison to physically prevent her from committing another crime for a specified period. Second, this incapacitation is designed to be so unpleasant that it will discourage the offender from repeating her criminal behavior.”). The prevention/deterrence purpose is likely the most relevant to try to strike down sex offender regulations because often the main purpose for the legislation is to prevent the offenders from inflicting future harm. See Punishment—Theories of Punishment, *supra* note 20.

81. *Brown*, 381 U.S. at 458–59 (“[T]he legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble . . . and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.”).

82. *Id.* at 461–62. Furthermore, another consideration here, as in previous cases where a bill of attainder was found, was that individuals who are subject to the Act would be criminally liable if

D. Selective Service System v. Minnesota Public Interest Research Group

In contrast to *Brown*, this case involved the Court distinguishing legislation that did not meet the requirements to be a prohibited bill of attainder.⁸³ In this case, the provision at issue—found in the Military Selective Service Act—denied federal financial assistance⁸⁴ to male students between the ages of eighteen and twenty-six who failed to register for the military draft.⁸⁵ The Court rejected the argument that the Act specifically targeted non-registrants in the same way that *Cummings* and *Ex Parte Garland*⁸⁶ had targeted those that could not take the Oath of Loyalty.⁸⁷ One main reason was that in this case, the affected status was completely reversible (or escapable), such that a student who wanted federal assistance could correct their deficient status simply by registering for selective service.⁸⁸ Moreover, in discussing whether the legislation had a punitive purpose, the Court was satisfied that Congress did not intend to punish⁸⁹ because rather than single out those that intentionally did not register for punishment, Congress chose to treat both willful and unintentional non-registrants the same by allowing both groups to avail themselves of financial aid simply by registering late.⁹⁰ Therefore, the provision survived the bill of attainder challenge.⁹¹

they did not leave their union positions. *Id.* at 450.

83. *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 858–59 (1984).

84. *See* Title IV of the Higher Education Act of 1965.

85. *Selective Serv.*, 468 U.S. at 854 n.13. The Court noted that Congress was aware that “more than half a million young men had failed to comply with the registration requirement.” *Id.* at 854.

86. *See supra* note 54.

87. *Selective Serv.*, 468 U.S. at 849.

88. *Id.* at 850–51. This was not available to the petitioners in *Cummings* or *Garland*, who were unable to take themselves out of the group that could not honestly take the oath. *See supra* notes 41, 55 and accompanying text.

89. The fact that federal authority places burdens on citizens does not automatically make those burdens punishment. *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 470 (1977); *United States v. Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). “Figuratively speaking all discomfiting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.” *Lovett*, 328 U.S. at 324. In this particular case the legislative history reflected the sentiment that students who wanted to further their education at the expense of their country should not expect to receive the benefits without accepting their fair share of responsibilities owed to their government. 128 CONG. REC. 7 9664–65 (1982) (remarks of Sen. Hayakawa); *see also id.* at 9664 (remarks of Sen. Mattingly); *id.* at 18,356 (remarks of Rep. Montgomery).

90. *Selective Serv.*, 468 U.S. at 855. The legislative history of the Act indicates that its purpose was to further non-punitive goals. *Id.* at 842. Further, the Act “imposes none of the burdens historically associated with punishment.” *Id.* The Court held that the pertinent law found in section 3 of the Military Selective Service Act required that every male born after January 1, 1963, register for the draft within thirty days of his eighteenth birthday; this regulation merely restricts financial assistance to those who fail to comply with the law. *See id.* at 848–49. “Congress sought, not to punish . . . but to promote compliance with the draft registration requirement and fairness in the allocation of scarce federal resources.” *Id.* at 855–56. It should be noted however, that legislative

E. Nixon v. Administrator of General Services

In this case, former President Richard Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act,⁹² which directed him to give up custody over his Presidential papers and tape recordings and grant them public access.⁹³ In its determination of whether the Act constituted a forbidden bill of attainder, the Court created a two-tiered test consistent with historical considerations and case law.⁹⁴ First, courts must determine whether an act targets an individual or group specifically.⁹⁵ Then, a court must determine whether the legislative act inflicts punishment within one of three tests formulated by the Court: historical, functional, and motivational.⁹⁶ Unless both the specificity and punitive prongs are satisfied, an enactment is not an unconstitutional bill of attainder.⁹⁷

“[L]egislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.”⁹⁸ In the midst of articulating the rule for specificity, it also appeared to create an exception; that if one voluntarily took action, which required a legislature to “re-act,” then it is possible to create a “legitimate

intent to encourage compliance with a particular law does not conclusively establish that a statute is innocuous or the legitimate regulation of conduct. *Id.* at 851–52.

91. *Id.* at 858–59.

92. Pub. L. No. 93-526, §§ 104–05 (1974). The Court determined that the Act did not violate the following: the separation of powers (because nothing in the Act rendered it excessively disruptive of the Executive Branch); the Presidential privilege doctrine; appellant’s constitutional privacy rights (because purely private information was to be returned to appellant); appellant’s First Amendment rights; or the Bill of Attainder Clause (because the Act did not have a punitive intent nor did it depend upon a congressional determination of appellant’s blameworthiness). *Nixon*, 433 U.S. at 425. Only the bill of attainder analysis will be discussed.

93. *Nixon*, 433 U.S. at 425. Nixon was arguing for an individual or defined group to be attained whenever either was compelled to bear burdens which the individual or group dislikes. *Id.* at 470. In rejecting such an expansive view, the Court said, “[it] would cripple the very process of legislating . . . invalidating every Act of Congress or the States that legislatively burdens some person or groups but not all other plausible individuals.” *Id.* at 470–71.

94. *Id.* at 472–74.

95. *Id.*

96. *Id.* at 472, 475, 478–79.

97. *See id.* Due to the unique circumstances in this case, the Court postulated one final consideration that is useful in determining whether the legislature sought to inflict punishment on an individual: an inquiry into the “existence of less burdensome alternatives” by which the legislature could have achieved its legitimate non-punitive objectives. *Id.* at 482.

98. *Id.* at 485. The most significant contribution to the understanding of what meets the specificity requirement was explained in *Brown*, *supra* notes 73–82 and accompanying text.

class of one.”⁹⁹ The Court found that due to the fact that Nixon had volitionally and singly entered into the “Nixon-Sampson agreement,” which by its terms called for the imminent destruction of certain materials, he constituted a “legitimate class of one.”¹⁰⁰

Next, the Court’s analysis turned to whether the deprivations imposed on Nixon by the enactment comprised punishment.¹⁰¹ First, the historical test focuses on whether the Act imposes traditional punishment historically associated with bills of attainder.¹⁰² Normally reserved for persons who were considered disloyal to the Crown or State, a wide range of punishments have traditionally accompanied bills of pains and penalties, such as “imprisonment, banishment, and the punitive confiscation of property by the sovereign.”¹⁰³ The Court found the closest thing to a colorable argument that Nixon had suffered any form of traditional punishment was that the Act ordered the General Services Administration to retain control over records, which Nixon claimed as his property.¹⁰⁴ However, the Court found this argument to be fatally flawed because section 105 of the Act authorized the district court to pay just compensation for the retention of the “property.”¹⁰⁵

99. *Nixon*, 433 U.S. at 472. The Court by its finding intimates that if the subject of the legislation voluntarily puts himself into a position where the legislation must “re-act,” then that may constitute a “legitimate party of one” and thus fall short of the specificity requirement. *See id.*

100. *See id.* Interestingly, however, in this case the Court still continued on to the punishment analysis, and thus it can be inferred that if the Court had found punitive intent, it still might have struck down the Act as an unlawful bill of attainder. *See id.*

101. Both the *Brown* Court as well as the Court in *United States v. O’Brien*, 391 U.S. 367, 383 n.30 (1968), did not alter the requirement that a person who challenges an act as a bill of attainder must establish that the legislature’s action carries with it a punitive intent and not merely the legitimate exercise of regulating conduct. *Nixon*, 433 U.S. at 476. In meeting this end, the *Nixon* Court once more confirmed that an examination is necessary of the purposes served by the alleged bill of attainder. *Id.*

102. *Nixon*, 433 U.S. at 473; *see also supra* notes 35–38 and accompanying text. There are a litany of examples from both England and the United States of such abuses of parliamentary and legislative power, which inflicted deprivations so unduly severe and inappropriate to non-punitive ends, which necessarily violate the Bill of Attainder Clause. *Nixon*, 433 U.S. at 473; U.S. CONST. art. I, § 9. “In England, a bill of attainder originally connoted a parliamentary Act sentencing a named individual or identifiable members of a group to death.” *Nixon*, 433 U.S. at 473 (citing 1 Jac. 2, c. 2. (1685)). More relevant in today’s analysis are bills of pains and penalties, which are legislative acts that inflict punishment other than execution. *United States v. Lovett*, 328 U.S. 303, 323–24 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866).

103. *Nixon*, 433 U.S. at 474–75. Our country has produced its own impermissible legislative punishment: “a legislative enactment barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal.” *Id.* at 474. For examples, see *supra* Part III.A (barring clergy from ministry in the absence of subscribing to a loyalty oath); *supra* Part III.B (barring named individuals from Government employment); and *supra* Part III.C (barring Communist Party members from offices in labor unions). A legislative act, which imposes any of these sanctions on named individuals or identifiable groups, would be immediately constitutionally suspect. *Nixon*, 433 U.S. at 473.

104. *Nixon*, 433 U.S. at 475.

105. *Id.* U.S. CONST. amend. V. Moreover, at the time of the decision, the fact was unsettled as to

Second, the functional test's purpose is to analyze the type and severity of burdens imposed by the law at issue to see if they can be reasonably said to further any non-punitive legislative purposes.¹⁰⁶ "Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers."¹⁰⁷ However, in this case, legitimate legislative justifications for the Act's passage were readily apparent.¹⁰⁸ Congress expressed that the Act was in the public interest because the materials to be destroyed via the agreement had "general historical significance."¹⁰⁹ Furthermore, the Court was concerned that the public would be denied access to all the facts surrounding the Watergate scandal, and if that were the situation it would not aid in the deterrence of others who would try similar scheming pursuits.¹¹⁰

The last possible test to find punishment is purely motivational. It looks at legislative record to determine if there is evidence of a legislative intent to punish.¹¹¹ In *Nixon*, the Act expressly provided President Nixon the right to an expedited judicial proceeding where he could present and assert all available defenses and privileges.¹¹² Then, the Court found probative that the record revealed that when opponents of the Act accused Congress of trying to pass a bill of attainder, the accusations were met directly and rebutted immediately with great fervor.¹¹³ However, the Court made it clear

whether the materials in question were the property of Nixon or of the Government. *Id.* at 475 n.39.

106. *Id.* at 475-76; *see also Cummings*, 71 U.S. (4 Wall.) at 319-20; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

107. *Nixon*, 433 U.S. at 476.

108. *Id.* First, there was an agreement ("Nixon-Sampson agreement") which Nixon voluntarily entered into that expressed intentions to destroy some of the former President's materials. *Id.* In passing the Act, Congress stressed the importance of preserving the information contained in those Presidential materials to move forward with the prosecutions of the Watergate-related crimes. *Id.* at 476-77; H.R. REP. NO. 93-1507, at 2 (1974). Moreover, the Court noted that it is a fair exercise of legislative power to guarantee the availability of evidence for use at criminal trials; thus this case was an example of "non-punitive legislative policy making." *Nixon*, 433 U.S. at 477-78.

109. *Nixon*, 433 U.S. at 477 (Congress expressed its belief that "[t]he information in these materials will be of great value to the political health and vitality of the United States.>").

