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Intrastate Banishment: An Examination and Argument for Strict Scrutiny of Judicially and Executively Imposed Banishment Orders

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NOTES

INTRASTATE BANISHMENT: AN EXAMINATION AND ARGUMENT FOR STRICT SCRUTINY OF JUDICIALLY AND EXECUTIVELY IMPOSED BANISHMENT ORDERS

INTRODUCTION

On November 26, 2002, seventy-two year old Marjorie Benner was found naked and dead in the bedroom of her Grays Harbor County, Washington home.[1] The post-mortem medical examination revealed no evidence of sexual assault but concluded that Benner had died from asphyxia caused by strangulation.[2] After a trial by jury, Benner's forty-year-old neighbor, David Schimelpfenig, was convicted of Benner's murder and the trial court imposed an exceptional sentence of 400 months imprisonment based on its conclusion that Benner was a "particularly vulnerable" victim.[3] As part of its sentence, the trial court ordered that Schimelpfenig could never again live in Grays Harbor County, nor have any contact with Benner's family.[4] Upon review however, a Washington appellate court vacated the banishment order, concluding that it was overly broad, and thereby impermissibly infringed upon Schimelpfenig's

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[1] State v. Schimelpfenig, No. 31012-1-II, 2005 WL 1523678, at *** 4 (Wash. Ct. App. June 29, 2005) (A partially published opinion can be found at 115 P.3d 338; however, the published opinion does not contain a full reporting of the facts.).

[2] *Id.*

[3] *Id.* at ***8 Upon review, the appellate court vacated the exceptional sentence and remanded the case to the trial court to impose a sentence in the statutorily approved range of 240 to 320 months.

[4] State v. Schimelpfenig, 115 P.3d 338, 339 (Wash. Ct. App. 2005).

right to travel.[5] Importantly, the appellate court did not rule that sentences imposing broad geographical restrictions are necessarily inappropriate or unconstitutional, but simply found that the geographical restrictions imposed on Schimelpfenig were inappropriate given the factual circumstances of the case.[6]

In contrast, in *Predick v. O'Connor*,[7] a Wisconsin appellate court upheld an order prohibiting the defendant, O'Connor, from entering Walworth County, Wisconsin. In *Predick*, the trial court had imposed the order after finding that O'Connor repeatedly violated the terms of a permanent harassment injunction,[8] which had been issued after O'Connor had violated previous restraining orders by verbally harassing Predick and allegedly using an automobile to run Predick off the road.[9] The trial court determined that the banishment injunction was appropriate because of O'Connor's past disregard for previous, less restrictive orders, and because of the physical threat that she posed.[10] Ultimately, the appellate court determined that the banishment order was "a proper exercise of discretion because it may finally keep the tormentor at bay."[11]

Upon first glance, the above cases may appear incongruous. In *Schimelpfenig*, the appellate court was unwilling to uphold an order prohibiting a convicted murderer from living in the county in which he had committed his crime. Schimelpfenig entered the home of his seventy-two year old neighbor, who had routinely hired him to do yard work,[12] and strangled her with her own stockings, leaving her dead and naked in her own bedroom.[13] The jury found Schimelpfenig guilty of first-degree murder, yet the appellate court held that an order prohibiting him from living in the county unconstitutionally infringed on his rights. Conversely, in *Predick*, the appellate court upheld a county-wide banishment order against a woman who was guilty only of harassing a woman with whom she claimed to have been involved in a romantic relationship, but did not physically harm.[14] Thus, one court was unwilling to banish a first-degree murderer from the county in which he committed his crime, while the other upheld a

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[5] *Id.*

[6] *Id.* at 341.

[7] 660 N.W.2d 1 (Wis. Ct. App. 2003).

[8] *Id.* at 2–5.

[9] *Id.*

[10] *Id.* at 2.

[11] *Id.*

[12] Schimelpfenig, 115 P.3d at 339.

[13] State v. Schimelpfenig, No. 31012-1-II, 2005 WL 1523678, at ***4 (Wash. Ct. App. June 29, 2005).

[14] *Predick*, 660 N.W.2d at 3. O'Connor was also enjoined from contacting a friend of Predick whom O'Connor was convinced had become Predick's new lover. *Id.* at 4.

county-wide banishment against a woman who had never physically injured anyone. Upon closer reflection however, these holdings are indeed consistent. In *Predick*, the banishment order was necessary because previous, less restrictive orders failed to protect the harassment victim. In *Shimelpfenig*, the offender was sentenced to a lengthy term in prison and there was no showing that a further banishment order was necessary to accomplish any valid state interests.

Schimelpfenig and *Predick* are just two examples of a state imposed order that is perhaps more common[15] than one might expect: banishment. For purposes of this Note, banishment is defined as "an order which compels a person 'to quit a city, place, or county for a specific period of time, or for life.'"[16] Intuitively, such an order seems like a thing of the past, calling to mind the use of Australia as a home for exiled criminals from the United Kingdom.[17] However, as communities deal with pervasive problems of gang violence, drug abuse, prostitution, and sexual abuse, state legislatures have increasingly explored legislation restricting where violators may live and travel.[18] Such legislative acts expressly banishing offenders from specified areas for specified acts are not the focus of this Note. Instead, this Note is primarily concerned with banishment orders exiling an individual from a specific geographic area within a state (intrastate banishment) and that are not authorized by specific legislation, but are instead issued at the discretion of a trial court or an executive agency, such as a parole board. In fact, while legislative enactments of geographical restrictions have increased, most

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[15] *See, e.g*, Jason S. Alloy, Note, *"158-County Banishment" in Georgia: Constitutional Implications Under the State Constitution and the Federal Right to Travel*, 36 GA. L. REV. 1083, 1099 ("One prosecutor in DeKalb County, Georgia, has participated in over two hundred cases in which the defendant was banished to Echols County.").

[16] Reeves v. State, 5 S.W.3d 41, 45 (Ark. 1999) (quoting State v. Culp, 226 S.E.2d 841, 842 (N.C. Ct. App. 1976)).

[17] For an extended discussion of the historical roots of banishment, see Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J ON CRIM. & CIV. CONFINEMENT 455, 458–465 (1998).

[18] For discussions of various legislative efforts to deal with these problems by implementing geographical restrictions, see Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711 (2005) (analyzing legislative efforts to restrict where convicted sex offenders may live); Robert L. Scharff, Comment, *An Analysis of Municipal Drug and Prostitution Exclusion Zones*, 15 GEO. MASON U. CIV. RTS. L.J. 321, 323–324 (2005) (analyzing legislation that establishes exclusion zones that "punish the otherwise innocent presence of an individual who is in an exclusion zone, simply because that person has been charged with committing a prohibited act in an exclusion zone at some point in the past"); Stephanie Smith, Comment, *Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?*, 67 U. CHI. L. REV. 1461 (2000) (scrutinizing an ordinance in Cicero, Illinois, banishing from Cicero any gang member found by a preponderance of the evidence to have engaged in gang activity).

banishment orders are actually issued as conditions of probation or parole.[19]

Many jurisdictions have not confronted the issue of judicially or executively imposed banishment orders.[20] Among those jurisdictions that *have* considered the issue, the jurisprudence concerning banishment varies. For example, at least fifteen states, including Ohio, have expressly prohibited banishment *from* the state (interstate banishment).[21] Even where there is no such prohibition within the state constitution, most courts have invalidated interstate banishment orders on the grounds that such orders violate public policy by impermissibly dumping convicts on other states.[22] However, while most states agree that interstate banishment is impermissible, the states disagree about intrastate banishment. Courts that have considered the issue often hold that banishment orders are either per se violations of public policy,[23] or that they violate the statutory law supposedly authorizing the given banishment order.[24] At the same time, a number of courts have upheld the validity of such orders.[25] Some courts that have upheld banishment explicitly recognize that such orders implicate important policy and constitutional issues. Thus, while ultimately upholding the banishment order in question,

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[19] Snider, *supra* note 17, at 456.

