
HUNTINGTON, NEW YORK'S SEX OFFENDER POLICY AND THE INTRASTATE RIGHT TO TRAVEL

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*"The strictest law sometimes becomes the severest injustice."
Benjamin Franklin*¹

I. INTRODUCTION

Sex offenders are among the most loathed and detested members of our society. Over the past fifteen years, communities have zealously passed laws restricting the rights of sex offenders.² These laws mandate that sex offenders register with authorities and severely limit where sex offenders may reside.³ This legislation is designed to foster an important goal: to protect the health and safety of children from possible recidivism from sex offenders.⁴ In 2007, the Town Board of Huntington, New York, passed a law barring sex offenders from renting or leasing accessory apartments within the Town.⁵ The health and safety of the town's children is a compelling governmental

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¹ Printquotes.info, Ben Franklin quotes, www.printquotes.info/quotes-by/benjamin-franklin/1/ (last visited Sept. 16, 2009).

² See National Center for Missing & Exploited Children, Sex-Offenders: History, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=3032 (last visited July 19, 2009).

³ Several federal laws mandate that states maintain a sex offender registry. Bureau of Justice Assistance, Overview and History of the Jacob Wetterling Act, <http://www.ojp.usdoj.gov/BJA/what/2a1jwachhistory.html> (last visited July 19, 2009) (outlining the applicable federal statutes). See also Wendy Koch, *States Restricting Where Sex Offenders Live*, USA TODAY, Feb. 26, 2007 at 1A (referring to a chart of state restrictions).

⁴ Grant Duwe et al., *Does Residential Proximity Matter? A Geographic Analysis of Sex Offense Recidivism*, 35 CRIM. JUST. & BEHAV. 484, 484 (2008).

⁵ Press Release, Town of Huntington, Precedent Setting Child Protection Legislation Passes Unanimously (Feb. 7, 2007), available at http://town.huntington.ny.us/town_gallery1.cfm?categoryID=51.

interest. However, the Huntington statute is unconstitutional because it is violative of the constitutional right to intrastate travel, as recognized by the Second Circuit.⁶ Deprivation of the right to travel outweighs the town's interest in protecting its children because the statute is not narrowly tailored to meet its public safety interest.

Huntington's accessory apartment statute is also poor public policy because it will lead to the inverse of its stated intentions. The statute is detrimental to the safety of children and will increase sex offender recidivism by pushing sex offenders underground and away from potential support systems.⁷ By enacting this statute, Huntington has done more harm than good for not only the citizens of the Town but for Suffolk County itself.⁸

Part II of this Comment provides a brief overview of the Town of Huntington. Part III discusses the development of the right to "intrastate" travel by first examining the fundamental right to "interstate" travel. Part IV analyzes the Second Circuit's recognition of a fundamental right to intrastate travel and whether this right exists in Suffolk County. Part V studies the development of sex offender policy, including the development and constitutionality of residency restriction statutes. Part VI looks closely at New York's sex offender policy, including the policy implemented in the Town of Huntington. Part VII deciphers why the Town of Huntington targeted accessory apartments, and whether the reasons for passing this statute contained in their legislative intent are valid. Finally, this Comment will examine the constitutionality of Huntington's accessory apartment statute, regarding the right to intrastate travel, and whether Huntington's sex offender policy, itself, is good for the general public welfare.

II. TOWN OF HUNTINGTON: OVERVIEW

The Town of Huntington is located on Long Island, in northwestern Suffolk County, New York, adjacent to the Nassau County

⁶ King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2nd Cir. 1971) ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.").

⁷ See Jennifer Smith, *The Sex Offender Debate: Where They Live*, NEWSDAY, Dec. 3, 2006, at A2.

⁸ See *id.*

border. The Town has a population of approximately 206,952,⁹ and encompasses an area of about ninety-three square miles.¹⁰ Along with numerous villages and hamlets, eight school districts are located in Huntington; five of which are entirely within the Town.¹¹ With the amount of children attending schools within the town, it comes as no surprise that the Huntington Town Board is very concerned with the welfare of children.¹²

III. THE INTERSTATE RIGHT TO TRAVEL

The right to intrastate travel developed from the constitutional right to interstate travel.¹³ Although the word “travel” is not included within the text of the United States Constitution, except in reference to members of Congress,¹⁴ a fundamental right to travel was first enumerated by the United States Supreme Court in *Corfield v. Coryell*.¹⁵ The Supreme Court later recognized a fundamental right to in-

⁹ United States Census Bureau, Fact Sheet, Huntington Town, Suffolk County, New York (2006-2008), <http://factfinder.census.gov/> (search for “Huntington Town”) (last visited Sept. 13, 2009).

¹⁰ Town of Huntington, About Us, http://town.huntington.ny.us/about_toh.cfm (last visited Nov. 8, 2009).

¹¹ *Id.*

¹² See Press Release, *supra* note 5.

¹³ See Sarah E. Agudo, *Irregular Passion: The Unconstitutionality and Inefficacy of Sex Offender Residency Laws*, 102 NW. U. L. REV. 307, 329 (2008) (“A reasonable reading of the Constitution . . . suggest[s] that the Supreme Court will inevitably recognize the intrastate right as a logical extension of the right to interstate travel.”); Andrew C. Porter, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820, 842 (1992) (“If a fundamental constitutional right to travel exists, then there is no reason to read the right as inapplicable to intrastate travel.”).

¹⁴ U.S. CONST. art. I, § 6, cl. 1. Some believe that the right to interstate travel was so inherent that the Founders thought that it was not necessary to be included in the text of the Bill of Rights. ZECHARIAH CHAFFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787* 185 (1956) (“[T]hey wanted to keep the provision operative, but considered that its substance was embodied elsewhere and left it out as superfluous.”). Another reason for the non-inclusion of the word “travel” in the Constitution is that its protection is subsumed within other protections of it; it is “firmly embedded in our jurisprudence.” *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (citing *United States v. Guest*, 383 U.S. 745, 757 (1966)).

¹⁵ 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230) (concluding that the Privileges and Immunities Clause extends to include “[t]he right of a citizen of one state to pass through, or to reside in any other state” is among “the particular privileges and immunities of citizens” that are “deemed . . . fundamental.”). See also *Smith v. Turner*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting) (“[T]he various provisions in the Constitution . . . all prove that it intended to secure the freest intercourse between the citizens of the different States. . . . [A]ll citizens of the United States . . . must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”).

terstate travel in *Crandall v. Nevada*.¹⁶ Relying upon Chief Justice Taney's dissent from *The Passenger Cases*,¹⁷ the Court found that a tax on every person leaving a state by "[r]ailroad, stagecoach, or other vehicle engaged or employed in the business of transporting passengers for hire[']"¹⁸ was unconstitutional because it would hinder transportation in and out of the country.¹⁹ After rendering a similar decision three years later in *Ward v. Maryland*,²⁰ the Court allowed the interstate travel doctrine to lay dormant for nearly seventy-five years until *Edwards v. California*.²¹ In *Edwards*, the Court found that a California statute, which made it a crime to transport an indigent person into the state, violated the constitutional right to travel.²² The majority of the justices derived this right from the Commerce Clause,²³ holding that the clause extended to the "transportation of persons[.]" and prohibited states from "shutting its gates to the outside world."²⁴ Although *Edwards* recognized the right to travel, it was not recognized as a fundamental right until 1966, in *United States v. Guest*.²⁵

Three years after *Guest*, the Court, in *Shapiro v. Thompson*,²⁶ invoked the right to interstate travel to invalidate statutes that imposed priorities on this right. Several states had statutory provisions denying welfare assistance to residents who had not resided in their jurisdiction for at least one year.²⁷ After examining the statutes, the Court concluded that the right to interstate travel was grounded in the

¹⁶ 73 U.S. (6 Wall.) 35, 49 (1867).

¹⁷ *Id.* ("Although these remarks are found in a dissenting opinion, they do not relate to the matter on which the dissent was founded. They accord with the inferences which we have already drawn from the Constitution itself, and from the decisions of this court in exposition of that instrument.").

¹⁸ *Id.* at 35.

¹⁹ *Id.* at 46.

²⁰ 79 U.S. (12 Wall.) 418 (1870) (holding that a Maryland statute requiring non-residents to obtain a license before selling merchandise made outside of the state violated the constitutional right to travel).

²¹ 314 U.S. 160, 178 (1941).

²² *Id.* at 177.