110. *Id.*; S. REP. NO. 93-1181, at 4 (1974).

111. *Nixon*, 433 U.S. at 478. The analysis here will examine Senate and House Committee Reports, floor debates, and other statements made in legislative hearings about the act at issue to determine if the collective legislative intent was to punish an individual or group for blameworthy offenses. *Id.* 478-79; *see also supra* notes 63, 65 and accompanying text.

112. *Nixon*, 433 U.S. at 480.

113. *Id.* "This bill does not contain a word to the effect that Mr. Nixon is guilty of any violation of the law. It does not inflict any punishment on him. So it has no more relation to a bill of attainder . . . than my style of pulchritude is to be compared to that of the Queen of Sheba." *Id.* (quoting Sen.

that it did not wish to suggest that such a formal, express “legislative announcement of moral blameworthiness or punishment is necessary” for finding an unlawful bill of attainder.¹¹⁴ In the present case, the Court found that the lack of evidence illustrating a punitive purpose, when combined with the judicial safeguards built into the Act, was enough to show that the legislature was not trying to usurp the judicial function with the creation of an unlawful bill of attainder.¹¹⁵

The case law provides the blueprint to challenge a legislative enactment as a prohibited bill of attainder; however, the doctrine for many courts is superficially esoteric especially when applied in the context of sex offender legislation, which is complex and in constant flux.¹¹⁶

IV. THE CURRENT CLIMATE OF SEX OFFENDER REGULATIONS AND THE GAPING HOLE FOR THE BILL OF ATTAINDER CLAUSE TO FILL

Legislation in the sex offender context is one of those unique areas of the law because public outrage and inflamed passions are often the impetus of much of the legislation.¹¹⁷ In part, this is due to legislators who have their own families’ interests in mind, leading them to make laws based on the stir of emotions that sex offenders generate, and not necessarily on what is best

Ervin’s comments in response to Sen. Hruska’s criticism that the Bill inflicted punishment through deprivation of the appellant’s papers without a judicial trial).

114. *Nixon*, 433 U.S. at 480 (citing *United States v. Lovett*, 328 U.S. 303, 316 (1946)). Nevertheless, in this case the Court felt that the noticeable absence of legislative history to suggest a punitive intent was indicative of non-punitive intentions and strongly undercut one of the major concerns that prompted the prohibition against bills of attainder: “the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge—or, worse still, lynch mob.” *Id.* at 480 (citing the *Brown* Court’s citation of Alexander Hamilton’s concern “that legislatures might cater to the ‘momentary passions’ of a ‘free people, in times of heat and violence’”).

115. *Nixon*, 433 U.S. at 480; *see supra* note 97 and accompanying text (discussing that both the specificity and punishment prongs must be satisfied for a court to find a bill of attainder).

116. Despite the fact that the prohibition against bills of attainder and *ex post facto* laws exist in the same article, section, and clause of the Constitution, there is a startling and overwhelming void of challenges based on the Bill of Attainder Clause. *See supra* note 22 and accompanying text; *see also* *Wright v. Iowa Dep’t of Corrs.*, 747 N.W.2d 213, 214, 217–18 (Iowa 2008) (sex offender challenged the constitutionality of being subject to the Iowa state residency restriction when his conviction pre-dated the registration requirement). In *Wright*, among the many challenges, all of which the Iowa Supreme Court rejected, was one based on the Bill of Attainder Clause. *Id.* at 217. The Iowa high court dismissed the claim with minimal analysis, interpreting the requirement that legislative punishment be without a judicial trial to mean *Wright*’s trial of guilt, without consideration for the current residency law’s imposition of new deprivation. *Id.* at 218. This Court’s statutory interpretation likely flies in the face of the Framers’ intent, because in many cases it will leave individuals newly punished without judicial remedy. *See infra* Part VI.A and notes 230–234 and accompanying text.

117. *See supra* note 114 and accompanying text (discussing the dangers in the area of public outrage for which the Bill of Attainder Clause was instituted to protect against).

for the community.¹¹⁸ For this reason, the promulgation of sex offender regulations are often hastily written, based on antiquated ideas and overbroad without sound reason.¹¹⁹ Not surprisingly, the media has played a large role in perpetuating the persona of sex offenders as “uncontrollable monsters.”¹²⁰ When a particularly heinous sex crime occurs there is national media coverage around the clock for weeks, sometimes months, following the crime.¹²¹ Research conducted in the 1970s and 80s, in which researchers

118. See John Curran, *Sex-offender Zones Assailed—Critics Say Ordinances Limiting Where Offenders can Live Are Ineffective and too Broad*, PHILA. INQUIRER, Aug. 22, 2005, at B01 (Brick Township, New Jersey Mayor said that despite the impracticability of the residency restriction, which effectively resulted in banishment, it was too difficult to vote no on ordinances relating to sex offenders.); *infra* note 126 and accompanying text.

119. The widely held perception is that the vast majority of sex offenders will repeat their crimes. However, according to research by the United States Department of Justice in association with the Canadian Government, the sexual recidivism rates average “between 14% and 20% over 5-year follow-up periods.” Association for the Treatment of Sexual Abusers, Facts About Adult Sex Offenders, <http://www.atsa.com/ppOffenderFacts.html> (last visited Feb. 20, 2010); see also Press Release, Office of the Governor of the State of California, Governor Schwarzenegger Proposes Toughest Sex Offender Laws in the History of the State of California (Aug. 16, 2005), available at <http://gov.ca.gov/press-release/1565/> (The press release quoted Assemblywoman Runner: “As a legislator, mother and soon to be grandmother, I feel my most important job is to keep these predators away from our children and within our sights.” The sentiment is illustrative of the point that despite the negative consequences or the unconstitutionality that may result, many are legislating on emotion rather than reason.). It should be noted that The Sexual Predator Punishment and Control Act, which was the subject of the press release, later became Proposition 83 on the November 2006 ballot, and was passed with over 70% support. See Frank D. Russo, *All California Statewide Bonds Pass as Does Proposition 83 on Sex Offenders. Propositions 85 through 90 All Fail*, CALIFORNIA PROGRESS REPORT, Nov. 8, 2006, <http://www.californiaprogressreport.com/site/?q=archive/200611&page=5>.

120. No one would mean to suggest that people who commit violent crimes (whether sex crimes or not) are not “evil” or a type of “monster.” However, there exists a fallacy that just because a perpetrator has committed a prior sex crime necessarily means that the person is uncontrollable or will inevitably re-offend, which is the typical portrayal in the media. The fact is that the people who commit sexual offenses are, perhaps surprisingly, a very heterogeneous group. Thus it becomes very difficult to treat them all as possessing the same characteristics. Research suggests that sex offenders who re-offend the most are pedophiles that molest young boys, and rapists of adult women—with recidivism rates at 52% and 39% respectively. Association for the Treatment of Sexual Abusers, *supra* note 119.

121. Criticism for the approach that media takes in reporting sex crimes and creating awareness for sex offenders is prevalent. Brian Montopoli of the CBS News Public Eye Blog (formerly of the Columbia Journalism Review) criticizes the *Dateline NBC: How to Catch a Predator* series because he believes that as a business, NBC cares more about dramatic footage and favorable ratings than about justice. See CBS News Public Eye Blog, Does “Dateline” Go too far to “Catch a Predator?”, Feb. 7, 2006, <http://www.cbsnews.com/blogs/2006/02/07/publiceye/entry1290135.shtml> (“NBC is first and foremost a business, and the producers’ motives are not simply altruistic . . . I find it telling that this program has been remade and rerun so often. You could argue that NBC is just making sure as many people as possible are aware predators are out there, but is it too much to think that a little thing called ‘ratings’ might play a part as well?”). For more information regarding

concluded that sex offenders would continue to re-offend because they were unable to detect a difference in recidivism rates between sex offenders who had undergone treatment and those who had not, is largely responsible for shaping the media paradigm.¹²² However, the reality is much tamer.¹²³ Notwithstanding the extensive media coverage of child abductions that result in extreme violence, more modern research suggests that “less than 1% of all sex crimes involve murder.”¹²⁴ Despite this reality, the legislative response is too often fashioned to calm the fears and satisfy the demands of the citizens the legislators serve.¹²⁵ As such, the response is swift, but in its expediency it falls short in weighing the potential negative side effects; not just to offenders themselves, but also to our system of Constitutional justice that our country holds tantamount.¹²⁶

nationwide media coverage of sex crimes and the legislative response that it can generate see *supra* notes 19–20 and accompanying text.

122. Lita Furby, Mark R. Weinrott & Lyn Blackshaw, *Sex Offender Recidivism: A Review*, 105(1) PSYCHOL. BULL 3, 3–30 (1989).

123. Furthermore, contrary to the myth that strangers pose the more serious danger, “the vast majority of sexually abused children (80–90%) are molested by family members and close friends or acquaintances.” Association for the Treatment of Sexual Abusers, *supra* note 119.

124. *Id.*

125. Adam Walsh Act § 102, 42 U.S.C. § 16901 (2006). The Act’s Declaration of Purpose states: “In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those offenders[.]” *Id.* The act goes on to list seventeen victims of sex crimes by name, ranging in ages from five to thirty-one over a twenty-one year period from 1984–2005. *Id.* Only four of them were attacked by perpetrators who were repeat or career offenders. *Id.* Some of the names, which received the most media attention, include Megan Kanka (“Megan’s Law”), Jessica Lunsford (“Jessica’s Law”), Elizabeth Smart (found alive), and Samantha Runnion; 5,500 mourners attended Samantha’s funeral (she was five years old at the time of her murder). *Id.* Clearly, the affects of such tragedy reach thousands of people. The fact cannot be ignored that legislation like this Act is often fueled by the public outcry for change. The difficult question is: do seventeen victims spread over twenty-one years justify such a heavy-handed response, and if so is the response constitutional? See *infra* note 242 and accompanying text.

126. The mob mentality for justice by the public must be tempered by the reason, planning, and protection of the government. It is without a doubt that sex offenders should be dealt with harshly. However, many of the laws are so focused on the severity and swiftness of a response that will calm the fears of the majority that they end up counterproductive to rehabilitation and restrict the individual liberties of “this group” passed the point that is tolerable by the Constitution. See e.g., Curran, *supra* note 118. Sex offenders living in Brick Township, New Jersey were prohibited from living within 2,500 feet of all bus stops after they were included on the list in the residency restriction statute. *Id.* There are more than 2,000 bus stops in the area, so the “measure effectively bars offenders from living anywhere in the town.” *Id.* Despite this result, Brick Mayor Joseph Scarpelli believes that politically it is very difficult to vote no on an ordinance that deals with sex offenders. *Id.* Mayor Scarpelli continued, “I know they’ll probably have a case that tests all these ordinances, and there’s a good possibility a lot will be thrown out as unconstitutional. But it makes a town feel that they care about their children.” *Id.*

A. Panic Driven Legislation: Origins of Sex Offender Laws

The origins of sex offender regulations can be traced to perhaps the most notorious sex crime ever committed.¹²⁷ On January 15, 1947, Elizabeth Short's mutilated and severed body was found in a vacant lot in Los Angeles, California.¹²⁸ One month later, California passed the first registry legislation to aid law enforcement in the monitoring of convicted rapists, child molesters, and other sexually aggressive "predators."¹²⁹ Between 1947 and the early 1990s few states had registration requirements imposed on convicted sex offenders.¹³⁰

However, beginning in the 1990s, legislative bodies began to react to highly publicized child abductions.¹³¹ First, in 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act¹³² ("Jacob Wetterling Act"), which "require[d] state implementation of a sex-offender registration program or a 10 percent forfeiture of federal funds for state and local law enforcement."¹³³ "Most people assume that a registered sex offender is someone who has sexually abused a child or engaged in a violent sexual assault of an adult," however, many state

127. See Crime and Investigation Network, Elizabeth Short: The Black Dahlia, <http://www.crimeandinvestigation.co.uk/crime-files/elizabeth-short-the-black-dahlia/arrest.html> (last visited Feb. 20, 2010) ("In February 1947, as a direct result of the Short murder, California became the first state requiring the registration of convicted sex offenders.").