[20] *See* Smith, *supra* note 18, at 1481 n.142 (citing a number of jurisdictions that, to the author's knowledge, had not addressed the issue).

[21] Snider, *supra* note 17, at 465 n.70.

[22] *See* Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) ("To permit one state to dump its convict criminals into another is not in the interests of safety and welfare; therefore, the punishment by banishment to another state is prohibited by public policy."); *see also* People v. Baum, 231 N.W. 95, 96 (Mich. 1930) (holding that interstate banishment is "impliedly prohibited by public policy" because such orders "would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several States which is the *basis of the Union itself*").

[23] *See* Crabtree v. State, 112 P.3d 618, 622 (Wyo. 2005) (overturning banishment from county after concluding that county-wide banishment implicates the same public policy concerns as interstate banishment because "banishment from an entire county will incite dissention and provoke retaliation among counties just as it would among states").

[24] *See* State v. Muhammad, 43 P.3d 318, 324 (Mont. 2002), *aff'd*, 121 P.3d 521 (Mont. 2005) (overturning banishment from county on grounds that sentencing court did not comply with the statutory parameters governing sentencing).

[25] *See* United States v. Cothran, 855 F.2d 749 (11th Cir. 1988) (upholding probation condition requiring defendant to stay out of Fulton County, Georgia for two years); State v. Brockelman, 933 P.2d 1315 (Colo. 1997) (upholding condition of two-year probation prohibiting defendant from entering the Evergreen or Bergen Park areas); State v. Collett, 208 S.E.2d 472 (Ga. 1974) (upholding the suspension of sentence conditioned upon the banishment of defendant from seven counties); State v. Nienhardt, 537 N.W.2d 123 (Wis. Ct. App. 1995) (upholding trial courts decision to stay sentence of sixty days in jail and instead place defendant on probation during which time defendant was prohibited from entering city where violations occurred); *see also* Smith *supra* note 18, at 1481 n.143 (documenting that Alabama, Alaska, California, Georgia, Illinois, Minnesota, Mississippi, Oregon, and Texas have all upheld intrastate banishment orders in either practice or theory).

the court in *Predick* noted, "[t]he knee jerk reaction is that this kind of order is arbitrary at the very least and an invasion of a person's constitutional right to travel at the most."[26] Still other courts have upheld banishment without raising any constitutional considerations and have simply applied an abuse of discretion review of the lower court's order.[27] Thus, "the jurisprudence in the area of banishment is woefully lacking a coherent theme."[28]

This Note examines the jurisprudence concerning intrastate banishment orders imposed in the context of probation and parole in an effort to provide a coherent framework for reviewing such orders. Ultimately, this Note argues that judicially and executively imposed banishment orders infringe upon the constitutional right of intrastate travel and should therefore be subject to strict scrutiny rather than the abuse of discretion standard many courts apply when reviewing such orders. By applying strict scrutiny, reviewing courts can best ensure that individual rights are not improperly infringed upon, while at the same time leave available a potentially effective tool to help rehabilitate offenders and protect communities. Additionally, strict scrutiny is warranted to minimize an intrinsic public policy problem created by banishment orders: such orders necessarily impose a burden on communities outside the banishment area, and are thus liable to provoke inter-community dissension and retaliation.

Judicially and executively imposed banishment has received limited scholarly attention.[29] Among those scholars who have written on the issue, most have argued for prohibiting or limiting its use.[30] Part I of this Note provides a broad historical overview of banishment and suggests that its ancient roots create an association with the distant, less civilized past, thereby causing many to feel intuitively suspicious when banishment is employed today. Part II(A) of this Note examines the common justifications for banishment orders and argues that while the justifications for banishment are certainly

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[26] Predick, 660 N.W.2d at 2; *see also* Schimelpfenig, 115 P.3d at 339 (noting the constitutional implications of the banishment order at issue).

[27] Cothran, 855 F.2d 750 (denying motion to correct a banishment sentence).

[28] Snider, *supra* note 17, at 475.

[29] *Id.* at 456 (noting the lack of scholarly attention to banishment orders and attributing this fact to the discretionary nature of such orders).

[30] *See id.* (arguing that banishment is a per se violation of the First Amendment's protection of freedom of association); *see also* Alloy, *supra* note 15 (arguing that certain banishment orders common in the State of Georgia violate both the Georgia and Federal Constitutions); Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. REV. 758 (1962–1963) (arguing that banishment serves no social value and is so cruel that it is in fact unconstitutional). *But see* Michael George Smith, *The Propriety and Usefulness of Geographical Restrictions Imposed as Conditions of Probation*, 47 BAYLOR L. REV. 571 (1995) (arguing that banishment serves legitimate state interests and should not be subject to strict scrutiny).

debatable, banishment can in fact serve a valid penological purpose. Part II(B) then examines whether courts and executive agencies have the authority to banish individuals. After concluding that banishment orders are in fact permissible, Part III examines the level of scrutiny that reviewing courts have and should apply to banishment. Part III(A) examines banishment conditions that are voluntarily agreed to and concludes that such agreements are no basis for removing banishment orders from judicial scrutiny. Part III(B) then examines the various types of review that courts have applied to banishment orders. Finally, Part III(C) examines whether there is a constitutional right to intrastate travel and concludes that because such a right does exist, all banishment orders must be subject to strict judicial scrutiny. Because banishment orders necessarily infringe upon the right of intrastate travel, and because such orders implicate important policy concerns regarding inter-local dumping of criminals, banishment orders should at all times be subject to strict judicial scrutiny.

I. HISTORICAL OVERVIEW

The practice of banishing individuals from a community is by no means a modern invention. As one court has noted, "[b]anishment as a punishment has existed throughout the world since ancient times."[31] In fact, scholars posit that banishment was used by the earliest human social groups as a powerful tool for maintaining order: formal or informal banishment would naturally serve as a powerful deterrent because expulsion from a social group could be devastating where membership in such a group was so important for survival.[32] In more organized societies, banishment was codified as a sanctioned form of punishment in such early legal systems as the Code of Hammurabi in Babylon, the Laws of Manu in India, the T'ang Code in China, and Mosaic Law and Talmudic legal systems.[33] Banishment was also endorsed by Aristotle in the *Nichomachean Ethics*, and scholars have shown that banishment was employed by the Athenians in Ancient Greece, as well as by Germanic peoples in the Middle Ages.[34] Perhaps more familiar to Americans is the British use of banishment as a major penological tool when the United Kingdom enacted the Transportation Act of 1718. Under this Act and those that followed, the British could exile both capital and non-capital offenders to the

[31] Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) (holding that banishment as part of a plea bargain was void).

[32] Snider, *supra* note 17, at 459.

[33] *Id.* at 459–60.

[34] *Id.* at 460.