²³ U.S. CONST. art. 1, § 8, cl. 3.

²⁴ *Edwards*, 314 U.S. at 173.

²⁵ *Guest*, 383 U.S. at 757 (1966) ("The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.").

²⁶ 394 U.S. 618 (1969).

²⁷ *Id.* at 622-26.

Constitution, but declined to find a particular source of this right.²⁸ The Court concluded that “any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.”²⁹ The Court also distinguished between the terms “residence” and “duration of residence.”³⁰ While “residence” is defined as an intent to remain in a jurisdiction, “duration of residence” is an intent to remain in a jurisdiction for a certain period of time.³¹ However, the Court left open the possibility that some durational residency requirements may be upheld.³² Thus, the scope of interstate travel became less clear after *Shapiro*, as the Supreme Court has either struck down or upheld various residency requirements.³³

The Supreme Court’s last decision regarding the right to interstate travel was in *Saenz v. Roe* in 1999.³⁴ In *Saenz*, three new California residents challenged the constitutionality of a state statute limiting the amount of welfare benefits available to a family that had resided within the state for less than one year.³⁵ In its decision, the Court recognized three components of a right to travel.³⁶ First, “[i]t

²⁸ *Id.* at 629-30.

²⁹ *Id.* at 634.

³⁰ *Id.* at 636 n.16.

³¹ *Shapiro*, 394 U.S. at 636 n.16.

³² *Id.* at 638 n.21.

We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

Id.

³³ See *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down a statute requiring a one-year residency in the state and a three-month county residence as prerequisites for voter registration). However, the Court recognized that a durational residency requirement would be valid if precisely drawn and the state does not “choose means that unnecessarily burden or restrict constitutionally protected activity.” *Id.* at 343. See also *Sosna v. Iowa*, 419 U.S. 393, 393, 406 (1975) (using rational basis to uphold a one-year residency requirement in order to obtain a divorce, stating that the “divorce residency requirement is of a different stripe[.]” and the plaintiff was not “irretrievably foreclosed” from obtaining a divorce, and that she would eventually qualify to obtain one, albeit with a delay); *N.Y. Att’y Gen. v. Soto-Lopez*, 476 U.S. 898, 911 (1986) (using strict scrutiny in finding a state statute unconstitutional which granted extra points on civil service exams to veterans who were New York state residents at the time of military service).

³⁴ 526 U.S. 498 (1999).

³⁵ *Id.* at 492, 493-94.

³⁶ *Id.* at 500.

protects the right of a citizen of one State to enter and to leave another State.”³⁷ Second, the right to travel protects “the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State.”³⁸ Third, the right protects “those travelers who elect to become permanent residents, [by granting them] the right to be treated like other citizens of that State.”³⁹ The Court found that this component is protected by the Privileges and Immunities Clause of the Fourteenth Amendment.⁴⁰ Although the reasoning in *Shapiro* differs from *Saenz*, the application of strict scrutiny to the fundamental right to travel is similar.⁴¹ Therefore, the Court found the statute unconstitutional.⁴²

Despite the murkiness and confusion surrounding the interstate travel doctrine, it has been universally accepted as a constitutional right.⁴³ On the other hand, it is unknown whether the right to intrastate travel exists.⁴⁴ It is hard to believe that one’s right to travel from New York to New Jersey is protected by the Constitution, but the right to travel within the Town of Huntington is not. Although intrastate travel should be a constitutional right, the Supreme Court has purposefully declined to so decide. If the Court establishes the constitutional right to intrastate travel, then the Huntington statute is unconstitutional because of its extreme effects on traveling within the Town of Huntington.

IV. INTRASTATE TRAVEL

A. The Supreme Court

The first mention of any right to intrastate travel was in Chief

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Saenz*, 526 U.S. at 500.

⁴⁰ *Id.* at 502-03.

⁴¹ See Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 124 (1999).

⁴² *Saenz*, 526 U.S. at 505 (finding that California’s statute placed a “penalty” on interstate travel).

⁴³ MARCUS NIETO & DAVID JUNG, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW 15 (2006), available at <http://www.library.ca.gov/crb/06/08/06-008.pdf>.

⁴⁴ See *id.* at 8.

Justice Taney's dissent in *The Passenger Cases*.⁴⁵ Although it is clear that the Chief Justice was discussing interstate travel, the phrase "as in our own States"⁴⁶ may have been the first statement by a United States Supreme Court Justice on the right to intrastate travel—albeit indirectly. The Supreme Court mentioned a right to intrastate travel in dicta of two early twentieth-century cases.⁴⁷ The Court, however, failing to address the issue in multiple cases, has not decided whether the right to intrastate travel is considered a fundamental right.⁴⁸ Therefore, it has been left up to the circuit courts to determine whether a fundamental right to intrastate travel exists.

B. King v. New Rochelle Housing Authority

In 1971, the Second Circuit Court of Appeals first recognized the right to intrastate travel in *King v. New Rochelle Municipal Housing Authority*.⁴⁹ The plaintiffs in *King* were residents of New Rochelle who had requested applications for public housing from the defendant.⁵⁰ These requests were either refused or denied because of a five-year durational residency requirement statute enacted by the housing authority.⁵¹ The plaintiffs challenged the constitutionality of the statute based on the right to interstate travel and the Equal Protection Clause.⁵² The court held that the residency restriction was a penalty "imposed solely because they [had] recently exercised their right

⁴⁵ 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting) (remarking that every United States citizen has the right to freely enter and exit states "without interruption, as freely as in our own States").

⁴⁶ *Id.*

⁴⁷ See *Williams v. Fears*, 179 U.S. 270, 274 (1900) ("[T]he right of locomotion, the right to remove from one place to another according to inclination . . . [the right] of free transit from or through the territory of any state is a right secured by the 14th Amendment . . ."); *United States v. Wheeler*, 254 U.S. 281, 293 (1920) ("[State citizens] possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom . . .").

⁴⁸ See *Memorial Hospital v. Maricopa*, 415 U.S. 250, 255-56 (1974); *Chicago v. Morales*, 527 U.S. 41, 53 n.19, 55 (1999).

⁴⁹ 442 F.2d 646 (2d Cir. 1971).

⁵⁰ *Id.* at 647.

⁵¹ *Id.* At the time of the case, the housing authority had an insufficient amount of public housing for the residents of New Rochelle, and because of this, persons with accepted applications were on a three to ten year waiting list; therefore, persons who were not eligible due to the residency requirement had an eight to fifteen year wait. *Id.*

⁵² *Id.*

to travel.”⁵³

The court further concluded that “[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.”⁵⁴ The Second Circuit recognized the right to intrastate travel and reviewed the New Rochelle statute under strict scrutiny.⁵⁵ The Second Circuit held that there was no compelling governmental interest in deterring the right to intrastate travel.⁵⁶ It reasoned that a state’s interest in favoring its long-term residents over short-term residents was not a compelling interest, and a community taking care of its own first is not a constitutionally viable reason for deterring the right to intrastate travel.⁵⁷ Because the Second Circuit recognizes the right to intrastate travel, the Huntington statute will be judicially reviewed under strict scrutiny. Although the state has a great interest in protecting the welfare of its children, the Town statute fails to survive strict scrutiny because it is not narrowly tailored to meet this interest.

V. HISTORY OF SEX OFFENDER STATUTES

The first sex offender restrictions were set in California in 1947.⁵⁸ Three years later, California began to keep track of sex offenders through fingerprints and photos.⁵⁹ Very few states passed sex offender restriction laws before 1990.⁶⁰ The first sex offender community notification act was enacted in Washington in 1990, after a seven-year-old boy was raped, stabbed, and mutilated by a man with a long history of sexual violence.⁶¹ This act was not only intended to

⁵³ *King*, 442 F.2d at 648.

⁵⁴ *Id.*

⁵⁵ *Id.* at 647-48.

⁵⁶ *Id.* at 649.

⁵⁷ *Id.*

⁵⁸ See Office of the Att’y Gen., *Megan’s Law: Sex Offender Registration and Exclusion Information*, <http://www.meganslaw.ca.gov/sexreg.aspx?lang=ENGL-ISH> (last visited Sept. 16, 2009).

⁵⁹ NIETO & JUNG, *supra* note 43, at 7.

⁶⁰ Alabama, Arkansas, Arizona, Illinois, Montana, Nevada, Ohio, Oklahoma, Oregon, and Utah were the only states to enact sex offender residency statutes before 1990. See SCOTT MATSON & ROXANNE LIEB, WASH. ST. INST. PUB. POL’Y, *SEX OFFENDER REGISTRATION: A REVIEW OF STATE LAWS 13-19* (1996).

