DATABASE INFAMIA: EXIT FROM THE SEX OFFENDER REGISTRIES

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Introduction ................................................................. 219
I. Opportunities for Exit ..................................................... 223
   A. Registrants Eligible for Exit ........................................... 225
       1. No or Extremely Limited Opportunity ...................... 225
       2. Somewhat Broader, Per Completion of Term ............. 226
       3. Possibility of Early Exit ....................................... 227
   B. Criteria and Procedures .............................................. 230
   C. Summary ..................................................................... 232
II. Constitutional Prospects for Change ............................. 233
III. Sex Offender Exceptionalism and the Way Forward ....... 240
Conclusion ......................................................................... 245

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.¹ Businesses track purchases and Internet activity for commercial purposes,² law enforcement agencies maintain expansive criminal record and biometric information databases,³ and the federal government makes regular use of “terrorist watch” and “no fly” lists.⁴ 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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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.5 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 nearby6—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.7 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),8 facing possible felony prosecution if they fail to do so.9

The laws, which originated during the nation’s sharp swing toward harsh penal policies in the 1990s,10 have been largely immune to constitutional attack11 and have significantly expanded their reach over time.12 While other manifestations of penal harshness have experienced a


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, mandatory minimum sentences, and other collateral consequences of conviction (e.g., loss of the right to vote)—Megan’s Laws not only endure, they flourish.

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.” If not, in the absence of their conviction being reversed or a gubernatorial pardon being granted (today a rare occurrence)—and sometimes not even then—individuals typically remain on registries for a minimum of 10 and up to 40 years. 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. The


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).


19. See infra notes197–98 and accompanying text.

20. See infra notes43–83 and accompanying text.

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

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). Despite common government assertions that registry information is being made available merely as a public safety service, the context is anything but neutral. 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.” The spotlighting has major adverse personal consequences for registrants,


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.”).

including social ostracism, lost job and housing opportunities, and even harassment and vigilantism.30

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,31 ranging from the very serious (e.g., forcible sexual assault and child molestation) to the less serious (e.g., peeping, indecent exposure, and bestiality).32 Possession of child pornography33 and child kidnapping by someone other than a parent or guardian34 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.”35 Eligible convictions date back many years, at a minimum encompassing those

30. LOGAN, supra note 6, at 125–29; see also DOE v. DEPT 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).


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. 36

In most states, all registrants are subject to community notification,37 with government websites only occasionally explicitly stating that registrants have not been evaluated for risk of reoffense.38 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.39 States also at times designate registrants with particular labels; Florida, for instance, designates registrants as “sexual predators”40 or “sexual


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


40. FLA. STAT. ANN. § 775.21(4) (West 2010 & Supp. 2015).
In most states, youthful offenders, adjudicated delinquent in juvenile court, are subject to community notification.\(^4\)

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.\(^4\) 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.”\(^4\)

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.\(^5\) South Dakota\(^6\) does as well but also extends the possibility of relief to those convicted of incest or bestiality (after 25 years on the registry).\(^7\) The only exceptions to Arizona’s lifetime\(^8\) registration requirement involve certain juvenile registrants\(^9\) and individuals convicted of non-parental kidnapping or unlawful imprisonment of a minor (who can seek relief after 10 years).\(^10\) 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.\(^11\)

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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).
\(^{47}\) 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. In some jurisdictions removal appears to be automatic upon petition after passage of the minimum term. In other instances, courts have discretion to bar relief to a petitioner. Kansas, which requires registration for 15 years, 25 years, or life terms, expressly states that no right to petition for early exit exists.

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56. Id. § 22-4908. The only exception being that those under age 14 at the time of their registrable 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).
Finally, in a majority of jurisdictions, opportunity exists for preterm exit, but the opportunity is usually quite limited. 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. 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. In Florida, also a lifetime registration jurisdiction, “Romeo and Juliet” offenders can seek relief at any time, and a handful of other less serious offender subgroups can do so after 25 years. In Missouri, registration is lifetime, but Romeo and Juliet registrants can petition after two years. The only other Missouri registrants eligible to petition for early relief (at 10 years)


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 and parents or guardians convicted of kidnapping or nonsexual abuse of their children. In Hawaii, only lifetime registrants have a right to petition for early termination, after 40 years on the registry. 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. New York, with perhaps the nation’s most due process-based system of classifying registrants, 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. Other examples of early termination include the following:

- In Idaho, all registrants are lifetime, but select registrants can petition after 10 years.
- 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.
- 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.
- In North Carolina, registration is for 30 years or lifetime, with only the 30-year group eligible to petition for relief after 10 years.
- In Wyoming, the registration period is lifetime, but certain registrants can petition for removal after 10 or 25 years.

