DOE V. O'DONNELL AND NEW YORK'S SEX OFFENDER REGISTRATION ACT: THE PROBLEM OF CONTINUED REGISTRATION UNDER SORA AFTER LEAVING THE STATE

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INTRODUCTION

The last two decades have seen the passage of sex offender registration and community notification laws in every state, including the District of Columbia, and at the federal level.[1] In 1995, New York State enacted the New York Sex Offender Registration Act (SORA),[2] requiring convicted sex offenders to report annually to the Division of Criminal Justice Services (DCJS), by providing address verification and other identifying information.[3] The statute further mandates community notification, enabling law enforcement to make information about sex offenders and their whereabouts available for public consumption and awareness.[4] In addition to registration and community notification, the statute also requires that sex offenders inform the DCJS within ten days of a change of address both within and outside the state.[5] The statute does not explicitly state whether a sex

1 *See* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 2 (2007), https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf ("Federal law and the laws of all 50 states now require adults and some juveniles convicted of specific crimes that involve sexual conduct to register with law enforcement . . . .").

2 N.Y. CORRECT. LAW § 168 (McKinney 1996). New York was the forty-third state to pass sex offender registry legislation and the thirtieth state to allow public notification. *See* Alison Virag Greissman, Note, *The Fate of "Megan's Law" in New York*, 18 CARDOZO L. REV. 181, 182 (1996).

3 N.Y. CORRECT. LAW § 168-f (McKinney 2014). *See infra* note 66 for more details on the type of information the DCJS collects.

4 *Id.* § 168-*l*(6)(a)–(c).

5 *Id.* § 168-f(4).

offender must continue to register in New York upon relocating to another state.[6]

In 2011, the Appellate Division, Third Department (Appellate Division) in *Doe v. O'Donnell* held that in the absence of such an explicit provision, the statute should be construed so as to assume continued registration.[7] The result of this ruling is a law imposed by New York State that requires residents of other states to continue to register as sex offenders even if they no longer live in New York and conceivably no longer pose a danger to the residents therein.[8]

This Note will focus on the New York Sex Offender Registration Act's registration requirement and its interpretation by the Appellate Division in *Doe v. O'Donnell*. It will consider the many implications of requiring continued registration in New York after a registered sex offender has relocated to another state—including issues of state sovereignty and offenders' rights—and will propose a potential judicial solution that seeks to address these implications in a way that does not offend relations between states or the rights of those who must register under SORA.

Part I of this Note provides background on the problem presented, beginning with a discussion of the evolution of sex offender registries across the country and the public policy motivations behind their enactment. This Part continues with an analysis of New York's own Megan's Law, the New York Sex Offender Registration Act,[9] and judicial interpretations of SORA's registration requirement. This Part also investigates how other states and the federal government deal with the issue of out-of-state relocation in their own sex-offender registration statutes and informational material. Part II provides an analysis of the implications of *Doe v. O'Donnell*'s holding, demonstrating how continued registration in New York following out-of-state relocation

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6 *See* Doe v. O'Donnell, 86 A.D.3d 238, 241 (N.Y. App. Div. 3d Dep't 2011) ("[W]hile SORA expressly addresses an offender's relocation to another state, it does not provide for his or her removal from the sex offender registry under such circumstances.").

7 *Id.* ("Had the Legislature intended to require the Division to remove a sex offender from New York's registry upon his or her relocation from this state, it would have so provided."). "Division" means the Division of Criminal Justice Services. N.Y. CORRECT. LAW § 168-a(5) (McKinney 2014).

8 As will be discussed throughout this Note, this is the "party line" of the Appellate Division and the Division of Criminal Justice Services. This is contrary to the holding of the Supreme Court of Albany County in *Roe v. O'Donnell* that exercising "continuing regulatory jurisdiction over petitioner after he moved out of New York [was] irrational and contrary to law." Roe v. O'Donnell, No. 3536–09, at *6 (N.Y. Sup. Ct. Albany Cty. 2009) (judgment pursuant to Article 78 of the N.Y. C.P.L.R.) (on file with author). In that case, a sex offender, who was convicted in Pennsylvania and subsequently moved to New York, petitioned to be removed from SORA after having moved back to Pennsylvania, where he had since been removed because the ten-year registration period applicable under Pennsylvania law had been satisfied. *Id. See* discussion *infra* Section I.C.2.

9 N.Y. CORRECT. LAW § 168 (McKinney 2014).

presents significant problems for notions of horizontal federalism and the individual rights of offenders. Finally, Part III proposes that the New York Court of Appeals adopt express language that terminates a sex offender's registration obligations in New York after having left the state, upon proof of continued registration in his new state of residence and compliance with the federal sex offender registration statute. This Part also addresses two potential objections to the asserted proposal.

I. BACKGROUND

A. *The History and Evolution of Sex Offender Management in the United States*

1. A Brief History of Sex Offender Registries in the United States

Offender registries gained increased traction in the United States in the early 1990s after decades of being met with extreme criticism regarding their constitutionality and effectiveness, and subsequent extensive repeal through legislation or litigation, or abandonment altogether.[10] The enactment of sex offender registration laws[11] dramatically increased throughout the end of the twentieth century, largely in response to a number of high-profile sex crimes[12] against

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10 *See* Elizabeth Reiner Platt, Article, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 728, 735 (2013). Since their inception, offender registries have targeted varied groups of individuals over time: "in the early 1930s, 'gangsters,' followed by increasingly broader swaths of specified criminal subgroups . . . ." WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 83 (2009) [hereinafter LOGAN, KNOWLEDGE AS POWER].

11 These laws have informally become known as "Megan's Laws," named after legislation enacted by the State of New Jersey following the rape and murder of seven-year-old Megan Kanka by her neighbor—a twice-convicted sex offender—in 1994. *See* Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 315–16 (2001).

12 Sex offenses range in kind and degree, and are codified differently within the statutes enacted among the states. *See generally* AM. UNIV., WASH. COLL. OF LAW, FIFTY STATE SURVEY OF ADULT SEX OFFENDER REGISTRATION REQUIREMENTS (2010), https://www.wcl.american.edu/endsilence/documents/FiftyStateSurveyofAdultSexOffenderRegistrationStatutes_November2010Update.pdf (describing the registerable offenses, information maintained in registries, duration of registration, etc., for each state's sex offender registration statute). Further, state statutes vary on what offenses are considered registerable and to what extent an offense is also subject to community notification. *See id.* The most commonly known sex offenses include rape in varying degrees, sexual assault in varying degrees, incest, and possessing child pornography, among others. *See id.* Section I.B of this Note describes the types of sex crimes for which an offender must register under SORA in New York.

children perpetrated by previously convicted sex offenders[13] and the rising societal panic over the presence of offenders in communities across the country.[14] The first federal law in the area of sex offender registration—the Jacob Wetterling Crimes Against Children and Sexually Violent Sex Offender Registration Act (Wetterling Act)—was enacted in 1994.[15] The Wetterling Act required each state to pass sex offender registration laws, conditioning the receipt of federal funding upon the enactment of such laws and development of state registries.[16] The Act provided guidance to states on what these new laws should look like, including which offenses required registration, and the frequency and duration of registration.[17]

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13 *See* Platt, *supra* note 10, at 736. In the most basic sense, a sex offender is someone who has committed a sex crime. *See, e.g.*, CAL. PENAL CODE § 290 (West 2014) (Section 290-c, which is not relevant for the purposes of this Note, was held unconstitutional in its different iterations by People v. Garcia, 74 Cal. Rptr. 3d 681 (Ct. App. 2008) and People v. Ruffin, 133 Cal. Rptr. 3d 27 (Ct. App. 2011)); FLA. STAT. ANN. § 943.0435 (West 2015); 730 ILL. COMP. STAT. ANN. § 150/2 (West 2007); N.J. STAT. ANN. § 2C:14 (West 2015); N.Y. CORRECT. LAW § 168-a (McKinney 2014); 42 PA STAT. AND CONS. STAT. ANN. §§ 9799.10–9799.41 (West 2014); TEX. CODE CRIM. PROC. ANN. art. 62.00–62.408 (West 2015). Defining who is or will become a sex offender, however, has presented significant challenges to legislatures, law enforcement, and mental health experts. *See Greissman*, *supra* note 2, at 185; *see also* James Popkin et al., *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 64 ("It is hard enough to figure out which imprisoned offenders pose the greatest dangers; it is far more difficult to discern who is or will become a sexual offender."). Sex offenders are a diverse group of criminals, who hail from varied cultural and socioeconomic backgrounds. Lawrence Wright, *A Rapist's Homecoming*, NEW YORKER, Sept. 4, 1995, at 56, 61 ("Sex offenders cut across all racial, economic, and social lines."); CENTER FOR SEX OFFENDER MANAGEMENT (CSOM), FACT SHEET: WHAT YOU NEED TO KNOW ABOUT SEX OFFENDERS 2 (2008) [hereinafter CSOM FACTSHEET], http://www.csom.org/pubs/needtoknow_fs.pdf ("There is no such thing as a 'typical' sex offender."). While many people who commit sex offenses are strangers to their victims, the majority of rape, child molestation, and other sex offenses are committed by friends and relatives of the victims. Corey Rayburn Yung, *The Ticking Sex-Offender Bomb*, 15 J. GENDER, RACE & JUST. 81, 89–90 (2012).

14 Bela August Walker, *Deciphering Risk: Sex Offender Statutes and Moral Panic in a Risk Society*, 40 U. BALT. L. REV. 183, 185 (2010) ("The increasing [sex offender] legislation is inspired by proliferating fears about sexual abuse and seeks to quell those fears by defining and controlling the threat.").

15 42 U.S.C. §§ 14071–14073 (2006), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 18 U.S.C., 42 U.S.C.). Jacob Wetterling was eleven years old when, in 1989, he was abducted by a stranger while riding his bike near his home. No arrest has been made in connection with his disappearance, and Jacob remains missing. *See* HUMAN RIGHTS WATCH, *supra* note 1, at 36 n.92.

16 *See* ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 16 (1st ed. 2006).

17 *See* Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 101 (1998); *see also* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 279–283 (2005) [hereinafter Logan, *Horizontal Federalism*].

On the heels of the Wetterling Act's passage, and just three months after the tragic death of Megan Kanka in New Jersey,[18] the New Jersey Legislature passed Megan's Law, mandating the registration of convicted sex offenders and requiring law enforcement to notify communities of the whereabouts of such offenders.[19] The statute was met with resounding support; states around the country were quick to enact their own similar statutes[20]—thereby coming into compliance with the Wetterling Act—and the federal government amended the Wetterling Act in 1996 by passing its own Megan's Law to introduce the community notification requirement.[21]

Federal sex offender registration and notification laws were further expanded in the years following the passage of the federal Megan's Law,[22] and in 2006, Congress passed its most comprehensive sex offender registration statute, the Adam Walsh Child Protection and

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18 *See* JANUS, *supra* note 16, at 16; *see also* Robert J. Martin, *Pursuing Public Protection Through Mandatory Community Notification of Convicted Sex Offenders: The Trials and Tribulations of Megan's Law*, 6 B.U. PUB. INT. L.J. 29, 31–36 (1996) (describing the enactment of Megan's Law in the New Jersey Legislature); *supra* note 11.

19 N.J. STAT. ANN. § 2C:7-1–2C:7-11 (repealed 2013). Although New Jersey's Megan's Law is often thought of as the first sex-offender registration and community notification law, it is predated by the enactment of Washington's Community Protection Act in 1990. New Jersey's statute, however, is credited with accelerating the proliferation of Megan's Laws across the country. *See* Filler, *supra* note 11, at 316 n.8.

20 JANUS, *supra* note 16 ("Soon all fifty states had adopted sex offender registration and community notification laws.").

21 Megan's Law, Pub. L. 104–45, 110 Stat. 1345 (1996) (codified as amended 42 U.S.C. § 14071 (2000)), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 600 (2006) (codified as amended in scattered sections of 18 U.S.C., 42 U.S.C.). Prior to the amendment, the "law authorized, but did not require, law enforcement officials to release to the public information on a registered sex offender . . . ." HUMAN RIGHTS WATCH, *supra* note 1, at 36. For more information on Megan's Law, see *supra* note 11.