Americas and Australia. One scholar estimates that between 1720 and 1765, close to 50,000 British subjects were banished to the Americas.[35] According to this scholar, the "overriding purpose [of the banishment policy] was neither rehabilitation nor deterrence, but ridding Britain of dangerous offenders."[36]

As one may expect, banishment has also been used as a political tool to preserve the authority of existing governments. Leaders have long exiled political rivals or dissenters as a means of preserving their own power. Just as early proto-social groups likely banished members for unforgivable offenses, it seems logical that leaders of such groups also banished those who unsuccessfully attempted to supplant them or who espoused threatening ideas. In more formally organized societies, political exile was employed by Ancient Greek city-states to exile citizens whom the Assembly deemed to be a threat to the political stability of the state.[37] Banishment was also used more recently in Europe and the United Kingdom as a tool for handling political agitators. For example, scholars have noted that a large percentage of convicts exiled to Australia were in fact Irish nationalists who protested British rule.[38] To cite another example, Russia long employed banishment as a method of political control, with Siberia the favored destination for exiles. Such banishment was officially adopted in Russia by the Code of Punishment of 1845, though it had been utilized as early as the sixteenth century.[39] Though this policy was officially abolished in 1917 after the Revolution, banishment of political dissenters was widely employed under the reign of Joseph Stalin.[40]

In the United States, banishment was imposed in colonial times as a means of expelling unwanted individuals from colonies.[41] That the colonies would utilize banishment is hardly surprising considering its widespread practice throughout the British Empire. Thus, at the time of the founding of the United States, it seems that banishment was hardly an uncommon tool for dealing with criminals and other unwanted citizens. For example, there is evidence showing that when

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[35] *Id.* at 462.

[36] *Id.* (quoting A. ROGER EKIRCH, BOUND FOR AMERICA. THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES 1718–1775, 2–3 (Oxford Univ. Press 1987)).

[37] *Id.* at 463 (discussing banishment tactics of various city-states).

[38] *Id.* at 464 (citing A.G.L. SHAW, CONVICTS AND THE COLONIES 166 (Oxford Univ. Press 1966)).

[39] *Id.*(noting the banishment of political prisoners).

[40] *Id.* at 465.

[41] Matthew D. Borrelli, *Banishment: The Constitutional and Public Policy Arguments Against This Revived Ancient Punishment*, 36 SUFFOLK U. L. REV. 469, 471 (2003) (citing JAMES GRAHAME, THE GREAT REPUBLIC BY THE MASTER HISTORIANS 92–93 (Hubert H. Bancroft, 1901)).

Georgia became an independent state, banishment was not considered to be a form of cruel and unusual punishment.[42] That strongly suggests that it was not particularly uncommon, and was in fact a relatively accepted part of the penological systems of the early United States. This conclusion is bolstered by an early Supreme Court decision, which held that "[t]he right to confiscate and banish, in the case of an offending citizen, must belong to every government. It is not within the judicial power, as created and regulated by the constitution of Georgia: and it naturally, as well as tacitly, belongs to the legislature."[43] One author has pointed to this holding as standing for the proposition that banishment is "*per se* violative of public policy."[44] On its face however, the Court's statement indicates that banishment was recognized as a legitimate exercise of governmental authority.

The point of this cursory outline of the historical use of banishment is to provide a context by which to view banishment as it is employed today. Sociologists have long noted that the manner in which a society punishes its criminals reflects the deep structures and values of that society. As the Sociologist David Garland has argued, "[p]unishment . . . can be viewed as a complex cultural artifact, encoding the signs and symbols of the wider culture in its own practices."[45] Accordingly, cultural norms determine what constitutes a "civilized punishment," and how we punish our criminals reflects what we, as a society, deem to be civilized and humane.[46] As cultural norms change over time, so too do the types of punishments that we employ. Moreover, the fact that we punish our criminals differently today than we did in the past symbolizes how we, as a society, have changed. That we no longer execute criminals in the open common signifies for many that we have become more civilized than our predecessors (if not simply more squeamish). Thus, the fact that banishment was a historically widespread form of punishment does not dictate that it comports with modern sensibilities and cultural norms. It is perhaps our notion of banishment as an "ancient"[47] punishment that makes us automatically suspicious when it is

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[42] State v. Collett, 208 S.E.2d 472, 473 (Ga. 1974) (citing WALTER MCELRETH, ON THE CONSTITUTION OF GEORGIA 442 (Harrison Co. 1912)).

[43] Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 20 (1800) (Cushing, J.).

[44] Snider, *supra* note 17, at 469.

[45] DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 198 (Univ. of Chicago 1990).

[46] *See id.* at 195–96.

[47] *See* Borrelli, *supra* note 41. The fact that Borrelli refers to banishment as an "ancient" punishment in his title arguably foreshadows his argument that it should be abolished in modern penology.

employed today. However, it is important to resist any snap judgments about banishment based solely upon its historical use. We should instead first recognize that banishment, as it is employed today, is both a product and reflection of our present cultural patterns and then objectively determine if, and how, banishment should be employed in our modern legal system.

II. PURPOSE AND AUTHORITY

It is a simple fact of American life that there are not enough prison beds to house all the criminals eligible for imprisonment. As one scholar has noted, "[b]ecause our existing prisons are so greatly overcrowded, expensive, and inadequate . . . , our system of criminal justice will inevitably be forced to use non-incarcerative means to deal with non-violent and, in some cases, moderately violent criminals over the next decade."[48] Additionally, as crime and recidivism occur at unacceptably high levels, despite the increased incarceration of criminals, many have questioned the efficacy and rationale of imprisonment.[49] Probation and parole have been, and will continue to be, one of the most heavily relied upon tools used by the criminal justice system to cope with the reality of prison overcrowding.[50] Banishment, as it is employed today, is generally either imposed as a condition of parole or probation.[51] By its very nature, banishment, as an alternative to the prison system, saves the state a considerable amount of money. Accordingly, banishment has the potential to help relieve the stress on the prison system at a relatively low cost.

A. Purpose

In evaluating the legitimacy of banishment orders as a whole, it is important to consider whether banishment orders serve legitimate governmental purposes. Because banishment orders are most commonly employed within a penological system, a key issue is whether banishment furthers an accepted penological purpose. More specifically, can banishment be justified under theories of rehabilitation, deterrence, retribution, and incapacitation?

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[48] NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE 1–3 (West 2d ed. 1999).

[49] GARLAND, *supra* note 45, at 4; *see also* COHEN, *supra* note 48, at 1–2 (noting that people have questioned prisons as either breeding grounds for more crime, or overly lenient country clubs).

[50] *See* COHEN, *supra* note 48, at 1–2 n.2 (noting a tripling of both the probation and parole populations between 1980 and 1997).

[51] *See supra* note 18 and accompanying text.

1. Rehabilitation

A common requirement of probationary conditions is that they promote the rehabilitation of the offender. A number of courts have struck down probationary banishment conditions under the theory that such conditions do not adequately serve rehabilitative purposes.[52] For example, courts have emphasized that removing an offender from the county in which his family lives is not rehabilitative,[53] while others have emphasized that banishing a broke and unemployed offender from a county does not reasonably promote the rehabilitation of that offender.[54] Central to this line of thinking is the notion that rehabilitating an offender necessitates active oversight by the punishing community. Indeed as one scholar has stated, "[r]ehabilitation necessarily presupposes that the banishing community intends to act proactively to aid offenders."[55] If rehabilitation requires oversight and active steps by the community, critics argue that simply expelling an individual from a community cannot have a rehabilitative effect.

