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COMMENT

CRUEL AND UNUSUAL?: VIRGINIA'S NEW SEX OFFENDER REGISTRATION STATUTE

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Amid horror stories on the nightly news about high crime rates and public cries for safer streets, many states have enacted statutes requiring sex offenders to register upon entering a community. Typically, these statutes require a convicted felony sex offender,¹ upon release from prison or upon commencement of probation if a sentence of confinement was not imposed, to register his name, address, other identifying information, and the nature of his offense with local law enforcement. At least twenty-six states now have such laws.² Virginia enacted its sex offender registration statute in 1994.³ The goal of these statutes is to deter repeat offenses and to protect children and others from becoming victims of recidivists. The demand for these statutes is so great that Congress included a provision to implement a consistent nationwide system of sex offender registries in its 1994 crime bill.⁴

This Comment examines the Virginia sex offender registration statute and its constitutionality under the Eighth Amendment. Part I examines the general policy rationales for and against registration statutes. Part II explains the Virginia statute. Part III analyzes the Virginia statute under the Eighth Amendment

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1. Felony sex offenses typically covered by registration laws include rape and other violent sex offenses against adults as well as less violent offenses involving children. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-3821 (1990).

2. The following states have some type of sex offender registration statute: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Matthew J. Herman, Note, *Are the Children of Illinois Protected from Sex Offenders?*, 28 J. MARSHALL L. REV. 883, 893 n.83 (1995).

3. Act of Apr. 6, 1994, ch. 362, 1994 Va. Acts 514 (codified at VA. CODE ANN. §§ 19.2-298.1, -298.3, -390.1 (Michie 1995)).

4. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (Supp. 1994)) (directing the Attorney General to establish guidelines for state sex offender registration programs).

and the United States Supreme Court's doctrine on cruel and unusual punishment. The Comment concludes with an opinion that the Virginia statute is constitutional under the Eighth Amendment.

I. POLICY BEHIND SEX OFFENDER REGISTRATION

States have cited rising crime rates, high recidivism rates among sex offenders, and the need to prevent sex offense victims from becoming sex offenders themselves as evidence of the need for sex offender registration statutes. For example, according to one study, substantiated child sexual assaults in Virginia increased from 102 attacks in 1975 to 1,720 in 1990.⁵ In addition, the allegedly "highly repetitive nature of these crimes has provided a strong incentive for States to monitor the whereabouts of convicted sex offenders."⁶ Some evidence suggests that child sex offenders are generally "serial offenders."⁷ For instance, one study concluded that the "behavior [of sex offenders] is highly repetitive, to the point of compulsion," and found that 74% of imprisoned child sex offenders had one or more prior convictions for a sexual offense against a child.⁸ Another study found that as many as eighty percent of untreated sex offenders released from prison commit more offenses.⁹ Some commentators believe that recidivism rates are actually higher than reported.¹⁰ These commentators believe that sex offenders may commit "hundreds of unreported crimes," and studies based on rearrest or reconviction therefore understate the rate of recidivism.¹¹ States jus-

5. Joe Jackson, *Mothers of Abused Children Testify for Tougher Laws*, VIRGINIAN - PILOT, Sept. 11, 1992, at D3 (reporting on work of the Virginia Commission on the Reduction of Sexual Assault Victimization).

6. HOUSE COMMITTEE ON THE JUDICIARY, JACOB WETTERLING CRIMES AGAINST CHILDREN ACT, H.R. REP. NO. 392, 103d Cong., 1st Sess., at 4 (1993) (citing NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, SELECTED STATE LEGISLATION: A GUIDE FOR EFFECTIVE STATE LAWS TO PROTECT CHILDREN 40 (3d ed. 1993)).

7. *Id.* (citing *A Study of the Child Molester: Myths and Realities*, J. AM. CRIM. JUST. 17, 22 (1978)).

8. *Id.*

9. Robert E. Freeman-Longo & Ronald V. Wall, *Changing a Lifetime of Sexual Crime: Can Sexual Offenders Ever Alter Their Ways?*, PSYCH. TODAY, Mar. 1986, at 58.

10. See A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQ. 450, 457 (1982). ("The low recidivism rate generally attributed to [sex] offenders can be understood due to the low visibility of such offenses. . . . [M]ost of [sex offender's] recidivism goes undetected.").

11. David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 573 (1994).

tify registration statutes on the premise that children and others need to be protected and point to high recidivism rates and the fact that "sexual offenders frequently go back to positions where they can prey on children."¹² States argue that sex offender registration statutes will help them address the problems of increasing crime rates and repeat offenders.

Policymakers' concern over the fact that victims of sex offenders can become sex offenders themselves provided additional motivation for the Virginia statute. The Virginia Commission on the Reduction of Sexual Assault Victimization (the "Commission"), headed by Lieutenant Governor Donald S. Beyer, focused much of its effort on the rehabilitation of child sexual assault victims to prevent them from becoming adult offenders. Lieutenant Governor Beyer said that a "guiding principle" for the Commission's work was the following statistic: ninety percent of sex offenders who began their criminal actions in childhood or adolescence were themselves the victims of child sexual assault.¹³ The Commission endorsed the legislative proposal for a sex offender registry and lobbied for its passage before the Virginia General Assembly.¹⁴

Although the policy objectives motivating registration statutes discussed above are compelling, they do not tell the whole story. First, recidivism rates are not necessarily higher for sex offenders than for other felons. In fact, some studies show a lower rate for sex offenders. For example, 1989 Bureau of Justice Statistics study found that the recidivism rate for sex offenders was lower than for most other criminals.¹⁵ Of the offenses studied, only homicide had a lower recidivism rate than sex crimes.¹⁶ Although many argue that low recidivism rates can be explained by the fact that sex offenders commit many unreported crimes, the same is probably true for other offenders. In fact, "no study has demonstrated that sex offenders have a consistently higher or lower recidivism rate than other major offenders studied for

12. Warren Fiske, *Beyer Proposes Registry of Sexual-Abuse Felons*, VIRGINIAN-PILOT, Jan. 21, 1994, at D5 (quoting Virginia Lt. Gov. Donald S. Beyer, Jr.).

13. Anna Barron Billingsley, *Message to Assembly Break Sexual Abuse Pattern Proposals Include a Registry of Convicted Child Sex Offenders*, RICHMOND TIMES-DISPATCH, Jan. 8, 1994, at B6.

14. See *Beyer Wants Virginia to Have Sex Offender Registry*, WASH. POST, Jan. 21, 1994, at B3; Billingsley, *supra* note 13, at B6; Fiske, *supra* note 12, at D5; *Panel to Recommend Sex Offenders' Register*, VIRGINIAN-PILOT, Jan. 8, 1994, at D3.

15. ALLEN J. BECK, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1983* 6 (1989).

16. *Id.*

the same time period with the same methods."¹⁷ At the very least, the data is unclear. Consequently, legislatures should be careful not to jump to emotional conclusions about the recidivism of sex offenders.

Second, sex registration statutes fail to recognize that once an offender has been convicted, served his time, and paid his debt to society, he should be given a chance to live his life without any additional punishment or stigma. A convicted sex offender is not given the chance to prove he is rehabilitated if he is forced to register after his release. Instead, he must register with the police upon arriving in a new community and announce to local law enforcement that the legislature deems him to be a risk to the community, regardless of whether he actually does pose such a risk.¹⁸ A central principle in our law of evidence is the character evidence rule, which prevents an inference of bad character from bad acts.¹⁹ That is, a person should not be labeled a "bad person," and therefore more likely to commit crimes, solely from the fact that he has previously committed a crime. One commentator has argued that "[s]ociety has made a judgment to allow its imprisoned criminals to rejoin society with relative anonymity after serving their sentences. . . . Any condition that requires a defendant to label himself . . . or to be shunned by his fellow citizen[s] violates [the] concept of the dignity of [humanity]."²⁰

When evaluating the rationales behind sex offender registration statutes, policy makers should take into account the potential ineffectiveness of the statutes. Of course, although the potential ineffectiveness of the statute alone is not a constitutional challenge, it is an important consideration for analysis of whether registration is punishment,²¹ and if so, whether it is proportional to the offense.²² Critics have argued that California's sex offender

17. Bryden & Park, *supra* note 11, at 572-73 ("Studies of sex offenders with smaller samples and different follow-up periods have shown both higher and lower recidivism rates for certain populations of sex offenders.").