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).
68. N.Y. CORRECT. LAW §§ 168-h(1), (2), -o(1) (McKinney 2014).
71. NEB. REV. STAT. ANN. § 29-4005(1) to (2) (LexisNexis 2009).
72. N.C. GEN. STAT. §§ 14-208.12A(a), -208.23 (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, can after 10 years on the registry petition for relief on the basis of a “certificate of rehabilitation.”

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. Less generous but still notable compared to other jurisdictions is Tennessee: lifetime registration is required, but all but the most serious offenders can seek removal after 10 years. 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.
- 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.
- In Colorado, lifetime registration is required for all registrants, but certain registrants can petition for removal 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).

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.
79. Id. § 40-39-207(g), (j).
80. Id. § 40-39-207(a).
after 10 or 20 years (five years for certain misdemeanants).83

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 offense84 or a felony,85 a petitioner can be disqualified because of a mere arrest for another registerable offense86 or a felony or misdemeanor (even if nonsexual).87 It is also common to require that a petitioner successfully complete any court-ordered treatment program.88 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.”89

Not surprisingly, risk of recidivism figures prominently in most laws,90 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”91: registrants must show that it is “highly probable” or “reasonably certain” that they will not commit another registerable offense.92 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.”93 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

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).
89. CAL. PENAL CODE § 4852.05 (West 2014).
safety of others.” In Virginia, a court shall grant a petition if the petitioner “no longer poses a risk to public safety.” In Missouri, the registrant must not be “a current or potential threat to public safety.” In Georgia, the court must find that the registrant “does not pose a substantial risk of perpetrating any future dangerous sexual offense.”

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.” 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.”

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.” 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.”

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. In Hawaii, the standard is “substantial evidence and more than proof by a preponderance of the evidence.” In at least two states (Arkansas and Georgia), the standard is preponderance of the evidence, while in others the petition provision fails to specify a burden of proof.

97. GA. CODE ANN. § 42-1-19(g) (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).
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.\textsuperscript{106} 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.\textsuperscript{107}

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.\textsuperscript{108} At least as problematic, recidivism risk thresholds can be unrealistically demanding.\textsuperscript{109} 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),\textsuperscript{110} and logic and experience support that risk of reoffense can never be predicted as nonexistent.\textsuperscript{111} Indeed, professional norms prohibit psychosexual evaluators from making “statements asserting that a [subject] is no longer at any risk to reoffend.”\textsuperscript{112} Nevertheless, state laws can require that courts assess whether a registrant poses any threat to public safety\textsuperscript{113} or prescribe an

\begin{itemize}
  \item \textsuperscript{106} See supra Part I.A.3.
  \item \textsuperscript{107} See supra notes 77–83 and accompanying text.
  \item \textsuperscript{108} See supra notes 102–05 and accompanying text.
  \item \textsuperscript{109} See supra notes 92–93 and accompanying text.
  \item \textsuperscript{111} See generally Ruth J. Tully et al., \textit{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).
  \item \textsuperscript{113} See supra notes 94–95 and accompanying text. To date, only rarely have courts seen fit to temper this absolutism. See \textit{In re Harold W.}, No. 2-12-1235, 2014 WL 1572518, at *6–7 (III. 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
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,” the state supreme court recently upheld a petition denial despite a finding that the petitioner posed a low risk of reoffense. 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.”

The upshot is that for many thousands of registrants, absent reversal of a conviction or a pardon (and perhaps not even then), 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, risk assessments, and a lawyer.

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 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).
v. Doe 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.