⁶¹ Christine Willmsen, *Dangerous Sex Felons: Address Unknown*, SEATTLE TIMES, Dec. 11, 2005, at A1.

enable agencies to monitor sex offenders, but to also notify the community that a sex offender resides in their area.⁶² A 1996 study of this registry concluded that although the act has helped to educate the community about sex offenders, there has been no reduction in the amount of sex crimes against children.⁶³

A. The Jacob Wetterling Act

On October 22, 1989, Jacob Wetterling was abducted by a masked gunman while riding his bicycle.⁶⁴ Neither Jacob nor the gunman has been seen since.⁶⁵ This event inspired the passing of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (hereinafter “Jacob Wetterling Act”).⁶⁶ The Act requires all sex offenders to register with state law enforcement, and disclose their permanent residence.⁶⁷ Compliance was made mandatory; if a state should refuse to comply, the result would be a ten percent loss of federal funding for state and local law enforcement.⁶⁸ In order to legally register, sex offenders must give local officials their current addresses, telephone numbers, social security numbers, names and addresses of employers, and, often, fingerprints, a photograph, and DNA samples.⁶⁹

B. Megan’s Law

In 1994, Megan Kanka, a seven-year-old girl in New Jersey, was raped and murdered by a neighbor who was previously convicted of sexually assaulting two young girls.⁷⁰ Due to extreme community pressure, Congress passed a law in 1996, which became known as Megan’s Law, which permits states to “release relevant information”

⁶² *Id.*

⁶³ See NIETO & JUNG, *supra* note 43, at 10.

⁶⁴ Richard Meryhew, *Wetterling Agency Changes Name to Better Reflect its Work*, STAR TRIBUNE, Sept. 22, 2008, at 2B.

⁶⁵ *Id.*

⁶⁶ 42 U.S.C.A. § 14071 (West 2006).

⁶⁷ 42 U.S.C.A. § 14071(a)(1)(A)-(B).

⁶⁸ 42 U.S.C.A. § 14071(g)(2)(A).

⁶⁹ Amber Leigh Bagley, “An Era of Human Zoning”: *Banishing Sex Offenders from Communities Through Residence and Work Restrictions*, 57 EMORY L.J. 1347, 1351 (2008).

⁷⁰ *Whitman Latest to Urge Laws on Notices of Sex Offenders*, N.Y. TIMES, Aug. 6, 1994, at 124.

pertaining to sex offenders who are required to register “to protect the public.”⁷¹ All fifty states have passed a version of Megan’s Law,⁷² and the Supreme Court has routinely upheld the public disclosure of sex offender registries as constitutional.⁷³ Since the passing of Megan’s Law, the Jacob Wetterling Act has been amended to include other restrictions against sex offenders.⁷⁴ In the same year that Megan’s Law passed, the Jacob Wetterling Act was amended by the Pam Lychner Sexual Offender Tracking and Identification Act of 1996,⁷⁵ the Campus Sex Crimes Prevention Act,⁷⁶ and the Adam Walsh Child Protection and Safety Act.⁷⁷

C. Residency Restriction Statutes

The first sex offender residency restriction law was passed in Alabama in 1996.⁷⁸ By 2005, fourteen states had adopted residency restrictions similar to Alabama’s.⁷⁹ Many of the state sex offender residency restrictions are known as “Jessica’s Laws,” due to the trag-

⁷¹ 42 U.S.C.A. § 14071(e)(2).

⁷² Bagley, *supra* note 69, at 1352.

⁷³ *See* Conn. Dep’t Pub. Safety v. Doe, 538 U.S. 1, 8 (2003) (reversing the lower court’s injunction that prevented public disclosure of Connecticut’s sex offender registry); *Smith v. Doe*, 538 U.S. 84, 105-06 (2003) (holding Alaska’s version of Megan’s Law to be constitutional).

⁷⁴ *See* Sex Offender Registration: Policy Overview and Comprehensive Practices (Oct. 1999), <http://www.csom.org/pubs/sexreg.html>; *see also* Overview and History of the Jacob Wetterling Act, <http://www.ojp.usdoj.gov/BJA/what/2a1jwacthistory.html> (last visited July 21, 2009).

⁷⁵ 42 U.S.C.A. § 14072(b) (West 2006) (establishing a national database of sex offenders to assist state and local law enforcement in tracking sex offenders released from prison).

⁷⁶ 42 U.S.C.A. § 14071(j) (requiring sex offenders attending educational institutions, or working or volunteering on campus to provide notice of their status to the institution).

⁷⁷ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (expanding the power of the Jacob Wetterling Act by lowering the age of juveniles who must register as sex offenders, expanding the definition of a sex offense, and lengthening registration and notification periods); *see also* Caitlin Young, *Children Sex Offenders: How the Adam Walsh Child Protection and Safety Act Hurts the Same Children it is Trying to Protect*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 459, 460 (2008).

⁷⁸ ALA. CODE § 15-20-26 (2009) (stating that sex offenders living in Alabama cannot establish a residence or be employed within: (i) 2,000 feet from any school or day care center; or (ii) 1000 feet of the residence of any of his or her former victims or their immediate family members).

⁷⁹ Jeffrey T. Walker, *Eliminate Residency Restrictions for Sex Offenders*, 6 CRIMINOLOGY & PUB. POL’Y 863, 864 (2007), available at <http://www.ccoso.org/library%20articles/Eliminate%20Residency%20Restrictions%20for%20Sex%20Offenders.pdf>.

ic death of Jessica Lunsford.⁸⁰ Jessica was a nine-year-old girl who was abducted from her home, raped, and buried alive by a next-door neighbor who had previously been convicted twice of molesting children.⁸¹ As a result of this, many states either passed new residency restrictions or expanded old restrictions.⁸² In all, twenty-seven states have enacted state-wide sex offender residency restrictions—including New York.⁸³ Almost all of the residency restrictions bar sex offenders from living within a certain distance from schools or child care facilities. Huntington's statute goes even further by barring sex offenders from owning or leasing a certain type of housing, regardless of the distance from a school or child care facility.⁸⁴ The Town's statute acts as a more restrictive supplement to the currently-enacted state restriction. Although all of these laws are bad public policy, resulting in more harm than good for the safety of children, sex offender residency restrictions are constitutional according to the Eighth Circuit.⁸⁵

1. *Doe v. Miller and the Fundamental Right to Travel*

The first constitutional challenge of sex offender residency restrictions that invoked the constitutional right to travel occurred in the Eighth Circuit, in *Doe v. Miller*.⁸⁶ In 2002, Iowa passed a residency restriction preventing sex offenders from residing within 2000 feet of a school or registered child care facility.⁸⁷ Almost immediately after the law took effect, three sex offenders filed suit, asserting that the residency restriction was unconstitutional on its face because the statute left only limited areas within the state where they could

⁸⁰ Wendy Koch, *Sex-Offender Residency Laws Get Second Look*, U.S.A. TODAY, Feb. 26, 2007, at A1.

⁸¹ HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE UNITED STATES 2 (2007), available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>.

⁸² Koch, *supra* note 80, at A1.

⁸³ *Id.* (stating that New York bars serious offenders from entering school grounds or child care facilities).

⁸⁴ See Press Release, *supra* note 5.

⁸⁵ *Doe v. Miller (Miller II)*, 405 F.3d 700, 704-05 (8th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005).

⁸⁶ *Id.* at 709, 711-12.

⁸⁷ IOWA CODE ANN § 692A.2A (West 2008).

possibly live.⁸⁸ The district court found that the restrictions prevented sex offenders from living in over seventy-five percent of Carroll County, Iowa, and the areas that remained consisted of mostly inhabitable farmhouses.⁸⁹ The district court concluded that the Iowa statute was unconstitutional on several grounds, including infringement upon the “fundamental rights to travel.”⁹⁰ By stating “rights” instead of “right,” it can be said that the district court recognized both interstate and intrastate right to travel. Reviewing the statute under strict scrutiny, the district court held that the statute was not narrowly tailored to serve a compelling state interest.⁹¹

However, the Eighth Circuit reversed the lower court’s holding and declared that the Iowa statute was constitutional.⁹² The court found that the statute did not interfere with the intrastate right to travel and declined to decide whether there is a fundamental right to intrastate travel.⁹³ However, the court did state that “assuming such a right is recognized, it would not require strict scrutiny[,]”⁹⁴ and such a right would be “‘correlative’ to the right to interstate travel.”⁹⁵ According to the court, the residency restriction statute did not prevent sex offenders from entering and leaving Iowa, and “[did] not erect any actual barrier to intrastate movement.”⁹⁶ The court reasoned that, since sex offenders are not prevented from maintaining employment or conducting commercial transactions, the Iowa statute does not “expel” sex offenders from communities—it just restricts their ability to establish a residence.⁹⁷ Since the court did not find a fundamental right implicated, it reviewed the statute under a rational basis test and concluded that promoting the safety of children was a legitimate state interest, thereby finding the Iowa statute constitutional.⁹⁸

⁸⁸ *Miller II*, 405 F.3d at 705.