18. The Virginia statute allows a registrant to petition a court to expunge his information from the registry upon a showing that he no longer poses a risk to society. VA. CODE ANN. § 19.2-298.3 (Michie 1995). This provision, however, does not relieve the registrant of his initial duty to register with the police upon entering a community after his release from confinement.

19. See, e.g., FED. R. EVID. 404(b).

20. Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1382 (1989).

21. See *infra* section III.A.2.d.

22. See *infra* section III.B.

registration statute is ineffective,²³ and at least one court has doubted the efficacy of registration statutes.²⁴ The possible ineffectiveness of these statutes is also important to policy analysts who must determine whether states should seek other more effective solutions. Several other legislative options could address the need to protect children from recidivists and to prevent victims from becoming offenders themselves. For example, intensive treatment of sex offenders can be successful in preventing recidivism.²⁵ Some experts assert that treatment, in addition to imprisonment, is necessary to "break the chain of victimization."²⁶ In the end, policymakers may find that registration statutes are a hard-line, yet ineffective, response to rising crime and high recidivism rates.

II. THE VIRGINIA STATUTE

In 1994, Virginia enacted a sex offender registration requirement on the recommendation of the State's Commission on the Reduction of Sexual Assault Victimization.²⁷ The statute has three main components. First, section 19.2-298.1 sets forth who must register, the procedures for registering, the information a registrant must furnish, and the penalty for failure to register. Second, section 19.2-390.1 provides the purpose of the law and provisions for maintenance of and access to the registry. Third, section 19.2-298.3 sets forth procedures for expungement of information from the registry.

Section 19.2-298.1 is the main section of the law. The statute provides that the following people must register with the Department of State Police as part of the sentence imposed upon conviction: (1) every person convicted on or after July 1, 1994, for a felony in violation of certain sections of the Virginia Code,²⁸

23. Kenneth Reich, *Many Simply Ignore Law; Sex Offender Registration Not Working, Experts Say*, L.A. TIMES, Aug. 8, 1986, at One-1.

24. *State v. Douglas*, 586 N.E.2d 1096, 1099 (Ohio Ct. App. 1989) ("The efficacy of criminal registration statutes is doubtful.").

25. See Freeman-Longo & Wall, *supra* note 9, at 58.

26. *Id.*

27. Act of Apr. 6, 1994, ch. 362, 1994 Va. Acts 514 (codified at VA. CODE ANN. §§ 19.2-298.1, -298.3, -390.1 (Michie 1995)).

28. The felonies requiring registration are the following: VA. CODE ANN. § 18.2-61 (rape); § 18.2-63 (carnal knowledge of child between ages of 13 and 15 years of age); § 18.2-64.1 (carnal knowledge of certain minors); § 18.2-67.1 (forcible sodomy); § 18.2-67.2 (object sexual penetration); § 18.2-67.3 (aggravated sexual battery); § 18.2-67.5 (aggravated rape and other crimes); § 18.2-67.5 (taking indecent liberties with children); and § 18.2-

and (2) every person serving a sentence of confinement or under community supervision on July 1, 1994, for a felony covered by this section.²⁹ In addition, all persons convicted of felony violations under laws of the United States or other states substantially similar to those listed must register with the Department of State Police within thirty days of establishing residence in Virginia.³⁰ The duty to register includes the duty to keep the registration current, which requires reregistering within thirty days following any change of residence.³¹

The registrant must register with the police his name, all aliases, the date and locality of the conviction for which registration is required, date of birth, social security number, current address, a description of the offense or offenses for which convicted, and the same information for convictions prior to July 1, 1994, for any of the specified offenses or for a similar offense under federal law or other states' laws.³² A knowing and intentional failure to register or knowingly providing materially false information is punishable as a Class One misdemeanor.³³

The second main section of the statute, section 19.2-390.1, provides that the purpose of the sex offender registry is "to assist the efforts of law-enforcement agencies to protect their communities from repeat sex offenders and to protect children from becoming the victims of repeat sex offenders by helping to prevent such individuals from being hired or allowed to volunteer to work directly with children."³⁴ The section also provides guidelines for access to the registry. The Department of State Police may disseminate registry information, upon request, only to authorized officers or employees of (1) a criminal justice agency, (2) a public school division, (3) a private, denominational, or parochial school, or (4) a child welfare agency or a registered or unregis-

370.1 (taking indecent liberties with a child by person in custodial or supervisory relationship). If the victim is a minor or physically helpless or mentally incapacitated as defined in the Code, the following felonies also require registration: § 18.2-361B (crimes against nature; relatives); § 18.2-366B (incest).

Examples of crimes for which convicted offenders are not required to register are stalking, § 18.2-60.3; marital sexual assault, § 18.2-67.2:1; prostitution, § 18.2-346; forcing or soliciting a minor to be a subject of child pornography, § 18.2-374.1; and indecent exposure, § 18.2-387.

29. § 19.2-298.1A, B.

30. § 19.2-298.1C.

31. *Id.*

32. § 19.2-298.1D.

33. § 19.2-298.1E.

34. § 19.2-390.1A.

tered small family day care home.³⁵ The registry information may be used only for the "purposes of the administration of criminal justice or for the screening of current or prospective employees or volunteers."³⁶ Dissemination of information for other purposes is prohibited and a willful violation is punished as a Class One misdemeanor.³⁷

The third main provision of the statute is section 19.2-298.3, which provides for expungement of information from the registry.³⁸ A person required to register may petition the court in which he was convicted or the circuit court of the jurisdiction where he resides for removal of his name and all identifying information from the registry.³⁹ The court must hold a hearing at which the petitioner may present witnesses and other evidence.⁴⁰ If the court is satisfied that the petitioner no longer poses a risk to public safety, the court must grant the petition.⁴¹ If the petition is not granted, the petitioner must wait at least twenty-four months to file a new petition.⁴²

III. EIGHTH AMENDMENT ANALYSIS

Convicted sex offenders have challenged registration statutes in several states on the grounds that the registration imposes a cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.⁴³ The Eighth Amendment provides that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁴⁴

35. § 19.2-390.1B.

36. *Id.*

37. *Id.*

38. § 19.2-298.1A.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. See *State v. Lammie*, 793 P.2d 134 (Ariz. Ct. App. 1990); *In re Reed*, 663 P.2d 216 (Cal. 1983); *People v. King*, 20 Cal. Rptr. 2d 220 (Ct. App. 1993); *In re DeBeque*, 260 Cal. Rptr. 441 (Ct. App. 1989); *In re King*, 204 Cal. Rptr. 39 (Ct. App. 1984); *People v. Mora*, 206 Cal. Rptr. 256 (Ct. App. 1984); *People v. Mills*, 146 Cal. Rptr. 411 (Ct. App. 1978); *State v. Douglas*, 586 N.E.2d 1096 (Ohio Ct. App. 1989).

44. U.S. CONST. amend. VIII. Every state, except Connecticut and Vermont, has a similar constitutional provision. See DAVID FELLMAN, *THE DEFENDANT'S RIGHTS TODAY* 383 (1976). In *State v. O'Brien*, 170 A. 98, 102 (1934), Vermont's highest court held that the prohibition against cruel and unusual punishment is part of the state's common law. See FELLMAN, *supra*, at 383. Connecticut's prohibition against cruel and unusual punishment can be found in CONN. GEN. STAT. ANN. § 53-20 (1968), which makes the infliction of cruel or unusual punishment a crime. See FELLMAN, *supra*, at 383.