128. Crime Library on truTV.com, The Black Dahlia Story: The Unsolved Murder of Elizabeth Short, http://www.trutv.com/library/crime/notorious_murders/famous/dahlia/index_1.html (last visited Feb. 20, 2010); WIKIPEDIA, http://en.wikipedia.org/wiki/Black_Dahlia (last visited Feb. 20, 2010) (entry for "Black Dahlia"). Better known as "The Black Dahlia," Short's murder gripped the public because of the brutality of the crime as well as sensational and sometimes inaccurate press coverage. *Id.* It was the largest investigation by the LAPD since the murder of twelve-year-old Marion Parker, in 1927, and involved hundreds of officers borrowed from other law enforcement agencies. *Id.* The murder, which remains unsolved, "has been the source of widespread speculation as well as several books and film adaptations." *Id.*

129. California Department of Justice, Megan's Law, Sex Offender Registration and Exclusion Information, <http://meganslaw.ca.gov/sexreg.aspx?lang=ENGLISH> (last visited Feb. 20, 2010).

130. Nat'l Ctr. for Missing & Exploited Children, Sex Offenders: History, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=3032 (last visited Feb. 20, 2010) [hereinafter Sex Offender History].

131. See Anna Barvir, *When Hysteria and Good Intentions Collide: Constitutional Considerations of California's Sexual Predator Punishment and Control Act*, 29 WHITTIER L. REV. 679, 683 (2008) ("In response to a string of highly publicized murders and sexual assaults on children in the early 1990s, Congress contributed to the emerging national patchwork of sex offender laws . . . aimed at strengthening offender-monitoring procedures in every state."); see also Jan M. Chaiken, *Foreward* to U.S. BUREAU OF JUST. STAT., NATIONAL CONFERENCE OF SEX OFFENDER REGISTRIES, at v (1998), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/Ncsor.pdf>.

132. 42 U.S.C. § 14071 (2006).

133. Sex Offender History, *supra* note 130.

registration laws require registration when an individual's "conduct did not involve coercion or violence, and may have had little or no connection to sex" at all.¹³⁴ Then in 1996, on the heels of the brutal sexual assault and murder of seven-year-old Megan Kanka,¹³⁵ Congress again acted to amend the Jacob Wetterling Act to include community notification when sex offenders are released from prison.¹³⁶ Today, every state including the District of Columbia has sex offender registry laws.¹³⁷ Furthermore, as many states continue to increase the reach of legislative regulations on sex offenders, so too has the ferocity and necessity increased for those who wish to challenge those expansions.¹³⁸

B. The Road to Nowhere: The Failure of Existing Challenges

Given that sex offenders are a disenfranchised group whose lobby is neither large nor vocal,¹³⁹ the courts more than ever have an enormous

134. See, e.g. ALA. CODE § 13A-11-200(b) (LexisNexis 2005 & Supp. 2009); MICH. COMP. LAWS ANN. §§ 28.722, 750.455 (West 2004); OR. REV. STAT. §§ 181.594, .595 (2007); TENN. CODE ANN. §§ 40-39-202 to -203 (2006 & Supp. 2009); W. VA. CODE §§ 15-12-2, 61-8-6 to -7 (2009). The five states require registration for adult prostitution-related offenses and are distinct from prostitution offenses relating to children. See HUMAN RIGHTS WATCH, *supra* note 14 at section V, n.108. "At least 39 states require persons to register as sex offenders for prostitute-related offenses against children." *Id.* "At least 13 states require registration for public urination," of which two limit registration to the act committed in view of a minor; and "[a]t least 29 states require registration for consensual sex between teenagers." *Id.*

135. See *supra* notes 19–20 and accompanying text.

136. Sex Offender History, *supra* note 130. The law, known as "Megan's Law," mandates the creation of state notification systems, including the creation of an Internet resource that contains the names and locations of newly released offenders; but leaves the specific methods and policies to the discretion of the States. *Id.*

137. *Id.*

138. New laws affecting sex offenders come with a "scarlet" label, a visual marker, which historically has led to contempt and scorn prior to full and complete investigation. See Jennifer Rosenberg, *The Yellow Star*, ABOUT.COM, <http://history1900s.about.com/od/holocaust/a/yellowstar.htm> (last visited Feb. 20, 2010) (Jews in Nazi Germany forced to wear a yellow star on their clothing designating them as Jewish, subjecting them to persecution, despite not being guilty of any crime); see also *infra* note 178 and accompanying text. For other examples of "scarlet letter" laws see S.B. 1163, 2007–08 Gen. Assem., Reg. Sess. (Ca. 2008) (This California bill is currently in the California Senate; last action Feb. 14, 2008. If passed, the bill will prohibit all sex offenders who are subject to the registration requirement from driving a vehicle unless it is displaying a specially issued license plate or sticker that indicates their status as a registered sex offender.); H.B. 217 126th Gen. Assem., Reg. Sess. 2005–06 (Ohio 2006). Many state legislatures have passed scarlet letter laws intended to restrict the movement of registered sex offenders on Halloween. See e.g., Wendy Koch, *Halloween Restrictions Put On Sex Offenders*, USA TODAY, Oct. 30, 2008, at 3A, available at http://www.usatoday.com/news/nation/2008-10-29-halloween_N.htm (discussing laws from Indiana, Maryland, Missouri, and New Mexico which require convicted sex offenders to post signs at their homes telling trick-or-treaters to stay away or saying "No candy at this residence"). For a picture of the sign see Tom LoBianco, *Pumpkin Symbol Marks Sex Offenders' Homes*, WASH. TIMES, Oct. 15, 2008, available at <http://www.washingtontimes.com/news/2008/oct/15/pumpkin-marks-sex-offenders-homes/>.

139. Cal. Dep't of Corrs. v. Morales, 514 U.S. 499, 522 (1995) (Stevens, J., dissenting) ("The

responsibility to protect their constitutional guarantees. Notwithstanding this responsibility, with few exceptions judges in courts of various state and federal jurisdictions have overwhelmingly upheld sex offender laws, rejecting challenges based on procedural due process,¹⁴⁰ equal protection,¹⁴¹ cruel and unusual punishment,¹⁴² banishment,¹⁴³ ex post facto,¹⁴⁴ and arguments that such laws violate fundamental rights, including the right to privacy.¹⁴⁵ Existing constitutional challenges are most commonly raised in the context of registration, community notification laws, and, more recently, residency restrictions.

First, despite the research that suggests community notification schemes are fatally flawed,¹⁴⁶ in 2003 the United States Supreme Court upheld the Alaska¹⁴⁷ and Connecticut¹⁴⁸ state notification laws.¹⁴⁹ The specific

danger of legislative overreaching against which the [Constitution] protects is particularly acute when the target of the legislation is a narrow group as unpopular (to put it mildly) as multiple murderers.”). It is easy to compare esteem in the minds of others for multiple murders to that of multiple offense sex offenders, especially those that involve children or that result in murder.

140. See *infra* note 148 and accompanying text.

141. See *Wright v. Iowa Dep’t of Corrs.*, 747 N.W.2d 213, 216–17 (Iowa 2008) (rejecting equal protection argument because the residency restrictions applied equally to all sex offenders and only needed to satisfy a rational-basis analysis). *Contra* *People v. Hofsheier*, 11 Cal. Rptr. 3d 762 (Ct. App. 2004), *overruled by* 129 P.3d 29 (Cal. 2006) (holding that requiring an individual convicted of engaging in oral copulation with a minor under the age of 18 is a violation of equal protection if the participants are within three years of each other, because adolescents of the same age difference who engage in consensual intercourse do not trigger the registration). Explaining its rationale the Court stated that it perceived “no reason why the Legislature would conclude that persons who are convicted of voluntary oral copulation with adolescents 16 to 17 years old, as opposed to those who are convicted of voluntary intercourse with adolescents in that same age group, constitute a class of ‘particularly incorrigible offenders’ . . . who require lifetime surveillance as sex offenders.” *Hofsheier*, 129 P.3d at 42; CAL. PENAL CODE §§ 288(a)(b)(1), 261.5

142. See *People v. Leroy*, 828 N.E.2d 769, 784 (Ill. App. Ct. 2005).

143. See *Wright*, 747 N.W.2d at 218 (Iowa Supreme Court dismissing the contention without a scintilla of analysis).

144. See *Smith v. Doe*, 538 U.S. 84 (2003); *infra* note 147 and accompanying text.

145. See *A.A. ex rel M.M. v. New Jersey*, 341 F.3d 206 (3d Cir. 2003) (rejected registrant’s privacy challenge because purpose of the registration statute was not to humiliate); see also *Byron M. v. City of Whittier*, 46 F. Supp. 2d 1037 (C.D. Cal. 1998) (holding information released to the media and the public under registration statutes is not an invasion of privacy because it was not shown that the legislative intent of the statute precluded dissemination of certain information to the media regarding high-risk sex offenders and plaintiff was unable to demonstrate irreparable harm).

146. See *infra* Part VI.

147. *Smith*, 538 U.S. at 84 (upholding Alaska’s version of Megan’s law against the constitutional challenge that the registration law constituted an ex post facto law). In *Smith*, the Court reviewed an argument that because Alaska’s sex offender law applied to sex offenders who committed acts prior to the enactment of the statute it was unconstitutional. *Id.* at 90–93. In a six-to-three opinion written by Justice Kennedy, the Court rejected that argument, finding that the law was designed to protect the public from sex offenders rather than to punish sex offenders themselves. *Id.* at 103–04. The

constitutional issues raised in the cases differed, but in both cases the Court gave little weight to the shaming and stigma that inevitably and necessarily accompany community notification, and further overlooked the unnecessarily broad scope of the statutes with respect to both who is required to register and who may access the registry.¹⁵⁰ Lower courts have similarly upheld registration requirements stating that the rights of privacy at issue are not “deeply rooted in this Nation’s history and tradition[] [nor] implicit in the concept of ordered liberty.”¹⁵¹ Indicative that a new challenge is needed is the fact that courts generally review registration and community notification statutes under a rational basis standard because the rights at issue are not considered fundamental to one’s constitutionally protected interests, and because sex offenders are not classified as a suspect group.¹⁵²

Court found that the Ex Post Facto Clause only applied to laws that were punitive in nature. *Id.*; see U.S. CONST. art. I, § 10, cl. 1.

148. Conn. Dep’t of Pub. Safety v. Doe, 538 U.S. 1 (2003) (holding that Connecticut’s version of Megan’s Law does not deprive sex offenders of procedural due process of law). In *Connecticut*, a unanimous Court rejected an argument that sex offenders were denied procedural due process because they were not afforded an opportunity to determine whether they were dangerous to the public. *Id.* at 6. Chief Justice Rehnquist, writing for the Court, found that the sex offenders were not entitled to a hearing about their dangerousness because the law applied to all convicted sex offenders rather than only those who are considered dangerous, and thus a sex offender’s propensity for danger was not an issue of consequence under Connecticut’s law. *Id.* at 7–8.