Certainly, there are better ways to rehabilitate a criminal than banishment. Drug treatment and job training programs are presumably more effective ways of inculcating character traits and skills that will help criminals avoid a recidivist cycle. However, such rehabilitation programs are both scarce and expensive, and thus do little to relieve over-stressed penal systems. Moreover, just because there are better rehabilitative methods does not dictate that banishment is without rehabilitative value. If the goal of rehabilitation is to help offenders from repeating their crimes, it seems clear that removing an offender from the environment in which he or she committed or learned criminal behavior can help keep that offender from repeating that behavior. The Third Circuit found this logic compelling in upholding a banishment order against an offender who grew up surrounded by drugs and prostitution and who had a history of criminal activity in the two counties from which she was banished.[56] According to the court, the banishment order was "clearly

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[52] *See* State v. McCreary, 582 So. 2d 425, 428 (Miss. 1991) (noting that banishment "struggles to serve any rehabilitative purpose"); Edison v. State, 709 P.2d 510, 511 (Alaska Ct. App. 1985) (overturning banishment because it did not comply with state requirement that all probation conditions reasonably relate to rehabilitating the offender).

[53] State v. Muhammad, 43 P.3d 318, 323–24 (Mont. 2002).

[54] Johnson v. State, 672 S.W.2d 621, 623 (Tex. App. 1984).

[55] Snider, *supra* note 17, at 478.

[56] United States v. Sicher, 239 F.3d 289, 289 (2nd Cir. 2000) (holding that the banishment was related to the defendant's history, was not greater than necessary, and was consistent with public policy).

intended to promote [the defendant's] rehabilitation by keeping her away from the influences that would most likely cause her to engage in further criminal activity."[57]

Rehabilitation rests on the theory that offenders can acquire new character traits and skills that will enable them to function lawfully in society. Promoters of rehabilitation recognize that environmental factors shape behavior and rehabilitation can best be accomplished in a rehabilitative environment. Drug treatment and job training programs function by placing individuals in environments that promote sobriety and emphasize the value of work. Just as adding positive environmental factors can foster rehabilitation, so can removing negative environmental factors. Moreover, while it is true that offenders may slip into criminal activity in their new communities, it may be more difficult for them to engage in such activity absent the criminal network they previously relied upon. As the District Attorney for the county of Houston, Georgia has written in explaining his policy of seeking to banish drug dealers from his jurisdiction, "it will be much more difficult for [a drug dealer] to start from scratch elsewhere."[58]

2. Deterrence

A common justification for criminal sentences is that such punishment has a deterrent effect on future criminality. A punishment deters future crime to the extent that individuals are aware that they may receive that punishment and refrain from engaging in criminal behavior in order to avoid that punishment. Whether banishment serves as a deterrent depends on the extent to which individuals are aware that it is a potential consequence of criminal activity, the extent to which an individual values being able to reside in or visit a given locality, and the extent to which the areas to which an individual may be banished are undesirable.[59]

The extent to which individuals are aware that banishment is a potential consequence of criminal activity is difficult to ascertain. Where banishment is infrequently employed, it seems doubtful that many people are aware of its use. However, in areas where banishment is more commonly used,[60] it is plausible that would-be offenders are aware that their actions may cause them to be expelled

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[57] *Id.* at 292.

[58] Kelly R. Burke, Banishment from Houston County (2006), http://www.houstonda.org/Houston_DA_News/Houston_County_Law_School/Banishment_from_Houston_County (last visited January 12, 2006).

[59] Snider, *supra* note 17, at 480.

[60] *See supra* note 13.

from a given area. In Houston County, Georgia, the District Attorney has posted an article on the Office of the District Attorney website explaining why he continually seeks to banish drug dealers from Houston County.[61] Considering that banishing drug dealers is the stated policy of the county, it seems highly probable that drug dealers in Houston County are aware that their actions may result in banishment.

The deterrent potential of banishment likewise depends on "factors that are variable to the region of banishment and idiosyncratic to the individual."[62] The economic prospects of the banishing area in relation to surrounding areas, coupled with a given individual's attachment to a community, will substantially affect the deterrent impact of banishment orders.[63] However, it seems clear that so long as an individual has either an economic or emotional tie to an area, the prospect of banishment from that area is capable of affecting a deterrent influence on that individual. While it has been suggested that criminals are inherently unaffected by social pressures and are thereby able to commit socially repugnant acts,[64] this argument does not dictate that would-be offenders cannot be deterred by threat of banishment. Just because an individual is tempted to flout certain rules and norms of a community does not mean that individual is willing to forgo membership in that community altogether.

3. Retribution

Another possible justification for a banishment sentence is that banishment can serve as a form of punishment by forcing an offender to pay a significant price for his or her transgression.[65] Because most banishment orders are issued as conditions of probation or parole, to withstand judicial scrutiny, such banishment orders must comply with the statutory purposes of probation. The most commonly recognized purposes of probation are to rehabilitate the offender and to protect the public.[66] However, some probationary statutes explicitly allow probationary conditions to have punishment as an objective,[67] while others have such broad language that punishment could logically fall

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[61] *See* Burke, *supra* note 58.

[62] Snider, *supra* note 17, at 481.

[63] *Id.*

[64] *Id.*

[65] *See* Smith, *supra* note 30, at 573–82 (arguing that courts should consider the punitive nature of probation when evaluating the legitimacy of banishment orders imposed as conditions of probation).

[66] *Id.* at 574 (citing Johnson v. State, 672 S.W.2d 621, 623 (Tex. App. 1984), People v. Beach, 195 Cal. Rptr. 381, 385 (Cal. Ct. App. 1983)).

[67] *Id.* at 577–78 (citing TEX. CODE CRIM. PROC. ANN. Art. 42.12, § 11(a) (Vernon 1994)).

under the gambit of the statute's legislative purpose.[68] Where probationary statutes recognize punishment of the offender as a legitimate goal of probation, courts should clearly weigh the punitive value of a banishment order in determining whether to issue such an order, or whether to uphold the order upon judicial review. Moreover, it is also worth recognizing that probation itself can be viewed as a form of punishment.[69] If probation is itself a punishment, it is only logical that probationary conditions can serve punitive purposes.

4. Incapacitation

A common requirement of probationary conditions is that they promote public safety.[70] In a very real sense, banishing an individual from a geographical locality protects that locality from further criminal transgressions committed by the offender. Moreover, a surviving victim of a crime would certainly feel safer knowing that the perpetrator is prohibited from entering the community for a specific period of time. Indeed banishment orders have been imposed and upheld on the theory that the orders are necessary to protect a victim from further contact with his or her transgressor.[71] In cases where a defendant has targeted a specific individual for harassment or violence, the protection of that specific victim is paramount. While an order prohibiting an offender from contacting a victim may protect that victim while at home or work, it would not protect the victim as effectively when in a public space. Absent imprisonment, a banishment order may be the best way to prevent victims and their transgressors from coming into contact with each other, inadvertently or otherwise. Additionally, the wider community may well feel safer knowing that criminals who have perpetrated crimes within their borders are not free to walk the streets of their community.

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[68] *Id.* at 577 (arguing that language in the California probation statute authorizing conditions designed "to protect the public to the end that justice may be done" can be read as recognizing punishment as a legitimate goal of a probationary condition (quoting In re White, 158 Cal. Rptr. 562, 565 (Cal. Ct. App. 1979))).