Article I, section 9 of the Virginia Constitution contains almost identical language.⁴⁵ For the prohibition to apply to a statute, the law must impose "punishment."⁴⁶ Thus, in evaluating the Virginia sex offender registration law, the first question is whether the registration requirement is punishment for purposes of the Eighth Amendment.

A. Is the Virginia Registration Requirement Punishment?

The Supreme Court in *Trop v. Dulles*⁴⁷ discussed the method for determining whether statutes are penal in its evaluation of whether denationalization as punishment for wartime desertion was violative of the Eighth Amendment.⁴⁸ The Court stated that its decisions addressing this question were generally based on determinations of the purpose of the law.⁴⁹ The Court stated that "[i]f the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."⁵⁰ The Court added that, although a statute may have both penal and nonpenal effects, the "controlling nature of such statutes normally depends on the evident purpose of the legislature."⁵¹

1. Purpose

The purpose of the Virginia sex offender registration statute as stated therein is "to assist the efforts of law-enforcement agencies to protect their communities from repeat sex offenders and to protect children from becoming the victims of repeat sex offenders by helping to prevent such individuals from being hired

45. "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . ." VA. CONST. art. I, § 9.

46. VA. CONST. art. I, § 9.

47. 356 U.S. 86 (1958).

48. Although *Trop* involved the Eighth Amendment, the Court did not limit its analysis to that context. That is, in evaluating whether the law involved was penal, the Court drew on cases that involved the constitutional prohibitions against ex post facto laws and bills of attainder, because in those cases it was also necessary to determine whether a penal law was involved, as those constitutional provisions apply only to statutes imposing penalties. *Id.* at 95-96.

49. *Id.* at 96.

50. *Id.* (citations omitted).

51. *Id.*

or allowed to volunteer to work directly with children.”⁵² Although this provision could be read as providing only two purposes, to assist law enforcement and to protect children, it appears to have a third purpose, to prevent sex offenders from being hired or allowed to volunteer to work with children. The third purpose, unlike the first two, which are clearly nonpenal, requires close scrutiny. Obviously, this third purpose was intended to serve the second purpose of protecting children from repeat sex offenders. Arguably, by including this phrase, the legislature explicitly attempted to prevent convicted sex offenders from obtaining employment in certain sectors of the work force. This purpose is arguably punitive because it focuses on the offender and not the children the statute is apparently designed to protect. In effect, this third purpose imposes additional penalties on a sex offender because of his conviction. Admittedly, this purpose does not seem particularly punitive when applied to offenders who committed their crimes against children, considering the limitations on persons who may receive registry information and the purpose of protecting children. As applied to offenders whose victims were adults, however, the goal of preventing offenders from obtaining employment which involves direct contact with children is more punitive since it is less closely related to the offense committed.

Sex offender statutes that courts have determined to be nonpenal have had similar purposes: to assist law enforcement agencies and to protect children.⁵³ These statutes, however, protect children by assisting law enforcement agencies in their investigation of sex crimes, rather than by preventing sex offenders from obtaining certain employment, as in the Virginia statute. For example, in the recent decision *State v. Ward*,⁵⁴ the Supreme Court of Washington examined whether Washington’s sex offender registration statute was an unconstitutional ex post facto law. In ex post facto analysis, as in Eighth Amendment analysis, the initial question is whether the statute imposes criminal punishment.⁵⁵ In deciding that the registration statute was regulatory and not punitive, the court in *Ward* noted that the legislature clearly enacted the statute to help community law enforcement

52. VA. CODE ANN. § 19.2-390.1 (Michie 1995).

53. See *State v. Noble*, 829 P.2d 1217, 1224 (Ariz. 1992); *State v. Ward*, 869 P.2d 1062, 1065 (Wash. 1994).

54. 869 P.2d 1062 (Wash. 1994).

55. See *supra* note 46 and accompanying text.

agencies protect their communities.⁵⁶ Similarly, in *State v. Noble*,⁵⁷ the Arizona Supreme Court found the Arizona sex offender registration statute to be nonpenal because, among other factors, it had the regulatory purpose of assisting law enforcement agencies in investigating future offenses and locating and apprehending recidivists.⁵⁸ The Virginia statute, in contrast, has the purpose of protecting the community and assisting law enforcement agencies, but also appears to have the secondary purpose of preventing offenders from obtaining certain kinds of employment.

In determining the legislature's purpose, the Court in *Trop* stated that the "severity of the disability imposed as well as all the circumstances surrounding the legislative enactment" are relevant.⁵⁹ As applied to the Virginia registration statute, these two factors tend to negate each other. First, the severity of the disability can be quite extreme. A sex offender who has served his time, and perhaps has been out of jail for several years, could be prevented from obtaining employment at a school or anywhere else where he might have direct contact with children. The offender may have committed his offense against an adult victim, which would render the disability extreme, considering that he may not be a risk to children at all. The statute may protect these individuals, however, through section 19.2-298.1, which allows an offender to petition the court to expunge his name from the registry on a showing that the offender no longer poses a risk to public safety.⁶⁰ Second, the circumstances surrounding the legislative enactment tend to show that the legislature was primarily concerned with protecting children.⁶¹ The true intent of the Virginia legislature in enacting the registration statute is at least questionable at this point.

2. *Mendoza-Martinez Factors*

In the absence of conclusive legislative intent, a court examines several factors to determine whether a statute is regulatory or punitive. The Supreme Court in *Kennedy v. Mendoza-Martinez*⁶² set forth the "tests traditionally applied to determine whether

56. *Ward*, 869 P.2d at 1068.

57. 829 P.2d 1217 (Ariz. 1992).

58. *Id.* at 1224.

59. *Trop v. Dulles*, 356 U.S. 86, 96 n.18 (1958).

60. VA. CODE ANN. § 19.2-298.1 (Michie 1995).

61. See Fiske, *supra* note 12, at D5; Jackson, *supra* note 5, at D3.

62. 372 U.S. 144 (1963).

[a legislative act] is penal or regulatory in character.”⁶³ The Court listed these tests as follows:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned⁶⁴

This list is neither exhaustive nor dispositive, but should provide guidance in determining the nature of the statute.⁶⁵ Several courts have used these factors to determine whether sex offender registration statutes constitute punishment for purposes of the Eighth Amendment and the constitutional prohibition against ex post facto laws.⁶⁶ This Comment will focus on the following four factors: whether the sanction imposes an affirmative disability or restraint, whether it has been regarded historically as punishment, whether it serves the traditional aims of punishment, and whether it appears excessive in relation to the alternate purpose assigned.

a. Affirmative Disability or Restraint

The first factor, whether the sanction involves an affirmative disability or restraint, is possibly met in the Virginia registration statute. In the abstract, the statute does not impose such a restraint because it does not explicitly impede an offender's movement in any way. However, it could have a chilling effect on the offender's freedom of choice to move to a new community.⁶⁷

63. *Id.* at 168.

64. *Id.*

65. See *United States v. Ward*, 448 U.S. 242, 248 (1980).

66. See *State v. Noble*, 829 P.2d 1217, 1224 (Ariz. 1992) (finding on a close decision that registration of child sex offenders is not punitive); *In re Reed*, 663 P.2d 216, 222 (Cal. 1983) (finding that sex offender registration is punitive as applied to certain misdemeanants); *People v. Adams*, 581 N.E.2d 637, 644 (Ill. 1991) (finding that the duty to register is not punishment); *State v. Ward*, 869 P.2d 1062, 1077 (Wash. 1994) (finding that sex offender registration is not punitive).

67. See *State v. Taylor*, 835 P.2d 245, 250 (Wash. Ct. App. 1992) (Agid, J., dissenting) (arguing that the Washington sex offender registration has “very real punitive impacts,” including a “chilling effect on [the sex offender’s] freedom of choice to move to a new place”).