22 This expansion began with the Pam Lyncher Sexual Offender Tracking and Identification Act of 1996 (Pam Lyncher Act), Pub. L. 104-236, 110 Stat. 3093 (repealed 2006). The Act was named after a woman who was sexually assaulted by a twice-convicted felon in Houston, Texas. *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 10, at 61. What followed was a series of laws passed by Congress in 1997, 1998, 2000, 2003, and 2005. *Id.* at 62 nn.82–86. In 1997, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Improvements Act of 1997 amending several provisions of the original statute to, most notably, require states to participate in the national sex offender registry and set up procedures for registering out-of-state offenders. Pub. L. 105–119, 111 Stat. 2440 (1997). The Protection of Children from Sexual Predators Act was passed in 1998 directing the Bureau of Justice Assistance to implement the Sex Offender Management Assistance program to assist eligible states in complying with registration requirements. Pub. L. 105-314, 112 Stat. 2974 (1998). In 2000, the Campus Sex Crimes Prevention Act was passed requiring any person obligated to register under a state's sex offender statute to notify an institute of higher education at which he is enrolled or employed. Pub. L. 106–386, 114 Stat. 1537 (2000). The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act was passed in 2003 and required states to maintain a website database of registry information. Pub. L. 108–21, 117 Stat. 650 (2003). In 2005, Dru's Law was passed creating an online national sex offender registry. H.R. 4472, 109th Cong. § 120 (2d Sess. 2005).

Safety Act (AWA),[23] which officially established the federal Sex Offender Registration and Notification Act (SORNA).[24] The AWA built upon the legacy of its predecessors, and heightened registration and notification requirements under SORNA for those convicted.[25]

The prevalence of sex offender registries in the United States has swelled over the past two decades, with every state and the federal government having some form of registration and community notification system in place.[26] A great number of states have also mandated risk level classification or "tier" notification systems, much like the AWA,[27] which address an offender's risk of recidivating and adjust registration requirements accordingly.[28] Although the federal

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23 The AWA repealed the Wetterling Act, Megan's Law, and the Pam Lyncher Act. *See supra* note 22 and accompanying text; *see also* LOGAN, KNOWLEDGE AS POWER, *supra* note 10, at 62.

24 Pub. L. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 18 U.S.C., 42 U.S.C.).

25 *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 10, at 62–63. Although the constitutionality of SORNA has been challenged widely in the courts, this Note will not examine the statutory and constitutional implications of the federal statute. For more information on the constitutional challenges to SORNA, see Jennifer Iacono, Note, *The Sex Offender Registration and Notification Act and its Commerce Clause Implications*, 17 WIDENER L. REV. 227, 228–29, nn.12–13 (2011).

26 *See* Logan, *Horizontal Federalism*, *supra* note 17, at 280. Today, sex offender registration statutes across the country require, at a minimum, that convicted sex offenders regularly report to state and local law enforcement, and provide detailed information, some of which is then made available to the public via online community notification databases. *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 10, at 60; HUMAN RIGHTS WATCH, *supra* note 1, at 2 (detailing the kind of information that is made available to the public via these online registries, including "a former offender's criminal history, current photograph, current address, and other information such as place of employment."). It is important to note that while all states have enacted sex offender registration and community notification laws, they differ in many notable respects.

27 *See* HUMAN RIGHTS WATCH, *supra* note 1, at 37 ("The Adam Walsh Act creates three tiers or levels of registrants, determined solely by the conviction offense, with Tier I crimes the least serious and Tier III crimes the most serious. The tiers dictate the duration of the registry requirement.").

28 *See* McAllister, *supra* note 17, at 108 ("Several states have enacted 'tier' notification systems like New Jersey's 'Megan's Law.' Under these statutory schemes, an offender's risk of recidivism is typically evaluated and classified as falling into one of three levels: low, moderate, or high. The resulting registration requirements and the degree of public access to registrant information or notification to the public depends on the offender's risk level . . . ." (footnotes omitted)).

> In a few states, such as . . . 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. States also at times designate registrants with particular labels; Florida, for instance, designates registrants as "sexual predators" or "sexual offenders."

Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WISC. L. REV. 219, 224–25 (2015) [hereinafter Logan, *Database Infamia*] (footnotes omitted). SORNA also mandates a tiered classification system. *See* HUMAN RIGHTS WATCH, *supra* note 1, at 37; Platt, *supra* note 10, at 737.

enactment of SORNA has had important implications for state sex offender registration and community notification laws, states have largely exercised their own judgment in the creation of such laws, often times irrespective of federal and other state laws.[29]

2. Public Policy Motivations for Sex Offender Registration and Community Notification

While this Note does not focus primarily on the overarching public policy motivations behind sex offender registration and community notification laws, the topic deserves some discussion, for it is an element the Appellate Division explores in *Doe v. O'Donnell*. These justifications are not without criticism,[30] but they nonetheless remain the bedrock for the enactment of Megan's Laws across the country.

The increase in registration and notification laws originates largely from the belief that such laws make communities safer in three key ways: by enabling police to monitor and apprehend sex offenders via increased information on their whereabouts; by giving communities access to information on registrants, empowering them to self-protect and aid law enforcement in capturing recidivist offenders; and by serving as a deterrent to recidivism among registrants by instilling an awareness that they are being monitored.[31]

Sex offender registration laws have been enacted with the intent to aid law enforcement in protecting the public by facilitating the monitoring of known sex offenders' movements and behaviors.[32] By having a central information repository on the whereabouts of sex offenders available to police, law enforcement is empowered to take

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29 *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 10, at 66 ("More notably, state prerogative has been manifest in the nature and content of state laws. Because federal law since 1994 has prescribed only minima, states have been free to indulge their sovereign prerogative to adopt independent policies. States have, in the words of Justice Louis Brandeis, acted as 'laborator[ies]' of experimentation. Federal law is thus only part of modern registration and notification's story, with the states playing a foremost role." (alteration in original) (footnote omitted)).

30 *See id.* at 109–33; Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 893–99, 906–09 (1995); Carol L. Kunz, Comment, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 AM. U. L. REV. 453, 470–475 (1997). This Note will only marginally examine these criticisms in the context of *Doe v. O'Donnell*. *See infra* Part II.

31 *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 10, at 109.

32 *See* State v. Myers, 923 P.2d 1024, 1032 (Kan. 1996) (stating that the promotion of public safety was the overriding concern behind the state's sex offender registration act); Rodriguez v. State, 93 S.W.3d 60, 75 (Tex. Crim. App. 2002) (giving deference to the statute and stating that "[a] reasonable legislator could have believed that the assembly and maintenance of a database to track the whereabouts of sex offenders . . . bore a rational connection to the promotion of public safety."); *see also* Bedarf, *supra* note 30.

steps to prevent crime, and identify and apprehend offenders following the commission of a crime.[33] Registries are also expected to aid law enforcement in returning children to safety by immediately facilitating investigations following a reported abduction.[34]

Linked to the idea that sex offender registration and community notification laws aid law enforcement in better protecting the public, there is also the expectation that the prevention of sex crimes,[35] and thus the protection of children, can be achieved through community empowerment facilitated by these mechanisms.[36] A strong sentiment among the public following Megan Kanka's murder was that her death could have been prevented if her parents had known about the presence of her murderer in their community.[37] Child protection and community empowerment became cornerstones of the Megan's Law movement, with legislatures, media, and the public rallying behind compelling narratives that underscored the importance and necessity of sex offender registration and community notification as tools to keep children and their communities safe.[38] Increasing access to information on registrants, the argument goes, empowers communities to self-

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33 *See* Matthew S. Miner, *The Adam Walsh Act's Sex Offender Registration and Notification Requirements and the Commerce Clause: A Defense of Congress's Power to Check the Interstate Movement of Unregistered Sex Offenders*, 56 VILL. L. REV. 51, 61 (2011); Bedarf, *supra* note 30, at 899; Platt, *supra* note 10, at 727.

34 *See* Miner, *supra* note 33, at 61–62 ("Registries . . . play a vital role—perhaps their most vital role—in supporting law enforcement's efforts to solve child abductions and sex crimes in the hours and days after a disappearance. . . . The very short time period first responders have to save an abducted child's life explains why law enforcement needs an accurate registry of known sex offenders who live or work in the area where a child disappears. In the immediate aftermath of a child's disappearance, law enforcement often questions sex offenders located in close proximity to the disappearance." (footnote omitted)).

35 For the purposes of this Note, the terms "sex crime" and "sex offense" are used interchangeably. For a definition of what constitutes a "sex offense" under New York's Sex Offender Registration Act, see N.Y. CORRECT. LAW § 168-a(2) (McKinney 2014).

36 *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 10, at 120–21.

37 *See* JANUS, *supra* note 16, at 16–17 ("[W]hat stands out most vividly is the *preventability* of the crime[] . . . . [T]he horrible future was in plain view. . . . The presence [of the perpetrator] in Megan's neighborhood was known to officials but unknown to Megan's parents."); Filler, *supra* note 11, at 340 ("The most common method for arguing the efficacy of Megan's Law was a single assertion: had the law been in place before Megan Kanka's murder, she would not have been killed."); Miner, *supra* note 33, at 61 ("The value of these registries and notification programs to citizens, and in particular to parents, can best be explained by looking to cases where parents and victims were unaware of the presence of sex offenders in their area due to the lack of an effective registry or the relocation of an unregistered sex offender.").

38 *See* Miner, *supra* note 33, at 61 ("[T]he parents of Megan Kanka . . . were outraged to learn that the offender . . . had been able to move into their neighborhood anonymously without parents being able to take basic precautions."); *see also* Filler, *supra* note 11, at 357 ("Arguing for the efficacy of the bill, New York legislators . . . suggested that the bill might have saved children's lives, and noted that it would empower parents to better protect children.").

protect, strengthening community accountability for the prevention of sex crimes by repeat sex offenders.[39]

A final public policy motivation behind sex offender registration and community notification is to curb recidivism.[40] Sex offenders represent a distinctive class of criminals largely lacking in common attributes and personality traits, and are thus difficult to identify.[41] Along with their unique characteristics, recidivism rates among sex offenders are commonly thought to be quite high.[42] Legislatures enacted sex offender registration laws with the intent to deter the commission of sex crimes on the premise that registered offenders are less likely to recommit if they know they are being monitored by law enforcement and the communities in which they live.[43] A further motivation is that

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39 Platt, *supra* note 10, at 745–46 ("By providing information to the public about potentially dangerous predators in one's midst, registries allow 'innocent' citizens to take measures to protect themselves and their families. . . . When you have public awareness of the presence of these individuals, there will be further accountability by neighbors, by people who are interested in making sure that their . . . residence[s] are safe.").

40 *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 10, at 60.

41 Greissman, *supra* note 2, at 185 ("One of the most pressing issues facing legislators and law enforcement officials is the difficulty of discerning who is or will become a sex offender. Although there appear to be common characteristics among sex offenders, there is no solid profile. Sex offenders come from all socioeconomic and racial backgrounds." (footnotes omitted)). Further, the reasons why people commit sex offenses vary, and there is no single factor or combination of factors that can completely capture why someone commits a sex offense. *See* CSOM FACTSHEET, *supra* note 13, at 3. Studies have demonstrated that a number of factors, either on their own or together, can increase a person's tendency to commit a sex offense, although they are not dispositive. These factors can be physiological or biological, such as abnormalities in the structure of the brain and imbalanced hormone levels; sociocultural, such as exposure to social messages supportive of sexual aggression; developmental, that is, behavior adapted to environmental or personal events such as domestic violence; and situational or circumstantial, such as having easy access to victims, high stress levels, and so on. *Id.*

42 *See* Platt, *supra* note 10, at 745 ("Supporters of sex offender registries . . . claimed that they were necessary to monitor sex offenders because of their unique characteristics, including high rates of recidivism."). Although recidivism rates among sex offenders are difficult to monitor, and studies often produce differing and inconsistent results, a recent evaluation of recidivism rates among sex offenders undertaken by the U.S. Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking suggests that the sexual recidivism rate for offenders with a prior conviction is nearly double the rate (thirty-nine percent compared to nineteen percent) than that of first-time offenders over the course of fifteen years. ROGER PRZYBYLSKI, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, & TRACKING, U.S. DEP'T OF JUST., SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE RESEARCH BRIEF: RECIDIVISM OF ADULT SEXUAL OFFENDERS 2 (2015), http://www.smart.gov/pdfs/RecidivismofAdultSexualOffenders.pdf. Compared to other crimes, however, "recidivism rates are significantly lower for convicted sex offenders than for burglars, robbers, thieves, drug offenders and other convicts." Roger N. Lancaster, *Sex Offenders: The Last Pariahs*, N.Y. TIMES (Aug. 20, 2011), http://www.nytimes.com/2011/08/21/opinion/sunday/sex-offenders-the-last-pariahs.html?_r=0.