[69] *See id.* at 578–82 (noting that while some jurisdictions do not view probation as a type of criminal sentence, the federal probation statute and the Supreme Court recognize that probation is a form of punishment).

[70] *See, e.g.*, MONT. CODE ANN. § 46-18-202(1)(e) (1997) (authorizing probationary conditions "reasonably related to the objectives of rehabilitation and the protection of the victim and society"); Johnson v. State, 672 S.W.2d 621, 623 (Tex. App. 1984) (holding that probationary conditions "must have a reasonable relationship to the treatment of the accused and the protection of the public").

[71] *See* Predick 660 N.W.2d at 2 (upholding banishment from county where previous, less restrictive restraining orders failed to protect victim from further harassment); People v. Brockleman, 933 P.2d 1315 (Colo. 1997) (upholding banishment order against defendant who had twice beaten his girlfriend because it was designed to prevent the possibility that the defendant could contact his victim).

Arguably, protecting the banishing community is the primary justification for banishment orders.[72] However, a powerful critique of banishment is that it protects one community at the expense of others. In fact, courts have cited this as reason for invalidating banishment orders. While it is no doubt true that banishment orders burden surrounding communities with convicted criminals, it is not always true that these surrounding communities will be exposed to more crime. For example, in the case of domestic violence or criminal harassment, the object of the offender's abuse tends to be a specific individual. Though the offender may pose a significant threat to that individual, it does not follow that the offender poses a significant threat to citizens more generally. Banishing an offender from the community in which the victim resides may thus go far to protect that victim without necessarily imposing a threat on outlying areas. The same may be true, though to a lesser degree, when drug dealers are banished from the areas in which they sell drugs. While drug dealers may possess characteristics that make them dangerous on a general level, drug dealing requires a social network of both suppliers and consumers. Removing a dealer from his or her social network can therefore largely impede his or her ability to successfully deal drugs.[73] Although a resourceful individual may certainly be able to establish a criminal network in a new community, it would no doubt be more difficult.

B. Authority

In *Cooper v. Telfair*, the Supreme Court stated emphatically that the power to banish rests in the legislature.[74] In a more contemporary holding, another court has held that "the power to banish, if it exists at all, is a power vested in the Legislature and certainly where such methods of punishment are not authorized by statute, it is impliedly prohibited by public policy."[75] William Garth Snider has noted that no state statute has specifically authorized banishment as a judicial sentence.[76] Snider takes this fact and argues that under *Cooper* courts and parole boards do not have the power to impose banishments

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[72] *See* Snider, *supra* note 17, at 483 (opining that "physical protection is the justification that is the main driving force behind banishment").

[73] *See* Burke, *supra* note 58.

[74] *See supra* text accompanying note 43.

[75] Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979).

[76] Snider, *supra* note 17, at 466. However, as noted previously, a number of states have enacted statutes that authorize specific geographical restrictions for offenses such as prostitution, drug dealing, and sexual predation. Snider is correct though, in the sense that no state legislature has specifically authorized banishment as an available punishment for general criminal offenses.

conditions upon parolees and probationers.[77] However, it is not at all clear that *Cooper* is applicable to state imposed banishment orders, nor that it is even still good law. In *Cooper*, the state of Georgia confiscated the property of the plaintiff, who no longer resided in Georgia, under a law passed during the Revolutionary War authorizing confiscation of property belonging to citizens that took up arms with the British against the American revolutionaries.[78] The Court upheld the constitutionality of this law and the confiscation of the plaintiff's property. Of the four Justices who wrote brief opinions, only two mentioned the power of the legislature to confiscate property and banish citizens. Justices Patterson and Cushing emphasized that the Georgia legislature had passed a statute authorizing confiscation and that it was beyond the judicial power to overturn the law when the power to banish rests inherently in the legislative body of any government.[79]

There are a number of reasons to doubt the applicability of this holding today. Importantly, this case did not actually involve a banishment order, but merely a confiscation of property. Thus, the Justices' statements concerning banishment are in fact dicta. Moreover, with four Justices writing separately, statements by individual Justices can hardly be seen as speaking for the entire Court. Additionally, the law at issue was passed in 1782, and at least one Justice did not inquire into the issue of banishment at all, but instead questioned whether the Constitution authorized the Court to pass judgment on laws enacted prior to ratification.[80] Most important of all, however, the United States Constitution does not speak to the allocation of power within state governments. In *Hunter v. City of Pittsburgh*,[81] the Court held that in regards to the power of a state over its political subdivisions, "[i]n all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."[82] *Hunter* tells us that political subdivisions exist at the pleasure of the state and have no rights stemming from the federal Constitution as against the state. Most importantly, *Hunter* states emphatically that the Constitution does not have authority over the organization of power within a state. Thus,

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[77] *Id.* at 469–71.
[78] *Cooper*, 4 U.S. at 14.
[79] *Id.* at 19–20.
[80] *Id.* (Chase, J.).
[81] 207 U.S. 161 (1907).
[82] *Id.* at 179.

despite the dictum in *Cooper*, the Constitution has nothing to say about where, within a state government, the power to banish resides.

Hunter also sheds light on the argument that intrastate banishment orders are prohibited by public policy. In *People v. Baum*,[83] the Supreme Court of Michigan held that interstate banishment is "impliedly prohibited by public policy" because "[i]t would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several States which is the basis of the Union itself."[84] Indeed, interstate banishment does offend the structure of the Union, which recognizes each state as a separate sovereign. State sovereignty is offended when one state is effectively able to force another state to house its unwanted citizens. Although an individual state could arguably protect its sovereignty via legislation prohibiting individuals banished from other states from entering or residing in that state, the fact of interstate banishment still offends notions of sovereignty by effectively *forcing* neighboring states to either house unwanted criminals or pass a specific type of legislation. However, this problem does not exist in the case of intrastate banishment. As *Hunter* tells us, local political subdivisions are agents of the state that exist entirely at the state's discretion.[85] State political subdivisions are not independent sovereigns; therefore, the structure of the federal government is not offended when one city or county banishes an individual from its limits. While intrastate banishment may implicate concerns regarding inter-local dissension and retaliation, it does not offend the federal Constitution. So long as intrastate banishment orders are authorized under state law and do not otherwise violate the state or federal Constitution, such orders are not prohibited by public policy.

As the above discussion indicates, the threshold question in analyzing banishment orders is whether the court or executive agency has the authority to impose such conditions. As previously noted, some courts have held that absent a specific legislative authorization of banishment, such conditions violate public policy and are therefore beyond the power of a court or parole board.[86] However, while no statutes explicitly authorize banishment from a large geographical area, such as a county or a state, there are a number of states that specifically authorize geographic restrictions as conditions of

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[83] 231 N.W. 95 (Mich. 1930).

[84] *Id.* at 96.

[85] *Hunter*, 207 U.S at 179.

[86] *See* Commonwealth v. Pike, 701 N.E.2d 951, 960–61 n.6 (Mass. 1998) (citing Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979); State v. Doughtie, 74 S.E. 2d 922, 923 (N.C. 1953); State v. Charlton, 846 P.2d 341, 343 (N.M. Ct. App. 1002)).

probation and parole.[87] Because a banishment order is simply one type of geographical restriction, probation and parole statutes that explicitly authorize geographic restrictions implicitly authorize banishment orders as well. For example, Congress has specifically granted federal courts the authority to require probationers to "reside in a specified place or area, or refrain from residing in a specified place or area."[88] A banishment order is essentially an order commanding an individual not to reside in a specific place. Thus, in federal courts, and in those states with statutes expressly authorizing geographical restrictions, courts clearly have the authority, expressly granted through the legislature, to impose banishment orders.