As the dissent in the Washington case of *State v. Taylor*⁶⁸ pointed out, "[i]t is inconceivable to think that one who must, as his first act, go to local law enforcement and announce that he is a felon convicted of a sex offense will not be deterred from moving in order to avoid divulging that ignominious event."⁶⁹ Similarly, the Arizona intermediate appellate court in *State v. Noble*⁷⁰ held that Arizona's sex offender registration statute imposed an affirmative disability or restraint because registration "impaired employability, subject[ed] registrants to increased police scrutiny, and last[ed] for life."⁷¹ The court based this conclusion on the fact that the registration information was available to employers and volunteer agencies if the employment or volunteer service would place the offender in regular contact with minors.⁷² The Arizona Supreme Court, however, disagreed with the appellate court's decision, and held that registration was not an affirmative disability or restraint.⁷³ Noting the statutory safeguards on disclosure of registration information and employers' and agencies' current access to conviction records, the court stated that the "registration's marginal impact on the information available to non-law enforcement personnel is not 'the kind of affirmative disability or restraint usually associated with criminal punishment.'"⁷⁴ An important distinction between the Virginia and Arizona statutes is that under Arizona's version, registration information is disclosed to potential employers only if the victim of the offender's underlying offense was a minor.⁷⁵ In contrast, Virginia allows this information to be disclosed to employers regardless of the age of the offender's victim.⁷⁶ The difference between the two statutes could determine a court's opinion as to whether the Virginia registration requirement imposes an affirmative disability or restraint.

In *In re Reed*,⁷⁷ a California court found that California's sex offender registration statute imposed an affirmative disability or restraint. In reaching a decision that the California sex offender

68. *Id.*

69. *Id.*

70. 808 P.2d 325 (Ariz. Ct. App. 1990), *rev'd*, 829 P.2d 1217 (1992).

71. *Id.* at 329.

72. *Id.*

73. *State v. Noble*, 829 P.2d 1217 (Ariz. 1992).

74. *Id.* at 1222 (citations omitted).

75. ARIZ. REV. STAT. ANN. § 13-3821 (1990).

76. VA. CODE ANN. § 19.2-390.1B (Michie 1995).

77. 663 P.2d 216 (Cal. 1983).

registration statute was cruel and unusual punishment as applied to certain misdemeanor offenders, the court held that the registration requirement imposed an affirmative disability or restraint under the *Mendoza-Martinez* factors.⁷⁸ The court noted that "[a]lthough the stigma of a short jail sentence should eventually fade, the *ignominious badge* carried by the convicted sex offender can remain for a lifetime."⁷⁹ The court also emphasized the potential compulsion and restraint that could result from "ready availability" to the police, a purpose of the registration requirement.⁸⁰ The California statute at issue in *Reed* differed, however, from the Virginia statute in two important respects. First, the California statute required certain misdemeanor sex offenders to register,⁸¹ whereas the Virginia statute imposes the duty only on felons.⁸² Second, although an offender could be relieved of the duty to register after a period of time, the California statute did not provide a means for expunging the initial registration. This deficiency factored into the court's decision in *Reed* as to whether the registration statute imposed an affirmative disability or restraint.⁸³ In contrast to the California statute, the Virginia statute provides a means for expunging the information from the initial registration.⁸⁴ In addition, under both the California and Virginia statutes, a convicted offender is protected by the same constitutional safeguards against police harassment as any other person.⁸⁵ Thus, although *Reed* provides some good arguments as to why a sex offender registration requirement is an affirmative disability, the differences between the California and Virginia statutes limit the applicability of those arguments.

On the other side of the argument is the Supreme Court of Washington's decision that the Washington sex offender registration statute is not an affirmative disability or restraint.⁸⁶ In reaching this decision, the court noted that most of the information required by the statute was already on file with at least one criminal justice agency, that the physical act of filling out

78. *Id.* at 218, 220.

79. *Id.* at 218 (quoting *In re Birch*, 515 P.2d 12 (Cal. 1973) (emphasis added)).

80. *Id.* (citing Kaus & Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L. REV. 1191, 1222 (1974)).

81. *Id.* at 217.

82. VA. CODE ANN. § 19.2-298.1 (Michie 1995).

83. *Reed*, 663 P.2d at 218.

84. § 19.2-298.3.

85. See *People v. Adams*, 581 N.E.2d 637, 641 (Ill. 1991) ("[R]egistrant's constitutional safeguards will still be in place to protect him from unwarranted police harassment.").

86. *State v. Ward*, 869 P.2d 1062, 1069 (Wash. 1994).

the registration form could hardly create an affirmative disability, and that an offender is free to change residences so long as he complies with the requirements of the statute.⁸⁷ The court emphasized that, although the defendant argued that dissemination of the registration information to the public had a punitive effect on registrants, the dissemination was significantly limited by the statute to circumstances that require the prevention of future harm, not the punishment of past offenses.⁸⁸ In contrast, the Virginia statute does not authorize disclosure of the information to the general public under *any* circumstances, and, in addition, it imposes criminal sanctions on those who release the information in violation of the statute.⁸⁹ Under the Washington Supreme Court's analysis, therefore, the Virginia statute would be unlikely to be construed as an affirmative restraint or disability.

In summary, a convicted sex offender in Virginia could make several arguments that the registration requirement imposes an affirmative restraint or disability. He could argue, as did the defendant in *State v. Taylor*,⁹⁰ that the registration imposes a restraint on his movement to a new community.⁹¹ He could also argue that registration impairs his employability, particularly because disclosure to employers is not limited to offenders who had child victims. Another route would be to persuade the court that registration subjects the defendant to increased police surveillance and harassment. Most likely, these positions would be countered with arguments similar to those found in the *Noble* and *Ward* decisions, which found that these disabilities arose from the conviction itself and the defendant's conduct leading to the conviction, rather than from the registration requirement.⁹² A court, however, could find that the requirement is an affirmative disability or restraint.

b. Historically Regarded as Punishment

The second *Mendoza-Martinez* factor, whether the condition imposed by the statute has been regarded historically as punish-

87. *Id.* at 1069.

88. *Id.* at 1069-71 (finding that "the statutory limits on disclosure ensure that the potential burdens placed on registered offenders fit the threat posed to public safety").

89. VA. CODE ANN. § 19.2-390.1B (Michie 1995); *see also Adams*, 581 N.E.2d at 637 (finding that because "it is a criminal offense, for law enforcement officials to convey this information to the public, it is unlikely the information the registrant supplies will be distributed to the public, and so no stigma attaches").

90. 835 P.2d 245, 250 (Wash. Ct. App. 1992).

91. *Id.* at 250.

92. *See Adams*, 581 N.E.2d at 641 ("We fail to see how any stigma attaches to a registrant that is not already present through his own actions.").

ment, probably is not fulfilled by the Virginia registration statute. In *Lambert v. California*,⁹³ the United States Supreme Court stated that a felon registration city ordinance was, at most, a law enforcement technique designed for the convenience of law enforcement agencies.⁹⁴ In *State v. Ward*,⁹⁵ the Washington Supreme Court held that registration historically has not been regarded as punishment.⁹⁶ The court cited *Lambert* and stated that "[r]egistration is a traditional governmental method of making available relevant and necessary information to law enforcement agencies."⁹⁷ In contrast, the Supreme Court of Arizona in *State v. Noble*⁹⁸ found that sex offender registration statutes have historically been regarded as punishment.⁹⁹ In reaching its decision, the *Noble* court referred to the Supreme Court case of *Weems v. United States*,¹⁰⁰ which held that a sentence of permanent government surveillance was cruel and unusual punishment.¹⁰¹ The *Noble* court also noted that the California Supreme Court had described sex offender registration as an "ignominious badge."¹⁰² The California statute, however, applied to those convicted of misdemeanors, an important fact in the court's decision in the California case.¹⁰³ The Virginia statute, in contrast, applies only to felons.¹⁰⁴ In addition, Virginia law enforcement officials may not release registry information to the public, which makes the statute less likely to have the effect of so-called "scarlet letter" punishments.¹⁰⁵ The court in *Noble* limited its finding, however, because the Arizona statute limited access to the registration information, and thus "dampened its stigmatic effect."¹⁰⁶

93. 355 U.S. 225 (1957).