43 Kimberly B. Wilkins, Comment, *Sex Offender Registration and Community Notification Laws: Will These Laws Survive?*, 37 U. RICH. L. REV. 1245, 1252 (2003) ("[S]upporters of sex offender registration and community notification laws believe the laws deter sex

the registries are good tools for monitoring and understanding recidivism rates among sex offenders,[44] generally, thus allowing public officials to effectively address incidences of sex crimes in their communities.

B. *The New York Sex Offender Registration Act*

New York State enacted the New York Sex Offender Registration Act in 1995 following the enactment of Megan's Law in New Jersey the year prior.[45] SORA was heavily influenced by New Jersey's law and was enacted in response to growing concern over the threat sex offenders posed to children and their communities in the wake of Megan Kanka's death.[46] SORA was the first law of its kind in New York to require certain classes of individuals to register with law enforcement, and authorize community notification of the whereabouts of such offenders.[47] A brief overview of the statutory scheme follows.

1. Persons Required to Register Under the Act

As of January 21, 1996, anyone on parole or probation, or incarcerated for a sex offense, must register as a sex offender under SORA.[48] Those persons convicted of sex offenses on or after January 21, 1996, or sentenced to probation or imprisonment after that date, must also register upon reentering the community.[49] Anyone convicted of a sex offense in another state must register with the DCJS upon relocating to New York State if the offense is one that the Board of Examiners of Sex Offenders deems is subject to registration under the New York statute.[50]

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crimes. . . . [S]upporters argue that sex offenders are less likely to commit an offense if they know the community and law enforcement are closely monitoring their activity . . . .").

44 *See id.*

45 N.Y. CORRECT. LAW § 168 (McKinney 1996).

46 *See* Maria Orecchio & Theresa A. Tebbett, Note, *Sex Offender Registration: Community Safety or Invasion of Privacy?*, 13 ST. JOHN'S J. LEGAL COMMENT. 675, 679–80 (1999) ("The legislature articulated that the objectives behind NYSORA are: (1) to protect members of the community, particularly children, by notifying the community of the presence of individuals who may pose a danger, and (2) to enhance law enforcement authorities' ability to investigate and prosecute sex crimes.").

47 *See* Filler, *supra* note 11, at 327.

48 *See Frequently Asked Questions,* N.Y. DIVISION OF CRIM. JUST. SERVICES, http://www.criminaljustice.ny.gov/nsor/faq.htm (last visited Oct. 21, 2015).

49 *See id.*

50 *See id.* The Board of Examiners of Sex Offenders is the body responsible for assessing a sex offender's risk level and determining his risk level classification for the purposes of registration and notification. *See* N.Y. CORRECT. LAW § 168-*l* (McKinney 2014). Many, if not all

Under SORA, a "sex offender" is defined as any person convicted of a "sex offense" or a "sexually violent offense."[51] A "sex offense" includes crimes such as sexual misconduct,[52] rape in the second[53] or third degree,[54] sexual abuse in the second degree,[55] and sex trafficking,[56] among others,[57] and the conviction or attempt thereof.[58] A "sexually violent offense" includes crimes such as rape in the first degree,[59] sexual abuse in the first degree,[60] course of sexual conduct against a child in the first degree,[61] predatory sexual assault,[62] and the conviction or attempt thereof.[63]

2. The Registration Scheme

An individual who is designated as a sex offender under SORA is required to register with the DCJS no later than ten days following his[64] discharge, parole, or release from any state or local correctional facility.[65] Upon registration, the DCJS has the duty to create and maintain a file on the individual, which includes personal identifying information,[66] as well as a photograph, a set of fingerprints, a description of the offense for which the offender was convicted, the date

states, require that a person convicted of a registerable sex offense in another jurisdiction who relocates to another state must register under that state's sex offender registration law immediately upon establishing residence in the state. *See* Logan, *Horizontal Federalism*, *supra* note 17, at 284–88.

51 N.Y. CORRECT. LAW § 168-a(2) (McKinney 2014).

52 N.Y. PENAL LAW § 130.20 (McKinney 2009).

53 *See id.* § 130.30.

54 *See id.* § 130.25.

55 *See id.* § 130.60.

56 *See id.* § 230.34.

57 *See generally id.* §§ 130.00–130.96.

58 *See* N.Y. CORRECT. LAW § 168-a(3) (McKinney 2014).

59 N.Y. PENAL LAW § 130.35 (McKinney 2009).

60 *See id.* § 130.65.

61 *See id.* § 130.75.

62 *See id.* § 130.95.

63 N.Y. CORRECT. LAW § 168-a(3).

64 The masculine gender will be used to refer to sex offenders throughout this Note. This is not to imply that only men commit sexual offenses. Data demonstrates, however, that men are overwhelmingly the perpetrators of sex crimes. *See* David Finkelhor, *The Prevention of Childhood Sexual Abuse*, THE FUTURE OF CHILD.: PREVENTING CHILD MALTREATMENT, Fall 2009, at 169, 171.

65 N.Y. CORRECT. LAW § 168-f(1).

66 Such information includes "[t]he sex offender's name, all aliases used, date of birth, sex, race, height, weight, eye color, driver's license number, home address and/or expected place of domicile, any internet accounts with internet access providers belonging to such offender and internet identifiers that such offender uses." *Id.* § 168-b(1)(a).

of conviction, the sentences imposed, and any other information the DCJS deems pertinent.[67]

The duration of registration required by a sex offender depends on his risk classification level and designation,[68] which is determined by the Board of Examiners of Sex Offenders.[69] Level One offenders, who constitute a low risk of reoffending, are required to register annually for a period of twenty years from the initial date of registration, regardless of designation.[70] Level Two offenders, who constitute a moderate risk of reoffending, are required to register annually for life, regardless of designation.[71] Any offender who has been assigned as Level Three—at high risk of reoffending—is required to register for life, regardless of designation, and must personally verify his address every ninety days to law enforcement of competent jurisdiction.[72] In all cases, the relevant law enforcement agencies having jurisdiction over the sex offender—or having had jurisdiction at the time of conviction—may disclose pertinent information to the public, in varying degrees.[73]

Any sex offender who has been pardoned by the governor of New York State or whose conviction has been overturned on appeal is no longer required to register under SORA.[74] A registrant who is classified as a Level Two risk, not designated as a sexual predator, sexually violent offender, or a predicate sex offender, and who has been registered for a minimum of thirty years may petition the court for relief from registration.[75] In such a case, the burden is on the registrant to prove by

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67 *See id.* § 168-b(1)(b)–(f).

68 Sex offender designations include "sexual predator," "sexually violent offender," and "predicate sexual offender." For definitions of these terms, see N.Y. CORRECT. LAW § 168-a(7)(a)–(c).

69 *See id.* § 168-*l*(5)–(6). The Board of Examiners of Sex Offenders determines an offender's risk level classification based on a number of factors, including risk of repeat offense, threat to public safety, the presence of mental abnormality or personality disorder, etc. *See id.* § 168-*l*(5).

70 *Id.* § 168-h(1).

71 *Id.* § 168-h(2).

72 *See id.* § 168-h(2)–(3).

73 *See id.* § 168-*l*(6)(a)–(c). For Level One offenders, only notification to law enforcement is authorized, however members of the public may call a special telephone number and inquire whether a named individual is listed. *See id.* § 168-p(1). For Level Two offenders, law enforcement is authorized to release identifying information, including a photograph and description of the offender, as well as the exact name and address of the offender, to "vulnerable organizational entities within its jurisdiction." *Id.* § 168-*l*(6)(b). Such entities include, but are not limited to, superintendents of schools or chief school administrators, superintendents of parks, public and private libraries, public and private school bus transportation companies, day care centers, nursery schools, pre-schools, neighborhood watch groups, community centers, civic associations, nursing homes, victims' advocacy groups, and places of worship. *See id.* For Level Three offenders, law enforcement, in addition to being authorized to disseminate to vulnerable entities the information described for Level Two offenders, must include this information in a subdirectory to be made available to the public. *Id.* § 168-*l*(6)(c).

74 *Id.* § 168-f(5).

75 *Id.* § 168-o(1).

clear and convincing evidence that his risk of re-offense and threat to the public is such that continued registration is no longer necessary.[76] Sex offenders who fail to register or verify as prescribed in SORA face a Class E felony conviction for the first failure to register, and a Class D felony conviction upon a second or subsequent failure to register.[77]

3. Relocation and Change of Address

SORA becomes ambiguous when considering its provisions for change of address by and relocation of sex offenders. Sex offenders are required to register with the DCJS no later than ten days after a change of address.[78] Furthermore, if a sex offender relocates to another state, the DCJS is required to notify the appropriate law enforcement agency in the offender's new state of residence with which the sex offender must register.[79] DCJS must also provide the offender with general information regarding the registration and notification requirements of the new state and jurisdiction,[80] including, at a minimum, the telephone numbers and addresses of appropriate law enforcement agencies from which offenders can obtain additional information and guidance.[81] It is

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76 *Id.*

77 *Id.* § 168-t ("Any sex offender required to register or to verify pursuant to the provisions of this article who fails to register or verify in the manner and within the time periods provided for in this article shall be guilty of a class E felony upon conviction for the first offense, and upon conviction for a second or subsequent offense shall be guilty of a class D felony."). Class D felonies carry a maximum sentence of seven years. *See* N.Y. PENAL LAW § 70.00(2)(d) (McKinney 2009). Class E felonies carry a maximum sentence of four years. *See id.* § 70.00(2)(e).

78 N.Y. CORRECT. LAW § 168-f(4) (McKinney 2014). This implicitly applies to both in-state and out-of-state relocation. *See* Greissman, *supra* note 2, at 193 n.73. Sex offenders must also notify the DCJS of any changes to internet accounts, internet identifiers, or changes to the status of enrollment, residence, attendance, or employment at any institute of higher education. N.Y. CORRECT. LAW § 168-f(4).

79 *Id.* § 168-j(3).

80 *Id.* § 168-c(4). Neither section168-j(3) nor section168-c(4) provide explicit guidance to an offender regarding what his registration obligations are under New York's statute following relocation out-of-state. In an email communication with the DCJS, the Division noted that

> [*w*]*hen asked*, the Registry advises offenders that they are free to move to another state or country but they must notify the local police department of the new state or country that they are moving into the area. That state or country will determine whether they need to register as a sex offender there. Additionally, offenders are advised that registration requirements do not end when they move to another state and they must notify DCJS of their new address within 10 days. They will not be removed from the New York State Sex Offender Registry.

E-mail from N.Y. Sex Offender Registry, Dep't of Criminal Justice Servs., to author (Nov. 5, 2015, 12:08 PM) (emphasis added) (on file with author).

81 § 168-c(4). Section 168-c(4) reads, in part: "The division shall provide general information . . . to registrants concerning notification and registration procedures that may apply if the registrant . . . relocates to another state . . . . Such information shall include

further prescribed that the local law enforcement agency having jurisdiction over the new place of residence must follow the registration and notification provisions set forth in the statute.[82]

The statute remains silent on whether those convicted of an offense for which ongoing registration in New York is required must continue to register upon relocation to a different state.[83] This statutory ambiguity has forced at least one court to resort to reading into the statute a requirement of continued registration following out-of-state relocation.[84] The Appellate Division directly addressed this issue in *Doe v. O'Donnell*,[85] which is discussed in the next section.

C. *Judicial Interpretations of SORA*

1. *Doe v. O'Donnell*: The Interpretation of SORA by New York's Appellate Division, Third Department

In 1997, John Doe, a resident of New York State, was convicted of the crime of sodomy in the third degree for which he was adjudicated a

addresses and telephone numbers for relevant agencies from which additional information may be obtained." *Id.*

82 *Id.* § 168-j(2).

83 *See generally* N.Y. CORRECT. LAW § 168.

