

## DATABASE INFAMIA: EXIT FROM THE SEX OFFENDER REGISTRIES

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### INTRODUCTION

For better or worse, it is now widely accepted that we live in an “information age,” enabled by powerful technologies that collect, store, and analyze personal data.<sup>1</sup> Businesses track purchases and Internet activity for commercial purposes,<sup>2</sup> law enforcement agencies maintain expansive criminal record and biometric information databases,<sup>3</sup> and the federal government makes regular use of “terrorist watch” and “no fly” lists.<sup>4</sup> The databases, which have prompted a fruitful ongoing national discussion on the parameters of informational privacy, share a common feature: they usually are not shared with the public. This Article

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1. See generally FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* (1997); SIMSON GARFINKEL, *DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY* (2000); JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 7–8 (2000).

2. See Alexander Tsesis, *The Right to Erasure: Privacy, Data Brokers, and the Indefinite Detention of Data*, 49 *WAKE FOREST L. REV.* 433, 437–39 (2014).

3. See Wayne A. Logan, *Policing Identity*, 92 *B.U. L. REV.* 1561 *passim* (2012).

4. See Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 *CORNELL L. REV.* 327, 336–45 (2014).

considers another kind of database, one that is decidedly more public in nature: sex offender registries.

Today, as a result of laws in effect nationwide, identifying information on almost eight hundred thousand convicted sex offenders is collected and posted on government-operated Internet websites.<sup>5</sup> Colloquially known as Megan's Laws—named after a seven-year-old girl in New Jersey who in 1994 was sexually assaulted and murdered by a recidivist sex offender who lived nearby<sup>6</sup>—the laws require that targeted individuals provide an array of data to law enforcement, including photos; home, school, and work addresses; vehicle identification information; e-mail or Internet identifiers; and descriptions of identifying body marks, such as scars and tattoos.<sup>7</sup> Targeted individuals must thereafter verify the accuracy of information, on at least an annual basis (for some, every 90 days), and update it in the event of any changes (e.g., changes in residence or workplace or the growth of a beard),<sup>8</sup> facing possible felony prosecution if they fail to do so.<sup>9</sup>

The laws, which originated during the nation's sharp swing toward harsh penal policies in the 1990s,<sup>10</sup> have been largely immune to constitutional attack<sup>11</sup> and have significantly expanded their reach over time.<sup>12</sup> While other manifestations of penal harshness have experienced a

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5. See NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, MAP OF REGISTERED SEX OFFENDERS IN THE UNITED STATES, available at [http://www.missingkids.com/en\\_US/documents/Sex\\_Offenders\\_Map.pdf](http://www.missingkids.com/en_US/documents/Sex_Offenders_Map.pdf) (2014); *Number of Registrants Reported by State/Territory*, PARENTS FOR MEGAN'S L. & CRIME VICTIMS CENTER, <http://www.parentsformeganslaw.org/public/meganReportCard.html> (last visited Nov. 11, 2014). For examples of state website registries, see *Sex Offender Search Options*, ALA. L. ENFORCEMENT AGENCY, <http://app.alea.gov/Community/wfSexOffenderSearch.aspx#1> (last visited Jan. 18, 2015); *Sex Offender Information*, ARIZ. DEPARTMENT PUB. SAFETY, [http://www.azdps.gov/Services/Sex\\_Offender/](http://www.azdps.gov/Services/Sex_Offender/) (last visited Jan. 17, 2015); *Florida Sexual Offenders and Predators*, FLA. DEPARTMENT L. ENFORCEMENT, <https://offender.fdle.state.fl.us/offender/homepage.do;jsessionid=KFkcFRfQ6kHxj3Faw49RdV2m-> (last visited Jan. 17, 2015); NEB. SEX OFFENDER REGISTRY, <https://sor.nebraska.gov/> (last visited Jan. 17, 2015); *WI Sex Offender Registry*, WIS. DEPARTMENT CORRECTIONS, <http://doc.wi.gov/community-resources/wi-sex-offender-registry> (last visited Jan. 17, 2015).

6. WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 54–55, 60 (2009).

7. See, e.g., *Megan's Law*, ST. N.J. DEPARTMENT L. & PUB. SAFETY, [http://www.state.nj.us/njsp/info/reg\\_sexoffend.html](http://www.state.nj.us/njsp/info/reg_sexoffend.html) (last visited Jan. 23, 2015); *Megan's Law Website*, PA. ST. POLICE, <http://www.pameganslaw.state.pa.us/FAQ.aspx> (last visited Jan. 23, 2015).

8. LOGAN, *supra* note 6, at 70, 80.

9. *Id.* at 70.

10. *Id.* at 90.

11. *Id.* at 136–47.

12. Since 1994, the federal government has played an integral role in this growth by threatening to withhold funds from states that do not enact federally prescribed, more extensive and onerous registration and community notification laws. See

wind down of late—such as “three strikes” laws,<sup>13</sup> mandatory minimum sentences,<sup>14</sup> and other collateral consequences of conviction (e.g., loss of the right to vote)<sup>15</sup>—Megan’s Laws not only endure, they flourish.<sup>16</sup>

This Article examines a particular outgrowth of this survival story, one directly affecting both the number of individuals on registries and their onerous quality: the extent to which registrants are provided an opportunity to exit registries. As will be discussed, individuals very often face a lifetime of registration requirements and community notification—a perpetual “rogues’ gallery.”<sup>17</sup> If not, in the absence of their conviction being reversed or a gubernatorial pardon being granted (today a rare occurrence)<sup>18</sup>—and sometimes not even then<sup>19</sup>—individuals typically remain on registries for a minimum of 10 and up to 40 years.<sup>20</sup> This is so regardless of whether or not they have been convicted of another crime (sexual or otherwise) and their future likelihood of recidivism.

During this time, individuals who are “off-paper” (i.e., they have served their time in prison or jail and/or community supervision) are subject to an array of distinct burdens and adverse consequences, in effect being legally forced to be complicit in their own monitoring.<sup>21</sup> The

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Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 997–99, 1007–08 (2010); Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51 *passim* (2008).

13. See, e.g., Niraj Chokshi, *California Voters Seem Ready to End the State’s ‘Tough on Crime’ Era*, WASH. POST, Oct. 31, 2014, <http://www.washingtonpost.com/blogs/govbeat/wp/2014/10/31/california-voters-seem-ready-to-end-the-states-tough-on-crime-era/>.

14. See, e.g., Peniel E. Joseph, *Eric Holder’s War on the War on Drugs*, ROOT, Aug. 13, 2013, [http://www.theroot.com/articles/politics/2013/08/attorney\\_general\\_eric\\_holder\\_seeks\\_to\\_curtail\\_stiff\\_drug\\_sentences.html](http://www.theroot.com/articles/politics/2013/08/attorney_general_eric_holder_seeks_to_curtail_stiff_drug_sentences.html).

15. See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013).

16. For more on the social and political forces behind this staying power, see Wayne A. Logan, *Megan’s Laws: A Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 399–410 (2011).

17. See *infra* Part I.A.1. For a discussion of rogues’ galleries—public displays of convicted offenders’ mugshots—gaining popularity in mid-nineteenth century urban police departments, see Logan, *supra* note 3, at 1567–68.

18. Margaret C. Love, *When the Punishment Doesn’t Fit the Crime: Reinventing Forgiveness in Unforgiving Times*, 38 HUM. RTS., Summer 2011, at 2, 5.

19. See *infra* notes 197–98 and accompanying text.

20. See *infra* notes 43–83 and accompanying text.

21. See *Heath v. State*, 983 A.2d 77, 81 (Del. 2009) (“The Registry requirement affects individual liberty more profoundly than simply serving as a recording mechanism for determining prior offenders.”); *State v. Guidry*, 96 P.3d 242, 249 (Haw. 2004) (“[T]he registration requirement imposes unending governmental regulation of basic life activities despite the completion of, and following any criminal sentence.”); *Doe v. Att’y*

very status of being a registrant, moreover, has consequences of its own: registrants often cannot change their names<sup>22</sup> and face limits on where they can live.<sup>23</sup> Registrant status can also result in satellite-based monitoring,<sup>24</sup> being forced to carry an identification card,<sup>25</sup> and having to pay an annual fee, which can be as much as \$100.<sup>26</sup>

The effects of registration, however, do not stand alone; rather, they combine with the even more significant effects of community notification. With community notification, information provided by registrants is displayed on specially created government-run websites and at times disseminated by more affirmative means such as by leaflets (often distributed by registrants themselves at their own expense).<sup>27</sup> Despite common government assertions that registry information is being made available merely as a public safety service, the context is anything but neutral.<sup>28</sup> As the Arizona Court of Appeals recently noted, registrants “are not only forced to display a scarlet letter to the world, but state authorities are required to shine a spotlight on that letter.”<sup>29</sup> The spotlighting has major adverse personal consequences for registrants,

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*Gen.*, 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J., concurring) (stating that registration represents “a continuing, intrusive, and humiliating regulation of the person himself”).

22. *E.g.*, N.C. GEN. STAT. § 14-292.6 (2013); VT. STAT. ANN. tit. 15, § 817 (2010); WIS. STAT. § 301.47(2)(a) (2013–14).

23. Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 6–7 (2006).

24. *E.g.*, N.C. GEN. STAT. § 14-208.40(a)(2)(ii).

25. *E.g.*, ARIZ. REV. STAT. ANN. § 13-3821(J) (2010); IND. CODE ANN. § 11-8-8-15 (LexisNexis 2014 & Supp. 2014).

26. *E.g.*, WIS. STAT. § 301.45(10); *see also, e.g.*, LA. REV. STAT. ANN. § 15:542(D) (2012 & Supp. 2015) (\$60 annual fee).