149. See *supra* notes 147–148 and accompanying text. Although the Court’s decisions in 2003 strongly indicate that the Court was inclined to uphold Megan’s Law, the Court did not address several key issues, such as whether these sex offender laws violate the offenders’ substantive due process or equal protection rights. *Id.* The Court has declined to review any of the sex offender cases that have come before it since, including a challenge to the Iowa residency restrictions law that prevents sex offenders from living within 2,000 feet of parks or other places where children might be expected to congregate. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005).

150. *Smith*, 538 U.S. at 100–01.

151. *Doe v. Moore*, 410 F.3d 1337, 1344 (11th Cir. 2005). “[A] state’s publication of truthful information that is already available to the public does not infringe the fundamental constitutional rights of liberty and privacy.” *Id.* at 1345.

152. *Id.* at 1345–46. The rational basis standard is the lowest level of scrutiny applied by courts deciding constitutional issues through judicial review. *United States v. Clary*, 846 F. Supp. 768, 773 (E.D. Mo. 1994). The rational basis standard requires that governmental action be “rationally related” to a “legitimate” government interest. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 183 (1980). Under this very deferential standard of review courts begin with a strong presumption that the law or policy under review is valid. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993). The burden of proof is on the party making the challenge to show that the law or policy is unconstitutional. *Id.* To meet this burden, the party must demonstrate that the law or policy does not have a rational basis. *Id.* This is a difficult to prove for two reasons: first, because a court can usually find some reasonable ground for sustaining the constitutionality of the challenged law or policy; and second, because the test gives great deference to the legislative branch. *Id.* I would think it unwise, unpopular, and unsuccessful to advance an argument for making sex offenders a suspect or quasi-suspect class, thereby elevating the level of scrutiny by which a court would be forced to review sex offender legislation. However, a bill of attainder challenge is nonetheless important because the test for bill of attainder is not whether a legislature has a legitimate purpose, but whether in its pursuit of such legitimate ends the means it chooses either intentionally punishes or inadvertently results in punishment. See *infra* Part V.B. This additional level of analysis is a slightly more burdensome hurdle that the legislature must clear. Whereas the rational basis review

Next, among the most controversial of sex offender laws, residency restrictions¹⁵³ are highly criticized for failing to reach their purported public safety purpose¹⁵⁴ and creating a litany of unintended consequences.¹⁵⁵ Many of the restrictions work in effect to banish sex offenders from the community.¹⁵⁶ Despite the slippery constitutional slope on which this type

only requires a finding of a legitimate legislative purpose and further allows a court to create such legitimate purpose whether one exists or not, the bill of attainder analysis, in contrast, does not provide for such judicial invention. See VIKRAM D. AMAR, WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 765–69 (13th ed. 2009).

153. There are nineteen states with residency restrictions that are not a condition of probation, parole, or supervision: Delaware; Alabama; Arkansas; Florida; Georgia; Idaho; Illinois; Indiana; Iowa; Kentucky; Louisiana; Michigan; Mississippi; Missouri; Ohio; Oklahoma; South Dakota; Tennessee; and Virginia. Eight states have a residence restriction as a condition of probation, parole, or supervision: Arizona, ARIZ. REV. STAT. ANN. § 41-1604.07(F) (2006); California, CAL. PENAL CODE § 3003(g) (West 2006); Florida, FLA. STAT. ANN. §§ 947.1405(7)(a)(2), 948.30(1)(b) (West 2006 & Supp. 2010); Indiana, IND. CODE ANN. §§ 11-13-3-4(g)(2)(B), 35-38-2-2.2(2) (West 2004); Louisiana, LA. REV. STAT. ANN. § 15:538(D)(1)(c) (2005); Oregon, OR. REV. STAT. § 144.642(1)(a) (2006); Texas, TEX. CODE CRIM. PROC. ANN. art. 42.12(13B) (Vernon 2006); and West Virginia, W. VA. CODE ANN. § 62-12-26(b) (LexisNexis 2005 & Supp. 2009).

154. The research continues to point to residency restrictions as being ineffective to cut down recidivism. Paula Reed Ward, *Residency Restrictions for Sex Offenders Popular, but Ineffective*, PITTSBURGH POST-GAZETTE, Oct. 26, 2008, available at <http://www.post-gazette.com/pg/08300/922948-85.stm>. “Even as prosecutors, criminal justice researchers and child advocates say they don’t work, parents and legislators continue to push for the tough laws.” *Id.*; see also JILL S. LEVENSON, *SEX OFFENDER RESIDENCE RESTRICTIONS: A REPORT TO THE FLORIDA LEGISLATURE* 2, Oct. 2005, available at [http://www.nacdl.org/sl_docs.nsf/issues/sexoffender_attachments/\\$FILE/Levinson_FL.pdf](http://www.nacdl.org/sl_docs.nsf/issues/sexoffender_attachments/$FILE/Levinson_FL.pdf) (noting that despite public and political support there is no concrete evidence that proximity to schools increases recidivism among sex offenders).

155. The occurrence of homelessness of paroled sex offenders has skyrocketed due to the residency restrictions limiting where sex offenders can live. See Michael Rothfeld, *Homeless Sex Offenders on Parole Jumps Sharply*, L.A. TIMES, Dec. 19, 2008, at B2, available at <http://www.latimes.com/news/local/la-me-briefs19-2008dec19,0,2571906.story>. Proposition 83, California’s version of Jessica’s Law, prohibits sex offenders from living within 2,000 feet of schools and parks where children regularly gather. *Id.*; CAL. PENAL CODE § 209 (West 2007) (codifying California Ballot Initiative Proposition 83, available at http://www.sos.ca.gov/elections/vig_06/general_06/pdf/proposition_83/entire_prop83.pdf). When the Sex Offender Management Board released a report looking at Proposition 83’s “effect on housing for all sex offenders, including those not on parole” and “against whom the [residency] law has not generally been enforced,” the Board found a sixty percent increase of homelessness. Rothfeld, *supra*. The Board’s report stated: “Common sense leads to the conclusion that a community cannot be safer when sex offenders are homeless,” and in further support cited “research concluding that unstable housing [is counterproductive to rehabilitation and] can lead to recidivism.” *Id.* In response to the Board’s report, the California governor’s office said that Governor Schwarzenegger still “strongly supports Jessica’s Law, [however,] all involved concede [it] needs fine-tuning.” *Id.*

156. Despite being cloaked in protective, public safety intent, banishment is the desired goal of these laws. Jason Garcia, *Legislator Seeks Statewide Predator Law*, SUN-SENTINEL, Sept. 15, 2005, at 12B (quoting Rep. Susan Goldstein who introduced a bill in the Florida legislature to increase the residence restrictions from 1,000 to 2,500 feet and whose ultimate goal was to “get these people out of our neighborhoods and hopefully out of our state”). In Georgia, where the laws are some of the

of restriction resides, federal and state courts who have ruled on such restrictions have, for the most part, upheld these laws against challenges that the restrictions are unconstitutionally overbroad¹⁵⁷ and vague,¹⁵⁸ violate substantive due process rights to housing,¹⁵⁹ violate the Ex Post Facto Clause against retroactive punishment,¹⁶⁰ and violate the Eighth Amendment's ban

most strict, Georgia House Majority leader Jerry Keen, the chief sponsor of 2006 Georgia House Bill 1059, stated:

'We want those people running away from Georgia. Given the toughest laws here, we think a lot of people could move to another state. . . . If it becomes too onerous and too inconvenient, they just may want to live somewhere else. And I don't care where, as long as it's not in Georgia.'

Whitaker v. Perdue Complaint, *supra* note 15, at 23. There was an amendment to S.B. 1 to narrow the holding in *Mann*, which allows offenders to stay in their homes or jobs if they have lived or worked there prior to July 1, 2006, but the intent is very much to drive sex offenders out of the state. *See infra* note 158 and accompanying text. That intent is further echoed in Rep. Keen's statements in the house chambers where he said:

If someone did something now to my grandchildren . . . [t]hose are the people we are trying to get off the streets of this state, and those are the people that we are going to send a message to that if you have a propensity to that crime perhaps you need to move to another state.

Statement by Rep. Keen to Rep. Roger Bruce, House Debate on H.B. 1059, House Internet Broadcasts (Feb. 2, 2006), available at http://www.georgia.gov/00/article/0,2086,4802_6107103_47120020,00.html; see also *Georgia's New Sex Offender Law Nixed*, GWINNETT DAILY ONLINE, July 3, 2006, <http://www.gwinnettdailyonline.com/GDP/archive/article19EE2C8F45E54F0C972E0BAE97E39C86.asp> (quoting Rep. Keen's remarks that the law would be an "inconvenience," but urging that "most folks would agree this is a good thing"). Notwithstanding the desire of legislatures to push sex offenders out of their respective states, the laws create practical problems because many who are still on probation or parole cannot legally leave the state until they have gone through a lengthy and tedious application process to transfer their supervision to another state; in the meantime they are forced on to the streets and underground, only exacerbating the difficulty of monitoring of such individuals. *See supra* note 155 and accompanying text.

157. *People v. Leroy*, 828 N.E.2d 769, 784 (Ill. App. Ct. 2005).

158. *Mann v. State* ("Mann I"), 603 S.E.2d 283, 286 (Ga. 2004); see *Mann v. Georgia Dep't of Corrs.* ("Mann II"), 653 S.E.2d 740 (Ga. 2007) (declaring GA. CODE ANN. § 42-1-15(a) (2008), a portion of Georgia's residency restriction statute, unconstitutional as a violation of state and federal takings clauses). The takings clause prohibits the government from physically taking someone's property for public use or placing regulations on it that result in the inability to use the land for its intended purpose, without just compensation for deprivation of the person's protected property interest. *See* U.S. CONST. amend. V. *Mr. Mann*, a person on the registry, purchased a home in an area that was originally not within 1,000 feet of a prohibited location. *Mann II*, 653 S.E.2d at 741-42. Later, two child-care centers opened within 1,000 feet of his home. *Id.* at 742. As a result, law enforcement authorities ordered him to move. *Id.* After the Georgia Supreme Court found the residency restrictions unconstitutional, an amendment to section 42-1-15 was passed to try and narrow and clarify the Georgia Supreme Court's decision. *See* S.B.1, 2007-08 Gen. Assem., Reg. Sess. (Ga. 2008). The bill that became law July 1, 2008, reinstated all residency and employment restrictions that were in place before the *Mann II* decision with two exceptions: a homeowner who has established ownership prior to July 1, 2006, will not be required to move if one of the enumerated places that are statutorily prohibited moves within 1,000 feet of the offender's residence; and a person employed at a certain location will not be required to change employment if he or she was employed prior to July 1, 2006. *Id.* (codified in GA. CODE ANN. § 42-1-15 (2008)).

159. *See Doe v. Miller*, 405 F.3d 700, 710 (8th Cir. 2005); see also *Leroy*, 828 N.E.2d at 776-77.