⁸⁹ *Doe v. Miller (Miller I)*, 298 F. Supp. 2d 844, 852 (S.D. Iowa 2004).

⁹⁰ *Miller II*, 405 F.3d at 708.

⁹¹ *Miller I*, 298 F. Supp. 2d at 876.

⁹² *Miller II*, 405 F.3d at 723.

⁹³ *Id.* at 713.

⁹⁴ *Id.*

⁹⁵ *Id.* (internal quotation omitted).

⁹⁶ *Id.*

⁹⁷ *Miller II*, 405 F.3d at 719.

⁹⁸ *Id.* at 714.

2. *Comparing and Contrasting Miller and King*

There seems to be a clear difference between the interpretation of “intrastate travel” applied in *Miller* and *King*.⁹⁹ In recognizing a fundamental right to intrastate travel, the Second Circuit determined that durational requirements for public housing made it impossible for a person to find housing in a municipality, thereby equating intrastate travel to the right to live where one wants.¹⁰⁰ In contrast to *King*, the Eighth Circuit defined the intrastate right to travel as freedom of movement within a state, not necessarily the ability to reside in a state.¹⁰¹ Only 2.7% of the remaining units were habitable in the county in question in *Miller*.¹⁰² It is true in both circumstances that neither the plaintiffs in *King* nor *Miller* were completely barred from living in their respective areas.¹⁰³ There was a very small percentage of housing available for sex offenders in Carroll County, and residents in New Rochelle could have put their names on the housing waiting list after residing in New Rochelle for a period of time.¹⁰⁴ Plaintiffs in both cases could have sought housing elsewhere in their respective states.¹⁰⁵ Additionally, perhaps both plaintiffs could have sought accessory apartment housing within their area. For example, the plaintiffs in *Miller* could have sought vacant farmhouses in larger farms or searched for accessory apartments outside the restricted area in Carroll County.¹⁰⁶ The plaintiffs in *King* already had housing in New Rochelle and could have realistically

⁹⁹ Compare *King*, 442 F.2d at 648 (recognizing that a statute that infringed the right to intrastate travel must be reviewed under strict scrutiny), with *Miller II*, 405 F.3d at 723 (holding that even if there is a fundamental right to intrastate travel, it would not require strict scrutiny).

¹⁰⁰ *King*, 442 F.2d at 648 (holding that the durational residency requirement was a penalty solely because the plaintiffs exercised their right to travel by trying to find housing in New Rochelle.).

¹⁰¹ *Miller II*, 405 F.3d at 714 (finding that the plaintiffs failed to prove any argument that “the right to ‘live where you want’ is ‘deeply rooted in this Nation’s history and tradition.’”).

¹⁰² See *Miller I*, 298 F. Supp. 2d at 852 (finding that 244 of the 9019 residential units in Carroll County, Iowa, were habitable and located in places not within the restricted area).

¹⁰³ *Id.* at 853-54, 856, 857, 858; see also *King*, 442 F.2d at 647.

¹⁰⁴ *Id.*

¹⁰⁵ See *Miller II*, 405 F.3d at 706 (noting that while the areas within city limits where sex offenders could establish residences was limited, such areas do exist); *King*, 442 F.2d at 647 (noting that all plaintiffs/respondents had established private residences in New Rochelle).

¹⁰⁶ See *Miller II*, 405 F.3d at 706.

stayed there until eligibility.¹⁰⁷ If possible, they could have also sought cheaper accessory apartments in New Rochelle. However, “seeking” and “finding” are two different concepts. Although a resident of New Rochelle may have the ability to seek some type of living space within the town, such as an accessory apartment, he is not guaranteed that one will be found. Considering the extremely long waiting period for public housing in New Rochelle,¹⁰⁸ finding other housing would be next to impossible. Although the statute is not a complete bar to living in New Rochelle, it does not make it any less unfair.

It can be argued that the statutes in question did not completely bar sex offenders from living within their respective areas. Therefore, the fundamental difference between the *King* and *Miller* courts is the degree of burden that a statute impinges on the right to intrastate travel in order for it to be held unconstitutional.¹⁰⁹ While the court in *King* believed that a *substantial* impairment on the right to intrastate travel warranted the application of strict scrutiny,¹¹⁰ the *Miller* court believed that, unless the right to intrastate travel was *completely* impaired, strict scrutiny was not justified.¹¹¹ Based on this difference, it is likely that the Second Circuit may rule differently than the Eighth Circuit regarding the Iowa sex offender statute. Moreover, since the residency restriction prevented sex offenders from living in over ninety-eight percent of the county,¹¹² it might be said that the restriction caused a substantial impairment on the right to intrastate travel.¹¹³ Most likely, the Second Circuit would have

¹⁰⁷ *King*, 442 F.2d at 647.

¹⁰⁸ *See id.* (stating that new residents who have not resided in New Rochelle for a minimum of five years may have to wait eight to fifteen years for public housing).

¹⁰⁹ *See King*, 442 F.2d at 648 (holding that the New Rochelle statute was unconstitutional since it penalized new residents for exercising their right to intrastate travel); *Miller II*, 405 F.3d at 705, 713 (holding that the Iowa statute was constitutional since it did not prohibit sex offenders' right to intrastate travel).

¹¹⁰ *See King*, 442 F.2d at 648.

¹¹¹ *See Miller II*, 405 F.3d at 713.

¹¹² *Miller I*, 298 F. Supp. 2d at 852 (stating that “barely two percent of housing is available” to registered sex offenders).

¹¹³ *See Agudo*, *supra* note 13, at 330 (stating that the Iowa statute restricts “where a person may live, especially in an expansive manner that virtually forbids residence in all urban areas, inhibits travel significantly”); Peter D. Edgerton, *Banishment and the Right to Live Where You Want*, 74 U. CHI. L. REV. 1023, 1046 (2007) (comparing sex offender residency restrictions to “felon disenfranchisement”).

concluded with the Iowa district court¹¹⁴ and ruled the statute unconstitutional. It can also be argued that the Second Circuit would hold the Huntington accessory apartment statute unconstitutional because barring sex offenders from owning or leasing accessory apartments results in a substantial impairment on the right to intrastate travel.

VI. HUNTINGTON TOWN CODE

Besides the already-implemented New York statute, Suffolk County has enacted its own sex offender residency restrictions.¹¹⁵ In 2007, Huntington enacted its own sex offender residency restriction statute.¹¹⁶ Although both statutes have the same quarter-mile restriction on sex offender residences, more areas are restricted under the Huntington statute than the New York statute.¹¹⁷ In addition to the residency restriction, Huntington enacted the following restriction pertaining to sex offenders:

It shall be unlawful for a property owner or person in charge of property to knowingly or recklessly lease or sublease his property to a registered sex offender, or to otherwise permit or allow such offender to establish a residence or be domiciled at his premises, if the property is located within an area prohibited by this Chapter.¹¹⁸

The statute mandates that sex offenders in Huntington are restricted from owning or residing in accessory apartments.¹¹⁹ To determine why Huntington targeted sex offenders living in accessory apartments, one must look at the legislative intent of the statute and examine whether the stated reasons are valid.

A. Accessory Apartments

An accessory apartment is a “self-contained second living

¹¹⁴ *Miller I*, 298 F. Supp. 2d at 875 (finding that the Iowa Code § 692A.2A infringes on sex offenders’ rights to both interstate and intrastate travel).

¹¹⁵ SUFFOLK COUNTY, N.Y. CODE § 428 (2006).

¹¹⁶ TOWN OF HUNTINGTON CODE § 194-3(A) (2007).

¹¹⁷ *Id.* § 194-3(A)(1) & (2) (banning sex offenders from day camps and beaches.).