27. ALA. CODE § 15-20A-21(b) (LexisNexis 2011); DEL. CODE ANN. tit. 11, § 4121(i) (2007); LA. REV. STAT. ANN. § 15:542.1(A)(3); 42 PA. CONS. STAT. ANN. § 9799.27 (West 2014); WIS. STAT. § 301.46(5); WYO. STAT. ANN. § 7-19-303(c)(ii) (2013).

28. *See, e.g., Doe v. State*, 189 P.3d 999, 1001 (Alaska 2008) (“A photograph of each registrant appears on a webpage under the caption ‘Registered Sex Offender/Child Kidnapper.’ Each registrant’s page also displays the registrant’s physical description, home address, employer, work address, and conviction information.”).

29. *State v. Henry*, 228 P.3d 900, 908 (Ariz. Ct. App. 2010) (internal quotation marks omitted); *see also People v. Zaidi*, 55 Cal. Rptr. 3d 566, 574 (Cal. Ct. App. 2007) (terming registration and notification “an obligation communicating public disgrace for a lifetime”). *Cf. Seth Kreimer, Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 7 (1991) (“No one doubts that Hester Prynne’s scarlet letter provided more than neutral information, or that the effort of Senator Joseph McCarthy to ‘expose’ the background of his political opponents was not simply public education.”).

including social ostracism, lost job and housing opportunities, and even harassment and vigilantism.<sup>30</sup>

This Article proceeds as follows. Part I surveys the limited opportunities for exit now afforded by state laws. Part II considers whether the lack of exit opportunity creates constitutional concern. Surprisingly, despite the expansive body of caselaw on registration and community notification more generally, the issue has been the subject of only limited attention, with courts thus far typically denying relief. With constitutional litigation holding little realistic promise for change, Part III considers how law reform advocates might persuade legislatures to expand opportunities for exit.

### I. OPPORTUNITIES FOR EXIT

Statutory law in every state today contains an expansive list of enumerated crimes that trigger registration,<sup>31</sup> ranging from the very serious (e.g., forcible sexual assault and child molestation) to the less serious (e.g., peeping, indecent exposure, and bestiality).<sup>32</sup> Possession of child pornography<sup>33</sup> and child kidnapping by someone other than a parent or guardian<sup>34</sup> are also common bases for registration. In addition to enumerated offenses, many jurisdictions also allow courts to require registration if a crime of conviction was “sexually motivated.”<sup>35</sup> Eligible convictions date back many years, at a minimum encompassing those

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30. LOGAN, *supra* note 6, at 125–29; *see also Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 141–43 (Md. 2013) (surveying array of adverse effects).

31. The list of predicate offenses has grown significantly over time, only on rare occasion contracting. An example of contraction is found in the California Legislature’s decision in 2007 to rescind the registration requirement for adults previously convicted of now legal consensual sexual behavior. *See* CAL. PENAL CODE § 290.019 (West 2014).

32. S.C. CODE ANN. § 23-3-430(C)(11), (12) (Supp. 2014) (buggery and peeping); S.D. CODIFIED LAWS § 22-24B-1(14) (2006 & Supp. 2014) (bestiality); *see also, e.g.*, KAN. STAT. ANN. § 22-4906(a)(1)(B) (Supp. 2013) (adultery if one of the parties involved is less than 18 years of age).

33. *See, e.g.*, IND. CODE ANN. § 11-8-8-4.5(a)(13) (LexisNexis 2014 & Supp. 2014).

34. *See, e.g.*, WIS. STAT. § 301.45(1d)(b) (2013–14). Kidnapping is included based on the rationale that it can be “a precursor” to a sexual offense. *People v. Johnson*, 870 N.E.2d 415, 426 (Ill. 2007).

35. 20 ILL. COMP. STAT. ANN. 4026/10(c)(20) (West 2015); W. VA. CODE ANN. § 15-12-2(c) (LexisNexis 2014); WIS. STAT. § 973.048(1m)(a) (2013–14). For examples of jurisdictions using similar eligibility language *see, for example*, ALA. CODE § 15-20A-5(39) (LexisNexis 2011); ARIZ. REV. STAT. ANN. § 13-3821(C) (2010); CAL. PENAL CODE § 290.006.

occurring after the enactment of the registration and community notification laws (in the early- to mid-1990s) but often decades before.<sup>36</sup>

In most states, all registrants are subject to community notification,<sup>37</sup> with government websites only occasionally explicitly stating that registrants have not been evaluated for risk of reoffense.<sup>38</sup> In a few states, such as Massachusetts, Minnesota, New Jersey, and New York, notification is limited: only information on those registrants determined to pose medium or high risk (based on the nature of the offense and/or clinical assessment) is made publicly available.<sup>39</sup> States also at times designate registrants with particular labels; Florida, for instance, designates registrants as “sexual predators”<sup>40</sup> or “sexual

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36. See, e.g., ARIZ. REV. STAT. ANN. § 13-3821(A) (dating back to 1978); CAL. PENAL CODE § 290(c) (dating back to 1944); MO. ANN. STAT. § 589.400.1(1) (West 2011 & Supp. 2014) (dating back to 1979); TEX. CODE CRIM. PROC. ANN. art. 62.002(a) (West 2006) (dating back to 1970).

37. See LOGAN, *supra* note 6, at 74–75.

38. See, e.g., *Connecticut Sex Offender Registry*, ST. CONN., [http://www.communitynotification.com/cap\\_office\\_disclaimer.php?office=54567](http://www.communitynotification.com/cap_office_disclaimer.php?office=54567) (last visited Feb. 6, 2015); *SONAR (Sex and Kidnap Offender Notification and Registration)*, UTAH DEPARTMENT CORRECTIONS, [http://www.communitynotification.com/cap\\_office\\_disclaimer.php?office=54438](http://www.communitynotification.com/cap_office_disclaimer.php?office=54438) (last visited Feb. 6, 2015).

39. MASS. ANN. LAWS ch. 6, § 178K(2)(a) (LexisNexis 2011 & Supp. 2014); MINN. STAT. ANN. § 244.052(subd. 4)(b)(1) (West 2010 & Supp. 2015); N.J. STAT. ANN. § 2C:7-8(c) (West 2005); N.Y. CORRECT. LAW § 168-n(3) (McKinney 2014); WASH. REV. CODE ANN. § 4.24.550(3) (West 2005 & Supp. 2015). A handful of other states also factor in risk to some extent. Texas and Vermont, for instance, post information on all registrants but indicate high or low risk. See *Public Sex Offender Name Search*, TEX. DEPARTMENT PUB. SAFETY, <https://records.txdps.state.tx.us/SexOffender/PublicSite/Application/Search/Caveats.aspx?SearchType=Name> (last visited Feb. 6, 2015); *Sex Offender Registry*, ST. VT. DEPARTMENT PUB. SAFETY, [http://sheriffalerts.com/cap\\_main.php?office=55275](http://sheriffalerts.com/cap_main.php?office=55275) (last visited Feb. 6, 2015). North Dakota also lists all registrants but indicates low, medium, or high risk (only high-risk and lifetime registrants have a photo displayed). See *Sex Offender Web Site*, ST. N.D. OFF. ATT’Y GEN., <http://www.sexoffender.nd.gov/OffenderWeb/search/publiclist> (last visited Feb. 6, 2015). California ties eligibility for the public registry to offense type: home addresses are provided for registrants convicted of specified offenses whereas only a zip code is provided for others, and information regarding registrants not falling in the foregoing categories is viewable only by law enforcement. See CAL. PENAL CODE § 290.46. Based on information provided by the California Department of Justice, as of February 6, 2015, information on roughly 110,000 registrants was subject to public disclosure, while information on about 30,000 registrants was not disclosed. See *California Sex Registrant Statistics*, ST. CAL. DEPARTMENT JUST., <http://www.meganslaw.ca.gov/statistics.aspx?lang=ENGLISH> (last visited Feb. 6, 2015). As of 2013, California posts risk assessment scores for specified registrants. See *Megan’s Law Home*, ST. CAL. DEPARTMENT JUST., OFF. ATT’Y GEN., <http://www.meganslaw.ca.gov/index.aspx?lang=ENGLISH> (last visited Mar. 19, 2015).

40. FLA. STAT. ANN. § 775.21(4) (West 2010 & Supp. 2015).

offenders.”<sup>41</sup> In most states, youthful offenders, adjudicated delinquent in juvenile court, are subject to community notification.<sup>42</sup>

As discussed next, if states have been generous with respect to the reach of registration and community notification laws, they have been decidedly ungenerous in extending registrants opportunities to get off registries.

### *A. Registrants Eligible for Exit*

#### 1. NO OR EXTREMELY LIMITED OPPORTUNITY

South Carolina takes the most extreme position: no registrant is provided the possibility of exit; all (including juveniles) face lifetime registration and community notification.<sup>43</sup> Only in the event a registerable conviction is reversed or a pardon is conferred will removal and even then only if the pardon “is based on a finding of not guilty specifically stated.”<sup>44</sup>

A cluster of other states provide somewhat greater but still very limited opportunity for relief. Alabama specifies that only some juveniles can petition for exit from the state’s lifetime registration requirement.<sup>45</sup> South Dakota<sup>46</sup> does as well but also extends the possibility of relief to those convicted of incest or bestiality (after 25 years on the registry).<sup>47</sup> The only exceptions to Arizona’s lifetime<sup>48</sup> registration requirement involve certain juvenile registrants<sup>49</sup> and individuals convicted of non-parental kidnapping or unlawful imprisonment of a minor (who can seek relief after 10 years).<sup>50</sup> Nebraska allows relief only to those convicted of misdemeanors, who must register for 15 years yet can petition for relief after 10 years on the registry; all other registrants must remain on the registry for 25 years or life.<sup>51</sup>

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41. FLA. STAT. ANN. § 943.0435(a) (West 2006 & Supp. 2015).