Most jurisdictions do not have statutes specifically authorizing geographic restrictions as conditions of probation or parole. Typically, these jurisdictions instead grant courts and executive agencies broad discretion to impose reasonable conditions that promote the purposes of probation. As discussed in Part III(A) of this Note, the predominant goals of probation and parole are rehabilitating the defendant and adequately ensuring public safety.[89] In these jurisdictions, banishment orders may be issued so long as they comport with purposes of probation or parole and the terms of the general grant of authority. Courts and executive agencies have the authority to impose reasonable conditions: thus, they have the authority to impose banishment orders so long as they are reasonably related to the goals of probation.[90] A court does not need a specific grant authorizing banishment as a condition of probation or parole. Thus, for example, according to the Illinois Supreme Court, "[a]lthough [a] banishment condition of probation is not expressly provided for by statute, it may, nonetheless, be a constitutionally valid condition of probation."[91] This power exists because "courts have broad discretion to impose probation conditions, whether expressly

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[87] *See* COHEN, *supra* note 48, at 10–12 n.1 (citing statutes in Florida, Georgia, Kansas, Kentucky, Mississippi, and Texas).

[88] 18 U.S.C. § 3563(b)(13) (2000) (amended 2002, 2006).

[89] *See, e.g.*, MONT. CODE ANN. § 46-18-202(1)(f) (2005) (granting sentencing judge the authority to impose "any other limitation reasonably related to the objectives of rehabilitation and the protection of the victim and society").

[90] *See* COHEN, *supra* note 48, at 10–14 (noting that restrictions on offenders' freedom of movement are generally upheld so long as they reasonable); *see also In re* J.W., 787 N.E.2d 747, 763–64 (Ill. 2003), *cert denied*, J.W. v. Ill., 2003 U.S. LEXIS 6980 (Oct. 6, 2003) (overturning a probation condition banishing a juvenile sex offender from the community and noting that "when deciding the propriety of a condition of probation imposed in a particular case, whether explicitly statutory or not, the overriding concern is reasonableness").

[91] *In re* J.W., 787 N.E.2d at 763.

allowed by statute or not, to achieve the goals of fostering rehabilitation and protecting the public."[92]

At this point, it is important to note that not all banishment orders are imposed as condition of probation or parole.[93] Although other kinds of orders are uncommon, it is worth examining a few examples that do exist. In *Doe v. City of Lafayette*,[94] a federal district court in Indiana upheld an order issued by the city Park's department permanently banning the defendant from all of the city's parks. The defendant was a convicted sexual offender who had served four years of house arrest and four years of probation for attempted child molestation.[95] Although he was no longer on probation, he was banished from the parks when his former probation officer discovered that he had visited a park and experienced sexual fantasies about the children he was watching.[96] Importantly, the Park's Department was a statutorily created entity vested with the power to establish rules for the city's parks and recreational facilities.[97] The court upheld the order as a valid exercise of governmental police powers because "[g]enerally, states are free to impose restrictions that have a rational relation to the goal of public safety."[98] Although the court expressed concerns about the process by which the city imposed the ban, because the defendant did not raise any procedural due process arguments,[99] the court upheld the ban as a rational use of the general welfare power of the state to protect public safety.

In *Predick v. O'Connor*,[100] as part of an injunction order, the trial court banished the defendant from an entire county for an indefinite period of time.[101] The appellate court upheld the banishment order against the defendant who had repeatedly harassed the plaintiffs and disregarded previous, less restrictive injunction orders.[102] However, the court did not address the source of the trial court's authority to issue such an order. The appellate court simply assumed that the trial court had such authority and instead limited its review to issues

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[92] *Id.*

[93] Again, this note does not address in depth the statutory geographical restrictions referred to *supra* note 18.

[94] 160 F. Supp. 2d 996 (N.D. Ind. 2001).

[95] *Id.* at 997.

[96] *Id.* The defendant told his sex offenders anonymous group about the incident, and the probation officer learned about it from an anonymous source. When the Park's superintendent learned about the incident, the department issued the banishment order. *Id.* at 998.

[97] *Id.* at n.1.

[98] *Id.* at 999.

[99] *Id.* at n.2.

[100] 660 N.W.2d 1 (Wis. Ct. App. 2003).

[101] *See supra* notes 7–14 and accompanying text.

[102] *Id.*

regarding whether the defendant's constitutional rights were infringed and whether the injunction was properly tailored. The appellate court's indifference to the trial court's source of authority may nevertheless be explained by the fact that the banishment injunction was issued pursuant to a Wisconsin statute authorizing harassment injunctions.[103] Under Wisconsin jurisprudence, a trial court has broad discretion to determine the scope of an injunction.[104] The *Predick* court presumably found that the trial court had authority to issue the banishment order as part of its discretionary power to fashion injunctive relief.

The discretionary nature of most probation and parole statutes, taken together with *Predick* and *Doe*, indicate that where there is a broad scope of authority, be it inherent in the general welfare power of government or granted by legislation, executive agencies and the courts have the authority to issue banishment orders. Because banishment is a severe punishment, the notion that it should only be employed where expressly authorized by legislative authority is appealing. However, there is nothing to compel the conclusion that banishment must be expressly authorized by legislative action. The only Supreme Court pronouncement on the subject came in 1800 and is of dubious precedential value.[105] As noted earlier, banishment has a longstanding historical tradition that continued through the founding of the United States. Although fifteen state constitutions have prohibited banishment from the state,[106] most state constitutions are silent on the subject. Where state legislatures have spoken on the subject of geographical restrictions, they have tended to authorize them through their probation statutes, or the increasing use of geographical restrictions on sex offenders, prostitutes, and drug dealers.[107] Most state legislatures have granted sentencing courts and executive agencies wide discretion to fashion conditions that further the objectives of probation and parole. In certain circumstances, banishment orders may well serve these purposes. The trend towards increasing legislation authorizing geographical restrictions, as well as the historical use of banishment, suggests that courts should have the authority to impose such conditions when granted broad discretion by their legislatures. Rather than handcuff these institutions by requiring an explicit legislative grant of banishment authority, the better view is

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[103] Predick, 660 N.W.2d at 5. The trial court issued the injunction pursuant to WIS. STAT. § 813.125.

[104] *In re* Paternity of C.A.S., 518 N.W.2d 283, 294 (Wis. Ct. App. 1994).

[105] *See supra* note 41 and accompanying text.

[106] *See supra* note 21.

[107] *See supra* note 18.

that courts and executive agencies have such power when they are granted discretionary powers.

III. JUDICIAL REVIEW OF BANISHMENT ORDERS

It is one thing to recognize that courts and executive agencies have the authority to impose banishment orders. It is quite another thing to uphold the orders themselves. Regardless of whether or not one feels banishment orders are appropriate in modern penology, it seems clear that if trial courts and executive agencies *are* going to issue such orders, they should be reviewed carefully under a consistent standard of review. Unfortunately, courts have varied substantially in the standard of review they employ when adjudicating the validity of banishment orders. In particular, the courts disagree as to whether or not such orders must be reviewed for their constitutional validity. This section explores the standards of review variously employed by courts and argues that because banishment infringes the constitutional right to travel, courts should employ some form of strict scrutiny when analyzing banishment orders.