Applying their own ex post facto provisions, the supreme courts of Indiana, Maine, New Hampshire, and Oklahoma 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. 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”).
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”).
challenged allowed some modest right to petition, with the possibility of exit essentially used as a buffer against constitutional redress.\textsuperscript{130}

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 \textit{Smith}, the Supreme Court in \textit{Connecticut Department of Public Safety v. Doe}\textsuperscript{131} (\textit{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.\textsuperscript{132} The \textit{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.\textsuperscript{133} 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.”\textsuperscript{134} The petitioners, in short, received all the procedural due process they were due when they were lawfully convicted of a registerable offense.\textsuperscript{135}

\textit{CDPS}, while of critical importance, concerned government refusal to allow individuals to contest placement on a registry,\textsuperscript{136} 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.\textsuperscript{137}

\begin{footnotesize}
\begin{enumerate}

\item \textsuperscript{131} 538 U.S. 1 (2003).

\item \textsuperscript{132} \textit{Id.} at 4.

\item \textsuperscript{133} \textit{Id.} at 7.

\item \textsuperscript{134} \textit{Id.} at 7–8.

\item \textsuperscript{135} See \textit{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”).

\item \textsuperscript{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 \textit{Doe v. Sex Offender Registry Bd.}, 882 N.E.2d 298, 308–09 (Mass. 2008) (granting relief on state constitutional grounds).

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In the Tennessee case, *Doe v. State*, the petitioner was convicted of aggravated sexual battery in 1983, was paroled from prison in 1987, and successfully completed parole in 1993. 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. 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. 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.”

In the first of the two West Virginia cases, *Haishlop v. Edgell*, 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.” The *Haishlop* 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.

Despite its holding, the *Haishlop* 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, 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

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.147

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.”148

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.,149 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.150 Because the victim was a minor, the state required that the petitioner register for his lifetime.151 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.152

The Supreme Court of Appeals, in an unpublished opinion, affirmed on the basis of Haislop.153 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.

147. Haislop, 593 S.E.2d at 849.
148. Id. at 850.
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.154

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.155

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.156 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.157 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.”158 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.159 Despite these successes, as with registration-related equal protection claims more

154. Id. (Ketchum, J., dissenting).
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”).
generally, such claims would face a steep uphill battle, based on deference typically shown to legislatively drawn classifications.

Finally, a substantive due process claim could conceivably be available, based on a fleeting reference by Justice Souter in CDPS. 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. 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. 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.

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, a persuasive claim can be made that a finding of current dangerousness, postregistration, would not be in the Court’s words a “bootless exercise.” 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, the fact that for at least some registrants state law allows for

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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].”).


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”).


168. See Logan, supra note 6, at 75.
postregistration relief, based on rehabilitation in some shape or form, 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 and Massachusetts.

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. 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, but concluded that an individualized risk assessment was not material under Connecticut’s law. 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.

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 molest children. Of late, law reform advocates have

169. See supra Part I.B.
174. Id. at 4, 7.
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, a recognition that has prompted some states to expand exit opportunities for this subpopulation.

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. And when they do, they will face both the debilitating effect of having a criminal conviction and the very significant adverse consequences of registration and community notification, 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.

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


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).


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.


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.” 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.”

Later, courts expressed similar concern over registration. In 1973, the California Supreme Court in *In re Birch* invalidated a guilty plea based on defense counsel’s failure to advise the petitioner of an attendant lifelong sex offender registration requirement. 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.” 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.

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, with Chief Justice Rehnquist stating in oral argument in one of the cases that convicted sex offenders “deserve[] stigmatization.”

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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.”).
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.”\(^{191}\) 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.”\(^{192}\) 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.”\(^{193}\) States that have undertaken efforts to expand opportunities for collateral consequences relief more generally, such as Illinois\(^{194}\) and North Carolina,\(^{195}\) 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,\(^{196}\) it is not uncommon for states to make an exception for sex offender registration\(^{197}\) or to specify that a pardon for a

\(^{192}\) Id.
\(^{193}\) Id.
\(^{196}\) 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. Jurisdictions also often bar expungement of sex offense convictions, and, if available, an expunged conviction will not result in relief from registration. 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.

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. When crafting provisions, however, policy makers—true to Justice Brandeis’s experimentalist design—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,

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 . . . .”).


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 108-18 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. 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. 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. 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).

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, it is hoped

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. The Right on Crime initiative, comprised of fiscal and political conservatives, has been at the forefront of this shift. See RIGHT ON CRIME, http://www.rightoncrime.com (last visited Feb. 9, 2015).
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.

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).