160. *Lee v. State*, 895 So. 2d 1038, 1041-44 (Ala. Crim. App. 2004); *Thompson v. State*, 603 S.E.2d 233, 234-36 (Ga. 2004); see also *Smith v. Doe*, 538 U.S. 84, 85 (2003).

on cruel and unusual punishment.¹⁶¹ Not surprisingly, no court applying a rational basis review has held that residency restrictions are an unreasonable means of achieving the state's legitimate purpose of protecting children.¹⁶² However, it is disturbing that in past challenges sex offenders have pointed to the lack of evidence that the exclusion zones enhance children's safety,¹⁶³ and courts in response have conceded that the efficacy of the restrictions is unproven, yet continue to uphold the restrictions.¹⁶⁴ There is a clear disconnect between the stated purpose of the legislation affecting sex offenders and the actual results.¹⁶⁵ It appears that many lawmakers are legislating without sound reason, as if the courts will step in if they go too far. However, courts in this area are instead stepping aside and granting legislatures broad discretion.¹⁶⁶ The result of this deference is that existing constitutional challenges are inadequate and ineffective to handle the poorly designed and overly oppressive legislation affecting sex offenders.

V. A NEW DIRECTION: APPLICATION OF THE BILL OF ATTAINDER ANALYSIS IN THE CONTEXT OF SEX OFFENDER LEGISLATION

From a society whose punishment for commission of a felony was death,¹⁶⁷ our society has evolved to reflect our increased collective

161. See *Leroy*, 828 N.E. 2d at 784.

162. See *Miller*, 405 F.3d at 716 (“[W]e are not persuaded that the means selected to pursue the State’s legitimate interest are without rational basis.”); see also *Leroy*, 828 N.E.2d at 777 (“[W]e conclude that . . . prohibiting child sex offenders from living within 500 feet of a playground . . . bears a reasonable relationship to the goal of protecting children.”).

163. See, e.g., *Miller*, 405 F.3d, at 714 (“[Petitioners] contend . . . that the statute is irrational because there is no scientific study that supports the legislature’s conclusion that excluding sex offenders from residing within 2000 feet of a school or child care facility is likely to enhance the safety of children.”).

164. *Id.* (describing the effectiveness of sex offender residency statutes as “an area where precise statistical data is unavailable and human behavior is necessarily unpredictable”); *Leroy*, 828 N.E.2d at 777 (“[T]he record is bare of any statistics or research correlating residency distance with sex offenses.”); see also *supra* note 154. Dr. Levenson, a Lynn University professor who has studied sex crime policy for almost a decade, says that because restrictions also limit access to family, affordable housing, employment, and treatment programs, the result of the restrictions is counter to what legislators had intended. LEVENSON, *supra* note 154, at 5. The reality is “[c]riminal offenders who have stable housing, stable employment and support systems in their lives . . . are less likely to go on and commit new crimes.” Ward, *supra* note 154.

165. See *supra* notes 154–156 and accompanying text.

166. See, e.g., *Miller*, 405 F.3d at 715 (“The legislature is institutionally equipped to weigh the benefits and burdens of various distances”); *Leroy*, 828 N.E.2d at 776–77 (“[T]he state has broad powers . . . to avert potentially dangerous situations.”).

167. NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/Felony> (last visited Feb. 20, 2010) (entry for “Felony”). “[W]hen the British and American legal systems

sophistication and social progress. The prohibition of bills of attainder has also progressed to include more than just capital sentences.¹⁶⁸ Part of the history that has remained is the continued focus on “legislative enactments that ‘set[] a note of infamy’ on the persons to whom the statute applies.”¹⁶⁹ The reputational tarnish of being labeled a felon will no doubt make normal life challenging.¹⁷⁰ However, add to it the additional classification as a sex offender and not only does it damage one’s pecuniary opportunities, but it also harms one’s ability to have interpersonal or intimate relationships.¹⁷¹ Therefore, it should be with great care and due caution that we designate a person with such a destructive label. It is important to distinguish between a narrowly constructed sex offender registration system designed to protect the public, and hastily crafted legislation that casts its net so wide that it captures offenders whose predatory behavior or criminal intent was never proven.¹⁷² A successful challenge to the latter through the Bill of Attainder Clause would serve what this country was built to preserve and protect—Justice.

In order for a legislative act to be struck down as a prohibited bill of attainder, it must satisfy the Supreme Court’s two-part inquiry: (1) whether the act specifically names or identifies an individual or group; and (2) whether the act inflicts punishment within the meaning of the Bill of Attainder Clause.¹⁷³

divorced in 1776, felonies were crimes for which the punishment was . . . death” *Id.*

168. *See supra* notes 36–38 and accompanying text.

169. *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003) (citing *United States v. Brown*, 381 U.S. 437, 453–54 (1965) (holding that a statute is not a bill of attainder where it “incorporates no judgment censuring or condemning any man or group of men”)).

170. Most if not all job applications ask applicants whether they have been convicted of a felony and if so to describe the circumstances surrounding all convictions. *See, e.g.*, Book Byte Application for Employment, http://www.bookbyte.com/employment/forms/bb_application.pdf (last visited Feb. 20, 2010). Aside from the disclosure requirement there is normally language that suggests a person would not be automatically disqualified from employment on the basis of a felony conviction, but that each conviction would be evaluated individually on its own merits, and that nondisclosure of a conviction would result in automatic disqualification from consideration or termination from employment. *Id.* Despite such language, common sense dictates that a felon has a more difficult time getting certain employment than someone of equal qualifications without the conviction.

171. *See supra* note 170; Henry, *supra* note 1 (As a sex offender Wendy has endured many hardships in her personal life. She filed for federal disability citing sleep apnea and a severe weight problem. Speaking about being subjected to the residency restrictions in Georgia Wendy said, “[t]his is causing a lot of problems in my marriage. My husband can’t quit his job. What are we supposed to do, separate? I really don’t know what I’ll do. I’m absolutely at wit’s end.”). To be clear, the persons who commit sex crimes have, by their actions and in conjunction with the courts, placed themselves squarely within such an unattractive group.

172. *Compare* GA. CODE ANN. § 42-1-12 (Supp. 2009) and IOWA CODE ANN. § 692A.1 (West 2003) (neither statute distinguishes between different sex offenders based on their committed offense), *with* California Proposition 83 codified in CAL. PENAL CODE § 290 (2009) (identifying classification of sex offenders based on the offense committed and perceived threat to society in the future).

173. *See Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 473 (1977).

A. *Application of the Specificity Requirement*

Generally, there is support in case law to analogize prior group classifications that resulted in findings of bills of attainder to certain types of restrictions that are placed on sex offenders as a class. In *Brown*, the Court found that section 504 inflicted “its deprivation upon the members of a political group thought to present a threat to the national security,”¹⁷⁴ and, therefore, members of the unpopular Communist party were an easily identifiable group.¹⁷⁵ While the specificity requirement had not yet been articulated, the Court’s findings in *Brown* are consistent with a finding of specificity.¹⁷⁶ Sex offenders as a group are analogous to Communists for two main reasons:¹⁷⁷ first, society and, by extension, legislators consider both groups undesirable and a threat to public safety;¹⁷⁸ and second, much of the legislation does not enumerate which characteristics it is trying to avoid but subjects all who are convicted of any “sex crime” to bear the same

174. *Brown*, 381 U.S. at 453.

175. Congress did not enumerate characteristics that it wished to eliminate from government service but identified the group as whole, which constituted prohibited legislative fact finding. *Brown*, 381 U.S. at 456; *see also id.* at 464 (White, J., dissenting) (“The legislature may focus on a particular group or class only when . . . it is common knowledge that all, not just some, members of the group possess the feared characteristics and thus such legislative designation would require no legislative fact-finding about individuals.”).

176. *See Brown*, 381 U.S. at 461 (finding that the Act was not exempted from being a bill of attainder just because it inflicted its deprivation “upon the membership of [a group] rather than upon a list of named individuals”).

177. Admittedly, members of the Communist Party who were singled out by Congress were never granted a judicial trial, and are thus distinguishable from sex offenders who have been tried and convicted criminally. *See* Part C of this section for the full discussion.

178. *Compare* American Masters, Arthur Miller, McCarthyism, <http://www.pbs.org/wnet/americanmasters/episodes/arthur-miller/mccarthyism/484/> (last visited Feb. 20, 2010) (Senator Joseph McCarthy publicly accused hundreds, if not thousands, of people of being communists or communist sympathizers. Though many of the allegations were proven untrue, the process saw many getting their passports taken away, while others were jailed for refusing to give the names of other communists. “The trials, which were well publicized, could often destroy a career with a single unsubstantiated accusation.” His over-zealous campaigning ushered in one of the most repressive times in 20th-century American politics. Today, “McCarthyism has entered American speech as a general term for . . . using accusations of disloyalty to discredit an opponent [and] subverting civil rights in the name of national security.”), and *Brown*, 381 U.S. at 450 (Communists were likely to “initiate political strikes” against the United States Government), *with* President William J. Clinton, *Regarding the Passage of Megan’s Law* (radio broadcast Aug. 24, 1996) (“Nothing is more threatening to our families and communities and more destructive of our basic values than sex offenders who victimize children and families. Study after study tells us that they often repeat the same crimes. That’s why we have to stop sex offenders before they commit their next crime, to make our children safe and give their parents piece [sic] of mind.”), and *supra* note 15 (discussing how overly-broad the legislation and the destructiveness in individual’s lives as a result of such legislative irresponsibility).

burden.¹⁷⁹ Furthermore, the position that legislation directed at sex offenders will satisfy the specificity requirement is strengthened because, unlike members of a political party, who could, if desired, escape the detriments of party affiliation, a sex offender cannot escape his or her classification.¹⁸⁰ Factoring in escapability in this context, the trapping nature of one's sex offender status more closely resembles the *Cummings/Garland* scenario, than that of *Selective Service*.¹⁸¹

Additionally, assuming *arguendo* that those who would be critical of sex offenders meeting the specificity requirement base their objection on *Nixon*, where the Court found it possible to create a legitimate class when there was unilateral and voluntary action, their objection can be distinguished.¹⁸² The creation of a legitimate "sex offender class" does not result when a person commits a crime of a sexual nature because, unlike Nixon who entered into the agreement to destroy presidential materials willingly and knowingly, many offenders commit acts that they do not know are sex crimes that would subject them to registration and other sex offender requirements.¹⁸³ Notwithstanding the firmly established principle in criminal law that ignorance or mistake of law does not constitute an excuse for the crime,¹⁸⁴ the *Nixon* Court by continuing their analysis even after finding a marginally met specificity prong impliedly created an exception for the bill of attainder inquiry.¹⁸⁵ As a result, the specificity prong is likely satisfied; therefore, the

179. See *supra* notes 134, 172 and accompanying text; see also *supra* note 175. Interestingly, this is often why the equal protection argument fails. See *supra* note 141 (This is demonstrative of the "catch-22" that exists in the current lawmaking scheme. Because of the complexity and individual intricacies within this area of the law, in order to survive an equal protection challenge, the legislation must apply equally; but by applying equally it unjustifiably includes individuals who neither are nor ever were a threat to public safety.). For more on the Equal Protection Clause see U.S. CONST. amend. XIV, § 1.

180. See *supra* note 41 and accompanying text. Escapability, though not determinative, is a probative factor in the Court's analysis in *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 850–51 (1984).

181. Compare *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 288 (1866) (mandating that before petitioner could resume his profession he had to take an oath which was impossible for him to subscribe to honestly), with *Selective Serv.*, 468 U.S. at 850–51 (men who had their federal aid money withdrawn for failure to register with the selective service could escape the deprivation by simply registering late without penalty). The factor of escapability has been considered for both the specificity purpose and the punitive inquiry for the purpose of the bill of attainder analysis. *Brown*, 381 U.S. at 457 n.32. In *Douds*, the Court considered it as probative of whether the statute was punitive in nature, whereas the Court in *Subversive Activities Control Board*, applied the factor for a specificity purpose. See *supra* note 41 and accompanying text.