A. Voluntary Agreements

At the onset, it is important to note that banishment conditions are more often overturned than upheld by reviewing courts.[108] Because most banishment orders are issued as conditions of probation or parole, these orders must comply with the requirements of the authorizing probation and parole statutes. Interestingly, when banishment orders are imposed as conditions of parole, they are more likely to be upheld by a reviewing court.[109] The logic for upholding such banishment orders rests on the notion that parole is an act of grace conferred upon the parolee that the parolee is free to accept or reject.[110] In *Dougan v. Brownlee*,[111] the Supreme Court of Arkansas upheld a parole condition banishing the convicted offender from an entire county. Although the Arkansas constitution prohibited banishment from the state,[112] and judicial precedent had overturned interstate banishment as a condition of probation,[113] the court upheld

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[108] *See* COHEN, *supra* note 48, at 10–16 (noting that banishment conditions are "usually, but not always, invalidated").

[109] *See* Snider, *supra* note 17, at 471 (noting that banishment as a parole condition is generally upheld because "[m]ost jurisdictions have held that any condition, so long as it is not illegal, immoral, or impossible to perform, may be attached to a parole or pardon.").

[110] *Id.* at 472.

[111] No. 04-623, 2005 Ark. LEXIS 519 (Ark. Sept. 29, 2005).

[112] ARK. CONST. art. II, § 21

[113] *See* Reeves v. State, 339 Ark. 304 (1999) (overturning probation condition banishing

the parole condition without any analysis of the appropriateness of its terms.[114] Instead, the court deferred to the legislatively granted discretionary powers of the parole board and emphasized that the convict had no right to parole.[115] Under such circumstances, "[i]f the conditions are too onerous, appellant could decline to accept the conditions set, and elect to serve out his sentence instead."[116]

The Arkansas Supreme Court is far from alone in its conclusion that parole conditions are presumptively valid due to the voluntary nature of the agreements.[117] On one level, this conclusion seems intuitively correct, considering that the alternative to parole is to serve out the length of one's sentence in prison. If the state can restrict a criminal's freedom via imprisonment, it seems logical that the state can choose to free a criminal under the less restrictive condition that the criminal absent him or herself from certain broad geographical areas. Of course, this is simply to reiterate that states naturally have the power to banish individuals, at least within certain parts of the state. However, simply because the state is under no obligation to offer prisoners parole does not mean that the conditions of parole should be effectively beyond judicial review. The fact that a parolee voluntarily agrees to a banishment condition likewise should not insulate the condition from proper review. In *Carchedi v. Rhodes*, the court noted that even though an individual cannot always be said to have made a voluntary choice when bargaining with the state, parole agreements are trustworthy because the choices are so clear that the parolee is capable of making an intelligent independent decision.[118] Thus the court, upon finding a voluntary agreement, upheld a banishment condition despite "serious reservations . . . as to whether these intrusions into Carchedi's rights are truly necessary and proper to further the state's legitimate interest in supervising released felons."[119]

The court in *Carchedi* did not review the appropriateness of the parole conditions because it found that the appellant had waived those

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defendant from state for seven years).

[114] *Dougan*, 2005 Ark. LEXIS at *4.

[115] *Id.*

[116] *Id.*

[117] *See* Carchedi v. Rhodes, 560 F. Supp. 1010, 1016–17 (S.D. Ohio 1982) (upholding parole condition banishing appellant from state of Ohio for forty year duration of sentence and holding that appellant waived his constitutional rights by voluntarily accepting the agreement); Beavers v. State, 666 So. 2d 868, 871–72 (Ala. Crim. App. 1995) (holding that banishment condition did not violate Alabama constitutional prohibition against exile because appellant voluntarily agreed to the parole conditions).

[118] 560 F. Supp at 1017 n.4.

[119] *Id.* at 1016.

rights that were implicated by the banishment order. California courts have reached a different conclusion in the course of invalidating banishment orders. According to California jurisprudence, "[a]lthough a defendant may waive rights which exist for his own benefit, he may not waive those which belong also to the public generally."[120] Thus in California, "[t]he fact that a defendant has the right to refuse probation does not preclude attack on an improper term of probation."[121] The logic in California rests on the notion that banishment implicates the fundamental right to travel.[122] If we accept this notion, it seems clear a probationer's or parolee's willingness to have this right abridged should not place a banishment order beyond the scope of judicial review. A fundamental right exists for the benefit of all citizens: a violation of such a right against one citizen, whether acquiesced in or not, is a violation of the right itself, thereby affecting all citizens. This is not to say that parolees and probationers cannot have their fundamental rights restricted.[123] However, restriction should be subject to judicial scrutiny regardless of whether they have been agreed to or not. Moreover, despite the *Carchedi* court's insistence that parolees given a choice between banishment and further imprisonment are faced with an uncomplicated decision, it seems clear that few inmates would choose to stay in jail.[124] Thus, there is no real reason to trust the voluntariness of a parolees, or probationers, decision to accept banishment. Accordingly, all banishment orders, whether imposed by a court or executive agency, and whether agreed to or not, should be subject to judicial review if and when the parolee or probationer objects to the conditions.

This conclusion is bolstered by the unconstitutional conditions doctrine. This doctrine holds that "a government may not grant a benefit with the condition that the recipient forego a constitutionally protected right, even if the government has no duty, in the first place, to provide the benefit."[125] Scholars have noted that the unconstitutional conditions doctrine has been applied unevenly by courts and that it is difficult to predict if and when the doctrine will be

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[120] People v. Blakeman, 339 P.2d 202, 203 (Cal. Ct. App. 1959) (quoting People v. Werwee, 112 Cal. App. 2d 494, 500 (1952)).

[121] *In re* White, 158 Cal. Rptr. 562, 565 (1979).

[122] The issue of whether there is a fundamental right of intrastate travel is addressed *infra* section IV(C).

[123] *See In re* White, 158 Cal. Rptr. at 567 ("Like all constitutional rights the right of free movement is not absolute and may be reasonably restricted in the public interest.").

[124] *See* COHEN, *supra* note 48, at 7–54 (noting that an "offender, faced with the possibility of avoiding prison, usually requests probation or parole and is delighted to accept any reasonable conditions.").