¹¹⁸ *Id.* § 194-3(B).

¹¹⁹ *See id.*

unit that is built into or attached to an existing single-family dwelling” that functions independently from the dwelling itself.¹²⁰ Codified by the Town of Huntington, an accessory apartment is habitable living space that has a minimum living space of 7500 square feet¹²¹ and a lot frontage of at least seventy-five linear feet.¹²² The creation of accessory apartments stemmed from an increase in housing costs and a decline in household income, which caused extreme difficulty for low and moderate-income families to find housing.¹²³ “An estimated [twelve] million renter and homeowner households now pay more than [sic] [fifty] percent of their annual incomes for housing,”¹²⁴ and the commonly accepted definition of affordability is for a household to “pay no more than thirty percent of its annual income on housing.”¹²⁵ Additionally, in the second quarter of 2008, the average sales price for a house in Suffolk County was \$445,256, and \$348,444 for a condominium.¹²⁶ In comparison, in 2008, the average one-bedroom apartment on Long Island costs \$1492 per month.¹²⁷ The sky-high cost of housing in Suffolk County has forced persons to choose between “food, clothing, transportation and medical care.”¹²⁸ These housing prices also indicate that, because of the near-impossibility of finding affordable housing in Suffolk County, people have been forced to turn to other means of finding housing—including finding accessory apartments.¹²⁹ This includes retired seniors who still wish to live independently but cannot afford, or are not

¹²⁰ GROWSMART MAINE, ACCESSORY APARTMENTS: AN AFFORDABLE HOUSING STRATEGY (2007), <http://www.growsmartmaine.org/docs/Affordable-Housing.pdf> (last visited Nov. 25, 2009).

¹²¹ TOWN OF HUNTINGTON CODE § 198-134(A)(2) (2007).

¹²² *Id.* § 198-134(A)(2).

¹²³ Timothy Overton, *Empty Laws Make for Empty Stomachs: Hollow Public Housing Laws in Utah and Other States Force the Nation's Poor to Choose Between Adequate Housing and Life's Other Necessities*, 21 BYU J. PUB. L. 495, 498 (2007) (citing Dep't of Hous. and Urban Dev., Affordable Hous., <http://www.hud.gov/offices/cpd/affordablehousing/index.cfm> (last visited July 22, 2009)).

¹²⁴ Dep't of Hous. and Urban Dev., *supra* note 123.

¹²⁵ *Id.*

¹²⁶ JONATHAN MILLER, LONG ISLAND/QUEENS MARKET OVERVIEW, <http://www.miller-samuel.com/reports/pdf-reports/LI-Qu2Q08.pdf> (last visited July 22, 2009).

¹²⁷ Apartment Ratings.com, New York-Northern New Jersey-Long Island Apartment Rental Rates, <http://www.apartmentratings.com/rate?a=MSAAvgRentalPrice&msa=5602> (last visited July 22, 2009).

¹²⁸ Overton, *supra* note 123, at 498 (quoting Dep't of Hous. and Urban Dev., *supra* note 123).

¹²⁹ GrowSmart Maine, *supra* note 120.

capable of, living on their own anymore. It also includes newly-graduated students who, although starting a new career, cannot afford to buy a house or rent an apartment because of student loan debt.

Accessory apartments may also be beneficial to sex offenders who are looking for a place to reside outside of any residency restriction. For example, a sex offender who was just released from prison, has found employment, and is looking for a fresh start on life may not have enough money for anything other than an accessory apartment. Perhaps a sex offender has family that lives within the residency restriction, and although he has little money, wants to remain in the community in order to maintain contact with his family. In these cases, accessory apartments may be extremely beneficial for sex offenders. However, the Town Board of Huntington felt differently in passing a statute barring sex offenders from residing in accessory apartments.¹³⁰ In determining the validity of the stated reasons for passing this statute, one must first look at the legislative intent of the residency restriction. This Comment respectfully submits that Huntington's legislative action is contrary to the result it seeks to achieve.

VII. INTENT OF THE ACCESSORY APARTMENT STATUTE

A. Children's Public Safety and Welfare

The first reason the Town Board of Huntington gives for creating the restriction is the finding that sex offenders "pose a significant threat to the health and safety of the community . . . especially to children."¹³¹ Although it is clear that Huntington's intentions are noble, it must be asked whether these sex offender restrictions are more beneficial or detrimental to the health and safety of children. Before the statute passed, some experts warned that "making it harder for sex offenders to find housing can . . . increase the likelihood that they will re-offend."¹³² If the sex offender is not able to locate suitable

¹³⁰ TOWN OF HUNTINGTON CODE § 198-133(B)(2) (2007) ("It shall be unlawful for a property owner . . . to knowingly or recklessly lease . . . an accessory apartment to a registered sex offender . . .").

¹³¹ *Id.* § 194-1(A).

¹³² Deborah S. Morris, *Huntington Mapping Out Sex Offender Plan*, NEWSDAY, Jan. 10, 2007, at A2.

housing, he or she may have fewer treatment options and be less likely to attend a rehabilitation program.¹³³ A sex offender who fails to complete a treatment program is at a greater risk for both general and sexual recidivism.¹³⁴

Making it harder for sex offenders to find housing may also lead to a clustering of sex offenders in Huntington, and, in the extreme, result in homelessness.¹³⁵ It is not a stretch to state that the elimination of sex offenders from accessory apartments in Huntington may lead to a greater concentration of sex offenders in certain parts of town.¹³⁶ This is exactly what happened in Iowa after their statute was ruled to be constitutional in *Doe v. Miller*.¹³⁷ The residency restriction forced sex offenders to flock to motels and trailer parks, creating clusters of sex offenders in certain areas.¹³⁸ One Cedar Rapids motel had twenty-six registered sex offenders living in twenty-four rooms.¹³⁹ This clustering of sex offenders may have dangerous negative consequences for the safety of children.¹⁴⁰ Sexual violence can be “normalized,” and when sex offenders live together, they may learn to become “better, more manipulative and more evasive by learning from other sex offenders’ mistakes and successes.”¹⁴¹

Iowa’s residency restriction has caused some sex offenders to become homeless, causing them to disappear.¹⁴² When looking at Iowa’s sex offender registry, it may be commonplace for a registrant’s address to be listed as “ ‘on the Raccoon River between Des Moines and West Des Moines,’ ‘behind the Target on Euclid,’ or ‘underneath the I-80 bridge.’ ”¹⁴³ Some sex offenders may even lie

¹³³ Margaret Troia, *Ohio’s Sex Offender Residency Restriction Law: Does It Protect the Health and Safety of the State’s Children or Falsely Make People Believe So?*, 19 J. L. & HEALTH 331, 341 (2006).

¹³⁴ The Ass’n for the Treatment of Sexual Abusers, *Facts About Adult Sex Offenders*, <http://www.atsa.com/ppOffenderFacts.html> (last visited July 22, 2009) [hereinafter ATSA].

¹³⁵ See Troia, *supra* note 133, at 341.

¹³⁶ See *id.*

¹³⁷ *Miller II*, 405 F.3d at 700.

¹³⁸ See Monica Davey, *Iowa’s Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, March 15, 2006 at A1.

¹³⁹ *Id.*

¹⁴⁰ Troia, *supra* note 133, at 333.

¹⁴¹ Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 43 (2008).

¹⁴² Davey, *supra* note 138, at A1.

¹⁴³ HUMAN RIGHTS WATCH, *supra* note 81, at 107.

about their residences because of the risk of prosecution or eviction.¹⁴⁴ Law enforcement in Iowa has struggled to maintain track of sex offenders throughout the state.¹⁴⁵ The Iowa County Attorney's Association estimates that they cannot account for half of the sex offenders living in Iowa.¹⁴⁶ A sheriff for Lynn County, Iowa, stated that, " '[w]e went from knowing where about [ninety] percent of them were. We're lucky if we know where [fifty] to [fifty-five] percent of them are now . . . the law created an atmosphere that those individuals can't find a place to live.' "¹⁴⁷

Although the Town of Huntington is seeking to protect its children, by banning sex offenders from owning or leasing accessory apartments, Huntington may be creating an unsafe environment for children.¹⁴⁸ Sex offenders that are forced out of Huntington, due to this statute, will go underground by living in motels or by becoming homeless. Some sex offenders will be forced to move to other neighboring towns, potentially creating clusters of them throughout Suffolk County. Others will lie about their residences to avoid persecutions. The net result of this statute will likely be that law enforcement will struggle to keep track of sex offenders, creating a more dangerous situation for children living not only in Huntington, but also Suffolk County.