84 *See* Doe v. O'Donnell, 86 A.D.3d 238 (N.Y. App. Div. 3d Dep't 2011). Three cases that are factually different from *Doe v. O'Donnell* have accepted the proposition of continued registration after out-of-state relocation. In *Spiteri v. Russo*, No. 12–CV–2780, 2013 WL 4806960 (E.D.N.Y. Sept. 7, 2013), a California resident (plaintiff) who was adjudicated a sex offender in California and who had temporarily relocated to New York as a nonresident worker, challenged the constitutionality of his adjudication as a Level Three sex offender and his subsequent registration requirement—as a nonresident worker—under New York's statute. *Id.* at *2. The United States District Court for the Eastern District of New York granted defendants' motion to dismiss, dismissing plaintiff's constitutional law claims and holding that plaintiff's status as a nonresident worker did not exempt him from being adjudicated and required to register even if he was in California at the time of his risk level determination hearing. *See id.* at *1. The court cited *Doe v. O'Donnell* for the proposition that the New York legislature's interest in protecting vulnerable populations from the threat of recidivist offenders persisted even when an offender leaves the state. *See id.* at *11. In *People v. Melzer*, 89 A.D. 3d 1000 (N.Y. App. Div. 2011), decided just a few months after *Doe v. O'Donnell*, the Second Department held that the Supreme Court of New York "did not err in conducting the risk level assessment hearing after the defendant had moved back to New Jersey," citing that dual purposes of the statute, as articulated in *Doe v. O'Donnell*, would be frustrated if such were the case. *Id.* at 1001. In *People v. Shim*, 28 N.Y.S.3d 87 (App. Div. 2016), the court held that a defendant's deportation from the United States did not render his appeal from his designation as a Level Two sex offender academic. The court accepted in dicta *Doe v. O'Donnell*'s holding, stating that "[e]ven if a sex offender were to relocate to another state, the offender would still be required to comply with the registration." *Shim*, 28 N.Y.S.3d at 90 (citing *Doe v. O'Donnell*, 86 A.D.3d 238).

85 *Doe v. O'Donnell*, 86 A.D.3d 238.

Level Two sex offender and required to register under SORA.[86] Shortly thereafter, Doe relocated to Virginia, where he was also required to register as a sex offender under Virginia's Sex Offender and Crimes Against Minors Registry Act.[87] In 2008, Doe successfully petitioned the Circuit Court for Fairfax County, Virginia for removal of his name from Virginia's sex offender registry.[88]

The same year, Doe filed his annual registration forms with the DCJS, requesting that he be removed from the New York registry.[89] The Division denied his request, stating that he had an obligation to register annually for life under SORA.[90] In 2009, Doe commenced an action under Article 78 of the New York's Civil Practice Law and Rules[91] seeking to dispose of the Division's determination that he must continue to register as a sex offender in New York on the grounds that requiring his continued registration was in excess of the Division's authority under SORA and in violation of various United States constitutional provisions.[92]

On appeal from the dismissal of Doe's petition by the supreme court, the Appellate Division considered the application of SORA to those persons who were convicted of registerable offenses in New York and who had subsequently relocated out-of-state.[93] Doe argued that the language and legislative intent of SORA signaled that it is not to be applied to those who have left New York State, and that the DCJS therefore lacked the authority and jurisdiction to direct his continued registration.[94] Linked to this argument, Doe further contended that requiring him to continue to register in New York constituted an extraterritorial application of the statute.[95] Finally, Doe argued that requiring a sex offender to continue to register under New York's statute, while at the same time being required to register under the relevant statute in the new state of residence—thereby subjecting an offender to the registration requirements of more than one state for the

86 *Id.* at 239.

87 *Id.* Virginia's sex offender registry is codified at VA. CODE ANN. §§ 9.1-900–9.1-923 (West 2011). The statute requires registration for "[a]ny offense for which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted." *Id.* § 9.1-902(A)(6). For new residents and nonresident offenders, the statute provides that "[a]ll persons required to register shall register within three days of establishing a residence in the Commonwealth." *Id.* § 9.1-905(A).

88 *Doe v. O'Donnell*, 86 A.D.3d at 239. For the process by which a registrant may petition to be removed from Virginia's sex offender registry, see § 9.1-909.

89 *Doe v. O'Donnell*, 86 A.D.3d at 239.

90 *Id.*

91 N.Y. C.P.L.R. § 7801 (McKinney 2008). An Article 78 proceeding is used to challenge the decision of a New York State or local agency in the New York courts.

92 *Doe v. O'Donnell*, 86 A.D.3d at 239–40.

93 *See id.* at 239.

94 *See id.* at 240.

95 *See id.* at 242.

same offense—constituted a violation of the U.S. Constitution's Full Faith and Credit Clause.[96]

The Appellate Division affirmed the supreme court's decision below, accepting DCJS's interpretation of SORA and holding that the establishment of residence outside of New York State did not relieve a sex offender of his obligation to register under SORA.[97] In rejecting Doe's extraterritorial application argument, the court reasoned that because his registration requirements arose from the commission and conviction of a crime while he was a resident of New York State, the statute, as applied, had no extraterritorial effect.[98] In support of its rejection of Doe's argument that requiring him to double register violated the Full Faith and Credit Clause of the Constitution,[99] the court held that the Clause is simply not implicated.[100] Because two different states separately adjudicated the risk Doe posed to the citizens of each state, and independently imposed registration requirements on him pursuant to each state's relevant sex offender statute, Full Faith and Credit did not apply.[101]

The main thrust of the court's reasoning focused on its attempts to ascertain the legislative intent of SORA, primarily by undertaking a textual analysis of the statute.[102] Because the statute is meant to be remedial and regulatory—and not punitive—in nature, the court assumed a broad and liberal interpretation of it in order to effectuate its purpose.[103] The Appellate Division reasoned that when a statute clearly describes the situations for which it applies, and omits or excludes any

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96 *See id.* at 243.

97 *See id.* at 240–43.

98 *See id.* The court qualified this point in a footnote, stating:

> [e]ven if SORA's registration requirements had such effect in these circumstances, given the absence of any provision in SORA requiring an offender's removal from New York's registry upon relocation, the remedial nature of the statute and its aim of protect[ing] communities by notifying them of the presence of individuals who may present a danger and enhancing law enforcement authorities' ability to fight sex crimes, we would conclude that the Legislature intended the lifetime registration requirement to apply without regard to whether an offender has moved out of the state.

Id. at 242 n.1 (alteration in original) (citations omitted).

99 U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.").

100 *Doe v. O'Donnell*, 86 A.D.3d at 243.

101 *Id.*

102 *See id.* at 240 ("[W]hen interpreting a statute, we attempt to effectuate the intent of the Legislature and the starting point for discerning such intent is the language of the statute." (alteration in original)).

103 *See id.* Courts will generally interpret criminal or punitive statutes narrowly, resolving ambiguities in favor of the defendant. This is known as the rule of lenity. *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885 (2004).

specific, qualifying exceptions,[104] an inference must be drawn that such exceptions were intended to be omitted or excluded by the enacting legislature.[105] Thus, the court concluded, the New York Legislature would have explicitly addressed the issue of continued registration after relocation out-of-state had they intended the registration obligation to cease upon doing so.[106]

The court also examined the legislative history behind enacting SORA.[107] The Appellate Division quoted directly from the New York State Bill and Veto Jacket associated with the law's passage, focusing heavily on the Senate Introducer's Memo in support of the bill,[108] to highlight the motivations and reasons for the statute's enactment.[109] Based on this analysis, the court reasoned that the dual purposes of the statute—tracking the location of sex offenders and aiding police in prosecuting recidivist offenders—would be frustrated if an offender's registration obligations were to cease upon leaving New York.[110] This would be particularly true, the court concluded, without the approval of a petition for removal after thirty years of registration, the reversal of a conviction following appeal, or a pardon by the Governor.[111] The concern expressed by the court was that offenders could leave and return to New York without re-registering, or relocate minutes outside the New York State border, posing a continued threat to the safety of New York citizens, running directly counter to the intended function of the statute.[112] The court thus concluded that requiring continued registration after a registrant-offender left New York State was the only way the "dual purposes" of the statute could be effectuated.[113]

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104 The court rightly noted that while SORA makes mention of an offender's relocation outside of New York, it does not pass on the issue of continued registration after having done so. *See Doe v. O'Donnell*, 86 A.D.3d at 241.

105 *Id.* at 241 ("Where a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." (quoting Rodgers v. N.Y.C. Fire Dep't, 80 A.D.3d 1091, 1094 (N.Y. App. Div. 2011)).

106 *Id.*

107 *See id.*

108 *See* S.11-B, 218th Sess., Sen. Introducer Mem. (N.Y. 1995) (on file with author).

109 *See Doe v. O'Donnell*, 86 A.D.3d at 241.

110 *Id.* at 241–42.

111 *Id.* at 240–41 ("While there is a procedure under SORA by which a risk level two sex offender may commence a proceeding to be removed from the requirements of registration, removal is unavailable until the sex offender has been registered for 30 years, and then only upon a finding that the offender's 'risk of repeat offense and threat to public safety is such that registration or verification is no longer necessary'. Otherwise, exemption from SORA's registration obligations is permitted only upon appellate reversal of the sex offender's conviction or a pardon by the Governor." (citations omitted)).

112 *Id.* at 241–42.

113 *Id.* at 242 ("Only by continually monitoring a sex offender's whereabouts for the duration of his or her registration requirement can these express purposes be effected. Thus, we hold

Legislative history available during the time SORA was passed indicates that the New York Legislature was indeed troubled by the threat sex offenders might pose to communities after having been released from custody.[114] Senate Sponsor Dean G. Skelos, in his letter to the New York State Governor's Executive Chamber, promoted New York's version of Megan's Law as a combination of the state's responsibility of protecting its citizens from recidivist offenders, and empowering parents and guardians to protect themselves and their children by making information on sex offenders available to the general public.[115] The legislature was concerned that the lack of information available to law enforcement agencies significantly impaired their ability to conduct investigations, quickly apprehend sex offenders, and thus protect their communities.[116] It was feared that this, paired with the dearth of information available to the public, could result in a breakdown of the criminal justice system to effectively identify, apprehend, and prosecute offenders.[117] Annual registration requirements and related procedural guidelines were the Legislature's solution to this problem, allowing law enforcement and the state to monitor the whereabouts of sex offenders, and by extension provide useful and potentially lifesaving information to communities.[118]

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that the establishment of a residence in another state does not relieve petitioner of his SORA registration obligations.").

114 S.11-B, 218th Sess., Sen. Introducer Mem., at 2 (N.Y. 1995) ("Protecting the public, especially children, from sex offenders is a primary governmental interest and the registration of convicted sex offenders reentering the community is a control that helps protect individuals from victimization.") (on file with author). New York was also motivated to established its sex offender registration scheme due to the enactment of federal law that required them to do so. Under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071–14073 (repealed 2006), Congress mandated that each state enact its own Megan's Law, establishing a state-wide registry of convicted sex offenders. *See* S.11-B, 218th Sess., Sen. Introducer Mem., at 2. If New York State failed to establish its sex offender registry by September 1997, it would risk losing funding—up to $3 million in just one year—from the Byrne Formula Grant. *See id.* The Byrne Formula Grant was established by the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (1988), and made Federal funding available to state and local law enforcement agencies to help control violent and drug-related crime, and strengthen coordination and cooperation among the different arms of the criminal justice system. *See* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NATIONAL ASSESSMENT OF THE BYRNE FORMULA GRANT PROGRAM 1 (1997).

115 Letter from Senator Dean G. Skelos, Deputy Majority Leader for Legislative Operations, Senate of the State of N.Y., to the Honorable Michael C. Finnegan, Counsel to the Governor, N.Y. State Exec. Chamber (July 11, 1995) (on file with author).

116 *See* S.11-B, 218th Sess., Sen. Introducer Mem., at 3 (N.Y. 1995).

117 *See id.*

118 *See id.* Assemblyman for the 45th District, Daniel L. Feldman, who co-sponsored the bill, wrote in his letter to the Governor's Counsel that

> [t]his bill allows the people of New York State to know what the State of New York already knows. When the law enforcement officers . . . have information that, when made available to individuals, may save lives, we are obligated to design a fair and reasonable plan for providing access to that information.