182. See *supra* notes 98–100 and accompanying text.

183. See *supra* note 15 and accompanying text.

184. DAVID C. BRODY ET AL., CRIMINAL LAW 295–96 (2001).

185. See *supra* note 100 and accompanying text (Perhaps with guilt already decided, the *Nixon* Court thought the bill of attainder safeguard was important enough and the punishment prong difficult to satisfy on its own, that is was not unwise to allow even a marginal group through to the latter analysis.). Furthermore, as a matter of policy, certain sex offenders should be allowed to prove

success of the constitutional challenge turns on whether the legislature seeks to inflict, or in fact does inflict, punishment.¹⁸⁶

B. The Last Hurdle: Meeting One of the Supreme Court Tests for Punishment

The punitive nature of a legislative enactment can be found according to one of three tests:¹⁸⁷ historical,¹⁸⁸ functional,¹⁸⁹ or motivational.¹⁹⁰ To begin, the *Nixon* Court relied on the “infamous history” of bills of attainder to flesh out the “deprivations and disabilities so disproportionately severe and so inappropriate to non-punitive ends that they unquestionably . . . fall within the proscription of [the Bill of Attainder Clause].”¹⁹¹ Another legislative punishment that has become part of the American bill of attainder jurisprudence is legislative bars on participation in specified employment or professions.¹⁹² “A statutory enactment that imposes any [such] sanctions on identifiable individuals would be immediately constitutionally suspect.”¹⁹³

Generally “scarlet letter” laws,¹⁹⁴ if enacted, along with current residency and employment restrictions inflict three of the most traditional

punitive intent because otherwise they are subject to such a disproportionately severe legislative response for a “victimless” crime (e.g., a consensual sex act with a peer who is under the age of consent; adult-adult prostitution). *See supra* note 134 and accompanying text.

186. *See supra* note 173 and accompanying text. “Since virtually all legislation operates by identifying the characteristics of the class to be benefited or burdened, it is not clear that the specificity requirement retains any real bite.” *BellSouth Corp. v. FCC*, 144 F.3d 58, 63 (D.C. Cir. 1998).

187. *See supra* notes 92–97 and accompanying text. Moreover, the Court in *Brown* clearly stated the proposition that punishment can serve several purposes. *Brown*, 381 U.S. at 458.

188. To meet the historical test, the punishment inflicted by the legislative act must be one that has historically been associated with bills of attainder, or more often in this country, bills of pains and penalties. *See supra* notes 102–105 and accompanying text.

189. The functional test asks whether the type and severity of burdens imposed by the law at issue can be reasonably said to further any non-punitive legislative purposes. *See supra* notes 106–110 and accompanying text.

190. The motivational test is an inquiry in to the legislative record (including legislative committee hearings and debates) to see if there is evidence of a legislative intent to punish. *See supra* notes 111–115. Additionally, the *Lovett* Court’s investigation into the legislative background going back some eight years prior to when it heard that case is illustrative of the importance of the surrounding context and circumstances to the analysis of punitive intent of the legislative act at issue. *See supra* Part III.B and notes 65, 67 and accompanying text.

191. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 473 (1977).

192. *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 852 (1984).

193. *Nixon*, 433 U.S. at 473.

194. *See supra* note 138 and accompanying text.

punishments under bills of attainder, other than death: the use of shame, a ban against practicing a profession, and banishment.¹⁹⁵ First, most sex offenders are subject to tremendous embarrassment and shame that is associated with meeting the legislative requirements for sex offenders, whether the sentiment flows from the community being notified when they enter a new area or from having a specially issued license plate.¹⁹⁶ Moreover, along with residency restrictions several states and local communities have enacted employment restrictions intended to keep sex offenders away from schools, daycare facilities, playgrounds, public swimming pools, video arcades, recreation centers, and public athletic fields.¹⁹⁷ Everyone would agree that there is a rational basis for prohibiting a child offender from employment at many of these places because most sex offenses committed against children are committed by individuals who have a prior relationship with their victims.¹⁹⁸ However, the ban on employment extends out to create a zone around the forbidden areas, working in effect to prohibit sex offenders from engaging in many professions.¹⁹⁹ Furthermore, sex offender residency restrictions, both intentionally and sometimes unintentionally, have largely resulted in banishment from the community.²⁰⁰ Case law indicates that to meet the historical test the primary focus is on the resulting punishment, not the intent of the legislature, which is only

195. See generally Part II (stating the idea that bills of attainder work to “taint” a person, often so that the community would know of one’s transgressions against the Crown, making death and forfeiture of lands seemingly more justified); *supra* note 169 and accompanying text (standing for the notion that part of a bill of attainder is a sense of community condemnation); *supra* note 36 and accompanying text (banishment was a common and effective punishment because of the shame that was associated with it).

196. See Part I and Part IV.B.

197. ALA. CODE § 15-20-26(a), (g) (LexisNexis 2005 & Supp. 2009); FLA. STAT. ANN. § 775.21(10)(b) (West 2005 & Supp. 2010); GA. CODE ANN. § 42-1-15(c)(1)–(2) (Supp. 2009); IDAHO CODE ANN. § 18-8327(1) (2006); IND. CODE ANN. § 35-42-4-10(b) (West 2006); MICH. COMP. LAWS ANN. §§ 28.733(f), 28.734(1)(a) (West 2004 & Supp. 2009); OKLA. STAT. ANN. tit. 57, § 589(A) (West 2004); TENN. CODE ANN. § 40-39-207(a) (2006 & Supp. 2009); VA. CODE ANN. § 18.2-370.4(A) (2009).

198. CTR. FOR SEX OFFENDER MGMT., MYTHS AND FACTS ABOUT SEX OFFENDERS 1 (2000), available at <http://www.csom.org/pubs/mythsfacts.pdf>.

199. Jobs that require workers to work at new locations on a regular basis such as plumbers, electricians, and construction are now off-limits to convicted sex offenders because of the risk of inadvertently entering the restricted zones. Downtown areas, the place of business of many white-collar workers, are also often off-limits to prior offenders because with just one daycare facility located on one floor of a high-rise building an entire city block could be forbidden. The practical effect of the restrictions is sex offenders will be relegated to agricultural work on the outskirts of the community. If that is not feasible, then unemployment is the natural consequence of these restrictions.

200. See Part IV.B *supra* note 156 and accompanying text; Henry, *supra* note 1 (House Majority Leader Jerry Keen, who sponsored Georgia’s residency restriction law, did not attempt to conceal the intended impact the law would have on sex offenders; in speaking to the Senate committee, he said, “Candidly, senators, they will in many cases have to move to another state.”). Thus, the historical test for punishment would be satisfied.

tangentially implicated.²⁰¹ Therefore, the historical test is likely met in most situations.

Next, application of the functional test requires some interpretation of its linchpin—a finding of a non-punitive legislative purpose.²⁰² Such legitimate non-punitive goals have included: encouraging draft registration,²⁰³ guaranteeing the availability of evidence at criminal trials,²⁰⁴ preserving historical records,²⁰⁵ and encouraging competition in formerly monopolized markets.²⁰⁶ The test requires one to establish that the legislature’s action constitutes punishment and not merely the legitimate regulation of conduct.²⁰⁷ However, “where there exists a significant imbalance between the magnitude of the burden imposed and purported nonpunitive purpose,” another way to disprove non-punitive purpose is through a showing that “less burdensome alternatives” are available.²⁰⁸

201. See *Bellsouth Corp. v. FCC*, 144 F.3d 58, 65 (D.C. Cir. 1998) (quoting the analysis from *Brown*, distinguishing *Agnew* because the act at issue “incorporat[ed] no judgment censuring or condemning any man or group of men,” to show that the result is the mainstay of the analysis and intent is only slightly involved).

202. See *supra* note 189 and accompanying text.

203. See *supra* notes 89–90 and accompanying text (finding that law that conditioned financial aid benefits on draft registration had a legitimate legislative purpose).

204. See *supra* note 108 and accompanying text (preservation of evidence for use in criminal trials was “fair exercise of Congress’ responsibility to the ‘due process of law in the fair administration of criminal justice’”); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 477 (1977).

205. See *supra* note 109 and accompanying text.

206. See *BellSouth*, 162 F.3d at 688–90 (holding that Congress had a legitimate non-punitive purpose in conditioning telephone company’s entrance into long distance markets on opening of local markets to competition).

207. See *Nixon*, 433 U.S. at 476 n.40 (Moreover, it is established that “punishment is not restricted purely to retribution for past events, but may include inflicting deprivation on some blameworthy or tainted individual in order to prevent his future misconduct.”).

208. *Foretich v. United States*, 351 F.3d 1198, 1221 (D.C. Cir. 2003); see also *Seariver Mar. Fin. Holdings v. Mineta*, 309 F.3d 662, 677–78 (9th Cir. 2002) (considering whether there existed any less burdensome alternatives by which the legislature could have achieved its purpose). Sex offender statutes, often written in haste to meet the public call to action, are not carefully tailored or narrow enough to be effective. See Pamela A. MacLean, *Challenges Grow Over Sex Offender Laws*, NAT’L LAW J., June 9, 2008, available at <http://www.justiceflorida.com/2008/06/articles/florida-criminal-lawyer-ronald-national-law-journal-challenges-grow-over-sex-offender-laws/> (discussing how sex offender legislation gets passed quickly without considering better alternatives); see also *infra* note 242 and accompanying text. The courts’ discussion of less burdensome alternatives further strengthens the proposition that the bill of attainder analysis is more stringent, resembling a higher level of scrutiny, than that of a normal rational basis review that other constitutional challenges have been held to in the sex offender context. See *supra* note 152 and accompanying text.

The challenge in the sex offender context is that the law in this area is fueled by media attention and public opinion.²⁰⁹ This moves the law very quickly, and most times legislative bodies can put forth a very colorable non-punitive purpose without having to show that the non-punitive purpose can be achieved by the enactment.²¹⁰ Nevertheless, it is still possible to reach a favorable finding of punishment under the functional test.²¹¹ A copious amount of recent and reliable research has exposed that residency and employment restrictions especially have failed to meet their proposed legitimate goals,²¹² and as such, should remove the impediment for finding that punishment was in fact its ultimate aim.²¹³ It would be hard to imagine that legislation that continued to inflict deprivations on people would remain immune from a bill of attainder challenge once the legitimate purpose relied upon when putting it forth was shown to be ineffective.²¹⁴

Lastly, the motivational test's inquiry centers on legislative intent as evidenced by the legislative record, "timing of the legislation, as well as specific aspects of the text or structure of the disputed legislation."²¹⁵ Intent to punish does not need to be express through a formal announcement in a

209. See *supra* notes 154–156 and accompanying text.

210. *Id.* One example of the problem is registration and GPS monitoring of the most dangerous sex offenders. GPS monitoring would serve a legitimate regulatory function; however, such a scenario normally does not occur because the extremely violent sex offenders do not get released from prison and thus are not subject to these legitimate regulatory safeguards.

211. This is especially true given that the nonpunitive aims must be "sufficiently clear and convincing" before a court will uphold a disputed statute against a bill of attainder challenge. *BellSouth II*, 162 F.3d at 686.

212. The most recent research on the subject of sex offenders tends to point to the conclusion that many of the sex offender regulations, especially those restricting where sex offenders can live and work, have no effect on recidivism rates, and actually do more harm than good because sex offenders cannot achieve any level of stability. See *supra* notes 154–155 and accompanying text; see also *infra* note 237 and accompanying text. It should be significant that research shows the legislation is not working to serve its ends. In light of that fact, the severity of the burdens which sex offenders remain subject to are unduly disproportionate to the purported non-punitive purpose of the enactment, and what would be left should be a bill of attainder.