B. High Recidivism Rates of Sex Offenders

According to its legislative intent, Huntington's second reason for passing the residency restriction is the high "rate of recidivism" for sex offenders.¹⁴⁹ Many residency restrictions are passed because of this belief; in fact, federal legislators have stated recidivism rates of forty, seventy-four, and ninety percent in support of residency restrictions for sex offenders.¹⁵⁰ There was no source given for these figures, nor were the legislators asked for one.¹⁵¹ Noting the lack of a source for these statistics, it must be asked whether sex of-

¹⁴⁴ Troia, *supra* note 133, at 343.

¹⁴⁵ HUMAN RIGHTS WATCH, *supra* note 81, at 105.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (quoting Sea Stachura, *The Consequences of Zoning Sex Offenders*, MINN. PUB. RADIO, April 25, 2006, <http://minnesota.publicradio.org/display/web/2006/08/10/soundart/>).

¹⁴⁸ See Morris, *supra* note 132, at A2.

¹⁴⁹ TOWN OF HUNTINGTON CODE § 194-1(B) (2007).

¹⁵⁰ See HUMAN RIGHTS WATCH, *supra* note 81, at 25 n.38.

¹⁵¹ *Id.*

fenders actually have a high risk of reoffending. Numerous studies have shown that this is not necessarily the case.¹⁵² The United States Department of Justice tracked 272,111 persons released from prison in 1994—9691 of them were sex offenders.¹⁵³ The study found that sex offenders were less likely to be rearrested for any offense as compared to non-sex offenders.¹⁵⁴ Additionally, out of the 9691 sex offenders tracked, only 5.3 percent of them were rearrested for a new sex crime.¹⁵⁵ The percentage rate for recidivism is slightly higher for sex offenders that had a prior history of sex offenses.¹⁵⁶

Furthermore, New York has implemented three studies on the recidivism rates of sex offenders, in 1986, 2002, and 2007.¹⁵⁷ In the first study, the state tracked 556 sex offenders who were released in 1986 over an eight-and-a-half to nine-and-a-half year period, depending on their release date.¹⁵⁸ Although forty-eight percent of sex offenders were arrested for a new offense, only six percent were arrested for a new sex crime.¹⁵⁹ The 2002 New York study, which tracked 12,863 inmates released between 1985–2002, whose most serious offenses included rape, sodomy, sexual abuse, and other sex crimes, concluded that only two percent of them returned to prison for another sex offense.¹⁶⁰ The 2007 New York study looked at the proportion of sex offenders rearrested after registering on the sex offender registry.¹⁶¹ After one year, fifteen percent of sex offenders were arrested for new crimes, but only two percent were arrested for

¹⁵² *Id.* at 26.

¹⁵³ U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDERS STATISTICS, <http://www.ojp.usdoj.gov/bjs/crimoff.htm#sex> (last visited Nov. 24, 2008).

¹⁵⁴ *Id.* (stating that forty-three percent of sex offenders were arrested for any offense, while sixty-eight percent of non-sex offenders were rearrested for any offense).

¹⁵⁵ *Id.*

¹⁵⁶ See HUMAN RIGHTS WATCH, *supra* note 81, at 26 (“8.3% of all sex offenders with more than one prior conviction for a sex offense were rearrested for another sex crime.”).

¹⁵⁷ C. David Hess, A Detailed Analysis of Sex Offender Recidivism in New York State, <http://theparson.net/so/recidivismanalysis.htm> (last visited Sept. 16, 2009).

¹⁵⁸ KATHY CANESTRINI, PROFILE AND FOLLOW UP OF SEX OFFENDERS RELEASED IN 1986 19 (1996), http://www.theparson.net/so/Profile_and_follow_up_of_sex_offenders_released_in_1986.pdf.

¹⁵⁹ *Id.* at 21.

¹⁶⁰ LESLIE KELLAM, 2002 RELEASES: THREE YEAR POST RELEASE FOLLOW-UP 16, http://www.theparson.net/so/2002_Releases_3YR_OUT.pdf.

¹⁶¹ N.Y. DIV. OF PROB. AND CORR. ALTERNATIVES, RESEARCH BULLETIN: SEX OFFENDER POPULATIONS, RECIDIVISM AND ACTUARIAL ASSESSMENT 3 (2007), <http://dpca.state.ny.us/pdfs/somgmtbulletinmay2007.pdf>.

new sex offenses.¹⁶² After eight years, forty-eight percent of sex offenders were arrested for new crimes, but only eight percent of them committed new sex crimes.¹⁶³

In addition to New York, low recidivism rates have been found in studies all around the United States.¹⁶⁴ For example, a 2007 Minnesota study found a twelve percent recidivism rate for sex offenders over ten years, with seven percent being re-incarcerated.¹⁶⁵ In the same year, a Tennessee study found a 7.6 percent recidivism rate for sex offenders.¹⁶⁶ Other states have also consistently shown under a ten percent recidivism rate for sex offenders.¹⁶⁷

Not only have state studies shown low rates of sex offender recidivism, but there is no study which suggests that residency restriction laws decrease recidivism rates.¹⁶⁸ “In fact, the studies [have shown] that prohibiting sex offenders from residing near schools does not affect community safety and should not be used to control recidivism.”¹⁶⁹ It is difficult to state that sex offenders are at a high risk of recidivism when numerous studies conclude exactly the opposite. Furthermore, studies have also shown that residency restrictions do nothing to deter sex offender recidivism.¹⁷⁰ It also should be noted that the Huntington statute, not surprisingly, does not cite to a

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *See, e.g.*, MINN. DEP’T OF CORR., SEX OFFENDER RECIDIVISM IN MINNESOTA 20 (2007), <http://www.doc.state.mn.us/documents/04-07SexOffenderReport-Recidivism.pdf>; TENN. BUREAU OF INVESTIGATION CRIME STATISTICS UNIT, RECIDIVISM STUDY 3 (2007), *available at* http://www.tbi.state.tn.us/Info%20Systems%20Div/TIBRS_unit/Publications/Sex%20Offender%20Recidivism%202007%208-14-07.pdf.

¹⁶⁵ MINN. DEP’T OF CORRECTIONS, *supra* note 164, at 20 (stating that the average follow up time was just over eight years, and that follow up periods were between three and sixteen years.)

¹⁶⁶ TENN. BUREAU OF INVESTIGATION CRIME STATISTICS UNIT, *supra* note 164, at 8.

¹⁶⁷ *See, e.g.*, ALASKA JUDICIAL COUNSEL, CRIMINAL RECIDIVISM IN ALASKA 8 (2007), <http://www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf> (finding that in a three year follow up from sex offenders released in 1999, only three percent of sex offenders committed a new sex offense); OHIO OFFICE OF CRIM. JUST. SERVICES, REPORT TO THE OHIO CRIMINAL SENTENCING COMMISSION: SEX OFFENDERS 2 (2006), *available at* <http://www.ocjs.ohio.gov/Research/Sex%20Offender%20Report%20pdf.pdf> (finding an eight percent recidivism rate from a ten year follow up with sex offenders released in 1989).

¹⁶⁸ ATSA, *supra* note 134.

¹⁶⁹ Troia, *supra* note 133, at 344 (describing two state studies that conclude that a rule prohibiting where a sex offender resides is irrelevant to preventing sex crimes—“living in close proximity to schools or parks is not a factor in recidivism”).

¹⁷⁰ *Id.* at 344.

source that indicates that “the rate of recidivism is high” for sex offenders.¹⁷¹ There is no basis for the high recidivism rates for sex offenders cited within the statute. A substantial majority of studies have shown a low rate of sex offender recidivism and state that these types of laws have no effect on reducing recidivism.¹⁷² In sum, the Huntington accessory apartment statute has no basis and will do nothing to deter the already minimal rate of sex offender recidivism.