94. *Id.* at 229.

95. 869 P.2d 1062 (Wash. 1994).

96. *Id.* at 1072.

97. *Id.*

98. 829 P.2d 1217 (Ariz. 1992).

99. *Id.* at 1222.

100. 217 U.S. 349, 366 (1910).

101. *Noble*, 829 P.2d at 1222-23.

102. *Noble*, 829 P.2d at 1222 (citing *In re Birch*, 515 P.2d 12, 17 (Cal. 1973)).

103. 217 U.S. at 366.

104. VA. CODE ANN. § 19.2-298.1 (Michie 1995).

105. See Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986). See generally Brilliant, *supra* note 20; Jeffrey C. Filcik, Note, *Signs of the Times: Scarlet Letter Probation Conditions*, 37 WASH. U. J. URB. & CONTEMP. L. 291 (1990); Rosalind K. Kelley, Note, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing — Are They Constitutional*, 93 DICK. L. REV. 759 (1989); Leonore H. Tavill, Note, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613 (1988).

106. *Noble*, 829 P.2d at 1223.

The Virginia statute can be distinguished from the registration law analyzed in *Noble* because it applies only to felons and does not allow release of information to the public. These characteristics and the tradition of registration statutes as law enforcement tools lead to the conclusion that the Virginia registration statute probably does not fit the second *Mendoza-Martinez* factor, whether the sanction has been regarded historically as punishment. Notably, the California Supreme Court in *In re Reed*¹⁰⁷ stated that the *Mendoza-Martinez* factors were relevant considerations rather than "a checklist of absolute requirements," and therefore, the fact that sex offender registration statutes have not been regarded historically as punishment is not dispositive.¹⁰⁸

c. Promote Traditional Aims of Punishment

The Virginia statute promotes retribution and deterrence, the traditional aims of punishment. Although the legislature's stated objectives are to protect children and assist law enforcement, it seems that the ultimate goal these purposes serve is to deter recidivism among sex offenders.¹⁰⁹ To serve the goal of protecting children, the statute must prevent sex crimes from occurring. The legislature's rationale in registering convicted offenders appears to be to protect children from these offenders and therefore to prevent the offenders from committing sex crimes again. The California and Arizona supreme courts have found that those states' sex offender statutes promote the traditional aims of punishment.¹¹⁰ In *State v. Noble*¹¹¹ the court held that, at least in part, the Arizona registration requirement serves the traditional deterrent function of punishment.¹¹² The court said this was so because "a convicted sex offender is less likely to commit a subsequent offense if his whereabouts are easily ascertained by law enforcement officials."¹¹³ The court in *In re Reed*¹¹⁴ found that

107. 663 P.2d 216 (Cal. 1983).

108. *Id.* at 219.

109. *See id.* (finding that "[w]hether or not recidivism is in fact a problem with [certain] misdemeanants, the legislative intent was surely to deter recidivism by facilitating the apprehension of past offenders").

110. *State v. Noble*, 829 P.2d 1217, 1223 (Ariz. 1992); *Reed*, 663 P.2d at 219.

111. 829 P.2d 1217 (Ariz. 1992).

112. *Id.* at 1223.

113. *Id.* (citing *State v. Lammie*, 793 P.2d 134 (Ariz. Ct. App. 1990)) ("Registration for lifetime places a defendant on notice that when subsequent sexual crimes are committed in the area where he lives, he will be subject to investigation. This may well have a prophylactic effect, deterring him from future sexual crimes.").

114. 663 P.2d 216 (Cal. 1983).

the California statute's purpose of assuring that sex offenders are readily available for police surveillance served to deter recidivism by facilitating the apprehension of past offenders.¹¹⁵

Some courts, however, have found that sex offender registration statutes do not serve the traditional aims of punishment. The Washington Supreme Court acknowledged that an offender required to register may be deterred from committing future offenses.¹¹⁶ The court attempted to dismiss this point by stating that, although deterrence is a traditional aim of punishment, the actual conviction and sentencing may serve to deter a registrant, regardless of whether he is required to register. Although the court's statement may be true, it does not negate the fact that the registration also serves to deter the registrant. The court then stated that "[e]ven if a secondary effect of registration is to deter future crimes in our communities, we decline to hold that such positive effects are punitive in nature."¹¹⁷ Following this argument to its logical extreme, one could also say that, because sentencing convicted criminals to life in jail removes them from the streets and therefore produces the positive effect of deterring future crimes, a life sentence is not punishment. Although the Virginia statute does not list the deterrence of future sex offenses as one of its official purposes, the statute clearly serves that end.

d. Excessive in Relation to the Alternative, Non-Punitive Purpose

In one sense, the Virginia statute is not excessive in relation to its non-punitive purposes of assisting law enforcement and protecting children. The information that an offender must furnish¹¹⁸ is minimal, particularly when compared with similar statutes from some other states.¹¹⁹ In addition, the statute does

115. *Id.* at 219.

116. *State v. Ward*, 869 P.2d 1062, 1073 (Wash. 1994); *see also* *People v. Adams*, 581 N.E.2d 637, 641 (Ill. 1991) ("The absence of corrective measures in the statute, while not controlling, further impels us to conclude it is nonpenal.").

117. *Ward*, 869 P.2d at 1073.

118. VA. CODE ANN. § 19.2-298.1 (Michie 1995) (requiring offenders to furnish their name, aliases, date and locality of conviction, date of birth, social security number, current address, description of offense(s), and information on prior convictions).

119. California registrants must supply a written statement, fingerprints, and a photograph, CAL. PEN. CODE § 290(e) (West Supp. 1995); Washington registrants must provide their name, address, date and place of birth, place of employment, crime for which convicted, date and place of conviction, aliases used, social security number, fingerprints, and a photograph, WASH. REV. CODE ANN. § 9A.44.130(2)(5) (West Supp. 1995).

not require a registrant to give up his constitutional safeguards against police harassment. That is, although law enforcement agencies have access to the registry, they still may not arrest a registrant without probable cause.¹²⁰ Potential prearrest suspicion of a registrant is "incident to the conviction and not a result of registration as a sex offender."¹²¹ The statute provides a mechanism for an offender to petition the court for removal of his information from the registry.¹²² The offender must prove that he no longer poses a risk to public safety. This feature, in theory, appears to ensure that the protective function of the statute is met without burdening those offenders who are not a risk to society.

A troubling feature of the statute, however, is the lack of differentiation between sex offenders whose victims were adults and those whose victims were children. Specifically, although the stated purpose of the statute is to protect *children*, information from the sex offender registry is released to requesting employers regardless of whether the offender/potential employee committed an offense against a child. The statute is excessive as applied to those offenders whose victims were not children. The Arizona Supreme Court, in *State v. Noble*, declined to deal with this precise issue.¹²³ The court held that the registration requirement was not excessive, *as applied to child sex offenders*, in relation to its non-punitive law enforcement purpose.¹²⁴ The court specifically left open the question of "whether the registration requirement would constitute punishment if applied to offenders convicted of other offenses for which the threat of recidivism may possibly be less significant or for which registration may have no valid regulatory purposes."¹²⁵ This question may be the key to a finding that the Virginia statute is excessive in relation to its nonpenal purpose and therefore constitutes punishment.

Balancing the *Mendoza-Martinez* factors, then, could weigh in favor of labelling the Virginia sex offender registration statute as punishment. The statute is arguably an affirmative disability or restraint; it promotes deterrence, a traditional aim of punishment; and it possibly is excessive in relation to its non-punitive

120. See *Ward*, 869 P.2d at 1073.

121. *Id.*

122. VA. CODE ANN. § 19.2-298.3 (Michie 1995).

123. *State v. Noble*, 829 P.2d 1217, 1224 (Ariz. 1992).