42. Catherine L. Carpenter, *Against Juvenile Sex Offender Registration*, 82 U. CIN. L. REV. 747 (2014).

43. S.C. CODE ANN. § 23-3-460(A) (Supp. 2014).

44. *Id.* § 23-3-430(F).

45. ALA. CODE § 15-20A-24 (LexisNexis 2011).

46. S.D. CODIFIED LAWS § 22-24B-19 (Supp. 2014).

47. *Id.* § 22-24B-19.1.

48. Alone among jurisdictions, Arizona statutory law does not specify the duration of registration; the state’s courts have concluded that the “default” registration period is lifetime. *Fisher v. Kaufman*, 38 P.3d 38, ¶ 11 (Ariz. Ct. App. 2001).

49. ARIZ. REV. STAT. ANN. § 13-3821(D), (G), (H) (2010 & Supp. 2014).

50. *Id.* § 13-3821(M).

51. NEB. REV. STAT. ANN. § 29-4005(1)(b)(i), (2) (LexisNexis 2009).

## 2. SOMEWHAT BROADER, PER COMPLETION OF TERM

Next on the continuum are the jurisdictions that allow possible relief to a larger yet still select group of registrants who, if not required to register for their lifetimes, can petition for relief only after fulfilling their minimum registration period, ranging from 10 to 25 years.<sup>52</sup> In some jurisdictions removal appears to be automatic upon petition after passage of the minimum term.<sup>53</sup> In other instances, courts have discretion to bar relief to a petitioner.<sup>54</sup> Kansas, which requires registration for 15 years, 25 years, or life terms,<sup>55</sup> expressly states that no right to petition for early exit exists.<sup>56</sup>

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52. ALASKA STAT. § 12.63.020(a)(1)–(2) (2012) (if not lifetime, petition after 15 years); ARIZ. REV. STAT. ANN. § 13-3821(D); ARK. CODE ANN. § 12-12-919(a)–(b) (2009 & Supp. 2013) (if not lifetime, petition after 15 years); CONN. GEN. STAT. ANN. § 54-251(a) (West 2009 & Supp. 2014) (if not lifetime, petition after 10 years); D.C. CODE § 22-4002(a), (b) (LexisNexis 2001) (same); 730 ILL. COMP. STAT. ANN. 150/7 (West 2007 & Supp. 2014) (same); IND. CODE ANN. § 11-8-8-19(a), (b) (LexisNexis 2014 & Supp. 2014) (same); KY. REV. STAT. ANN. § 17.520(2)–(3) (LexisNexis 2013) (if not lifetime, petition after 20 years); ME. REV. STAT. tit. 34-A § 11225-A(1)–(3) (2010) (if not lifetime, petition after 10 years); MASS. ANN. LAWS ch. 6, § 178G (LexisNexis 2011) (if not lifetime, petition after 20 years); MINN. STAT. ANN. § 243.166(subd. 6)(a), (d) (West 2010 & Supp. 2014) (same); N.M. STAT. ANN. § 29-11A-4 (LexisNexis Supp. 2013) (if not lifetime, petition after 10 years); 42 PA. CONS. STAT. ANN. § 9799.15 (West 2014 & Supp. 2014) (if not lifetime, petition after 15 years if tier I offender or 25 years if tier II offender); R.I. GEN. LAWS § 11-37.1-4(a)–(b) (2002 & Supp. 2013) (if not lifetime, petition after 10 years); VT. STAT. ANN. tit. 13, § 5407(e)–(f) (2009) (same); VA. CODE ANN. § 9.1-910 (2012) (if not lifetime, petition after 15 or 25 years); WASH. REV. CODE ANN. § 9A.44.140(1)–(3) (West Supp. 2015) (if not lifetime, petition after 10 or 15 years); W. VA. CODE ANN. § 15-12-4 (LexisNexis 2014) (if not lifetime, petition after 10 years); WIS. STAT. § 301.45(5) (2013–14) (if not lifetime, petition after 15 years).

53. *See, e.g.*, ALASKA STAT. § 12.63.020(a)(2); ARIZ. REV. STAT. ANN. § 13-3821(D); CONN. GEN. STAT. ANN. § 54-251(a); 730 ILL. COMP. STAT. ANN. 150/7; IND. CODE ANN. § 11-8-8-19; KAN. STAT. ANN. § 22-4906(a), (b) (Supp. 2013); KY. REV. STAT. ANN. § 17.529; VA. CODE ANN. § 9.1-910; VT. STAT. ANN. § tit. 13, § 5407(e)–(f); WASH. REV. CODE ANN. § 9A.44.140(1)–(3); WIS. STAT. § 301.45(5).

54. *See, e.g.*, D.C. CODE § 22-4002; HAW. REV. STAT. ANN. § 846E-10(f) (LexisNexis Supp. 2013); MISS. CODE ANN. § 45-33-47(2)–(3) (West 2012 & Supp. 2014); R.I. GEN. LAWS § 11-37.1-4; VA. CODE ANN. § 9.1-910(A); W. VA. CODE ANN. § 15-12-4(a).

55. KAN. STAT. ANN. § 22-4906.

56. *Id.* § 22-4908. The only exception being that those under age 14 at the time of their registerable offense can be relieved of registration at age 18 or five years from the date of adjudication or release from confinement, whichever is later. *Id.* § 22-4906(f)–(h).



## 3. POSSIBILITY OF EARLY EXIT

Finally, in a majority of jurisdictions, opportunity exists for preterm exit, but the opportunity is usually quite limited.<sup>57</sup> Adjudicated juveniles are the most common subclass of registrants provided a right to petition. In Pennsylvania, for instance, only adjudicated juvenile lifetime registrants can petition for early relief, after 25 years.<sup>58</sup> When legislatures expand the scope of those eligible for relief they do so with respect to registrants convicted of less serious offenses, yet require extended wait periods. In Wyoming, where lifetime registration is the norm, adjudicated juveniles can petition after 10 years and individuals convicted of specified less serious offenses after 25 years.<sup>59</sup> In Florida, also a lifetime registration jurisdiction, “Romeo and Juliet” offenders can seek relief at any time,<sup>60</sup> and a handful of other less serious offender subgroups can do so after 25 years.<sup>61</sup> In Missouri, registration is lifetime, but Romeo and Juliet registrants can petition after two years.<sup>62</sup> The only other Missouri registrants eligible to petition for early relief (at 10 years)

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57. CAL. PENAL CODE § 290.5 (West 2014); COLO. REV. STAT. ANN. § 16-22-113 (West 2006); DEL. CODE ANN. tit. 11, § 4121(d)(6) (Supp. 2012); FLA. STAT. ANN. § 943.04354 (West Supp. 2015); GA. CODE ANN. § 42-1-19 (2014); HAW. REV. STAT. ANN. § 846E-10(a), (e) (LexisNexis Supp. 2013); IDAHO CODE ANN. § 18-8310(1) (Supp. 2014); LA. REV. STAT. ANN. § 15:544(E) (Supp. 2014); MD. CODE ANN., CRIM. PROC. § 11-707(4)(iv) (LexisNexis Supp. 2014); MASS. ANN. LAWS ch. 6, § 178G; MICH. COMP. LAWS ANN. § 28.728(9) (West 2012 & Supp. 2014); MO. ANN. STAT. § 589.400.7–8 (West 2011 & Supp. 2014); MONT. CODE ANN. § 46-23-506(3)(b) (2013); NEB. REV. STAT. ANN. § 29-4005(2) (LexisNexis 2009); NEV. REV. STAT. ANN. § 179D.490(3) (LexisNexis 2011); N.H. REV. STAT. ANN. § 651-B:6(III)(a)(2)(3) (LexisNexis Supp. 2014); N.J. STAT. ANN. § 2C:7-2(f) (West 2005 & Supp. 2014); N.Y. CORRECT. LAW § 168-h(2) (McKinney 2014); N.C. GEN. STAT. § 14-208.12A (2013); N.D. CENT. CODE § 12.1-32-15(16) (2012 & Supp. 2013); OHIO REV. CODE ANN. § 2950.15 (LexisNexis 2010); OKLA. STAT. ANN. tit. 57, § 583(E) (West Supp. 2015); OR. REV. STAT. § 181.820 (2013); 42 PA. CONS. STAT. ANN. § 9799.17(a)(1) (West 2014); TENN. CODE ANN. § 40-39-207 (2014); TEX. CODE CRIM. PROC. ANN. art. 62.404–.405 (West 2006); UTAH CODE ANN. § 77-41-112 (LexisNexis Supp. 2014); WASH. REV. CODE ANN. § 9A.44.142; WYO. STAT. ANN. § 7-19-304 (2013).

58. 42 PA. CONS. STAT. ANN. § 9799.17(a)(1). Adults must register for their full term: 15 years, 25 years, or their lifetime. *Id.* § 9799.15(a).

59. WYO. STAT. ANN. § 7-19-304.

60. FLA. STAT. ANN. § 943.04354. The “Romeo and Juliet” subclass refers to those adjudicated or convicted of consensual sexual activity when four years older or less than the victim, who was between the ages of 13 and 18. *Matos v. State*, 111 So. 3d 694, 965 (Fla. Dist. Ct. App. 2013).