C. Failure of Treatment Options

In developing the accessory apartment statute, the Town Board of Huntington also stated that “programs designed to treat . . . [sex] offenders have been largely ineffective” in reducing recidivism rates.¹⁷³ Early studies, from the 1970s and 1980s, concluded that a difference in recidivism rates did not exist between sex offenders that underwent treatment, and those who had not.¹⁷⁴ Some recent research has developed similar conclusions.¹⁷⁵ However, more recent studies have concluded that treatment for sex offenders may have a significant effect in deterring recidivism.¹⁷⁶ University of Missouri-Kansas City law professor John Q. LaFond believes that this discrepancy from earlier studies stems from the state’s decision that sex offenders “were not sick; they were bad.”¹⁷⁷ He notes, however, that “there [is] an emerging optimism that psychologists can deal with these people and offer alternatives to continued incarceration.”¹⁷⁸

¹⁷¹ TOWN OF HUNTINGTON § 194-1(B) (Feb. 6, 2007).

¹⁷² ATSA, *supra* note 134.

¹⁷³ TOWN OF HUNTINGTON CODE § 194-1(B) (Feb. 6, 2007).

¹⁷⁴ L. Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCH. BULLETIN 3, 3 (1989).

¹⁷⁵ Anna Goodnough & Monica Davey, *For Sex Offenders, a Dispute Over Therapy’s Benefits*, N.Y. TIMES, Mar. 6, 2007, at A1 (describing an authoritative California study finding that sex offenders that entered relapse treatment were slightly more likely to offend again than those who received no therapy at all).

¹⁷⁶ Amy Baron-Evans, *Still Time to Rethink the Misguided Approach of the Sex Offender Registration and Notification Act*, 20 FED. SEN. R. 357 (2008) (citing several studies which show that sex offenders that have undergone behavior treatment have lower recidivism rates than non-treated sex offenders).

¹⁷⁷ Karen Kersting, *New Hope for Sex Offender Treatment*, 34 MONITOR ON PSYCH. 52, 54 (2003), available at <http://www.apa.org/monitor/julaug03/newhope.html>.

¹⁷⁸ *Id.*

VIII. ANALYSIS**A. Is Huntington's Accessory Apartment Statute Constitutional Under *King*?**

King recognized a fundamental right to intrastate travel and determined that a statute cannot substantially deter living in a state within the Second Circuit.¹⁷⁹ In order to fully determine whether Huntington's accessory apartment statute is unconstitutional, one must look at a map created by Huntington last year.¹⁸⁰ Along with barring sex offenders from owning or leasing accessory apartments, Huntington also passed a Child Protection Act,¹⁸¹ which pinpoints on a map every school, park, licensed day care center, and playground in Huntington. The map also shows every accessory apartment in Huntington, and indicates areas inside and outside the quarter-mile buffer zones. Huntington Town Councilman Stuart Besen stated that "[n]othing is more important . . . than the safety of our Town's children," and the map is a "powerful tool" in enforcing the statute.¹⁸² The overall goal of the map is to point out where Level Two and Three sex offenders may live.¹⁸³

Additionally, this map is also influential in determining the overall constitutionality of the statute.¹⁸⁴ There are approximately 1700 accessory apartments in Huntington,¹⁸⁵ most of them located within the quarter-mile residency restriction buffer areas.¹⁸⁶ Of the 1700 accessory apartments, approximately twenty-four percent are located outside the quarter-mile residency restriction.¹⁸⁷ Considering

¹⁷⁹ See *King*, 442 F.2d at 648.

¹⁸⁰ Town of Huntington, Child Protection Act (Mar. 1, 2008), http://town.huntington.ny.us/permit_pics/644.pdf.

¹⁸¹ *Id.*

¹⁸² See Press Release, *supra* note 5.

¹⁸³ Morris, *supra* note 132, at 130.

¹⁸⁴ See *King*, 442 F.2d at 648 (noting a residency requirement penalizes residents only because they assumed their right to travel). See also Child Protection Act, *supra* note 180 (portraying several accessory apartments outside the quarter-mile residency restriction in the Town of Huntington uninhabitable by sex offenders).

¹⁸⁵ Morris, *supra* note 132.

¹⁸⁶ See Child Protection Act, *supra* note 180 (delineating quarter-mile buffer zones in pink).

¹⁸⁷ See *id.* (indicating that approximately 407 of the 1700 accessory apartments are located outside of the residency restriction).

most of the Town of Huntington is already uninhabitable due to the quarter-mile residency restriction, the potential ramifications of this statute are significant for sex offenders. Some of the areas in Huntington that do not have accessory apartments have few or no roads, which suggest that those areas lack any housing or living space.¹⁸⁸ Despite the probable difficulty that a sex offender would encounter in securing housing, it is feasible that he or she may still do so in Huntington. However, the mere fact that a sex offender is not completely foreclosed from living in Huntington does not equate to the statute's constitutionality. The troubling aspect of this statute lies not within the present difficulty of finding housing, but in the future difficulty of it. Although sex offenders are unable to reside in over 400 accessory apartments, it is probable that they could find housing elsewhere in Huntington.¹⁸⁹ However, sex offenders may not be able to live in Huntington in the future. Each time a homeowner decides to erect an accessory apartment, it results in one less residence that a sex offender may reside. Due to an exceedingly expensive housing market, not only are persons unable to afford to buy a house, but homeowners may look for new means to be able to afford paying off their mortgages. One of these means is to create accessory apartments.

A major increase in the amount of accessory apartments in Huntington will indirectly lead to substantial difficulty for sex offenders to find homes to live in, perhaps leading to a complete impairment of the right to residency. Similar to the New Rochelle public housing statute in *King*, the Huntington statute may indirectly bar sex offenders from exercising their intrastate right to reside within the Town.¹⁹⁰ Since the Second Circuit recognizes an intrastate right to travel, strict scrutiny must be used in determining the constitutionality of the statute.¹⁹¹

Huntington believes that its statute is the "most narrowly tailored" means of limiting sex offender contact with children, while stating that the protection of its residents is a "compelling govern-

¹⁸⁸ See *id.* (delineating open areas in white).

¹⁸⁹ See Morris, *supra* note 132 (noting sex offenders are only banned from renting accessory apartments). See also GrowSmart Maine, *supra* note 120 (stating that an accessory apartment is a "self-contained second living unit . . . built into or attached to an existing single family dwelling").

¹⁹⁰ See *King*, 442 F.2d at 648 (holding that a public housing statute, with a five-year residency requirement, infringed the interstate right to travel).

¹⁹¹ See *id.*

mental interest.”¹⁹² Even assuming that the protection of Huntington’s residents is a compelling governmental interest, this statute is not the most narrowly tailored means of limiting sex offender contact with children. Although the Huntington Town Board concedes that it “cannot remove the threat posed to or guarantee the safety of minors,”¹⁹³ the statute extends its power too far. As written, the statute will lead to the indirect banishment of sex offenders residing in Huntington. Laura Ahearn, executive director of Parents for Megan’s Law and the Crime Victims Center in Stony Brook, New York, agrees with the intention of the statute, but is concerned with its overbreadth.¹⁹⁴ Ahearn believes towns have to be “very careful [to] maintain [their] focus and goals on public safety laws and policy so that they won’t compromise existing laws and policies because they go too far. Because ultimately they will be overturned.”¹⁹⁵

Huntington can accomplish the same legislative intentions by narrowing the scope of the statute. It is nonsensical that a sex offender cannot rent an accessory apartment outside of the restricted area, but can rent an apartment in the non-restricted area right next to a family with three children. Therefore, Huntington can narrowly tailor the statute by prohibiting the lease of accessory apartments to only those sex offenders who established their residences in the restricted zone after October 31, 2005 (or between 1000 feet and a quarter-mile of a school, park or playground; 500 feet and a quarter-mile of a park, beach, or playground before February 6, 2007).¹⁹⁶ Sex offenders should be able to rent accessory apartments outside of the residency restriction. This would accomplish the same governmental purpose by preventing sex offenders from using a manner of contact within the residency restriction area. It would also allow sex offenders who want to reside in Huntington, outside of the restricted area, to do so. As it stands, the statute allows a sex offender to rent an apartment in a restricted area as long as it is not an accessory apartment. Thus, the statute does not make any sense, overextends its authority, and will eventually prevent sex offenders from living in

¹⁹² TOWN OF HUNTINGTON CODE § 194-1(D) (Feb. 6, 2007).

¹⁹³ *Id.* § 194-1(E).

¹⁹⁴ See Morris, *supra* note 132, at A2 (noting that Ahearn believes it is “good sense” to ban sex offenders who own a home from leasing accessory apartments to families, but offenders should be able to rent accessory apartments outside the restricted areas).

¹⁹⁵ *Id.*

¹⁹⁶ TOWN OF HUNTINGTON CODE § 194-6(A)-(C) (Feb. 6, 2007).

the town of Huntington.