The available legislative history at the time SORA was passed in 1994 does not address the issue of what registration obligations, if any, an offender would have after relocating outside of New York State. As originally proposed and enacted, the statute itself did not include section 168-c(4) as it is currently known.[119] While the Act provided guidelines for what a registrant must do upon a change of address and prescribed the duties of the DCJS when an offender relocated to another state,[120] much like its current iteration, it was silent regarding continued registration following out-of-state relocation.

Section 168-c of SORA was amended in 2004 to expand the duties incumbent upon the DCJS after an offender relocates outside of New York State.[121] The purpose of the amendment was to advise New York registrants who have relocated out of the state of their duty to notify law enforcement officials in the new state of residence and of their registration obligations therein.[122] Although the DCJS, in response to a request for comment, expressed some concern regarding the vagueness of the terms in the proposed amendment, as well as the potential for duplication of procedures between the statutorily-prescribed duties of the DCJS and already-instituted DCJS policies and practices,[123] neither

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Letter from Daniel L. Feldman, Assemblyman 45th Dist., to the Honorable Michael Finnegan, Counsel to the Governor, N.Y. State Exec. Chamber (July 7, 1995) (on file with author). Further, he noted, "[i]f our 'Megan's Law' had been on the books several years ago, a number of New York's children might have been saved from murder." *Id.*

119 Section 168-c, specifically section 168-c(4), is the current provision of the SORA that specifies the responsibilities of the DCJS when a sex offender relocates out of state. For the original text of 168-c(4), see S.11-B, 218th Sess., Sen. Introducer Mem., (N.Y. 1995). The old provision is now codified in section 168-c(3) of the current statute. See N.Y. CORRECT. LAW § 168-c(4) (McKinney 2014) for its current text.

120 The original text of section 168-f(4) provided "[a]ny sex offender shall register with the division within ten calendar days prior to any change of address. The division shall, if the sex offender changes residence to another state, notify the appropriate state law enforcement agency with which the sex offender must register in the new state." S.11-B, 218th Sess., § 2 (N.Y. 1995). This provision is currently codified at section 168-j(3).

121 *See* N.Y. Assemb. 11599, 227th Leg., Reg. Sess. (N.Y. 2004). "The bill requires the Division of Criminal Justice Services to notify offenders sentenced in New York who are required to register under SORA that the registration requirement may continue under the laws of *other* U.S. states and possessions." *Id.* (emphasis added). The bill also amended section 168-k, which instructs the DCJS to provide information to officials in other states regarding the notification procedures required under SORA and what steps states can take to effect appropriate notification if a registrant relocates to New York. *Id.*

122 *See id.*

123 In a letter to the Legislature commenting on the draft amendment, Kimberly A. O'Connor, Deputy Commissioner and Counsel for the DCJS, noted that:

> The Division has several concerns regarding what information should be provided given the vagueness of certain language in the proposal, e.g. "general information," "relevant agencies." In addition, "registrant" is not defined in the statute . . . . It is believed that the drafters intended that the provision apply to each registered "sex offender," as defined in Correction Law § 168-a(1) . . . .

the Legislature nor any other potential stakeholders to the statute either explicitly or implicitly passed on out-of-state registration requirements. Section 168-c(4) has not been revised since the 2004 amendment, and the statute—and legislative history and intent—remains silent on the issue of continued registration in New York upon relocation to another state.

2. Another Perspective: *Roe v. O'Donnell* and the Supreme Court of Albany's Interpretation of SORA

At least one court in New York has held that once an offender leaves New York, he leaves the jurisdiction of SORA, and is thus no longer required to register.[124] The Supreme Court of Albany County—interestingly, also in the Third Department—rejected the DCJS's interpretation of SORA in *Roe v. O'Donnell*, decided two years before *Doe v. O'Donnell*.[125] The court held that under the established law of the Third Department, the relevant sex offender laws in the new state of residence control the registration process.[126]

The court interpreted the plain language of the statute to hold that after an offender has relocated outside of New York, the DCJS is responsible only for notifying the appropriate law enforcement agency having jurisdiction in the new state of residence of the sex offender's presence therein.[127] Thereafter, "New York's statutory authority only

Id. at 6. Further, the letter notified the Legislature of a number of procedures that the DCJS already had in place to notify sex offenders of their registration obligations, if any, in their new state of residence. *See id.* Ms. O'Connor noted that the DCJS would not take a position on the proposed legislation. *Id.* Incidentally, it appears as though none of these concerns were factored into the final amendment that was eventually passed into law.

124 Roe v. O'Donnell, No. 3536–09, at *5 (N.Y. Sup. Ct. Albany Cty. Nov. 6, 2009) (judgment pursuant to Article 78 of the N.Y. C.P.L.R.) (on file with author).

125 DCJS argued that since none of the statutorily prescribed criteria for removal applied to petitioner, he was required to remain on the registry and comply with registration obligations. *Id.* at *4. The Division reasoned that such an interpretation best furthered the goal of the Legislature "to protect the citizens of this state from convicted sexual offenders." *Id.* The Appellate Division accepted this interpretation in *Doe v. O'Donnell*.

126 *Id.* at *5. The court cited *People v. Arotin* as the controlling authority in the Third Department. 19 A.D.3d 845 (N.Y. App. Div. 2005). There, the court considered a challenge by a sex offender to a decision that placed him at a risk-level classification in New York that was higher than what he had been classified in Ohio, the state in which he was convicted. *Id.* at 845. In rejecting his challenge, the *Arotin* court found that "[t]he administrative manner in which a state chooses to exercise the registration requirements for a sex offender who moves into its jurisdiction falls squarely within the power of that state and is not governed by the procedures in effect in the state where the offender previously resided" and therefore New York's statutory scheme applied. *Id.* at 846–47.

127 *Roe v. O'Donnell*, No. 3536-09, at *5.

controls the regulation process when and if petitioner is residing, working, or attending school in New York State."[128]

The supreme court considered the goals and legislative intent of New York State in enacting SORA, and concluded—while not reaching the constitutional arguments advanced by petitioner[129]—that the interpretation of the statute by DCJS had the effect of providing it, and New York State, with the "authority to exercise continuing regulatory jurisdiction over petitioner after he moved out of New York," which was both "irrational and contrary to law."[130] In view of this, the court granted the offender's petition for removal from his registration obligations under SORA.[131] While *Roe v. O'Donnell* is only one decision from New York's lowest court—and was effectively abrogated by *Doe v. O'Donnell*—it represents an approach to SORA that is in direct contravention to the Appellate Division's interpretation thereof in *Doe v. O'Donnell*, and signals disagreement among New York courts on the issue of continued registration in New York following out-of-state relocation.

D. *Registration Requirements in Other Jurisdictions: A Sample*

Although the laws leading up to SORNA's passage[132]—and SORNA itself—have prescribed a number of elements that states must incorporate into their sex offender laws and policies,[133] these standards represent a floor, not a ceiling for state registration and notification systems.[134] Criminal and corrections law (including remedial and regulatory law such as sex offender laws) have always been considered to be within the domain of the states,[135] and vis-à-vis sex offender laws,

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128 *Id.*

129 Petitioner submitted that continued registration violated his constitutional rights to due process, and violated the Full Faith and Credit Clause of the Constitution. *Id.* at *3.

130 *Id.* at *6.

131 *Id.*

132 *See supra* note 22 and accompanying text.

133 *See* Logan, *Horizontal Federalism*, *supra* note 17, at 280–81 ("Today, all U.S. jurisdictions have registration laws in effect, prompted by the federal government's threats in the Jacob Wetterling Act [] and Megan's Law [] to withhold funds from non-compliant states. The laws specify that states must register persons convicted of criminal offenses against victims who are minors, as well as those convicted of a 'sexually violent offense,' and maintain registration of such individuals for a minimum of ten years. The Pam Lyncher Act [] . . . requires lifetime registration for offenders with two or more prior convictions for registration-eligible offenses and those initially convicted of specified 'aggravated' sex offenses. Finally, in 1998, Congress required that states take steps to identify 'sexually violent predators,' by means of judicial hearings. Such offenders . . . are subject to lifetime registration and must verify their address information with the state on a quarterly basis . . . ." (footnotes omitted)).

134 *Id.* at 279.

135 *See* Rochin v. California, 342 U.S. 165, 168 (1952) ("In our federal system the administration of criminal justice is predominantly committed to the care of the

states have met, and in many cases have gone far beyond, the implementing guidelines mandated by federal law.[136] This Section examines sex offender registration requirements as articulated in other state statutes and guidelines, namely those in Michigan, California, and New Jersey, as well as the federal registration requirements under SORNA.[137] These states were chosen for analysis based on population size generally, the size of the registered sex offender population, and the required duration of registration as prescribed in their respective sex offender registration laws.[138] New Jersey, in particular, was selected because it is the Megan's Law that New York's Sex Offender Registration Act is modeled after.

Michigan's Sex Offenders Registration Act[139] employs a tiered classification system similar to New York's, and requires varied registration duration depending on what tier level an offender is adjudicated.[140] Sex offenders are required to report a change of address either within or outside the state immediately before relocating.[141] Although continued registration is not written into the statute, this statutory ambiguity is somewhat clarified via the Michigan State Police website, where the frequently asked questions section advises that offenders who establish residence outside of the state no longer appear on the Public Sex Offender Registry website and are no longer considered active registrants unless they re-establish residency in Michigan.[142]

States. . . . Broadly speaking, crimes in the United States are what the laws of the individual States make them . . . ."); Logan, *Horizontal Federalism*, *supra* note 17, at 258–59 ("Consistent with the tenets of 'fifty-labs' federalism, and the Supreme Court's abiding reluctance to regulate state criminal law and its attendant sanctions, states continue to evince diverse views on criminal law matters in particular." (footnotes omitted)).

136 *See* Logan, *Horizontal Federalism*, *supra* note 17, at 281 ("States are free to broaden the list of offenses warranting registration, lengthen the mandated minimum periods of registration, and impose more stringent registration regulations than federal law. As a result, significant variation exists in the types of offenses warranting registration under state laws." (footnote omitted)).

137 This Note to does not undertake a fifty-state survey on the issue of continued registration following out-of-state relocation. For a comprehensive overview of the States' respective sex offender registration statutes, see SMITH, *supra* note 12.

138 *See Number of Registrants Reported by State/Territory*, PARENTS FOR MEGAN'S LAW & THE CRIME VICTIMS CTR., http://www.parentsformeganslaw.org/public/meganReportCard.html (last visited Nov. 27, 2015) (reporting the number of sex offenders residing in each state from 2005–2015).

139 MICH. COMP. LAWS ANN. § 28 (West 2012).

140 *See id.* § 28.725(10)–(12).

141 *See id.* § 28.725(6) ("An individual required to be registered under this act who is a resident of this state shall report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located immediately before he or she changes his or her domicile or residence to another state.").

142 Sex Offender Frequently Asked Questions, MICH. STATE POLICE, http://www.michigan.gov/msp/0,4643,7-123-1878_24961---,00.html (click Sex Offender Registry FAQs and search for question number 22) (last visited May 18, 2016). The Michigan State

California's sex offender registration statute[143] requires persons adjudicated as sex offenders who reside in California to register for life.[144] When relocating within or outside the state, registered sex offenders must notify law enforcement within five working days following a change of address.[145] While the statute is silent on the issue of continued registration, the California Department of Justice—the body responsible for effectuating the statute—has noted that it does not have continuing jurisdiction over an offender who relocates outside the state.[146]

New Jersey's Megan's Law,[147] on which New York's sex offender registration statute is modeled,[148] requires adjudicated sex offenders to register for life.[149] If a sex offender changes addresses, he is required to notify the law enforcement agency in the jurisdiction he is leaving, as well as the law enforcement agency in his new jurisdiction within ten days before moving.[150] New Jersey's statute, like those in Michigan and California, is silent on whether a sex offender convicted and adjudicated in New Jersey must continue to register after leaving the state. Similar to Michigan, however, the New Jersey State Police website provides information regarding removal from the state's registry, stating that removal can occur in situations where the offender has died, has been

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Police—the owner and operator of the Frequently Asked Questions database—has been statutorily tasked as being the administering agency of the Michigan registry and the repository for sex offender data. *See* MICH. COMP. LAWS ANN. § 28.728.