124. *Id.*

125. *Id.*

purposes of assisting law enforcement and protecting children. Although registration has not been regarded historically as punishment, this factor is not dispositive, because the *Mendoza-Martinez* factors are not merely a checklist. Instead, they require a balancing of the strengths of each test.¹²⁶ Although these tests are not perfect, they do provide a somewhat objective method of determining the purpose of a statute absent a clear legislative intent. If the limitations of the test are taken into account, the *Mendoza-Martinez* factors can be helpful in determining whether a statute's purpose is punitive. Assuming, then, that a court could regard the Virginia statute as punishment, the next step in an Eighth Amendment analysis is whether the punishment is "cruel and unusual."

B. Is the Virginia Registration Requirement Cruel and Unusual?

The prohibition against "cruel and unusual" punishment was first recognized in the American colonies in 1776, when a verbatim copy of a prohibition in the English Bill of Rights was included in the Virginia Constitution.¹²⁷ Thereafter, eight other states adopted the provision, the federal government included it in the Northwest Ordinance of 1787, and, in 1791, it became the Eighth Amendment to the United States Constitution.¹²⁸

Debates by the framers of the Constitution and comments by the first Congress suggest that the provision was directed at prohibiting certain methods of punishment.¹²⁹ Until the end of the nineteenth century, the state and federal courts interpreted the clause as a prohibition against certain methods of punishment.¹³⁰ The courts viewed the Eighth Amendment as prohibiting barbarous or "inhumane" methods of punishment, not punishments that were merely excessive in relation to the crime. For example, "[b]reaking on the wheel [and] flaying alive" were con-

126. See *In re Reed*, 663 P.2d 216, 219 (Cal. 1983).

127. Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969) (citing R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 35-36, 232 (1950)). Section 9 of the Virginia Declaration of Rights states: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . ." VA. CONST. Art. I, § 9.

128. Granucci, *supra* note 127, at 840.

129. *Id.* at 841-42.

130. *Id.* at 842.

sidered cruel and unusual,¹³¹ but death by hanging for the crime of stealing fifty dollars worth of merchandise was not.¹³² The courts did not accept arguments that the clause covered any punishment disproportionate to the crime and commentators believed the clause to be obsolete.¹³³

In 1892, three justices of the Supreme Court, in a dissent to *O'Neil v. Vermont*,¹³⁴ set forth the view that "[t]he whole inhibition [of the Eighth Amendment] is against that which is excessive"¹³⁵ Seventeen years later, another claim of disproportionate penalties was brought before the Court in *Weems v. United States*,¹³⁶ which involved a sentence of fifteen years in chains at hard labor for a conviction of the strict liability crime of falsifying an official document.¹³⁷ In holding that the penalty was an unconstitutional violation of the cruel and unusual clause, the Court stated that "the inhibition of the [clause] was directed, not only against punishments which inflict torture, 'but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'"¹³⁸ The Court recognized both that the Eighth Amendment encompassed a flexible standard and that the prohibition against "cruel and unusual punishments is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."¹³⁹

Similarly, in holding that denationalization of a member of the armed services convicted of wartime desertion was cruel and unusual, Chief Justice Warren stated in *Trop v. Dulles*¹⁴⁰ that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁴¹ The Court noted that the precise meaning of the phrase "cruel

131. *Harmelin v. Michigan*, 501 U.S. 957, 981 (1991) (citing B. OLIVER, *THE RIGHT OF AN AMERICAN* 186 (1832)).

132. *Id.* at 980-81.

133. Granucci, *supra* note 127, at 842 (citing 1 T. CODEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 694 (8th ed. 1927)).

134. 144 U.S. 323 (1892).

135. *Id.* at 340 (Field, J. dissenting).

136. 217 U.S. 349 (1910).

137. *Id.* at 357-58.

138. *Weems*, 217 U.S. at 371 (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)).

139. *Id.* at 378.

140. 356 U.S. 86 (1958).

141. *Id.* at 101.

and unusual" had not been detailed by the Supreme Court.¹⁴² Prior cases did not identify precise distinctions between cruelty and unusualness; the Court observed that if "unusual" has any meaning apart from "cruel," "the meaning should be the ordinary one, signifying something different from that which is generally done."¹⁴³ The Court emphasized, however, that the basic policy reflected in the prohibition was part of the Anglo-American tradition of criminal justice. The opinion recalled that the phrase was taken directly from the English Declaration of Rights and that the basic principle for which it stands could be traced back to the Magna Carta.¹⁴⁴ That is, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of [humanity]."¹⁴⁵ In holding that the Amendment serves to assure that the state's power to punish be exercised "within the limits of civilized standards,"¹⁴⁶ the Court stated that "[f]ines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."¹⁴⁷ With this analysis, the Court strengthened the interpretation of the Court in *Weems* that the Eighth Amendment prohibited "greatly disproportioned" punishment.

Since the *Weems* and *Trop* decisions, the Court has applied this proportionality principle in both death penalty cases and noncapital cases. Although the Court has applied the principle extensively in the death penalty area,¹⁴⁸ because the Virginia registration statute imposes noncapital punishment, this Comment focuses on the Court's application of the proportionality principle in noncapital cases. The Court decided three important cases in this area during the early 1980s: *Rummel v. Estelle*,¹⁴⁹ *Hutto v. Davis*,¹⁵⁰ and *Solem v. Helm*.¹⁵¹

142. *Id.* at 99.

143. *Id.* at 101 n.32.

144. *Id.* at 100.

145. *Id.*

146. *Id.*

147. *Id.*

148. See *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991); see also *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (holding that a capital sentence for a felony murder conviction in which the defendant had not committed the actual murder and lacked the intent to kill was excessive and violated the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (holding that capital punishment is grossly disproportionate for the crime of rape and is therefore prohibited by the Eighth Amendment).

149. 445 U.S. 263 (1980).

150. 454 U.S. 370 (1982).

151. 463 U.S. 277 (1983).

In *Rummel*, the defendant had previously been convicted of two felonies, fraudulent use of a credit card to obtain eighty dollars worth of goods or services and passing a forged check in the amount of \$28.36. Upon conviction of his third felony, obtaining \$120.75 by false pretenses, the defendant received a mandatory life sentence pursuant to a Texas recidivist statute.¹⁵² The defendant argued that the punishment was disproportionate in relation to the three underlying felonies on which his sentence was based.¹⁵³ The Court held that the determination of criminal punishments was a matter of legislative prerogative in the absence of unique punishments such as the death penalty and, therefore, declined to strike down the sentence.¹⁵⁴ The court relied on the fact that the legislature had made a determination to punish recidivists in a harsher manner than first-time offenders. The legislature had found that those who repeat criminal acts have shown that they are incapable of conforming to the norms of society.¹⁵⁵ The Court nevertheless recognized the applicability of the proportionality principle in extreme cases.¹⁵⁶ The Court reached a result similar to *Rummel* in *Hutto*, in which the defendant challenged a sentence of forty years in prison for a conviction of possession of less than nine ounces of marijuana as cruel and unusual.¹⁵⁷ The Court recognized the proportionality rule but found that it was inapplicable to the sentence at issue.¹⁵⁸

Justice Powell wrote a strong dissent to *Rummel* in which he expressed the view that Rummel's sentence was grossly disproportionate to his offenses and that penalties for non-capital offenses could indeed be unconstitutionally disproportionate.¹⁵⁹ He set forth a test of three "objective" factors to determine the proportionality of a punishment to the crime committed. These factors were the following: "(i) the nature of the offense[,] ... (ii) the sentence imposed for commission of the same crime in other jurisdictions[,] ... and (iii) the sentence imposed upon other criminals in the same jurisdiction"¹⁶⁰

152. *Rummel*, 445 U.S. at 265-66.

153. *Id.* at 265.

154. *Id.* at 274, 284.

155. *Id.* at 276.