B. Public Policy

In reviewing the public policy implications, Huntington's residency restriction and accessory apartment statutes will be analyzed together because both of them have the same effect. As a matter of public policy, the Town of Huntington's decision to enact these types of sex offender statutes is appalling. Although Huntington is well-intentioned in enacting restrictions against sex offenders, these statutes will negatively affect the public welfare of children.

The statutes will lead to greater instability for sex offenders. It is entirely possible that this statute will force sex offenders to move out of Huntington. But, where will they go? Some sex offenders will inevitably have to find housing outside of Huntington. There are two potential problems that may occur because of this. First, sex offenders could potentially be removed from any type of support system they may have.¹⁹⁷ Moving away from that support system, whether that consists of families, close friends, relatives, or even one's employment, will detrimentally affect the psyche of a sex offender, which will increase the chances of re-offense. These support systems may include a psychotherapy treatment center, such as The Peterson-Krag Center in Smithtown, which offers adult psychotherapy and group therapy.¹⁹⁸ Although the beneficial effects of medical treatment for sex offenders are not clear, forcing sex offenders to move further away from a medical treatment center will increase their chances of committing another offense.

Huntington's sex offender statute will also indirectly force sex offenders out of Huntington, leading to sex offender clustering in other areas of Suffolk County.¹⁹⁹ Sex offender clustering has already occurred in several parts of Long Island. For example, forty-five sex

¹⁹⁷ See Troia, *supra* note 133, at 341 (noting that residency restrictions can force sex offenders to live away from individuals who can provide support systems such as relatives and immediate family; if sex offenders are forced away from their support system they will be unable to receive positive support, which has been shown to lead to "fewer criminal and technical probation violations").

¹⁹⁸ The Peterson-Krag Center, Mental Health Services, http://www.peterson-krag.org/mhs_dyn.html (last visited Nov. 24, 2008) (offering "a full array of therapeutic services").

¹⁹⁹ See Troia, *supra* note 133, at 341 (indicating that residency laws forced sex offenders to live in clustered areas "away from treatment options and monitoring systems").

offenders reside in Coram; seventeen of those individuals reside on the same block, the highest concentration of sex offenders in Suffolk County.²⁰⁰ Seventy-six sex offenders live within a five-mile radius in Mastic.²⁰¹ This type of clustering has already occurred within Huntington itself, as eight of the twenty-two sex offenders reside within less than a two-mile radius.²⁰² These types of clusters will continue to develop and build around Suffolk County as an effect of Huntington's sex offender statute.

It is also likely that Huntington's sex offender policy will make it harder for the town to track sex offenders. If a sex offender is unable to find housing, it is not a stretch to assert that the offender may be rendered homeless, forcing them to go underground. Of the twenty-two sex offenders living in Huntington, only twelve are in compliance.²⁰³ This means that potentially ten sex offenders who were tracked by Huntington before the passing of the statute are now off the radar. Perhaps some of the sex offenders who are in compliance may have given that address only to act in compliance, but are actually living inside of the residency restriction or elsewhere. The Town of Huntington may have lost track of almost half of the sex offenders residing in the area.²⁰⁴ As a result, the statute has had detrimental effects on public policy, and it has put children at a greater risk of harm.

It should be noted that Suffolk County has seemingly admitted these types of effects by putting sex offenders in temporary housing trailers, moving them around the county regularly, and parking the trailers in non-residential areas for several weeks at a time.²⁰⁵ These offenders are under a strict curfew from 8:00 pm to 7:30 am, and are given minimal accommodations.²⁰⁶ The purpose of these trai-

²⁰⁰ Jennifer Gonnerman, *The House Where They Live*, N.Y. MAG., Dec. 30, 2007, available at <http://nymag.com/news/features/42368/>.

²⁰¹ Corey Kilgannon, *Threats of Violence as Homes for Sex Offenders Cluster in Suffolk*, N.Y. TIMES, Oct. 9, 2006, at B1.

²⁰² See Child Protection Act, *supra* note 180.

²⁰³ *Id.*

²⁰⁴ See Troia, *supra* note 133, at 343 (suggesting residency restrictions do not lessen the risk sex offenders pose to children because a sex offender seeking a residence may not register his new address with law enforcement to avoid legal repercussions).

²⁰⁵ See Corey Kilgannon, *Suffolk County to Keep Sex Offenders on the Move*, N.Y. TIMES, Feb. 17, 2007, at B1.

²⁰⁶ *Id.* (stating that accommodations only consist of a large room, bathroom, and running water; there is no cooking and no televisions).

lers is to “motivate the offenders to seek permanent housing.”²⁰⁷ However, if there is no housing available for sex offenders, this goal can never be realized. With its sex offender policy, Huntington is forcing sex offenders to choose between living away from potential support systems outside of town, going underground, or living in no-frills trailers. With those options, reoffending and going back to prison does not seem like a far-fetched alternative.

Not only are Huntington’s intentions for protecting the safety and welfare of children overstated, so are the high recidivism rates that the Town portrayed in passing this statute.²⁰⁸ In fact, the United States Department of Justice, and three New York State studies, concluded the exact opposite.²⁰⁹ It is irresponsible of the Town to state that sex offenders have high recidivism rates when three easily-accessible state studies have concluded that sex offenders have low recidivism rates. Passing legislation under the fallacy that sex offenders have high recidivism rates perpetuates the public’s unnecessary fear and paranoia.²¹⁰ Such legislation only increases the chances that a sex offender will commit another sex offense.²¹¹ Those high recidivism rates discussed in Huntington’s statutory intent will eventually become a self-perpetuating reality.

IX. CONCLUSION

Huntington’s sex offender policy is an honest attempt at trying to protect its citizens from sex offenders. The Town Board of

²⁰⁷ *Id.*

²⁰⁸ TOWN OF HUNTINGTON CODE § 194-1(B) (Feb. 6, 2007).

²⁰⁹ See CANESTRINI, *supra* note 158 (indicating forty-eight percent of sex offenders violated parole or committed a new offense but only six percent were arrested for new sex crimes); See also KELLAM, *supra* note 160 (noting that less than eight percent of 12,863 released sexual offenders who were “re-committed” were “re-committed” for a new sex crime); N.Y.S. DIV. OF PROB. AND CORR. ALTERNATIVES, RESEARCH BULLETIN: SEX OFFENDER POPULATIONS, RECIDIVISM AND ACTUARIAL ASSESSMENT 3 (2007), <http://dpca.state.ny.us/pdfs/somgmtbulletinmay2007.pdf> (showing only two percent of registered sex offenders committed a new sex crime out of fifteen percent who committed any type of new crime within one year of registering as a sexual offender).

²¹⁰ TOWN OF HUNTINGTON CODE § 194-1(B) (Feb. 6, 2007) (indicating that the legislative intent is to reduce the high rate of recidivism, the restrictions would “minimize the risk of repeated acts”).

²¹¹ See Troia, *supra* note 133, at 341 (explaining that restriction laws isolate sex offenders creating controversy because it has been shown that “sex offenders with positive informed support systems commit significantly fewer criminal and technical probation violations than offenders with negative or no support systems”).

Huntington believes that this will improve the public safety and welfare of children.²¹² Regardless of whether its policy is effective, Huntington's accessory apartment statute is unconstitutional. Considering that the Second Circuit recognizes the right to intrastate travel, this statute indirectly violates a sex offenders' constitutional right.²¹³ Since this right is infringed, strict scrutiny applies, and the statute is not narrowly tailored to meet a compelling governmental interest. The statute could be modified to accomplish the same purpose without infringing on sex offenders constitutional rights to intrastate travel. Furthermore, Huntington's sex offender policy is terrible public policy. It will ultimately do more harm than good to the citizens of not only Huntington, but all of Suffolk County. Forcing sex offenders out of Huntington will create dangerous clusters of sex offenders throughout Suffolk County, and leave sex offenders in a realm of uncertainty. The reasons stated in Huntington's legislative intent are all refutable. Furthermore, the statute will cause an increase in sex offender recidivism by pushing sex offenders underground and away from social support structures designed to help sex offenders. This statute will undoubtedly result in unintended negative consequences, which neither sex offenders, nor the Town, are ready for.

²¹² TOWN OF HUNTINGTON CODE § 194-1(C) (Feb. 6, 2007).

²¹³ See *King*, 442 F.2d at 648 (noting that since individuals have a constitutional right to travel between states, it would only follow that the same right exists for travel within a state).