213. See *Nixon*, 433 U.S. at 476 ("Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.").

214. See *Foretich*, 351 F.3d at 1221 ("[W]here there exists a significant imbalance between the magnitude of the burden imposed and purported nonpunitive purpose, the statute cannot reasonably be said to further nonpunitive purposes."); see also *Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 354 (2d Cir. 2002) (holding a statute to be a bill of attainder where "the legislature piled on a burden that was obviously disproportionate to the harm caused").

215. See *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 855 n.14 (1984) (stating that a court must inspect legislation for a congressional purpose to "encroach[] on the judicial function of punishing an individual for blameworthy offenses"). The motivational test is not determinative in the absence of "unmistakable evidence of punitive intent." *Flemming v. Nestor*, 363 U.S. 603, 619 (1960); see also *BellSouth II*, 162 F.3d at 690 ("'Several isolated statements' are not sufficient to evince punitive intent[,] and cannot render a statute a bill of attainder without any other indicia of punishment. (quoting *Selective Serv.*, 468 U.S. at 856 n.15)).

legislative hearing.²¹⁶ However, in the context of sex offender regulations, the legislative records often are replete with statements similar to that of one legislator who expressed: “[s]ex offenders are the most reviled people in society . . . [;] [t]hey’re one step above terrorists; there’s no political downside to cracking down on these folks.”²¹⁷ Many of the legislative statements in the current milieu regarding sex offenders reflect the same sentiments of contempt and scorn that were held against Communists in the United States during the McCarthy era,²¹⁸ the Court determined that many of those statutes were punitive and prohibited by the Bill of Attainder Clause.²¹⁹

Furthermore, the test seeks to address “the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge—or, worse still, lynch mob.”²²⁰ The fear is especially real because sex offenders incite the passions and outrage of the public.²²¹ For legislators in highly publicized areas of law, “the promulgation of criminal laws affords an irresistible chance to align themselves with the victims of crime and against the criminal element, [which is] a compelling political symmetry accentuated in modern times by the soundbite imagery of the media.”²²² In such an emotionally charged

216. *Nixon*, 433 U.S. at 480. However, it is unclear where the high water mark is—where a court would find a bill of attainder in the absence of a rich legislative record evidencing punitive intent.

217. *See Henry*, *supra* note 1.

218. *See supra* note 178 and accompanying text. *But see* Part V.C (discussing an interpretational acceptance that makes it possible for Communists, who have never had a judicial trial, to be appropriately analogized to convicted sex offenders).

219. *Compare, e.g., Whitaker v. Perdue Complaint, supra* note 15, at 23 (Georgia House Majority leader Jerry Keen House statements in support of his proposed residency restriction bill: “We want *those people* running away from Georgia. If it becomes too onerous and too inconvenient, *they* just may want to live somewhere else. And I don’t care where, as long as it’s not Georgia. . . . *Those* are the people we are trying to get off the streets of this state, and *those* are the people that we are going to send a message to that if you have a propensity to that crime perhaps you need to move to another state.”) (emphasis added), with 89 CONG. REC. 474, 486 (1943) (Chairman Congressman Martin Dies comments from a 1943 speech on the floor of the House: We must “take immediate and vigorous steps to eliminate *these people* from public office[;] . . . [they are] unfit to hold a Government position.” He urged the Appropriations Committee to “weigh the evidence [against the so-called “subversives”] and take immediate steps to dismiss *these people* from the federal service.”) (emphasis added)). The remarks from Congressman Dies, in conjunction with other evidence that suggested Congress intended to punish those who they felt were undesirable, was important in the *Lovett* Court’s decision that the act was a prohibited bill of attainder. *See supra* Part III.B.

220. *Supra* note 114; *see also supra* note 47 and accompanying text.

221. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (acknowledging that a legislature’s “responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals”).

222. *See Wayne A. Logan, Democratic Despotism and Constitutional Constraint: An Empirical*

environment there is political pressure on legislators to support sex offender bills despite the constitutional questions raised; they do not want to be viewed by their constituency as “soft,” or by their colleagues or peers as sympathetic towards sex offenders.²²³ Therefore, the motivational test would likely be satisfied because such evidence reaches the concerns that this test seeks to protect against.

C. *Remaining Interpretational Issues for Which History Is the Best Teacher*

A finding of both specificity and punishment paves the way for successfully challenging a legislative act as a bill of attainder, where the legislature makes a determination—normally reserved for another branch of government²²⁴—that inflicts deprivation on sex offenders as a class.²²⁵ However, any constitutional challenge must overcome a court’s general reluctance to declare a statute or law unconstitutional.²²⁶ The novelty of bills of attainder as well as some gaps left in case law make this challenge particularly demanding.²²⁷ Thankfully, our Founders wrote rich commentaries explaining the purpose of this prohibition.²²⁸ Looking at these commentaries can help make sure that the ends are served when applying the Bill of Attainder Clause to modern day legislation.²²⁹

Analysis of Ex Post Facto Claims in State Courts, 12 WM. & MARY BILL RTS. J. 439, 495 (2004); see also DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 157 (2001) (“TV has changed the rules of political speech . . . with its soundbite rapidity, its emotional intensity, and its mass audience—has tended to push politicians to be more populist, more emotive, more evidently in tune with public feelings.”).

223. See *supra* note 126 and accompanying text.

224. See *United States v. Brown*, 381 U.S. 437, 464 (1965) (White, J., dissenting) (Referring to the majority’s holding, White stated: “[The statute] is invalid as a bill of attainder because Congress has engaged in forbidden fact-finding about individuals and groups and has thus strayed into the area reserved to the judiciary by the Constitution.”). Under our Constitution, Congress has full legislative authority to weed dangerous persons out of places and positions where they could be harmful to others or the country, but the task of adjudicating which individuals are to be targeted must be left to other tribunals. *Id.* at 461.

225. It is not appropriate for a legislative act that affects sex offenders to be considered any less punitive in nature simply because of the fact that the legislation is enacted with a preventative aim. See *id.* at 458 (“One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.”); see also *supra* note 214 and accompanying text.

226. See *Brown*, 381 U.S. at 462 (indicating the Court “is always reluctant to declare that an Act of Congress violates the Constitution”).

227. They are novel because up until now no court has adequately applied the bill of attainder to sex offender regulations. See *supra* Part I. The gaps in case law refer in part to the fact that this would be a case of first impression no matter where it was heard; the court’s exact analysis and answers to interpretational questions is unknown. See *infra* notes 230 through 234 for more on interpretation.

228. See *supra* Part II.B and notes 49–53 and accompanying text.

229. See *supra* Part II.B and notes 49–53 and accompanying text.

An ambiguity exists as to the meaning of the phrase “legislative determination without judicial trial.”²³⁰ The phrase could mean the subject of the legislation must never have had a judicial trial when the legislation punished them, or it could mean there was no trial relative to the specific punitive legislative act at issue. The first meaning would refer to one who had a trial of guilt by a court, which of course would encompass all convicted criminals. This interpretation construes the Bill of Attainder Clause²³¹ too narrowly, and leaves certain groups at the mercy of future legislation without judicial redress.²³²

A possible alternative explanation is that “without the protection of a judicial trial” means it is outside the scope of the legislatures’ powers to pass acts punitive in nature that affect a group, after their initial trial of guilt, without a new judicial determination as to whether the act will or should affect them. However, the policy interest of judicial economy would likely not be served by an interpretation that would require a new judicial trial every time the legislature wanted to create a new law that affected the rights of certain identifiable groups.

Thus, a more probable meaning of the phrase is somewhere in between: one that allows the Clause to function as a sieve and not an impenetrable barrier. The Framers did not intend the Bill of Attainder Clause to allow a legislature to stigmatize one’s reputation and seriously impair one’s chance to earn a living, all outside the purview of judicial interference;²³³ rather, their intent was for it to guard against excessive and overstepping legislative authority consistent with the Constitution’s central theme to separate powers.²³⁴ Therefore, a broader interpretation of the phrase is proper. Beyond just restoring rights to those who have unconstitutionally had them

230. See *supra* Part II and note 30 and accompanying text.

231. See *supra* Part II.B.

232. Despite prohibition against ex post facto laws, many sex offender regulations apply retroactively, thus leaving those affected with no remedy. See *Smith v. Doe*, 538 U.S. 84, 103–04 (2003) (holding that forcing sex offenders who completed their sentences before the new law went into effect to register their whereabouts at regular intervals, including the posting of personal information about them on the Internet, does not violate the constitutional prohibition against ex post facto laws because the burden imposed serves a public safety purpose, and therefore does not constitute punishment); see also *supra* note 125 and accompanying text (Congress passed the Adam Walsh Child Protection and Safety Act of 2006, which imposes new registration requirements on previously convicted sex offenders).

233. See *United States v. Lovett*, 328 U.S. 303, 314 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 288 (1866) (“The constitutional prohibition [of the Bill of Attainder Clause] was intended to protect every man’s rights against that kind of legislation which seeks either to inflict a penalty without a trial or to inflict a new penalty for an old matter.”).

234. See *supra* Part II.B.

taken away, the bill of attainder challenge can combat another danger created by the poorly articulated and overly broad laws in this area.

VI. HOW THE BILL OF ATTAINDER CLAUSE CAN HELP PROTECT SOCIETY FROM A MORE ACUTE DANGER: A FALSE SENSE OF SECURITY

The overwhelming myth in society is that most men who commit sexual offenses do not know their victim.²³⁵ The fact is that “90% of child victims know their offender, with almost half of the offenders being a family member. Of sexual assaults against people age 12 and up, approximately eighty percent of the victims know the offender.”²³⁶ Dr. Gene Abel, director of the Behavioral Medicine Institute of Atlanta, a professor of clinical psychiatry at both Emory University and Morehouse School of Medicine, and a national expert on the treatment of sex offenders believes that residency restrictions intended to control rogue sexual predators like Jessica Lunsford’s killer “ignore[] a larger public safety threat, lulling people into a false sense of security.”²³⁷ A 2003 Minnesota Department of Corrections Report found that “[e]nhanced safety due to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact. . . . [Actually,] it appears that a sex offender attracted to such locations for purposes of committing a crime is more likely to travel to another neighborhood in order to act in secret, rather than [re-offend] in a neighborhood where his or her picture is well known.”²³⁸ One of the causes of the problem is that the media ignores empirical data, so its coverage of child abductions and sex crimes predominately depicts stereotypical stranger kidnappings, creating the appearance that this type of abduction is typical.²³⁹ This misleads parents to “overprotect there [sic] children from strangers, and

235. CTR. FOR SEX OFFENDER MGMT., MYTHS AND FACTS ABOUT SEX OFFENDERS 1 (2000), available at <http://www.csom.org/pubs/mythsfacts.pdf>.

236. California Department of Justice, Office of the Attorney General, Facts About Sex Offenders, <http://meganslaw.ca.gov/facts.aspx> (last visited Feb. 20, 2010).

237. Henry, *supra* note 1. Dr. Abel explains: “only 10 percent of child molesters are strangers About 30 percent of these crimes are committed by immediate family, another 30 percent by extended family and the final 30 percent by family friends and neighbors.” *Id.* (internal quotation marks omitted). Therefore, he says the residency and registry restrictions do little to address the salient dangers. Another problem as he sees it is that the laws fuel harmful misconceptions. *Id.* “When we’re talking about child sexual abusers, the public perception is of a 50-year-old man hanging around a schoolyard In reality, the average age for a child sexual abuser is 14.” *Id.*

238. MINN. DEP’T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: REPORT TO THE LEGISLATURE (2003) (examining “level three” re-offenders and finding no examples that residential proximity to a park or school was a contributing factor in any of the sexual re-offenses noted).