156. *Id.* at 274 n.11 ("This is not to say that the proportionality principle would not come into play in the extreme example ... if a legislature made overtime parking a felony punishable by life imprisonment.").

157. *Hutto v. Davis*, 454 U.S. 370, 371 (1982).

158. *Id.* at 374.

159. *Rummel*, 445 U.S. at 307 (Powell, J., dissenting).

160. *Id.* at 295 (Powell, J., dissenting).

Justice Powell's position in his dissent to *Rummel* was adopted by the majority in *Solem*. The defendant in *Solem* was convicted of "uttering a 'no account' check for \$100" and was sentenced to life imprisonment without possibility of parole under South Dakota's recidivist statute because of six prior felony convictions.¹⁶¹ The Court held that the Eighth Amendment's proscription of cruel and unusual punishments "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."¹⁶² Justice Powell's majority opinion traced the history of the meaning of the Eighth Amendment and concluded that the proportionality rule was "deeply rooted" in American jurisprudence.¹⁶³ Citing *Weems* and *Trop*, Justice Powell then asserted that the principle of proportionality had been recognized explicitly by the Supreme Court for almost a century.¹⁶⁴ Justice Powell added, however, that although "outside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare[.]" . . . [t]his does not mean that proportionality analysis is entirely inapplicable in noncapital cases."¹⁶⁵ The Court then held that "a criminal sentence must be proportionate to the crime for which the" offender was convicted.¹⁶⁶

In a proportionality analysis, the Court stated that reviewing courts should grant substantial deference to the legislature, but should also consider that no penalty is per se constitutional and that one day in prison may be unconstitutional in some circumstances.¹⁶⁷ The Court then set forth the "objective factors" by which courts should be guided in an Eighth Amendment analysis.¹⁶⁸ These factors are the same as set forth in Justice Powell's dissent to *Rummel*: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and, (3) sentences imposed for commission of the same crime in other jurisdictions.¹⁶⁹ After *Solem*, the next relevant Supreme Court case was *Harmelin v. Michigan* in 1991.¹⁷⁰

161. *Solem*, 463 U.S. at 281-82.

162. *Id.* at 284.

163. *Id.*

164. *Id.* at 286.

165. *Id.* at 289-90 (quoting *Rummel*, 445 U.S. at 272) (alteration in original).

166. *Id.* at 290.

167. *Id.* at 290.

168. *Id.*

169. *Id.* at 290-91.

170. 501 U.S. 957 (1991).

In *Harmelin*, the defendant was sentenced to life in prison without possibility of parole for a conviction of possessing more than 650 grams of cocaine. At issue was whether this sentence was cruel and unusual within the meaning of the Eighth Amendment.¹⁷¹ Whereas in *Trop* and many subsequent cases the Court stressed the flexibility and progressive nature of the Eighth Amendment, Justice Scalia's opinion in *Harmelin v. Michigan* looked to the meaning of "cruel and unusual" at the time the English Declaration of Rights was drafted.¹⁷² Although, as discussed above, the Court had developed a substantial body of law on the meaning of the Eighth Amendment since the seventeenth century, Justice Scalia chose to dismiss this intervening precedent and instead compare the 1980 case of *Solem* to the original meaning of the Constitution. Justice Scalia concluded that the Eighth Amendment contains no proportionality guarantee and that *Solem* was wrong.¹⁷³ Only Chief Justice Rehnquist, however, joined this part of Justice Scalia's opinion. Although Justice Scalia wrote the opinion of the Court with respect to one issue (the individualized capital-sentencing doctrine), the other three justices who joined with Justice Scalia and Chief Justice Rehnquist on that issue did not join them on the issue of proportionality.

Instead, Justice Kennedy, joined by Justices O'Connor and Souter, found that the cruel and unusual punishment prohibition encompasses a narrow proportionality principle. Justice Kennedy wrote that "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."¹⁷⁴ Thus, although Justice Scalia's opinion overruled *Solem* and declared that the Eighth Amendment contains no proportionality principle, this part of his opinion was not joined by a majority of the Court. Rather, it was joined only by Chief Justice Rehnquist, and the other three justices who concurred in the judgment approving the defendant's punishment, explicitly disagreed with that part of the opinion. As a result, the proportionality test for noncapital offenses currently encompasses Justice Powell's three-part test as set forth in *Solem* and as modified by Justice Kennedy's *Harmelin* limitation of the test to only those punishments that are "grossly disproportionate."

171. *Id.* at 961-62.

172. *Id.* at 967 (plurality opinion).

173. *Id.* at 965.

174. *Id.* at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (citing *Solem*, 463 U.S. at 288).

The principle of proportionality was essential to the holdings of the few courts that have ruled that sex offender registration statutes are a violation of the Eighth Amendment.¹⁷⁵ In *In re Reed*,¹⁷⁶ the California Supreme Court held that California's mandatory registration of sex offenders convicted under the misdemeanor disorderly conduct statute violated the cruel and unusual provision of the California Constitution. The court cited *Weems* and, later, *Trop* in commenting on the "flexible and progressive standard for assessing the severity of punishment."¹⁷⁷ Implicit in the flexible and progressive character of the constitutional prohibition, the court held, is "the notion that punishment may not be grossly disproportionate to the offense."¹⁷⁸ The California court had previously explicitly adopted the proportionality standard under the California Constitution.¹⁷⁹ The court then analyzed the statute under a variation of the three-part proportionality test endorsed in *In re Lynch*.¹⁸⁰

Under the first part of this test, "an examination of the 'nature of the offense and/or offender, with particular regard to the degree of danger both present to society,'"¹⁸¹ the court found that the offenses for which persons may be convicted under the misdemeanor statute were relatively minor. The defendant had been "convicted of soliciting 'lewd or dissolute conduct' from an undercover vice officer in a public restroom."¹⁸² The court explained that under the California code section the defendant had violated, an offender need not "victimize" anyone in the traditional criminal sense. Rather, the court explained, only a "gesture, a flirtation, an invitation for sexual favors, if accompanied by any

175. See *In re King*, 204 Cal. Rptr. 39, 43 (Ct. App. 1984); *In re Reed*, 663 P.2d 216, 220-22 (Cal. 1983) (both resting on California constitutional law); cf. *State v. Lammie*, 793 P.2d 134, 139 (Ariz. Ct. App. 1990) (resting on United States constitutional law); *People v. King*, 20 Cal. Rptr. 2d 220, 223-24 (Ct. App. 1991) (resting on California constitutional law); *In re DeBeque*, 260 Cal. Rptr. 441, 444-45 (Ct. App. 1989) (resting on California constitutional law); *People v. Mora*, 206 Cal. Rptr. 256, 258 (Ct. App. 1984) (resting on California constitutional law); *People v. Mills*, 146 Cal. Rptr. 411, 416 (Ct. App. 1978) (resting on California constitutional law); *People v. Adams*, 581 N.E.2d 637, 640-41 (Ill. 1991) (resting on Illinois and United States constitutional law); *Ohio v. Douglas*, 586 N.E.2d 1096, 1098-99 (Ohio 1989) (resting on Ohio and United States constitutional law).

176. 663 P.2d 216 (Cal. 1983).

177. *Id.* at 220.

178. *Id.*

179. See *In re Lynch*, 503 P.2d 921 (Cal. 1972).

180. *Reed*, 663 P.2d at 220.

181. *Id.* at 220 (citations omitted).