61. FLA. STAT. ANN. § 943.0435(11).

62. MO. ANN. STAT. § 589.400.8.

are those convicted of specified less serious offenses<sup>63</sup> and parents or guardians convicted of kidnapping or nonsexual abuse of their children.<sup>64</sup>

In Hawaii, only lifetime registrants have a right to petition for early termination, after 40 years on the registry.<sup>65</sup> In North Dakota, the registration period is 15 years, 25 years, or lifetime, and the only registrants eligible to seek early release are those convicted before 1999 of an offense for which registration is no longer required.<sup>66</sup> New York, with perhaps the nation's most due process-based system of classifying registrants,<sup>67</sup> is notably restrictive when it comes to exit: level I registrants must remain on the registry for their full 20 years, without right to relief; level II or level III registrants are lifetime registrants and cannot petition for relief; and only a select subgroup of less serious level II registrants can seek relief after 30 years.<sup>68</sup> Other examples of early termination include the following:

- In Idaho, all registrants are lifetime, but select registrants can petition after 10 years.<sup>69</sup>
- In Oregon, all registrants are lifetime, but specified registrants, convicted of a class C felony or certain misdemeanor offenses, can seek relief after 10 years.<sup>70</sup>
- In Nebraska, lifetime and 25-year registrants are not eligible for early release; only the 15-year category can petition for relief after 10 years.<sup>71</sup>
- In North Carolina, registration is for 30 years or lifetime, with only the 30-year group eligible to petition for relief after 10 years.<sup>72</sup>
- In Wyoming, the registration period is lifetime, but certain registrants can petition for removal after 10<sup>73</sup> or 25 years.<sup>74</sup>

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63. *Id.* § 589.400.7.

64. *Id.* § 589.400.6.

65. HAW. REV. STAT. ANN. § 846E-10(a), (e) (LexisNexis Supp. 2013). Ten- and 25-year registrants can petition for relief after 10 and 25 years. *Id.* § 846E-10(b)–(c).

66. N.D. CENT. CODE § 12.1-32-15(8), (16) (2012 & Supp. 2013).

67. See Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593 (2000).

68. N.Y. CORRECT. LAW §§ 168-h(1), (2), -o(1) (McKinney 2014).

69. IDAHO CODE ANN. § 18-8310(1) (Supp. 2014).

70. OR. REV. STAT. § 181.820(1)(a) (2013).

71. NEB. REV. STAT. ANN. § 29-4005(1) to (2) (LexisNexis 2009).

72. N.C. GEN. STAT. §§ 14-208.12A(a), -208.23 (2013).

73. WYO. STAT. ANN. § 7-19-304(a)(i) (2013).

74. *Id.* § 7-19-304(a)(ii). For other examples, see MD. CODE ANN., CRIM. PROC. § 11-707 (LexisNexis Supp. 2014) (with the exception of some adjudicated juveniles who must register for five years, registration period is 15 years, 25 years, or life; juveniles can

California, which mandates lifetime registration and has the greatest number of registrants of any state, takes a different approach. A select subset of registrants, not falling within an expansive list of excluded categories,<sup>75</sup> can after 10 years on the registry petition for relief on the basis of a “certificate of rehabilitation.”<sup>76</sup>

A handful of other states have seen fit to allow petitions at significantly shorter durations of time. Iowa has the nation’s most generous relief provision: registration is for 10 years or lifetime, but registrants convicted of less serious crimes can petition after two years, and those convicted of more serious crimes can petition after five years.<sup>77</sup> Less generous but still notable compared to other jurisdictions is Tennessee: lifetime registration is required,<sup>78</sup> but all but the most serious offenders<sup>79</sup> can seek removal after 10 years.<sup>80</sup> Three other states make petition available for at least some registrants after five years:

- Utah bars relief for lifetime registrants but allows possible relief for a subset of its other category, 10-year registrants, who can petition after five years.<sup>81</sup>
- New Hampshire tier III lifetime registrants lack a right to petition, but tier II and lifetime registrants can petition after 15 years, while tier I registrants, subject to a 10-year term, can petition after five years.<sup>82</sup>
- In Colorado, lifetime registration is required for all registrants, but certain registrants can petition for removal

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seek early relief, as can the 15-year subgroup (after 10 years)); MICH. COMP. LAWS ANN. § 28.728c (West 2012) (tier I (15-year) registrants can petition after 10 years, tier III (lifetime) can petition at the 25-year mark, and tier II (25-year) registrants are ineligible for early relief).

75. CAL. PENAL CODE § 4852.01(d) (West 2011 & Supp. 2015).

76. CAL. PENAL CODE § 290.5 (West 2014). The certificate, if issued, is then forwarded to the governor for consideration as the basis for a possible pardon. CAL. PENAL CODE § 4852.13. California law also allows relief for individuals convicted before 1976 of sexual acts between consenting adults that were later decriminalized. *See* CAL. PENAL CODE § 290.19. Under California law, moreover, some registrants can apply for exclusion from the website but if successful must still continue to comply with the lifetime registration requirement. *Id.* § 290.46.

77. IOWA CODE ANN. § 692A.128(2)(a), (6) (West Supp. 2014); *State v. Iowa Dist. Ct.*, 843 N.W.2d 76, 85 (Iowa 2014). In Iowa, tier designations (I-III), based on offense seriousness, determine the frequency of registration verification, not duration of registration. § 692A.108.

78. TENN. CODE ANN. §§ 40-39-202, -207 (2014).

79. *Id.* § 40-39-207(g), (j).

80. *Id.* § 40-39-207(a).

81. UTAH CODE ANN. § 77-41-105, -112(1) (LexisNexis Supp. 2014).

82. N.H. REV. STAT. ANN. § 651-B:6(III)(a)(2)–(3) (LexisNexis Supp. 2014).

after 10 or 20 years (five years for certain misdemeanants).<sup>83</sup>

### *B. Criteria and Procedures*

Jurisdictions often do not provide much in the way of detail when it comes to petition criteria and procedures. While laws usually require that a petitioner not be convicted or adjudicated of another registerable offense<sup>84</sup> or a felony,<sup>85</sup> a petitioner can be disqualified because of a mere arrest for another registerable offense<sup>86</sup> or a felony or misdemeanor (even if nonsexual).<sup>87</sup> It is also common to require that a petitioner successfully complete any court-ordered treatment program.<sup>88</sup> In California, which as noted permits relief based on a “certificate of rehabilitation,” the standard is that a registrant “shall live an honest and upright life, shall conduct himself or herself with sobriety and industry, shall exhibit a good moral character, and shall conform to and obey the laws of the land.”<sup>89</sup>

Not surprisingly, risk of recidivism figures prominently in most laws,<sup>90</sup> but some important variation is seen in two areas. The first concerns how risk is conceived. In most states, the court is asked to consider the risk posed by the petitioner but the quantum of tolerable risk varies. In Idaho, for instance, the relief “mechanism is strict and presents a very high hurdle for offenders”<sup>91</sup>: registrants must show that it is “highly probable” or “reasonably certain” that they will not commit another registerable offense.<sup>92</sup> In Hawaii, the court can grant relief only if satisfied that the petitioner is (1) “very unlikely to commit a [registerable] offense ever again” and (2) continued registration “will not assist in protecting the safety of the public or any member thereof.”<sup>93</sup> In other states, such as Arkansas, Massachusetts, and New Jersey, the question is whether the petitioner “is not likely to pose a danger to the

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83. COLO. REV. STAT. ANN. § 16-22-113 (West 2006).

84. TENN. CODE ANN. § 40-39-207(c).

85. WASH. REV. CODE ANN. § 9A.44.128(3) (West 2009).

86. N.C. GEN. STAT. § 14-208.12A(a1) (2013).

87. FLA. STAT. ANN. § 943.0435(11)(a)1 (West Supp. 2015).

88. *See, e.g.*, IOWA CODE ANN. § 692A.128(2)(b) (West Supp. 2014).

89. CAL. PENAL CODE § 4852.05 (West 2014).

90. Nebraska and Wyoming omit any express mention of recidivism risk. NEB. REV. STAT. ANN. § 29-4005(2) (LexisNexis 2009); WYO. STAT. ANN. § 7-19-304(d) (2013).

91. *State v. Kimball*, 181 P.3d 468, 472 (Idaho 2008).

92. IDAHO CODE ANN. § 18-8310(4) (Supp. 2014).

93. HAW. REV. STAT. ANN. § 846E-10(f)(3)–(4) (LexisNexis Supp. 2013).

safety of others.”<sup>94</sup> In Virginia, a court shall grant a petition if the petitioner “no longer poses a risk to public safety.”<sup>95</sup> In Missouri, the registrant must not be “a current or potential threat to public safety.”<sup>96</sup> In Georgia, the court must find that the registrant “does not pose a substantial risk of perpetrating any future dangerous sexual offense.”<sup>97</sup>

At times, however, risk is cast in broad public safety terms. Montana law provides that a court can grant relief if “continued registration is not necessary for public protection and . . . relief from registration is in the best interests of society.”<sup>98</sup> In Utah, the court may grant a petition if it determines that “it is not contrary to the interests of the public to do so.”<sup>99</sup>

Some states take a hybrid approach. In Mississippi, the petitioner must show that “future registration . . . will not serve the purposes of [the law] and the court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.”<sup>100</sup> In New York, a registrant must show that his “risk of repeat offense and threat to public safety is such that registration or verification is no longer necessary.”<sup>101</sup>

The second area in which states differ is the burden of proof that a petitioner must satisfy. In most jurisdictions, the standard is clear and convincing.<sup>102</sup> In Hawaii, the standard is “substantial evidence and more than proof by a preponderance of the evidence.”<sup>103</sup> In at least two states (Arkansas and Georgia), the standard is preponderance of the evidence,<sup>104</sup> while in others the petition provision fails to specify a burden of proof.<sup>105</sup>

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94. MASS. ANN. LAWS ch. 6, § 178G (LexisNexis 2011); *see also* ARK. CODE ANN. § 12-12-919(b)(2)(B) (2009 & Supp. 2013); N.J. STAT. ANN. 2C:7-2(f) (West 2005 & Supp. 2014).