239. GLENN W. MUSCHERT ET AL., CHILD ABDUCTION POLICY: INFLUENCED BY MEDIA COVERAGE OR EMPIRICAL DATA? 18–19 (Aug. 2005) available at <http://www.drc.state.oh.us/web/Reports/MuschertPaperRevised.pdf>.

ignore the potential for abduction by someone close to them.”²⁴⁰ Then, the public, armed with inaccurate and incomplete information, “engage[s] in political or grassroots efforts to ‘solve’ the social problem, [while actually] exclud[ing] the majority of victims.”²⁴¹ It is not surprising then that many sex offender laws do not affect recidivism rates and effectively work as a placebo to calm the public’s fear. The Bill of Attainder Clause is important to this area of the law because it can be a tool to curb over-burdensome legislation where many if not most of the common legal challenges have failed, resulting in laws that do not effectuate their stated purpose²⁴² and people who bear the burden of those legislative missteps with little redress.²⁴³

A. Recommendations for the Future

Current sex offender laws,²⁴⁴ while ostensibly enacted with the goal to further public safety, are neither essential nor balanced to meet that goal.²⁴⁵ Governments are charged with the duty to protect its citizens by taking the necessary and appropriate steps to safeguard them from violence.²⁴⁶ The sex offender regulatory scheme, and by extension our Government, will continue to fail us until it focuses on the problem and responsibly acts to meet it.²⁴⁷ With statistics and research indicating a child is more likely to go missing because they are abducted by a non-custodial family member than a sex

240. *Id.* at 19; *supra* note 237 and accompanying text.

241. *See* MUSCHERT, *supra* note 239, at 19.

242. *See, e.g.,* MacLean, *supra* note 208 (The 8th U.S. Circuit Court of Appeals upheld residency restrictions in Arkansas and Iowa despite them being so onerous in Iowa that “most sex offenders were forced to live in cars, cemeteries or abandoned houses.” Once the sex offenders were forced into the streets, they stopped registering, which “prompted the Iowa County Attorneys Association and Iowa sheriffs in 2007 to petition the legislature to repeal the law as ‘counterproductive.’” But, “[t]he legislature refused.” According to Corwin Ritchie, executive director of the Iowa County Attorneys Association, “[l]egislators did such a good job of selling the idea that the restrictions on residency was a safety measure, people have the false idea it provides safety and politicians fear going against that . . .”).

243. *See infra* notes 139–162 and accompanying text. Without this challenge, once the appeals process is complete these sex offenders are left without remedy: a proposition that the Framers did not intend. *See United States v. Lovett*, 328 U.S. 303, 314 (1946).

244. *See supra* note 136 and accompanying text.

245. *See infra* note 237 and accompanying text; *supra* notes 154–155 and accompanying text.

246. HUMAN RIGHTS WATCH, *supra* note 14 at Ch. X (citing The European Court of Human Rights, which held that there is duty to governments to take measures to prevent sexual violence); *see Stubbings v. United Kingdom*, 4 Eur. Ct. H.R. 1487 (1996).

247. *See infra* note 237 and accompanying text; *supra* notes 154–155 and accompanying text.

predator, it should be clear that this problem needs to be addressed.²⁴⁸ Moreover, in the majority of cases, “abusers gain access to their victims through deception and enticement, seldom using force. Abuse typically occurs within a long-term, ongoing relationship between the offender and victim and escalates over time.”²⁴⁹ In order to truly protect this nation’s children²⁵⁰ it is important for the Government to focus its efforts where it is needed—in the home. Government officials need to look past the discomfort of admitting that child abuse occurs within American families and must educate parents so they may effectively protect their children from harm; and if abuse does occur, the Government must provide resources for treatment in a way to encourage reporting.²⁵¹

Next, the Government needs to better address the tragic, albeit less frequent, occurrence when a violent sex offender re-offends.²⁵² The challenge here is not a minor one; it starts with relieving the problem of over-crowding in prisons so that offenders who belong in jail stay there. Then, parole boards must have the expertise and resources to carefully screen potential parolees as another way to prevent the release of those who exhibit signs or tendencies to re-offend. Another way to reach this issue is to increase minimum and mandatory sentences for violent offenses. Also, the Government must discard outdated notions that all sex offenders cannot be rehabilitated²⁵³ and invest in cost-effective rehabilitation programs.²⁵⁴

Lastly, lawmakers must rely on sound research rather than sensational media to tailor legislation to meet the true needs of society.²⁵⁵ Everyone would agree that Wendy Whitaker has more than paid for her mistake and she is not now, nor has she ever been, a danger to society; thus, she should be taken off the registry list and the money and effort should be used to monitor those that pose a real threat to public safety.²⁵⁶

248. See MUSCHERT, *supra* note 239 at 10–11.

249. See *supra* note 236.

250. See *supra* note 178 and accompanying text.

251. Sexual assault/abuse is a “highly underreported” crime. SexOffender.com, Recidivism of Sex Offenders, <http://www.sexoffender.com/sorecidivism.html> (last visited Feb. 21, 2010).

252. See *supra* note 237 and accompanying text.

253. See *supra* notes 119, 122 and accompanying text.

254. Association for Treatment of Sexual Abusers, *supra* note 119 (explaining that “[w]hereas treatment of sex offenders costs about \$5,000 per year, incarceration costs more than \$20,000 per year per offender”); see also Center for Sex Offender Management, <http://www.csom.org> (last visited Feb. 20, 2010).

255. See *supra* note 172 and accompanying text.

256. See *supra* notes 1–15.

B. Implications for Sex Offenders

The bill of attainder challenge will have a profound impact on two main sex offender statutes: residency²⁵⁷ and employment restrictions,²⁵⁸ and the lifetime registration requirement.²⁵⁹ First, residency and employment restrictions would have to be considerably narrowed so the restrictions do not result in banishment or permanent bans of certain professions, except if they are proven to serve a legitimate regulatory purpose.²⁶⁰ Dr. Levenson, a Lynn University professor who has studied sex crime policy for almost a decade, says that “[c]riminal offenders who have stable housing, stable employment and support systems in their lives . . . are less likely to go on and commit new crimes.”²⁶¹ Secondly, the lifetime registration subjects sex offenders to a form of punishment²⁶² that survives constitutional challenge because it is disguised as a regulatory scheme to protect the public, and subsequently continues on in perpetuity.²⁶³ It is hard to see how such a heavy burden is needed because those individuals deserving of such punishment should remain in jail and physically removed from society.²⁶⁴ Registration of a sex offender’s whereabouts cannot prevent recidivism, and researchers say it does not even deter recidivism,²⁶⁵ so it is hard to see how a lifetime registration requirement is necessary or justified. The success of the bill of attainder challenge will give sex offenders a voice to protect themselves from overreaching by the government in the same way as other “non-tainted” citizens.

257. See *supra* notes 153–164 and accompanying text.

258. See *supra* notes 197–199 and accompanying text.

259. E.g., GA. CODE ANN. § 42-1-12(f)(7) (Supp. 2009) (requiring monitoring for life); CAL. PEN. CODE § 290 (West 2009) (requiring monitoring for life).

260. See *supra* notes 156, 197–199 and accompanying text.

261. See *supra* note 164 and accompanying text.

262. Punishment not only includes deprivation of life, liberty, or property, but also deprivation or suspension of political or civil rights. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 321 (1866); *supra* Part IV.

263. See *supra* notes 119–138 and accompanying text; see also Terry Wolf, *New Sex Offender Law Takes Effect*, COURIER HERALD ONLINE Jan. 2, 2009, http://news.mywebpal.com/news_tool_v2.cfm?pnPID=909&show=localnews&NewsID=942675&CategoryID=19667 (quoting Georgia State Senator Cecil Staton; stating the belief that sex offenders rights are of little consequence when weighed against the perceived societal benefits of the restrictions (vis-à-vis public safety)). But see Abel, *supra* note 237.

264. See *supra* note 210 and accompanying text.

265. See *supra* note 238 and accompanying text.

VII. CONCLUSION

If you casually observe marionettes, you may feel that they are alive. “A marionette may accurately present the expressions and emotions of a human being”²⁶⁶ However, upon closer inspection it is readily apparent that a marionette is a lifeless thing, whose strings are being manipulated by a puppeteer.²⁶⁷ Legislators who are making and voting on sex offender legislation are very much like marionettes; from afar they appear to be well reasoned, acting responsibly the way we think lawmakers should act.²⁶⁸ However, upon critical review the strings are visible, and the puppeteer chaotically orchestrating the lives of 664,731 people²⁶⁹ is a misinformed and fearful public, shaped by media sensationalism.²⁷⁰

Often, legislators have been willing participants because many of them share the feeling of contempt and disgust that is the prevailing attitude held toward sex offenders.²⁷¹ As with individuals and identifiable groups in the past who were also the subject of disdain, had their loyalty called into question, or their actions feared, there existed the Bill of Attainder Clause that sought to protect against the punitive burdens created, without judicial safeguards, by legislative enactments that were often fueled by a mob mentality for justice.²⁷² Similarly, although the bill of attainder challenge has yet to be effectively utilized in the context of sex offender legislation, its rich commentaries and case law make it clear that it is a viable challenge.²⁷³

It is important to note that violent and predatory sex offenders should be dealt with swiftly and harshly.²⁷⁴ However, such consequences should be achieved through mandatory sentencing guidelines and comprehensive, competent parole reviews, not through overly broad legislation that fails to

266. CRIEnglish.com, *The Art of Marionette Puppetry*, <http://english.cri.cn/4026/2008/12/03/1261s429274.htm> (last visited Feb. 20, 2010).

267. *Id.*

268. *See supra* note 156 and accompanying text.

269. Sex Offender History, *supra* note 130 (number of registered sex offenders in the United States and U.S Territories).

270. *See supra* Part IV and Part VI.

271. *See supra* Parts IV–V and *supra* note 219 and accompanying text.

272. *See supra* notes 53–82 and accompanying text.

273. *See supra* notes 30–116 and accompanying text.

274. To the victims of sex crimes, I empathize with you for the brutality and torture you have endured. I hope this Comment does your experiences justice and you do not find my words too cold or disrespectful. To the criminals, while this article may on its face look as though I am advocating for your freedoms, understand that I condemn your actions and strongly support your punishment. Nevertheless, our Constitution should guide our legislative choices, and as such when the trend of restrictions of individual rights is going in a dangerously unconstitutional direction, there is merit in an analysis of the consequences. This is that comment, hopefully sympathetic to the countless victims, while discussing the constitutionality of the use of legislation to regulate the lives of perpetrators of sex crimes.

meet its stated goals to make the public safer²⁷⁵ and severely punishes many who do not deserve it.²⁷⁶

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275. See Wendy Koch, *Sex-Offender Residency Laws Get Second Look*, USA TODAY, Feb. 26, 2007, available at http://www.usatoday.com/news/nation/2007-02-25-sex-offender-laws-cover_x.htm (Nancy Sabin of the Jacob Wetterling Foundation, which fights child exploitation, says: "Broad restrictions provide a 'false sense of security.' [S]uch laws do not protect the more than 90% of abused children who suffer at the hands of people they know. And many of the laws bar offenders from living near schools but do not stop them from loitering there . . .").

276. See *supra* Part I notes 1–15.

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