182. *Id.* at 216.

touching and done in a public place, may suffice."¹⁸³ In addition, the court observed that the petitioner "is not the prototype of one who poses a grave threat to society; nor does his relatively simple sexual indiscretion place him in the ranks of those who commit more heinous registrable sex offenses."¹⁸⁴ Important to the court's finding on this issue was the fact that the petitioner did not assert that *all* sex offenders per se are not recidivists and therefore should not be required to register, but that persons convicted under the misdemeanor statute for which the petitioner was convicted cannot be presumed to be dangerous recidivists.¹⁸⁵

For the second part of the *Solem*-type test, a comparison of the penalty with those imposed in the same jurisdiction for more serious crimes, the court noted several more serious sex-related misdemeanors for which registration was not required.¹⁸⁶ The court also set forth that more serious crimes that were not sex offenses, such as robbery, burglary, and arson, did not require registration, even "though violence and victimization are more pronounced and recidivism is often proved."¹⁸⁷ Persons who commit these more serious crimes may serve their jail time and get on with their lives, whereas those convicted under the misdemeanor statute at issue must carry the "onus" of sex offender registration.¹⁸⁸

For the last part of the proportionality test, the court found that California's registration requirement was relatively severe as compared to other jurisdictions.¹⁸⁹ After balancing the three parts of the test, the court concluded that the registration requirement as applied to those convicted under the misdemeanor statute at issue was in violation of the California Constitution's prohibition against cruel and unusual punishment.

The court in *In re King*¹⁹⁰ also concluded that cruel and unusual punishment existed after applying the three-part proportionality test. In *King*, as in *Reed*, the court examined a semi-as-applied/semi-facial challenge to the California sex offender registration statute. That is, the defendant challenged the inclusion of a

183. *Id.*

184. *Id.* at 221.

185. *Id.*

186. *Id.* at 221-22.

187. *Id.* at 222.

188. *Id.*

189. At the time of this decision, only four states had sex offender registration statutes. *Id.* at 222.

190. 204 Cal. Rptr. 39 (Ct. App. 1984).

particular type of offense within those that trigger registration under the statute.¹⁹¹ At issue was the California sex offender registration statute that required registration for those convicted under a misdemeanor indecent exposure statute.¹⁹² The court found that the offenses under the misdemeanor statute were relatively minor, that several more serious offenses in California were not punished by imposition of the registration statute, and that the registration requirement was severe in relation to punishments in other jurisdictions.¹⁹³ The court concluded that "sex offender registration is out of all proportion to the crime of misdemeanor indecent exposure."¹⁹⁴

One important difference between these cases and any case involving the Virginia sex offender registration statute is that the Virginia statute requires registration only for persons convicted of sex-related felonies. However, all of those felonies are not exactly similar in degree, and one may be able to make distinctions on the dangerousness of persons convicted under the different felony sections.¹⁹⁵ That is, for certain offenses, registration may be too severe a punishment because felons convicted of those offenses simply are not per se dangerous recidivists. A semi-as-applied/semi-facial argument similar to those entertained by the California courts could thus still be addressed to a Virginia court in challenging the Virginia registration statute. Another important difference is that the California Supreme Court had explicitly included the proportionality principle within the cruel and unusual prohibition of the California Constitution. Although Virginia federal courts are not inclined to apply a proportionality rule,¹⁹⁶ as discussed above, the result of the *Harmelin* decision was not to overrule the proportionality rule, but to modify its reach to punishments that are "grossly" disproportionate. A defendant could argue in a Virginia court that the court must apply the modified *Solem* proportionality test. In addition, a defendant could argue that the Virginia Constitution provides more protection than the Eighth Amendment of the United States Constitution and, thus, an unmodified *Solem* test would be ap-

191. *Id.* at 40.

192. *Id.*

193. *Id.* at 41.

194. *Id.*

195. *See supra* note 28.

196. The Fourth Circuit has held that a proportionality analysis is unavailable unless a term of life imprisonment has been imposed. *See United States v. Melton*, 970 F.2d 1328, 1336 (4th Cir. 1992); *United States v. Rhodes*, 779 F.2d 1019, 1027-28 (4th Cir. 1986).

propriate. Virginia courts, however, have been reluctant to extend the reach of the Virginia Constitution's guarantee against cruel and unusual punishment.¹⁹⁷

Most cases that have examined whether sex offender registration constitutes cruel and unusual punishment have concluded that it does not violate that prohibition. The minority approach is that of the two California decisions discussed above, *In re Reed* and *In re King*. Those courts held that the California sex offender registration statute, as applied to certain misdemeanor offenders, was cruel and unusual in violation of the proportionality guarantee of the California Constitution. The majority of courts that have addressed this issue have examined the proportionality of the registration statutes and found it to pass constitutional standards.¹⁹⁸ One court held that the punishment to the registrant results from his own actions and therefore is not cruel and unusual.¹⁹⁹ Most likely, a general challenge to the Virginia sex offender registration would also result in a finding of constitutionality under the Eighth Amendment.

IV. CONCLUSION

The policy rationales underlying the Virginia sex offender registration statute are clearly legitimate and admirable legislative considerations. A state has a responsibility to protect its citizens from criminals, to take steps to prevent future crimes, and to punish those who break its laws. Particularly troubling, however, in the context of registration statutes is the weakness of the evidence on which legislatures rely to support their contention that all types of sex offenders are more likely recidivists than other violent offenders. Such questionable data should not support a legislature's decision to single out all sex offenders from other (some, arguably, more dangerous) criminals and label them as risks to society whether or not they pose such a risk and thus deny them the opportunity to obtain certain kinds of employment. More specifically, the most troubling aspect of the Virginia statute is its stated objective of preventing registered

197. See *Hart v. Commonwealth*, 109 S.E. 582, 588 (Va. 1921) (declining to follow *Weems* because only four justices had joined the opinion).

198. See *State v. Lammie*, 793 P.2d 134, 140 (Ariz. Ct. App. 1990); *People v. King*, 20 Cal. Rptr. 2d 220, 225 (Ct. App. 1991); *In re DeBeque*, 260 Cal. Rptr. 441, 449 (Ct. App. 1989); *People v. Mora*, 206 Cal. Rptr. 256, 258 (Ct. App. 1984); *People v. Mills*, 146 Cal. Rptr. 411, 415 (Ct. App. 1978); *Ohio v. Douglas*, 586 N.E.2d 1096, 1099 (Ohio App. 1989).

199. *People v. Adams*, 581 N.E.2d 637, 641 (Ill. 1991).

sex offenders from obtaining employment in which the offender would have direct contact with children. A person who committed a rape ten years prior to his release from prison must register with local law enforcement upon his release. Although he may petition a court for expungement of his name from the registry on a showing that he no longer poses a "risk" to society, he still has the initial duty to register. As a result, he could be prevented from working with children even though his offense was not committed against a child victim and he may never have posed a risk to children at all. That he does not pose such a risk does not negate the fact that the crime of rape is certainly a heinous crime, but it also does not provide a rationale for preventing him from working with children.

This argument could be used in a semi-as-applied, semi-facial challenge to the Virginia statute. A defendant could challenge the application of the statute as applied to certain categories of felons who committed their offenses against adults. Of course, the court must be willing to accept some sort of a proportionality test. Ideally for the defendant, the court would adopt the approach of the California courts in *In re Reed* and *In re King* and apply a full-fledged, three-part proportionality test. Virginia courts, however, have not been receptive to this approach. In 1921, in *Hart v. Commonwealth*,²⁰⁰ the Virginia Supreme Court held that it was not required to apply such a proportionality test because the United States Supreme Court had left the question "open." Fortunately, however, the United States Supreme Court has since more fully developed its Eighth Amendment doctrine. Although after *Harmelin v. Michigan* the proportionality test does not have the reach it had when it was set forth in *Solem v. Helm*, the Eighth Amendment encompasses at least a "grossly disproportionate" standard. Virginia courts, therefore, may not provide less protection than such a standard, but may choose to provide more.

In summary, Virginia's sex offender registration statute may serve important state policy objectives, but those objectives may be outweighed by other considerations. Although the state has the power to protect children and assist law enforcement, it must accomplish those goals without infringing on the constitutional rights of its citizens. Sex offender registration arguably is punishment and it may be cruel and unusual as applied to certain

200. 109 S.E. 582 (Va. 1921).

categories of felons. In all, the statute appears not to violate the constitutional prohibition against cruel and unusual punishment and will probably be upheld under challenges that it is a facially invalid statute violative of the Eighth Amendment.