143 CAL. PENAL CODE §§ 290–294 (West 2014).

144 *Id.* § 290(b) ("Every person described in subdivision (c), for the rest of his or her life while residing in California, or while attending school or working in California, as described in Sections 290.002 and 290.01, shall be required to register with the chief of police of the city in which he or she is residing . . . .").

145 *Id.* § 290.013(a) ("Any person who was last registered at a residence address pursuant to the Act who changes his or her residence address, whether within the jurisdiction in which he or she is currently registered or to a new jurisdiction inside or outside the state, shall, in person, within five working days of the move, inform the law enforcement agency or agencies with which he or she last registered of the move . . . .").

146 E-mail from Cal. Dep't of Just., Cal. Sex Offender Registry, to author (Dec. 1, 2015, 01:36 PM) (on file with author) ("[T]he DOJ does not have jurisdiction of registration requirements, when a sex offender relocates to another state.").

147 N.J. STAT. ANN. §§ 2C:7-1–2C:7-11 (West 2015).

148 *See supra* Section I.B; S.11-B, 218th Sess., Sen. Introducer Mem., at 3 (N.Y. 1995) ("[A] driving force behind the passage of New York's version of Megan's Law was the untiring support of many crime victim advocates. Special recognition should be given to Maureen Kanka of New Jersey . . . who admirably used [her] personal traged[y] to heighten the awareness necessary for passage of this legislation.").

149 N.J. STAT. ANN. § 2C:7-2.

150 *Id.* § 2C:7-2(d)(1) ("Upon a change of address, a person shall notify the law enforcement agency with which the person is registered and shall re-register with the appropriate law enforcement agency no less than 10 days before he intends to first reside at his new address.").

reclassified under the statute, or the offender no longer resides in the state.[151]

Under the federal sex offender registration act, SORNA, a sex offender is required to register and keep his registration current where he resides, is an employee, or is a student.[152] SORNA does not specifically prescribe the removal of a sex offender from a state's registry once he has moved out of that state,[153] and thus SORNA's registration requirement could be interpreted to contemplate the possibility that sex offenders will be registered in more than one state.[154] The plain language of the statute, however, would seem to imply that an offender need only register in the state of conviction "for initial registration purposes only" if that state is different from the one in which he currently resides,[155] and keep his registration current based only on his state of residence.[156]

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151 *New Jersey Sex Offender Internet Registry: Important Information for Sex Offenders*, N.J. STATE POLICE, http://www.njsp.org/sex-offender-registry/so-important-information.shtml (last visited Nov. 21, 2015) ("The removal of a sex offender's name from the Sex Offender Registry can occur for the following reasons: death of the individual; the individual no longer resides in the State of New Jersey; or reclassification of the individual to a Tier 1."); *see also* N.J. STATE POLICE, ACKNOWLEDGMENT OF DUTY TO REGISTER, RE-REGISTER AND VERIFY ADDRESS, http://www.njsp.org/spoff/pdf/010311-meganslaw-acknowledge-eng.pdf (last visited Nov. 21, 2015) ("I understand that if I move out of New Jersey and then move back to New Jersey, I must *re-register* within 10 days of returning to this State with the local law enforcement agency in the town where I live." (emphasis added)).

152 42 U.S.C. § 16913(a) (2012) ("A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.").

153 *See id.* §§ 16901–16962; Spiteri v. Russo, No. 12–CV–2780, 2013 WL 4806960 (E.D.N.Y. Sept. 7, 2013).

154 A number of courts have explicitly interpreted SORNA in such a way, with at least one having had this proposition abrogated by the same circuit in a later case. *See, e.g.*, United States v. Begay, 622 F.3d 1187, 1196 (9th Cir. 2010), *abrogated by* United States v. DeJarnette, 741 F.3d 971, 982 (9th Cir. 2013) (holding that SORNA did not obligate the defendant to register in the jurisdiction in which he was convicted of the sex offense when he resided in a different jurisdiction); United States v. Gundy, No. 13 Crim. 8, 2013 WL 2247147, at *10 (S.D.N.Y. May 22, 2013) ("Section 16913 requires offenders to register in each jurisdiction where they reside, work, or study . . . ."), *rev'd*, 804 F.3d 140 (2d Cir. 2015); *Spiteri*, 2013 WL 4806960, at *43 (holding that New York's Sex Offender Registration Act was not pre-empted by SORNA and dismissing defendant's Supremacy Clause claim with prejudice).

155 42 U.S.C. § 16913(a).

156 For information regarding SORNA's registration applicability to offenders who have relocated outside of the United States and its territories, see *infra* note 190.

II. ANALYSIS: THE IMPLICATIONS OF *DOE V. O'DONNELL*: HORIZONTAL FEDERALISM AND OFFENDERS' RIGHTS

A. *Horizontal Federalism*

The result of the Appellate Division's holding in *Doe v. O'Donnell* is the application of one state's statutory requirements on residents of other states. While the Appellate Division in *Doe v. O'Donnell* held that SORA's continued registration requirement does not implicate a number of federal constitutional issues,[157] it is important to consider the impact that such a ruling might have on the notion of states as individual sovereigns.[158] And despite the fact that the Appellate Division dismissed plaintiff's argument that requiring continued registration after relocating outside of New York did not constitute an extraterritorial application of the statute,[159] the well-held presumption against extraterritoriality is worthy of consideration, particularly in the context of an examination of horizontal federalism.[160]

The concept of horizontal federalism encompasses the idea that states are equal sovereigns, each exclusively responsible for those individuals who reside within their respective borders, pursuant to their own laws.[161] Issues of horizontal federalism are implicated when states act in ways that run contrary to this notion of co-equality, causing interstate friction,[162] the manifestations of which vary based on the type of conduct undertaken by a state.[163] The concept of "overreaching"[164] is

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157 Doe v. O'Donnell, 86 A.D.3d 238, 242 (N.Y. App. Div. 3d Dep't 2011) (holding that "the statute as applied has no extraterritorial effect"). At least one federal court has adopted *Doe v. O'Donnell*'s holding in dicta. *See generally Spiteri*, 2013 WL 4806960 (holding that SORA did not violate equal protection, substantive and procedural due process, the right to travel; did not implicate federal pre-emption, the Privileges and Immunities clause, Full Faith and Credit clause, Commerce Clause, or Dormant Commerce Clause, or Cruel and Unusual Punishment; nor was it void for vagueness as applied to plaintiff).

158 *See* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 507 (2008) ("Long-established constitutional doctrine holds that all states exist on an 'equal footing' and are 'equal in power, dignity, and authority.'").

159 *Doe v. O'Donnell*, 86 A.D.3d at 241.

160 Extraterritorial application of state statutes is a concern inherent to the concept of horizontal federalism. *See* Jeffrey M. Schmitt, *Constitutional Limitations on Extraterritorial State Power: State Regulation, Choice of Law, and Slavery*, 83 MISS. L.J. 59, 110 (2014) ("As the debates over the extraterritorial application of . . . law demonstrate, however, the historical antecedents of the doctrine are grounded in concern over the proper allocation of power between the states, or horizontal federalism.").

161 *See* Erbsen, *supra* note 158, at 503 ("In most cases, we can think of horizontal federalism as encompassing the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions.").

162 *See id.* at 529 ("[D]isputes [implicating horizontal federalism] can involve a mix of private citizens, state instrumentalities, or states themselves . . . .").

163 *See id.* at 514–28 (describing the possible sources of interstate friction).

most instructive for examining the implications of *Doe v. O'Donnell*'s holding, as it considers the impact on interstate relations when one state attempts either to regulate out-of-state conduct, or exercise civil or criminal jurisdiction over those individuals who do not reside within its borders.[165]

As mentioned in Section I.B, section 168-f(4) of SORA requires a sex offender to notify the Division within ten days of a change of address.[166] Section 168-j(2) requires the law enforcement agency of jurisdiction in the new place of residence to carry out the registration requirements prescribed by the statute upon receipt of such change of address information.[167] By holding that a sex offender's registration obligations do not cease upon relocating outside of New York, the *Doe v. O'Donnell* court in effect obligates the law enforcement agency of jurisdiction—that is, the law enforcement agency in the new state of residence—to register an offender's whereabouts on behalf of New York State.[168] This is particularly troubling in cases—much like petitioner's in *Doe v. O'Donnell*—where an offender has been relieved of his obligation to register in the new state, but must continue to do so—and by default must request the new state to assist him in doing so—pursuant to New York law.[169]

While the Appellate Division rejected petitioner's argument that continued registration constitutes an extraterritorial application of the statute,[170] it wholly failed to consider the burden this requirement might impose on the new state of residence. The presumption against extraterritorial application of statutes[171] has traditionally been understood, in part, to prohibit states from regulating the conduct of individuals outside their borders.[172] It could be argued—as the Appellate

164 "Overreaching" can be described as "efforts to extend the effective reach of state authority beyond a state's borders." *Id.* at 527.

165 *See id.* at 527–28.

166 N.Y. CORRECT. LAW § 168-f(4) (McKinney 2014).

167 *Id.* § 168-j(2).

168 In an e-mail correspondence with the Division of Criminal Justice Services, it was asked if sex offenders—pursuant to the statutory provisions that require them to periodically appear before law enforcement for address and photo verification, etc.—would have to appear in New York or if it is incumbent upon them to report to local law enforcement in their new state. The DCJS informed that "[t]he offender would appear to the agency having jurisdiction." E-mail from N.Y. Sex Offender Registry, Dep't of Criminal Justice Services, to author (Nov. 6, 2015, 9:04 AM) (on file with author).

169 *See generally* N.Y. CORRECT. LAW § 168.

170 Doe v. O'Donnell, 86 A.D.3d 238, 242 (N.Y. App. Div. 3d Dep't 2011).

171 It is worth noting that many scholars find the principle of extraterritoriality to be very confusing. "Modern legal scholarship has failed to provide a satisfying answer to a fundamental question about state power in our federal system: when can a state regulate conduct that occurs in another state? . . . According to many modern legal scholars, [it is] confusing, inconsistent, and unworkable as a matter of policy." Schmitt, *supra* note 160, at 60.

172 *See id.* at 67–68 ("The Supreme Court has imposed a much stricter prohibition against extraterritorial state legislation. Under this doctrine, the Court has held that the Constitution

Division did in *Doe v. O'Donnell*[173]—that because Doe's registration obligations under SORA are the product of his commission and conviction of a sex offense in New York, requiring him to continue to register in New York is not a regulation of his conduct in the new state per se, but merely a regulatory byproduct of the event that occurred within New York's borders. While the situation here might not implicate issues of extraterritoriality as it has come to be known jurisprudentially,[174] it nonetheless represents a statutory construction that has the effect of regulating citizens of another state and that other state itself, inherently implicating issues of horizontal federalism.[175]

In *American Libraries Association v. Pataki*, the District Court for the Southern District of New York struck down a New York law that made it a crime to knowingly send sexual or pornographic communication to a minor using computer-to-computer transmission.[176] The court found the law invalid under the Commerce Clause on the ground that the Clause "embodies a principle of comity that mandates that one state not expand its regulatory powers in a manner that encroaches upon the sovereignty of its fellow states (a horizontal limitation)."[177] The court found that it was improper for New

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prohibits a state from applying its statutes to conduct that 'takes place wholly outside of the State's borders.' Thus, a state may not 'project its legislation into other States.' The Court has based this doctrine both on the Dormant Commerce Clause and 'the inherent limits of the enacting State's authority.'" (footnotes omitted)).

173 *Doe v. O'Donnell*, 86 A.D.3d at 242.

174 *See supra* note 172 and accompanying text; *see also* Healy v. Beer Inst., Inc., 491 U.S. 324 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); Edgar v. MITE Corp., 457 U.S. 624 (1982).

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> [R]egulation by a particular jurisdiction outside its own territory raises a constellation of concerns. Other jurisdictions may . . . view such regulation as an encroachment on their sovereignty and autonomy. Competing claims by various sovereigns to regulate the same behavior may lead to inconsistent standards being applied and uncertainty on the part of actors who wish to conform their conduct to the law.

Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1064 (2009). Criminal and regulatory statutes generally fall under the "doctrine that one sovereign will not enforce the penal laws of another sovereign and by the assumption that regulatory laws are not intended by the enacting legislatures to have extraterritorial application." Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1885 (1987) (footnote omitted). This was a concern shared by the *Roe v. O'Donnell* court. Roe v. O'Donnell, No. 3536–09 at *6 (N.Y. Sup. Ct. Albany Cty. Nov. 6, 2009). Of course, this might not be a problem if the new state agreed to register the offender on behalf of New York State in the interest of comity, but the presumption of this willingness by the Appellate Division and the DCJS is problematic.