95. VA. CODE ANN. § 9.1-910(A) (2012).

96. MO. ANN. STAT. § 589.400.9(1) (West 2011 & Supp. 2015).

97. GA. CODE ANN. § 42-1-19(g) (2014).

98. MONT. CODE ANN. § 46-23-506(3)(b)(ii) (2013).

99. UTAH CODE ANN. § 77-41-112(4)(c) (LexisNexis Supp. 2014).

100. MISS. CODE ANN. § 45-33-47(3) (West 2012 & Supp. 2014).

101. N.Y. CORRECT. LAW § 168-o(1) (McKinney 2014).

102. *See, e.g.*, ALA. CODE § 15-20A-24(b) (LexisNexis 2011); IDAHO CODE ANN. § 18-8310(4) (Supp. 2014); MASS. ANN. LAWS ch. 6, § 178G (LexisNexis 2011); MISS. CODE ANN. § 45-33-47(3); N.Y. CORRECT. LAW § 168-o(1); OR. REV. STAT. § 181.820 (2013). The standard, according to the Oregon Court of Appeals, “requires evidence of extraordinary persuasiveness—that is, evidence establishing that the truth of the facts in issue is highly probable.” *Patterson v. Foote*, 204 P.3d 97, 101 (Or. Ct. App. 2009).

103. HAW. REV. STAT. ANN. § 846E-10(f) (LexisNexis Supp. 2013).

104. ARK. CODE ANN. § 12-12-919(b)(2) (2009 & Supp. 2013); GA. CODE ANN. § 42-1-19(f) (2014).

105. *See, e.g.*, MO. ANN. STAT. § 589.400 (West 2011 & Supp. 2015); UTAH CODE ANN. § 77-41-112(4) (LexisNexis Supp. 2014); VA. CODE ANN. § 9.1-910(A) (2012).

*C. Summary*

As the foregoing highlights, jurisdictions vary considerably with respect to exit. On one extreme are jurisdictions that preclude or severely circumscribe the possibility; in others, more opportunity for relief is available, but it is extended to an only somewhat larger pool of registrants who have been on the registry for anywhere from 10 to 40 years.<sup>106</sup> In a handful of jurisdictions, some registrants, typically juveniles or adults convicted of less serious offenses, can petition for relief after shorter periods, with Iowa and Tennessee standing out as being especially generous.<sup>107</sup>

Variability is also seen in petition criteria and procedures. It is not unusual, for instance, for laws to omit specification of the standard of proof a petitioner must satisfy.<sup>108</sup> At least as problematic, recidivism risk thresholds can be unrealistically demanding.<sup>109</sup> While recidivism risk understandably plays a lynchpin role in relief decisions, risk assessment presents unique challenges in this context. Decision makers have a natural aversion for Type II errors (wrongly certifying a petitioner as unlikely to recidivate),<sup>110</sup> and logic and experience support that risk of reoffense can never be predicted as nonexistent.<sup>111</sup> Indeed, professional norms prohibit psychosexual evaluators from making “statements asserting that a [subject] is no longer at any risk to reoffend.”<sup>112</sup> Nevertheless, state laws can require that courts assess whether a registrant poses any threat to public safety<sup>113</sup> or prescribe an

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106. See *supra* Part I.A.3.

107. See *supra* notes 77–83 and accompanying text.

108. See *supra* notes 102–05 and accompanying text.

109. See *supra* notes 92–93 and accompanying text.

110. Such reluctance is in abundant evidence in the related context of release decisions from involuntary civil confinement for persons designated as a “sexually violent predator.” See Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 320–21 (2003). Cf. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1380 (2009) (noting with respect to national security cases that courts are often “loath to question the judgment of executive officials when push comes to shove”).

111. See generally Ruth J. Tully et al., *A Systematic Review on the Effectiveness of Sex Offender Risk Assessment Tools in Predicting Sexual Recidivism of Adult Male Sex Offenders*, 33 CLINICAL PSYCHOL. REV. 287 (2013).

112. See ASS’N FOR TREATMENT OF SEXUAL ABUSERS, PRACTICE STANDARDS AND GUIDELINES FOR THE EVALUATION, TREATMENT, AND MANAGEMENT OF ADULT MALE SEXUAL ABUSERS 22 (2005), available at <http://www.atsa.com/ATSAMemberDocs/2004RevisedStandards.pdf>.

113. See *supra* notes 94–95 and accompanying text. To date, only rarely have courts seen fit to temper this absolutism. See *In re Harold W.*, No. 2-12-1235, 2014 WL 1572518, at \*6–7 (Ill. App. Ct. April 18, 2014) (upholding denial of a petition for a low-risk registrant while stating that requiring proof of the “complete absence of risk

unrealistically high quantum of evaluated risk, such as in Idaho (“highly probable” to not reoffend)<sup>114</sup> or Hawaii (“very unlikely” to reoffend).<sup>115</sup>

No less problematic are laws predicating relief on a generalized sense that requiring continued registration of an individual comports with broad public safety goals. In Montana, for instance, where relief can be obtained only if “continued registration is not necessary for public protection and . . . relief from registration is in the best interests of society,”<sup>116</sup> the state supreme court recently upheld a petition denial despite a finding that the petitioner posed a low risk of reoffense.<sup>117</sup> After noting that “protection from recidivism by sexual offenders is the primary purpose of the Sexual or Violent Offender Registration Act,” the court concluded that “evidence that there is some risk of reoffending is a sufficient basis to deny relief from the duty to register.”<sup>118</sup>

The upshot is that for many thousands of registrants, absent reversal of a conviction or a pardon (and perhaps not even then),<sup>119</sup> very little or no realistic prospect of exit exists. And even for the fortunate few who enjoy a right to petition, practical impediments can stand in the way: they must pay for filing fees,<sup>120</sup> risk assessments,<sup>121</sup> and a lawyer.<sup>122</sup>

## II. CONSTITUTIONAL PROSPECTS FOR CHANGE

To date, lack of opportunity for exit has not often figured in constitutional litigation. Most commonly, lack of exit has arisen in claims challenging the retroactive application of laws, based on state or federal ex post facto clauses, with the Supreme Court’s decision in *Smith*

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would mean that no one would ever be able to satisfy the statute beyond any doubt . . . because it is virtually impossible to eliminate all risk of reoffending” and “[t]here is always a possibility that sex offenders will reoffend”); *Patterson v. Foote*, 204 P.3d 97, 102 (Or. Ct. App. 2009) (rejecting government argument that a petitioner must prove an absolute absence of any possibility of recidivism).

114. IDAHO CODE ANN. § 18-8310(4) (Supp. 2014).

115. HAW. REV. STAT. ANN. § 846E-10(f) (LexisNexis Supp. 2013).

116. MONT. CODE ANN. § 46-23-506(3)(b)(ii) (2013).

117. *Langford v. State*, 2013 MT 265, ¶¶ 17–18, 309 P.3d 993.

118. *Id.* ¶ 16.

119. *See infra* notes 197–99 and accompanying text.

120. *See, e.g.*, ALA. CODE § 15-20A-24(m) (LexisNexis 2011) (\$200 filing fee); OR. REV. STAT. § 21.135 (2013) (\$252 filing fee); UTAH CODE ANN. § 78A-2-301(1)(b)(vi) (LexisNexis 2012 & Supp. 2014) (\$125 filing fee).

121. *See, e.g.*, N.H. REV. STAT. ANN. § 651-B:6(III)(a)(2)–(3) (LexisNexis Supp. 2014); TEX. CODE CRIM. PROC. ANN. art. 62.406 (West 2006).

122. *See, e.g.*, S.D. CODIFIED LAWS § 22-24B-17 (2006 & Supp. 2014) (“No person petitioning the court . . . for an order terminating the person’s obligation to register is entitled to court appointed counsel, experts, or publicly funded witnesses.”). In California, registrants are afforded the right to counsel when seeking a certificate of rehabilitation. CAL. PENAL CODE § 4852.08 (West 2011).

v. *Doe*<sup>123</sup> being the foremost instance. In response to the majority's conclusion that Alaska's law was nonpunitive in its effect and was thus constitutional, Justice Ginsburg (joined by Justice Breyer) in dissent attached the "heaviest weight" in her analysis to the following fact:

[T]he [law] makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.<sup>124</sup>

Applying their own ex post facto provisions, the supreme courts of Indiana,<sup>125</sup> Maine,<sup>126</sup> New Hampshire,<sup>127</sup> and Oklahoma<sup>128</sup> have echoed this view.

State and lower federal courts, however, most often have rejected ex post facto claims, reasoning in line with the *Smith* majority that registration and community notification laws are regulatory and nonpunitive in nature, even when they retroactively extend registration periods and limit or bar opportunity for exit altogether.<sup>129</sup> In some instances courts have rebuffed claims based on the rationale that the law

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123. 538 U.S. 84 (2003).

124. *Id.* at 117 (Ginsburg, J., dissenting) (footnote omitted).

125. *Gonzalez v. State*, 980 N.E.2d 312, 320 (Ind. 2013) (deeming law punitive because it applied without regard for degree to which "a prior offender has been rehabilitated and does not present a risk to the public"); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (deeming it significant that law "provides no mechanism by which a registered sex offender can petition the court for relief from the obligation of continued registration and disclosure" and noting that "[o]ffenders cannot shorten their registration or notification period, even on the clearest proof of rehabilitation").

126. *State v. Letalien*, 2009 ME 130, ¶ 62, 985 A.2d 4 (retroactive application of lifetime registration requirement "without, at a minimum, affording those offenders any opportunity to ever be relieved of the duty as was permitted under [prior law] is punitive").

127. *Doe v. State*, No. 2013-496, 2015 WL 575847, at \*17 (N.H. Feb. 12, 2015) (attaching particular importance to state's "lifetime-registration-without review provision").