176 Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997).

177 *Id.* at 176.

York to "deliberately impose[] its legislation on the Internet" and that by doing so, New York "projected its law into other states."[178]

While the issue here does not implicate interstate commerce[179] in the same way Internet use did in *American Libraries* (and therefore the does not call into question the Commerce or the dormant Commerce Clauses), its "horizontal limitation" principle is important in that it announces a ceiling on state conduct across borders, not just vis-à-vis economic activity between the states, but one that takes account of relations between states more broadly.[180] If this idea of a horizontal limitation on state regulation can be extended to include regulation of non-economic conduct by states—and it is argued here that it can[181]—the Appellate Division's holding and subsequent implications necessarily run afoul of this principle.

Whether or not the statutory construction of SORA by the Appellate Division has any extraterritorial effect, the operation and result of such a construction is the imposition of the registration requirements of New York State's sex offender law on other states and their citizens. Although the Appellate Division concluded that even if the statute had such extraterritorial reach, the statutory silence and the legislative history and intent imply continued registration,[182] this does not get around important considerations of horizontal federalism that are an essential component of the extraterritoriality principle, but nonetheless stand alone as a central tenet of how the country and government are structured.[183] This is particularly important in light of

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178 *Id.* at 177. The court cited the Supreme Court's decision in *Edgar v. MITE Corp.* as support for its conclusion, stating "[t]he Court has more recently confirmed that the Commerce Clause precludes a state from enacting legislation that has the practical effect of exporting that state's domestic policies." *Id.* at 174.

179 In isolation, there is arguably little economic effect of a sex offender residing in one state and fulfilling his registration obligations therein (even if such obligations are required by another state). *See* Florey, *supra* note 175, at 1089.

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> [S]ome scholars have argued that the[] [Supreme Court's extraterritoriality cases] should be properly understood as rooted not specifically in the Commerce Clause but in broader structural notions of federalism implicit in the Constitution . . . . [One scholar] has argued that the Commerce Clause provides an inadequate basis for understanding the extraterritoriality principle because some state regulation that we would clearly condemn as extraterritorial has nothing to do with commerce.

Id.

181 *See id.*; *supra* Part III.

182 Doe v. O'Donnell, 86 A.D.3d 238, 242 n.1 (N.Y. App. Div. 3d Dep't 2011). For the full text of the court's footnote, see *supra* note 98 and accompanying text.

183 "'It is an essential attribute of . . . sovereignty, that it has no admitted superior, and that it gives the supreme law within its own domains on all subjects appertaining to its sovereignty.' Thus, 'no state . . . can, by its laws, directly affect, or bind . . . persons not resident therein.'" Schmitt, *supra* note 160, at 72 (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS: FOREIGN AND DOMESTIC §§ 8, 20 (Boston, Hillard, Gray, & Co. 1834)).

the fact that one other, albeit lower, New York State court has held—on facts similar to those in *Doe v. O'Donnell*—that once an offender leaves New York State, he leaves the jurisdiction of SORA and is subject only to the laws and regulatory scheme of his new state of residence.[184] Further, in consideration of the fact that a number of states relieve offenders of their registration obligations after they have moved out-of-state,[185] and that SORNA imposes federal jurisdiction upon offenders when they move from one state to another,[186] the Appellate Division's reasoning becomes increasingly tenuous.

B. *Constitutional Rights of Offenders*

The result in *Doe v. O'Donnell* implicates a number of important considerations not only between states, but also for the individual offender. What does an offender do if his new state of residence refuses to help him comply with New York's registration requirements? Must the offender periodically return to New York to fulfill his statutory registration obligations? Or does the offender not return to New York and risk prosecution under section 168-t[187] of the statute for failure to register? These questions implicate an array of constitutional issues, from the right to travel, to the authority of a state and its courts to hail nonresidents across its borders and subject them to suit therein.

The United States Supreme Court has recognized the freedom of movement and the right of citizens to travel within and across the several states as a fundamental right implicit in a number of constitutional provisions.[188] Courts have ruled that requiring a sex

184 *See* Roe v. O'Donnell, No. 3536–09, at *5 (N.Y. Sup. Ct. Albany Cnty. Nov. 6, 2009) (judgment pursuant to Article 78 of the N.Y. C.P.L.R.) (on file with author); *see also* People v. Arotin, 19 A.D.3d 845 (N.Y. App. Div. 2005). *But see* People v. Meares, 876 N.Y.S.2d 615, 623 (N.Y. Crim. Ct. 2009) (holding that because defendant was convicted in New York, New York had an interest in maintaining information about his whereabouts, even after he left the state). *People v. Meares* can be distinguished from *Doe v. O'Donnell*. There, the sex offender was only challenging prosecution under SORA for failure to notify the DCJS of his initial relocation to Connecticut. 876 N.Y.S.2d at 616.

185 *See supra* Section I.D.

186 42 U.S.C. § 16913 (2012).

187 N.Y. CORRECT. LAW § 168-t (McKinney 2014).

188 This right can be found in the Privileges and Immunities Clause of the Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1. "[T]he 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." Saenz v. Roe, 526 U.S. 489, 498 (1999) (quoting United States v. Guest, 383 U.S. 745, 757 (1966)); *see also* Paul v. Virginia, 75 U.S. 168, 180 (1868) (discussing the Privileges and Immunities Clause and stating "[i]t was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by

offender to register his travel plans or report a change of address do not infringe upon his right to travel because it does not fundamentally prevent him from travelling, it merely presents a de minimis burden on the offender that does not outweigh the governmental interest in monitoring his whereabouts.[189] While an offender's right to travel might not be implicated by requiring his continued registration in New York when local law enforcement in the new state is willing to help him do so, it is possible to imagine a scenario where, having been relieved of his registration obligations in the new state and therefore no longer required to report periodically to law enforcement therein, he must appear in New York to keep his registration current or else risk prosecution for failure to register. This would be particularly challenging if the offender had relocated to, say, Alaska or outside the United States entirely.[190] Such a burden might then rise to the level of violating his constitutionally protected right to travel by deterring travel altogether out of fear of prosecution for failure to register[191] or due to onerous travel costs in having to periodically appear in New York.

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other States; *it gives them the right of free ingress into other States, and egress from them*" (emphasis added)); Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (finding the Privileges and Immunities Clause to confer the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise"). "Scholars have suggested that the right to travel may be based in the Privileges and Immunities Clause of the Fourteenth Amendment; Article Four, Section Two; the Commerce Clause; or the Ninth Amendment." Regina Armon, Note, *The Nebulous Right to Travel as a Possible Limitation on "Child Safety Zones": The Greenwich Sex Offender Ordinance*, 10 CONN. PUB. INT. L.J. 441, 452 (2011) (footnotes omitted).

189 *See* United States v. Shenandoah, 595 F.3d 151, 163 (3d Cir. 2010) (holding that while "[s]ex offender registration requirements may be burdensome, and the consequences may interfere with a registrant's freedom. . . . [a]ny impediment on . . . travel does not reach the Constitutional threshold of [the] right to travel interstate"), *abrogated on other grounds by* Reynolds v. United States, 132 S. Ct. 975 (2012); Doe v. Moore, 410 F.3d 1337, 1348 (11th Cir. 2009) (holding that Florida's requirement that a sex offender notify law enforcement when changing addresses did not violate the constitutional right to travel); People v. McGarghan, 83 A.D.3d 422, 423 (N.Y. App. Div. 2011) (holding that New York's sex offender registration act does not violate plaintiff's right to travel), *accord* Spiteri v. Russo, No. 12–CV–2780, 2013 WL 4806960, at *37 (E.D.N.Y. Sept. 7, 2013).

190 Interestingly, the Supreme Court of the United States recently decided a case involving the question of whether SORNA's registration scheme requires a sex offender who has relocated to a foreign country to continue to update his registration in the jurisdiction where he formerly resided or was convicted. Nichols v. United States, 136 S. Ct. 1113 (2016). In a unanimous decision, the Court held that SORNA's registration provision, 42 U.S.C. § 16913(a) (2012), did not require a sex offender to update his registration upon or after leaving the relevant jurisdiction, noting that "[i]f the drafters of SORNA had thought about the problem of sex offenders who leave the country and had sought to require them to (de)register in the departure jurisdiction, they could easily have said so. . . ." *Nichols*, 136 S. Ct. at 1118.

191 "A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (citations omitted). "Any classification that penalizes the exercise of the right to travel survives scrutiny if it is necessary to promote a compelling governmental interest." *Ex parte* Mercado, No. 14-02-00750-CR, 2003 WL 1738452, at *5 (Tex. App. Apr. 3, 2003) (citing Dunn

An offender in this situation might also find a liberty interest in the Due Process Clause of the Fourteenth Amendment in avoiding being subject to the laws of another state or suit thereunder when he lacks sufficient contacts therein. The Supreme Court has placed limitations on the extent to which a court or a party to a conflict can subject an individual to suit in a state in which he or she is not a resident.[192] If an offender has been living outside of New York, as Doe had for more than sixteen years,[193] and has significantly cut off ties to the state, it would seem to offend "traditional notions of fair play and substantial justice"[194] to require him to continue to register therein.[195] This would become even more problematic if New York sought to prosecute him under section 168-t of the statute if he failed to register.[196]

III. PROPOSAL

Given that SORA and the legislative record behind its enactment have been completely silent on the issue of continued registration following out-of-state relocation, paired with the divergent approach of the Supreme Court of Albany County in *Roe v. O'Donnell*, the sex offender laws of other states, and the myriad constitutional issues that are implicated by such a requirement, this Note therefore proposes that New York courts, particularly the New York Court of Appeals if it has occasion to decide this issue, affirm the statutory provision requiring

v. Blumstein, 405 U.S. 330, 339 (1972)). In New York, the government would then have to demonstrate a compelling interest in requiring the continued registration in New York of a sex offender who lives in, say, Alaska.

192 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980) ("[A] . . . court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. The concept of minimum contacts . . . protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States . . . do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." (citation omitted)). "[I]f a State has only an insignificant contact with the parties, . . . application of its law is unconstitutional." Allstate Ins., Co. v. Hague, 449 U.S. 302, 310–11 (1981).

193 Brief for Appellant at 17, Doe v. O'Donnell, 86 A.D.3d 238 (N.Y. App. Div. 3d Dep't 2011) (on file with author).

194 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting Milliken v. Meyer, 311 U.S. 457, 663 (1940)).

195 "SORA does not require registration for occasional, brief trips into New York, for business or social reasons." Roe v. O'Donnell, No. 3536–09, at *5 (N.Y. Sup. Ct. Albany Cty. Nov. 6, 2009) (judgment pursuant to Article 78 of the N.Y. C.P.L.R.) (on file with author).

196 This links back to horizontal federalism. Some scholars have argued that the Supreme Court "should expand upon suggestions in cases like *World-Wide Volkswagen* that personal jurisdiction also has implications for the balance of power among the various states." Florey, *supra* note 175, at 1081.

notification of a change of address within ten days of relocating,[197] and terminate a sex offender's registration obligations in New York after having left the state. Such registration obligations should be terminated upon proof, to be provided by the sex offender, that he has commenced registration and is compliant with the law in his new state of residence, and that he has registered his relocation appropriately, as required under SORNA. If the DCJS believes that it is in the best interests of the community to mandate an offender's continued registration in New York, then the burden should shift to the Division to prove the substance of such a claim, perhaps by employing a minimum contacts test similar to the one used in personal jurisdiction determinations.[198]

A. *The Importance of Eliminating the Requirement of Continued Registration Following Out-of-State Relocation*

By adopting an approach such as the one proposed above, New York would avoid the constitutional difficulties associated with requiring the continued registration of sex offenders following their relocation out of New York State.[199] This is important, as noted in Part II, not only from the perspective of states as individual sovereigns, but also in view of the constitutional rights guaranteed to all persons, regardless of sex offender status. The laws and associated punishments for sexual deviancy may well need to be stricter and perhaps more constraining on rights than those for other types of crimes, perhaps because of the particularly heinous nature of sex offenses and the perceived high rates of recidivism among sex offenders.[200] But in all situations, the interpretation of the law must at the very least meaningfully and rationally advance the law's purpose. In this situation, providing DCJS with the authority to exercise continuing regulatory authority over offenders who have completely relocated outside of New York State does not rationally serve the purposes of the statute—that is,

197 N.Y. CORRECT. LAW § 168-f(4) (McKinney 2014).

198 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); *supra* Section II.B. The Division and the State would also have to employ a process that would not offend the sovereignty of the new jurisdiction, perhaps by facilitating online registration.

199 *See* discussion *supra* Part II.

200 *See supra* Section I.A.2. As mentioned in this Part, perceived high rates of recidivism among sex offenders is a significant motivating concern behind sex offender laws. However, "[d]espite the public perception that all sex offenders are recidivists—a belief that drove these laws in the first place—sexual re-offense rates are in fact lower than those for other crimes . . . ." Editorial, *Sex Offenders Locked Up on a Hunch*, N.Y. TIMES (Aug. 15, 2015), http://www.nytimes.com/2015/08/16/opinion/sunday/sex-offenders-locked-up-on-a-hunch.html?_r=0.

to prosecute recidivist offenders and monitor their whereabouts—to protect the citizens *within* New York State.[201]

Further, adopting such language would resolve the different approaches within the Third Judicial Department on the issue of continued registration after relocation out of the state,[202] allowing New York courts and the DCJS to speak with one voice on the issue. This would provide greater clarity on the duties and responsibilities of offenders, law enforcement in New York State, and law enforcement in other states that receive offenders from New York.[203] Given that SORA itself does not pass upon this issue and that the legislative history is silent on the matter,[204] this approach avoids the imputation to the New York Legislature of the intent to direct continued registration after out-of-state relocation and a resulting enlargement of the statute.[205] While courts are often called upon to resolve various statutory ambiguities and may give deference to agency construction thereof,[206] here, the plain language of SORA in its entirety, combined with the view of its individual sections, suggests that it was meant to apply to residents of New York and those persons who attend school or work therein, and not resident-citizens of other states.[207] The New York Legislature is, of

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201 *See generally* Roe v. O'Donnell, No. 3536–09, at *6 (N.Y. Sup. Ct. Albany Cty. Nov. 6, 2009) (judgment pursuant to Article 78 of the N.Y. C.P.L.R.) (on file with author); *see also* Section I.C.2.

202 *See* discussion *supra* Section I.C.

203 Notice of the law is a cornerstone principle of legality in criminal law. While SORA purports to be regulatory and not punitive in nature, the interpretation of a law in such a way that can have the effect of criminally penalizing an offender for failure to register, *see* N.Y. CORRECT. LAW § 168-o(1) (McKinney 2014), would seemingly warrant sufficient notice. Scholars disagree about the regulatory nature of sex offender laws, likening their requirements more to criminal punishments. *See, e.g.*, Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1101–05 (2012); Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 42–45 (2010).

204 *See* discussion *supra* Sections I.B.3, I.C.1.

205 The Supreme Court of the United States has cautioned courts against doing so: "[w]hat the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." Nichols v. United States, 136 S. Ct. 1113, 1118 (2016) (quoting Iselin v. United States, 270 U.S. 245, 251 (1926)).

206 *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (footnotes omitted)).

207 *See generally* N.Y. CORRECT. LAW § 168. Nor should a court substitute its judgment for that of an administrative agency. Courts "must ascertain only whether the administrative determination is rational and supported by the record." *Roe v. O'Donnell*, No. 3536–09 at *4. In *Doe v. O'Donnell*, the Appellate Division accepted DCJS's interpretation of SORA despite the

course, free to explicitly pass upon the issue by clarifying or amending SORA.[208]

Finally, this approach would provide a measure of consistency for New York vis-à-vis the procedures prescribed by the other state statutes examined in this Note.[209] Although this Note does not purport to undertake a fifty state survey of sex offender registration requirements, it demonstrates, at a minimum, that some states do not consider their exercise of regulatory authority to extend to those who no longer live within their respective jurisdictions.[210] Finally, this approach would seemingly match SORNA's requirement that offenders register "[*f*]*or initial . . . purposes only* . . . in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence."[211]

B. *Two Possible Objections*

1. Forum Shopping

It may be submitted that this proposal would facilitate or even encourage forum shopping by sex offenders. That is, after having been adjudicated a sex offender and required to register, the offender moves out of New York State, petitions for removal from New York's registry, and then returns to New York without re-registering[212] or simply establishes residency in a state where the sex offender laws are more lenient or have shorter registration duration. Such forum shopping, the argument follows, would facilitate an offender's evasion of his registration obligations under SORA and sex offender laws across the country, more generally. Indeed, the court in *Doe v. O'Donnell* feared that terminating a sex offender's registration obligations after he left the

significant problems—that are examined in this Note—associated with doing so. Doe v. O'Donnell, 86 A.D.3d 238 (N.Y. App. Div. 3d Dep't 2011).

208 The thrust of the Proposal is focused at New York courts, rather than the New York State Legislature, as the courts are frequently called upon to decide issues related to SORA and offenders' rights thereunder.

209 *See supra* Section I.D.

210 This is particularly illustrative for a state like California, where sex offender laws are arguably the toughest in the country due to the sheer volume of offenders therein. "One embodiment of the super-registration scheme is California's Jessica's Law . . . . Acknowledged on both the ballot measure and in subsequent case law as the toughest in the country, Jessica's Law expanded the list of registerable offenses and made more stringent reporting requirements and notification procedures." Carpenter & Beverlin, *supra* note 203, at 1079 (footnotes omitted). Indeed, it is also interesting vis-à-vis New Jersey, after which New York's sex offender law was modeled. *See* Section I.D.

211 42 U.S.C. § 16913(a) (2012) (emphasis added). *See* Nichols v. United States, 136 S. Ct. 1113 (2016).

212 A concern expressed by the Appellate Division in *Doe v. O'Donnell*, 86 A.D.3d 238. *See supra* Section I.C.1.

state would expose New York communities to the potential danger posed by sex offenders engaged in such evasive tactics.[213]

While these are legitimate concerns, the forum shopping objection has two significant responses that can be found in the provisions that are already built into both SORA and SORNA (and many other state statutes), and that attempt to address these issues. For those sex offenders who might return to New York and fail to re-register, SORA requires that an offender notify DCJS no later than ten days after establishing residence in the state[214] and imposes upon nonresident workers and students a similar obligation to notify the DCJS of their presence in the state within ten days of commencing employment or studies.[215] For those offenders that might relocate to another state to benefit from more lenient laws or in search of increased anonymity (the essence of the forum shopping argument), their whereabouts still do not cease to be monitored. Not only will an offender have registration requirements in his new state of residence, by virtue of his relocation, he is exposed to additional federal liability under SORNA.[216] Failure to register under both state and federal sex offender statutes carries with it significant penalties.[217] What the statute does not, and realistically cannot, provide for is the unpredictable, mobile offender who travels and offends regardless of the laws that seek to constrain him.[218] But this is not a characteristic that is unique to sex offenders,[219] and is an

213 *Doe v. O'Donnell*, 86 A.D.3d at 241.

214 N.Y. CORRECT. LAW § 168-k(1) (McKinney 2014) ("A sex offender who has been convicted of an offense which requires registration . . . shall notify the division of the new address no later than ten calendar days after such sex offender establishes residence in this state.").

215 *Id.* § 168-f(6).

216 SORNA mandates that individuals must register "in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a) (2012). When registrants leave their home jurisdiction for seven or more days, they must notify the home jurisdiction as well as the destination jurisdiction. 42 U.S.C.A. § 16914 (Westlaw through Pub. L. No. 114-219).

217 *See* 18 U.S.C.A. § 2250 (Westlaw through Pub. L. No. 114-219); 42 U.S.C. § 16913(e) (2012). "[F]ederal law specifies a minimum penalty that states must impose for registration violations—a maximum term of imprisonment in excess of one year . . . . It also . . . imposes federal criminal liability for registration violations." Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 79 (2008).

218 To this end, the court's reasoning is also flawed in that it ignores the threat posed by those sex offenders who never lived in New York State—that is, those who live and reside in neighboring states and are not covered by SORA, but who arguably pose the same threat to New York citizens as those who were convicted in New York and have subsequently relocated. "By that reasoning, New York could place *all* sex offenders in the entire world on its Registry." Brief for Appellant at 16, Doe v. O'Donnell, 86 A.D.3d 238 (N.Y. App. Div. 3d Dep't 2011) (on file with author). Further, if every state court read continued registration into their respective sex offender registration laws, an offender could conceivably be required to continually register in all fifty states. This approaches the absurd.

219 That is, convicted and since-released murderers might be just as likely as sex offenders to move states and re-commit there, yet there is no known state or national murder registry that

inevitable incident of a national society, government, and judicial system that promotes and protects the freedom of travel within and across state borders.

2. Sex Offender Public Policy

Another objection might argue that this proposal runs directly counter to the public policy motivations behind the enactment of sex offender laws.[220] The *Doe v. O'Donnell* court rooted its holding in the idea that legislative history and intent, though silent on the issue, indicate a presumption of continued registration, which is grounded in the dual purposes of the statute—to prosecute recidivist offenders and monitor their whereabouts.[221] This reasoning reflects the sound public policy motivations the New York Legislature considered when initially enacting SORA; however, such reasoning becomes increasingly tenuous as applied to nonresident offenders.[222] The purpose of law enforcement monitoring and community notification is to inform "need-to-know" parties—police, parents, and communities—about individuals in their midst who purportedly pose a threat, so that they are able to change their behaviors.[223] Further, one of the cornerstone goals of sex offender registration and community notification laws is to provide law enforcement with a ready-made list of offenders so that they are able to investigate and make swift arrests in situations involving missing children.[224] While registration and community notification serve these important ends when an offender lives across the street or in a neighboring or even distant county, these public policy justifications make significantly less sense once a registrant has moved out of the state, particularly to a state that does not border New York.[225]

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requires such individuals to notify law enforcement of their whereabouts (after serving parole) and that mandates community notification of thereof.

220 *See supra* Section I.A.2.

221 Doe v. O'Donnell, 86 A.D.3d 238, 240 (N.Y. App. Div. 3d Dep't 2011).

222 The reason why we tell people that Jack, who was convicted of a sex offense, lives at a particular address in a particular neighborhood, is so parents can avoid the area and tell their children to do so as well. *See* S.11-B, 218th Sess., Sen. Introducer Mem., at 2 (N.Y. 1995) (on file with author).

223 *See* discussion *supra* Section I.A.2.

224 *See supra* Section I.A.2.

225 "No less problematic are laws predicating relief on a generalized sense that requiring continued registration of an individual comports with broad public safety goals." Logan, *Database Infamia*, *supra* note 28, at 233. Further, the argument that ongoing registration is required for effectuating the community notification requirement of the statute simply does not make sense for Level One offenders, whose information the DCJS is prohibited from sharing on New York's Sex Offender Public Registry website. *See Search Public Registry of Sex Offenders*, N.Y. DIVISION CRIM. JUST. SERV., http://www.criminaljustice.ny.gov/SomsSUBDirectory/search_index.jsp (last visited Jan. 11, 2016).

CONCLUSION

Sex offenders are, understandably, an unsympathetic group, often considered to be among the worst offenders in society,[226] and their conduct and the consequences thereof should be prosecuted to the full extent of the law. It is important, however, that the law does not run afoul of well-settled and reasoned constitutional principles, many of which underpin how individuals and states function and interact in society today. This Note and proposal do not advocate for expanding the rights of sex offenders or minimizing in any way the important strides the state and federal governments have made in monitoring and prosecuting recidivist sex offenders and appropriately bringing them to justice. Instead, it serves as a solution to the present statutory silence of New York's Sex Offender Registration Act and attempts to provide a remedy to the problems raised by and attendant constitutional effects of the Appellate Division's holding in *Doe v. O'Donnell*.

226 "Few crimes spark as strong or distinctive an aversion as sexual offenses . . . . As a society, we seem united in our categorization of these acts as among the most heinous. Those who commit such offenses are outcasts, perverts, or animals, not worthy of the basic human rights our Constitution guarantees." Kunz, *supra* note 30, at 454. "[P]erhaps more than any other group, sex offenders are the pariahs of our society." Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 506 (1998).