128. *Starkey v. Okla. Dep't of Corr.*, 2013 OK 43, ¶¶ 72-73, 305 P.3d 1004 (deeming punitive retroactive removal of mechanism for registrant "to petition for relief or discharge from the obligation of registration and the many contingent obligations resulting from . . . registration").

129. See Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1121-22 (2012).



challenged allowed some modest right to petition, with the possibility of exit essentially used as a buffer against constitutional redress.<sup>130</sup>

Lack of opportunity for exit would appear well suited to serve as a basis to bring a procedural due process challenge. Although the Supreme Court has not directly addressed such a claim, it has come close. In the same term as *Smith*, the Supreme Court in *Connecticut Department of Public Safety v. Doe*<sup>131</sup> (*CDPS*) held that procedural due process does not require that a risk assessment be conducted before an individual is subject to registration and community notification.<sup>132</sup> The *CDPS* Court held that Connecticut's conviction-based approach to registration and community notification was permissible because the state's website registry stated that individuals were included solely because of their conviction, not the recidivism risk they might pose.<sup>133</sup> Writing for the Court, Chief Justice Rehnquist reasoned that "even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information on *all* sex offenders—currently dangerous or not—must be publicly disclosed. . . . [A]ny hearing on current dangerousness [would be] a bootless exercise."<sup>134</sup> The petitioners, in short, received all the procedural due process they were due when they were lawfully convicted of a registerable offense.<sup>135</sup>

*CDPS*, while of critical importance, concerned government refusal to allow individuals to contest placement on a registry,<sup>136</sup> not lack of access to relief postregistration. Surprisingly, to date the latter issue has seemingly been directly addressed on only three occasions, once in Tennessee and twice in West Virginia, and was rejected.<sup>137</sup>

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130. See *State v. Henry*, 228 P.3d 900, 907 (Ariz. Ct. App. 2010); *People v. Parilla*, 109 A.D.3d 20, 25–26 (N.Y. App. Div. 2013); *Kammerer v. State*, 2014 WY 50, ¶ 31, 322 P.3d 827.

131. 538 U.S. 1 (2003).

132. *Id.* at 4.

133. *Id.* at 7.

134. *Id.* at 7–8.

135. See *id.* at 7 (stating that registration is based on "an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest").

136. For a rare instance of a court granting due process relief in a case challenging the retroactive application of registration without an opportunity to challenge a conclusive presumption of dangerousness as a result of a conviction, see *Doe v. Sex Offender Registry Bd.*, 882 N.E.2d 298, 308–09 (Mass. 2008) (granting relief on state constitutional grounds).

137. *In re Jimmy M.W.*, No. 13-0762, 2014 WL 24042298, at \*1–3 (W. Va. May 30, 2014).

In the Tennessee case, *Doe v. State*,<sup>138</sup> the petitioner was convicted of aggravated sexual battery in 1983, was paroled from prison in 1987, and successfully completed parole in 1993.<sup>139</sup> Fourteen years later, in 2007, Tennessee amended its registration law (which took effect in 1995) to retroactively require registration of individuals convicted of sexual offenses before 1995.<sup>140</sup> Petitioner registered as required and later challenged the circa 2007 law requiring his lifetime registration as a “violent sexual offender” without opportunity to petition for removal from the registry.<sup>141</sup> In an unpublished decision, the Tennessee Court of Appeals summarily rejected petitioner’s state constitutional claim that the lack of exit opportunity violated procedural due process, relying upon *CDPS*, which involved a “similar challenge.”<sup>142</sup>

In the first of the two West Virginia cases, *Haislop v. Edgell*,<sup>143</sup> the Supreme Court of Appeals (the state’s highest court) undertook an only somewhat fuller examination of the question. The three petitioners, lifetime registrants, contended that their due process rights under the West Virginia Constitution were violated because they were placed on the public registry without individualized risk evaluation and state law lacked “any mechanism by which a registrant could demonstrate that he or she has been rehabilitated and is no longer dangerous to the public.”<sup>144</sup> The *Haislop* court rebuffed both challenges, citing *CDPS* and noting that the state’s law, like the Connecticut law upheld in *CDPS*, was “offense based” and did not turn on a finding of dangerousness.<sup>145</sup>

Despite its holding, the *Haislop* court took the opportunity to voice its concern over the lack of any possibility of exit based on demonstrated rehabilitation. Citing Justice Ginsburg’s dissent in *Smith v. Doe*, noted above,<sup>146</sup> the court remarked:

The courts of this state are often called upon to make custody decisions that could involve sex offenders, and quite probably have made some custodial determinations in favor of

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138. No. M2008–00807–COA–R3–CV, 2009 WL 637104 (Tenn. Ct. App. Mar. 10, 2009).

139. *Id.* at \*1.

140. *Id.* at \*1, 3.

141. *Id.* at \*6.

142. *Id.* at \*6–7.

143. 593 S.E.2d 839 (W. Va. 2003).

144. *Id.* at 847.

145. *Id.* (internal quotation marks omitted). The court noted that state law did provide a narrow subgroup—“sexually violent predators”—subject to the most onerous registration requirements, a postdesignation right to petition a court to have the label removed (as distinct from terminating registration altogether). *Id.* at 848 (internal quotation marks omitted).

146. *See supra* note 124 and accompanying text.

individuals who would be required to register . . . . It does seem logically incongruent that a court has the power to make a determination that a person convicted of a sexual offense has been rehabilitated to the extent he or she can have custody of a child, but such a person has no means by which to ask for an end to registration as a sex offender.<sup>147</sup>

The court, however, was “still not convinced that the appellants in this case have demonstrated a violation of their procedural due process rights. While the Legislature has the power to amend the Act in a way that would give the appellants the opportunity to show they should not have to register for life, it has not yet made any such amendment.”<sup>148</sup>

Over a decade later, with the legislature not having acted, the Supreme Court of Appeals addressed another procedural due process challenge to the lack of exit possibility. In *In re Jimmy M.W.*,<sup>149</sup> the petitioner was placed on the West Virginia registry in 1998 as a result of pleading no contest to sexual abuse in the third degree—a misdemeanor—for touching the breast of a 15-year-old girl when he was an adult.<sup>150</sup> Because the victim was a minor, the state required that the petitioner register for his lifetime.<sup>151</sup> In 2012, after remaining compliant with registration requirements for 14 years and marrying the victim and raising children with her, petitioner’s effort to be removed from the registry was rebuffed by a state trial court.<sup>152</sup>

The Supreme Court of Appeals, in an unpublished opinion, affirmed on the basis of *Haislop*.<sup>153</sup> In dissent, Chief Justice Davis, joined by Justice Ketchum, echoed the concern voiced in *Haislop* over the lack of any possibility of exit:

The defendant is required to register as a sex offender for the rest of his life because he touched the breast of a girl he later married. In addition, our law provides that he can never be removed from the sex offender registry even if he is later rehabilitated.

This makes no sense. Violent criminals serving long prison terms are eligible for parole if they rehabilitate while in prison. Drug addicts are sent to rehabilitation.

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147. *Haislop*, 593 S.E.2d at 849.

148. *Id.* at 850.

149. No. 13-0762, 2014 WL 2404298 (W. Va. May 30, 2014).

150. *Id.* at \*1.

151. *Id.*

152. *Id.*

153. *Id.* at \*3.

This man received worse than a scarlet letter. He will be limited in obtaining employment and [his identifying information] will be published on the internet registry until he dies. The majority opines that the Sex Offender Registration Act is not punitive. It is worse than punitive if you have been rehabilitated and are required to tell your prospective employers that you are a sex offender.<sup>154</sup>

Two other constitutional avenues possibly afford bases for relief. First, it could be argued that the Fourteenth Amendment's guarantee of equal protection of the law is violated when the government provides an opportunity for exit to some but not other categories of registrants. Concurring in *CDPS*, Justice Souter (joined by Justice Ginsburg) remarked that Connecticut's law allowing courts discretion to exempt a few select subgroups of convicts from registration and community notification could raise equal protection concern.<sup>155</sup>

The first basis to raise such a claim—that the varied treatment turns on a suspect (or quasi-suspect) classification or implicates a fundamental right—would likely be to no avail.<sup>156</sup> As a consequence, a petitioner would need to persuade a reviewing court that the legislative decision to allow possible relief to some but not other registrants impermissibly treats similarly situated individuals differently without a rational basis in law.<sup>157</sup> In California, courts of appeal on occasion have faulted the legislature for imposing limits on the ability of some registrants to exit based on a “certificate of rehabilitation.”<sup>158</sup> In South Dakota, the state supreme court unanimously backed an equal protection challenge against the state's decision to allow adult but not juvenile registrants to exit when they obtained a suspended imposition of sentence.<sup>159</sup> Despite these successes, as with registration-related equal protection claims more

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154. *Id.* (Ketchum, J., dissenting).

155. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 9–10 (2003) (Souter, J., concurring).

156. *See, e.g., Butler v. Jones*, 2013 OK 105, ¶ 12, 321 P.3d 161 (noting that “[s]ex offenders are not members of a suspect class nor is there a fundamental right at stake in this case”).

157. *City of Cleburne v. Cleburne Learning Ctr., Inc.*, 473 U.S. 432, 439 (1985).

158. *See, e.g., People v. Schoop*, 151 Cal. Rptr. 3d 200, 210–12 (Cal. Ct. App. 2012); *D.M. v. Dep't of Justice*, 147 Cal. Rptr. 3d 798, 807–08 (Cal. Ct. App. 2012). *But see People v. Adair*, 176 Cal. Rptr. 3d 721, 726 (Cal. Ct. App. 2014) (rejecting claim because petitioner was not similarly situated to other registrants provided earlier petition opportunity).

159. *In re Z.B.*, 2008 SD 108, ¶ 4 n.1, ¶ 10, 757 N.W.2d 595.

generally,<sup>160</sup> such claims would face a steep uphill battle, based on deference typically shown to legislatively drawn classifications.<sup>161</sup>

Finally, a substantive due process claim could conceivably be available, based on a fleeting reference by Justice Souter in *CDPS*.<sup>162</sup> But again a registrant would face considerable difficulty: he or she would need to establish that registration and notification jeopardize a fundamental right, which exit would restore.<sup>163</sup> The last two decades of litigation, however, have made clear that courts do not look favorably upon the claim that a right to privacy or reputation serves as an actionable basis for challenge.<sup>164</sup> A registrant would therefore need to convince a court that a legislature acted without a rational basis in denying opportunity for exit, a conclusion that courts typically are reluctant to reach.<sup>165</sup>

In sum, for registrants lacking a legislative option for exit, constitutional litigation seemingly provides little chance of success. Among the possibilities discussed, procedural due process would appear to have the greatest potential. Despite the large shadow cast by *CDPS*,<sup>166</sup> a persuasive claim can be made that a finding of current dangerousness, postregistration, would not be in the Court's words a "bootless exercise."<sup>167</sup> Even if a conviction is the sole basis to justify registration in the first instance, as in Connecticut and the majority of state registration schemes,<sup>168</sup> the fact that for at least some registrants state law allows for

160. See, e.g., *Doe v. Cuomo*, 755 F.3d 105, 115 (2d Cir. 2014) (New York law); *Doe v. Moore*, 410 F.3d 1337, 1346–48 (11th Cir. 2005) (Florida law); *Johnson v. Dep't of Justice*, 341 P.3d 1075, 1077–78 (Cal. 2015); *State v. Dickerson*, 97 A.3d 15, 17 (Conn. App. Ct. 2014); *Doe I v. Williams*, 61 A.3d 718, 736 (Me. 2013).

161. Such was the outcome, for example, in the West Virginia case noted earlier in the text. See *In re Jimmy M.W.*, No. 13-0762, 2014 WL 2404298, at \*2 (W. Va. May 30, 2014) ("Petitioner committed his crime against a minor. He fails to establish that he is similarly situated to sex offenders who do not commit acts against minors or who otherwise do not fall within [the subgroups warranting 10-year registration].").

162. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 9 (2003) (Souter, J., concurring).

163. Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 962 n.35 (2002).

164. See LOGAN, *supra* note 6, at 141–47 (surveying case law).

165. See, e.g., *Ex parte Chamberlain*, 352 S.W.3d 121, 124 (Tex. Ct. App. 2011) (rejecting substantive due process challenge because the Texas Legislature rationally concluded that "Texas's citizens should continue to be protected from perpetrators of this type of sexual offense").

166. See also, e.g., *Clark v. O'Connell*, No. 4:13–CV–0129–TUC–JAS(JR), 2015 WL 736330, at \*7 (D. Ariz. 2015) (relying on *CDPS* to reject challenge against state law that "imposes lifetime registration obligations on all offenders and offers no mechanism to seek relief").

167. *Conn. Dep't of Pub. Safety*, 538 U.S. at 7–8.

168. See LOGAN, *supra* note 6, at 75.

postregistration relief, based on rehabilitation in some shape or form,<sup>169</sup> suggests the legal materiality of a subsequent evaluation. Likewise, in jurisdictions where registrants are placed in tiers, affecting either or both registration requirements and the extent of community notification, postregistration evaluation would appear material. This is especially so in the handful of states where courts have held that due process requires that the initial tiering decision be based on individualized risk evaluations, such as New Jersey<sup>170</sup> and Massachusetts.<sup>171</sup>

A registrant, however, would still need to convince a court that registration and community notification implicate a constitutionally protectable liberty interest, the threshold requirement in any procedural due process challenge.<sup>172</sup> The *CDPS* Court assumed without deciding that Connecticut's law did so, based on what has come to be known as the "stigma plus" test,<sup>173</sup> but concluded that an individualized risk assessment was not material under Connecticut's law.<sup>174</sup> Courts directly addressing the question in the context of conviction-based registration and community notification regimes, however, have usually refused to find a liberty interest.<sup>175</sup>

### III. SEX OFFENDER EXCEPTIONALISM AND THE WAY FORWARD

Given the limited prospects for a successful constitutional challenge, any expansion in opportunity for exit will need to come from the political branches, especially legislatures. For this to occur, however, law reformers will need to change the framing of sex offender registration and community notification policy.

Since originating in the early- to mid-1990s, registration and notification laws have enjoyed broad public and political support, catalyzed in significant part by a politically potent mix of fear and disdain for sex offenders, epitomized by the trench-coated stranger who sexually molests children.<sup>176</sup> Of late, law reform advocates have

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169. See *supra* Part I.B.

170. *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995).

171. *Doe v. Att'y Gen.*, 715 N.E.2d 37 (Mass. 1999).

172. See Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1178–86 (1999).

173. *Conn. Dep't of Pub. Safety*, 538 U.S. at 6–7 (citing *Paul v. Davis*, 424 U.S. 693 (1976)).

174. *Id.* at 4, 7.

175. See Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 166 & n.94 (2000) (collecting cases). But see *State v. Norman*, 808 N.W.2d 48, 62–63 (Neb. 2012) (holding that Nebraska's law negatively affected personal reputation and its requirements satisfied "plus" prerequisite).

176. See LOGAN, *supra* note 6, at 99.

succeeded in highlighting the reality that registration laws in fact have a far broader sweep, including individuals convicted of “Romeo and Juliet” offenses,<sup>177</sup> a recognition that has prompted some states to expand exit opportunities for this subpopulation.<sup>178</sup>

Although such changes are without question salutary, they can nonetheless distract from the much larger public policy debate that needs to occur vis-à-vis registrants who have been convicted of more serious offenses and constitute the lion’s share of registry populations.

While individuals convicted of more serious sex offenses of course warrant punishment, it remains an empirical reality that they, like the vast majority of other offenders, will one day leave prison and return to society.<sup>179</sup> And when they do, they will face both the debilitating effect of having a criminal conviction<sup>180</sup> and the very significant adverse consequences of registration and community notification,<sup>181</sup> very often for their lifetimes. Policy makers must be convinced that enhancing opportunity for exit can at once provide a positive incentive for individuals to remain law-abiding and better ensure that registries contain individuals posing greatest public safety risk.<sup>182</sup>

Such practical arguments, however, will need to overcome a powerful countervailing social and political zeitgeist. In the past, the very idea of forcing individuals to register with government authorities

177. See, e.g., HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 5 (2007), available at <http://www.hrw.org/reports/2007/09/11/no-easy-answers>.

178. See *supra* 60–62 and accompanying text. For an example of how putting a “human face” on the excesses of registration can foster legislative change, see Bill Rankin, *Restricted by Registry No More*, ATLANTA J.-CONST., Sept. 18, 2010, at B1 (recounting the saga of a 31-year-old woman who was subjected to registration and residential limits as a result of engaging in consensual oral sex with a 15-year-old when she was 17 that prompted the Georgia Legislature to rescind registration for such offenders).

179. See generally JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY, at i, 127–29 (2003); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005).

180. See Logan, *supra* note 15.

181. As one federal judge put it:

While it might seem that a convicted felon could have little left of his good name, community notification . . . inflict[s] a greater stigma than would result from conviction alone. Notification will clearly brand the plaintiff as a “criminal sex offender” . . . —a “badge of infamy” that he will have to wear for at least 25 years—and strongly implies that he is a likely recidivist and a danger to his community.

*Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999).

182. As Justice Potter Stewart observed in another context: “[W]hen everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

engendered concern, with the Supreme Court in 1941 emphasizing that “champions of freedom for the individual have always vigorously opposed burdensome registration systems.”<sup>183</sup> In 1947, when California was contemplating creating the nation’s first state sex offender registry, the director of the Department of Corrections, Richard McGee, wrote to Governor Earl Warren that while sexual offending was “revolting,” there was a “principle involved which should not be disregarded. It has never been the practice in America to require citizens to register with the police, except while actually serving a sentence under the Probation or Parole laws.”<sup>184</sup>

Later, courts expressed similar concern over registration. In 1973, the California Supreme Court in *In re Birch*<sup>185</sup> invalidated a guilty plea based on defense counsel’s failure to advise the petitioner of an attendant lifelong sex offender registration requirement.<sup>186</sup> Noting the “unusual and onerous nature” of registration, the Court reasoned that registration would make the defendant “the subject of continual police surveillance . . . . Although the stigma of a short jail sentence should eventually fade, the ignominious badge carried by the convicted sex offender can remain for a lifetime.”<sup>187</sup> Ten years later, the same court deemed registration not only punitive in nature, for its lifetime ignominy and “command performances” in providing and updating information, but also a violation of the Eighth Amendment.<sup>188</sup>

Times have certainly changed, however. Since the 1990s, registration, combined with the far more personally consequential effects of community notification, has enjoyed broad judicial support. In 2003, the Supreme Court on two occasions turned back constitutional challenges against state registration and community notification laws,<sup>189</sup> with Chief Justice Rehnquist stating in oral argument in one of the cases that convicted sex offenders “deserve[] stigmatization.”<sup>190</sup>

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183. *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941).

184. LOGAN, *supra* note 6, at 38–39.

185. 515 P.2d 12 (Cal. 1973).

186. *Id.* at 12–13.

187. *Id.* at 16–17.

188. *In re Reed*, 663 P.2d 216, 218, 222 (Cal. 1983); *see also, e.g., State v. Miller*, 520 P.2d 1248, 1252 (Kan. 1974) (“It has become common knowledge today that a criminal record is a serious handicap which works against the rehabilitation of the ex-offender. The consequences of a criminal conviction include not only formal penalties and restrictions imposed by law but also collateral sanctions incidentally imposed by society. Although the criminal offender has paid his debt imposed by law, society stigmatizes him with the ex-convict label.”).

189. *See Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

190. Transcript of Oral Argument at 29, *Smith v. Doe*, 538 U.S. 84 (2003) (statement of Rehnquist, C.J.), *available at* [http://www.supremecourt.gov/oral\\_](http://www.supremecourt.gov/oral_)



The social and legal acceptability of singling out sex offenders is evident even in progressive law reform efforts dedicated to limiting collateral consequences. The Uniform Collateral Consequences of Conviction Act, recently drafted by the Uniform Law Commission, specifically exempts relief from registration from the kind of relief attainable when successfully petitioning for a “restoration of rights.”<sup>191</sup> The commentary states that “additional methods of relief would be duplicative and perhaps inconsistent with the detailed and elaborate provisions for individual evaluation that now exist.”<sup>192</sup> As made clear earlier, however, little basis exists to conclude that enhanced bases for relief “would be duplicative” or “inconsistent with . . . elaborate provisions for individual evaluation that now exist.”<sup>193</sup> States that have undertaken efforts to expand opportunities for collateral consequences relief more generally, such as Illinois<sup>194</sup> and North Carolina,<sup>195</sup> have codified exceptions for registration.

Exceptionalism is also seen with other more traditional forms of postconviction relief. While a pardon can automatically result in relief from the registry,<sup>196</sup> it is not uncommon for states to make an exception for sex offender registration<sup>197</sup> or to specify that a pardon for a

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arguments/argument\_transcripts/01-729.pdf; see also *Smith*, 538 U.S. at 98 (“[T]he stigma of Alaska’s Megan’s Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.”). American courts, unlike their British counterparts, do not embrace the possibility of “rebiograph[y],” which allows a criminal record to “expire[]” over time with good behavior. See SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 164–65 (2001) (internal quotation marks omitted).

191. UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 12 (2010), available at [http://www.uniformlaws.org/shared/docs/collateral\\_consequences/ucca\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/collateral_consequences/ucca_final_10.pdf).

192. *Id.*

193. *Id.*

194. 730 ILL. COMP. STAT. ANN. 5/5-5-5(f) (West 2007 & Supp. 2014). Vermont, the first state to adopt the UCCA (in 2013, effective in 2016), also carves out registration. See VT. STAT. ANN. tit. 13, § 8012(a)(1) (Supp. 2014).

195. N.C. GEN. STAT. ANN. § 15A-173.3(1) (2013).

196. *Heath v. State*, 983 A.2d 77, 81 (Del. 2009) (“Because an unconditional pardon cannot be granted unless the Board and Governor find no propensity for recidivism, an unconditional pardon extinguishes the underlying premise for sex offenders’ registration obligations.”); MD. CODE ANN., CRIM. PROC. § 11-704(b)(2) (LexisNexis Supp. 2014) (a pardon suffices).

197. LA. REV. STAT. ANN. § 15:544(A)–(B) (2012 & Supp. 2014) (requirement continues in the event of a pardon; relief occurs only when the underlying conviction is reversed, set aside, or vacated); *Edwards v. State Law Enf. Div.*, 720 S.E.2d 462, 466 (S.C. 2011) (interpreting South Carolina Code § 23-3-430(F)) (“The purpose of the

registerable offense must be based upon factual innocence.<sup>198</sup> Jurisdictions also often bar expungement of sex offense convictions,<sup>199</sup> and, if available, an expunged conviction will not result in relief from registration.<sup>200</sup> Finally, convictions that are dismissed based on successful completion of probation, while sufficient to relieve other collateral consequences, often do not result in relief from registration.<sup>201</sup>

Going forward, the policy question needs to be whether subjecting individuals to life or decades-long registration and community notification without the possibility of relief is sensible, not simply that doing so is politically popular. For legislatures, there will be difficult questions concerning such issues as standards of proof and thresholds of recidivism risk.<sup>202</sup> When crafting provisions, however, policy makers—true to Justice Brandeis’s experimentalist design<sup>203</sup>—can and should look to the experience in states such as Iowa with its broad relief regime. While crafting a fair and effective relief regime will not be easy,

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amendment [to registration law] evinces the legislature’s intent to except the sex offender registry requirements from the broad relief afforded by the pardon statute . . .”).

198. See, e.g., N.C. GEN. STAT. ANN. § 14-208.6C (allowing relief “if the registrant has been granted an unconditional pardon of innocence for the offense requiring registration”); S.C. CODE § 23-3-430(F) (Supp. 2014) (allowing relief when “the pardon is based on a finding of not guilty specifically stated in the pardon”); TEX. CODE CRIM. PROC. ANN. art. 62.002 (West 2006) (granting relief if conviction set aside on appeal or if registrant “receives a pardon on the basis of subsequent proof of innocence”).

199. See, e.g., KAN. STAT. ANN. § 21-6614(e)–(f) (Supp. 2013).

200. See, e.g., MICH. COMP. LAWS §§ 28.722(b)(i), 28.723(1)(b) (West 2012); N.C. GEN. STAT. §§ 15A-145.4(a)(3), -145.5(a)(3) (2013). However, if a conviction is expunged this can be noted on the registry if the registrant formally so requests. MICH. COMP. LAWS ANN. § 28.728(10) (West 2012 & Supp. 2014). In Indiana, an individual remains on the registry, but the conviction is denominated as expunged on the registry website. IND. CODE ANN. § 35-38-9-6(e) (LexisNexis Supp. 2014). Compare *State v. Fletcher*, 974 A.2d 188, 195–96 (Del. 2009) (expungement triggers registration relief because it makes no sense for an individual with no legal record of a registerable sex offense to register as a sex offender), with *State v. Divine*, 236 P.3d 692, 695 (Kan. 2011) (holding that expungement triggers registration relief because no exception contained in registration law).

201. See, e.g., *Does v. Munoz*, 507 F.3d 961, 963 (6th Cir. 2007) (interpreting Michigan law); *State v. Robinson*, 142 P.3d 729, 732 (Idaho 2006) (concluding that relief “cannot reach back in time to remove [petitioner] from the application of the registration act”); cf. *Montoya v. Driggers*, 320 P.3d 987, 991 (N.M. 2014) (requiring continued registration despite the triggering conviction being vacated on double jeopardy grounds, stating that conviction was “vacated[] not because the conviction lacked sufficient evidence, but because the conviction would result in double punishment”).

202. See *supra* notes 108-118 and accompanying text.

203. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

twenty years after registration and community notification laws first began to sweep the nation, it is past time for the work to begin.

#### CONCLUSION

Since their enactment in the 1990s, sex offender registration and community notification laws have enjoyed broad public support, proved largely impregnable to constitutional challenge, and expanded considerably in their scope. This is so despite the lack of conclusive research supporting their expected public safety benefit and concern that the laws actually exacerbate recidivism risk factors by hindering opportunities for work and housing and fostering social ostracism.<sup>204</sup> For telling evidence of their staying power one need look no further than the recent California tragedy involving Jaycee Dugard who for years was imprisoned and sexually assaulted by a registrant who was in compliance with state registration requirements.<sup>205</sup> While similarly high profile public safety failures typically catalyze legal change in criminal justice policy, the obvious policy failure resulting in Ms. Dugard's victimization was met with collective disinterest.

Nor should we expect to see a critical reexamination of Megan's Laws to come as a result of fiscal considerations, such as is now occurring with corrections policy.<sup>206</sup> This is because, unlike the enormous cost of mass incarceration, registration and community notification promise social control on the cheap (with the added benefit of publicly shaming convicted sex offenders).<sup>207</sup>

In short, registration and community notification laws are very likely here to stay. In the face of this reality, law reform efforts should be channeled toward enhancing opportunities for exit, based on law-abidingness, risk of sexual reoffense, and other relevant considerations. While to date legislative efforts have often gone in the other direction, imposing limits on the opportunity for exit,<sup>208</sup> it is hoped

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204. LOGAN, *supra* note 6, at 110–32.

205. Marisol Bello, *Questions Arise on Monitoring of Sex Offenders*, USA TODAY, Sept. 2, 2009, at 3A.

206. See, e.g., RIGHT ON CRIME, <http://www.rightoncrime.com> (last visited Feb. 9, 2015) (website of the Right on Crime initiative, comprised of fiscal conservatives, which advocates for prison population reductions consistent with public safety goals).

207. See Wayne A. Logan, *Information and Social Control*, in *THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA* 137, 137–40 (John T. Parry & L. Song Richardson eds., Cambridge Univ. Press 2013).

208. See, e.g., *State v. Divine*, 246 P.3d 692, 694 (Kan. 2011) (noting that the state legislature in 2001 amended its law to delete a provision allowing petitions for relief prior to the expiration of 10 years); *State v. Knapp*, 79 P.3d 740, 742 (Idaho Ct. App. 2003) (observing that “the legislature has embraced a successively more restrictive approach to releasing offenders from the registration requirement”); *In re Hamilton*, 725

that this Article has provided a framework for this much-needed change to occur.

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S.E.2d 393, 397 & n.1 (N.C. Ct. App. 2012) (noting that the legislature deleted the right to automatic termination, raised the registration requirement from 10 to 30 years, and required that eligible individuals seeking relief from the 30-year registration requirement file a petition at the 10-year mark). Iowa has proven a notable exception. *See State v. Iowa Dist. Court for Story Cty.*, 843 N.W.2d 76, 78 (Iowa 2014) (noting that the 2009 amendment modified law to expand opportunities for petition).