[125] Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 AM. U. J. GENDER & LAW 15, 25 (1994).

applied to a given governmental action.[126] Traditionally, the doctrine has been used where a government has attached specific conditions on the receipt of some government benefit such as Medicaid, food stamps, and tax exemptions.[127] However, as professor Richard Epstein has observed, "[t]he problem of unconstitutional conditions arises whenever a government seeks to achieve its desired result by obtaining bargained-for *consent* of the party whose conduct is to be restricted."[128] Although this doctrine has not been applied to conditions attached to probation or parole, banishment conditions fit well within the doctrine's conceptual framework. In the case of banishment, the benefit conferred on the offender is freedom from jail or prison. The condition that the offenders "consent" to is banishment from a particular locality. The unconstitutional conditions doctrine tells us that the "voluntary" nature of the agreement does not place the constitutionality of the agreed to conditions beyond judicial review. One of the factors that trigger the doctrine is the coercion involved in the bargained for agreement. As previously noted, there are numerous reasons to doubt the "voluntariness" of a parolee's agreement to accept a banishment order. While the state may not be coercing the parolee in any overt manner, the unequal bargaining position of the parties arguably makes the agreement coercive. Moreover, even if acquiescence in banishment is not coercive, I would side with those who argue that "analysis of whether the doctrine applies ends by determining if a condition is affecting a constitutionally protected right."[129] Because there is a fundamental right to intrastate travel, the unconstitutional conditions doctrine mandates that banishment orders issued as a condition of probation or parole be subject to judicial scrutiny regarding the validity of the conditions themselves.[130]

B. Abuse of Discretion Versus Strict Scrutiny

Banishment orders, where objected to, should in all cases be subject to judicial review. The issue is thus presented: at what level of

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[126] *Id.* at 34–35; *see also* Richard A. Epstein, *The Supreme Court, 1987 Term Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 13 (1988) (characterizing the unconstitutional conditions doctrine as "unruly").

[127] *See generally* Epstein, *supra* note 126, at 73–102 (discussing the application of the unconstitutional conditions doctrine to conditions attached to government benefits).

[128] *Id.* at 7 (emphasis in original).

[129] *Id.* at 36.

[130] The important point here is that the "voluntariness" of consent to a banishment order does not place such orders beyond judicial review. This is not to suggest that the constitutional conditions doctrine mandates strict judicial scrutiny of banishment orders. The appropriate level of review is addressed *infra* Part III(C).

judicial review should banishment orders be scrutinized? The courts disagree as to whether the appropriate standard is a heightened form of scrutiny, or whether the orders should simply be reviewed under the level of review typical for the type of government action taken. Although the courts do not always address the issue, the level of scrutiny they apply is generally determined by whether or not the courts recognize a constitutional right of intrastate travel.

Because most banishment orders are issued as a condition of probation or parole, most banishment orders are first, if not exclusively, reviewed in light of the purposes of probation and parole. Because probation conditions are imposed on a discretionary basis by trial courts, banishment orders are often subjected to an abuse of discretion review.[131] Under this standard, the reviewing courts set out to determine if the trial court imposed the banishment conditions for valid probationary reasons. For example, in upholding a condition banishing a convicted drug dealer from Fulton County, Georgia, the Eleventh Circuit Court of Appeals in *United States v. Cothran* held that a district court does not abuse its discretion in imposing a probation condition "so long as it is reasonably related to rehabilitation of the probationer, protection of the public against other offenses during its term, deterrence of future misconduct by the probationer or general deterrence of others, . . . or some combination of these objectives."[132] The court then found that because the defendant had committed all his crimes in Fulton County, the banishment was reasonably related to the defendant's rehabilitation as it removed him from a corrupting environment and allowed him to start a new life.[133] The *Cothran* court is not alone in analyzing banishment orders solely under an abuse of discretion review that examines if the condition complies with the requirements of probationary or parole conditions.[134] Importantly, the standards

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[131] *See, e.g.*, United States v. Cothran, 855 F.2d 749, 751 (11th Cir. 1988) ("In reviewing the district court's decision to impose the specific condition of probation contested by the defendant [banishment from Fulton County, Georgia], this court must determine if the district court abused its discretion."); People v. Brockelman, 933 P.2d 1315, 1319 (Colo. 1997) (reviewing probation order banishing defendant from town under "the applicable standard of review which requires an abuse of discretion by the trial court to occasion any modification of the trial court's sentence").

[132] *Cothran*, 855 F.2d at 751 (quoting United States v. Tonry, 605 F.2d 144, 148 (5th Cir. 1979)); *see also* State v. Muhammad, 43 P.3d 318, 323 (Mont. 2002) (overturning banishment condition, stating "we must analyze whether the banishment condition is reasonably related to the objective of rehabilitation and the protection of the victim and society to determine whether the condition is within the parameters provided by statute").

[133] *Cothran*, 855 F.2d at 752.

[134] *See, e.g.*, United States v. Sicher, 239 F.3d 289, 290 (3rd Cir. 2000) (upholding a two-county ban against a convicted prostitute under both an abuse of discretion and plain error standard).

governing probationary and parole conditions are not always without teeth.[135] For example, in Colorado, courts judge the validity of probationary geographical restrictions based on the relation of the restrictions to rehabilitation; the severity of the restrictions in reference to where the defendant resides and works; whether there are less restrictive means available; and whether the defendant can petition the court to relax the restrictions.[136] A sentencing court abuses its discretion if it imposes conditions that conflict in whole or in part with these considerations. However, my own research suggests that courts that apply only an abuse of discretion review are more likely to uphold banishment conditions,[137] especially courts that do not recognize a constitutional right to intrastate travel.[138]

However, many courts, when reviewing banishment orders, *do* recognize that such orders implicate important constitutional rights and therefore apply a heightened level of review. California courts are at the forefront in this regard. For example, one California appellate court has held that "the right to intrastate travel (which includes intra-municipal travel) is a basic human right protected by the United States and California Constitutions as a whole."[139] This court then went on to invalidate a probation order banning a convicted prostitute from a substantial portion of a California municipality. In so doing, the court held that broad geographical restriction should by viewed skeptically and that where "available alternative means exist which are less violative of the constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used."[140] In other words, geographical restrictions should be narrowly tailored or avoided altogether where other means of achieving the desired objective are available.

California is hardly alone in recognizing the right of intrastate travel, and thus applying heightened scrutiny to banishment orders.[141]

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[135] *See* COHEN, *supra* note 48, at 10–17 (noting that banishment orders are often overturned for serving neither rehabilitation nor public-protection functions).

[136] People v. Brockelman, 933 P.2d 1315, 1319 (1997).

[137] *See id.*; United States v. Sicher, 239 F.3d 289 (3rd Cir. 2000); United States v. Cothran, 855 F.2d 749 (11th Cir. 1998); State v. Nienhardt, 537 N.W.2d 123 (Wis. Ct. App. 1995) (all of which upheld substantial geographic conditions based solely on an abuse of discretion standard); *supra* notes 98–101.

[138] *See* Thompson v. Ashe, 250 F.3d 399 (6th Cir. 2001) (applying rational basis in upholding an order issued by a public housing authority banning plaintiff from all public housing operated by authority); Doe v. City of Lafayette, 160 F. Supp. 2d 996 (N.D. Ind. 2001), *rev'd*, 334 F.3d 606 (7th Cir. 2003), *rev'd en banc*, 377 F.3d 757 (7th Cir. 2004) (applying rational basis in upholding order issued by parks department banning plaintiff from all city parks).

[139] *In re* White, 158 Cal. Rptr. 562, 567 (Cal. Ct. App. 1979).

[140] *Id.* at 568.

[141] *See In re* J.W., 787 N.E.2d 747, 763–64 (Ill. App. Ct. 2003) (recognizing the right of

A Washington appellate court in *State v. Schimelpfenig* articulated this standard most succinctly, holding that banishment orders "must be narrowly tailored to serve a compelling governmental interest."[142] In practice, courts that recognize the constitutional implication of banishment orders do not always reach the constitutionality of such orders. Often, for example, the orders are struck down for not complying with the requirements of probation statutes; in which case the courts do not need to address the constitutionality of the conditions.[143] Moreover, the application of heightened scrutiny is often comparable to abuse of discretion reviews requiring that banishment orders be reasonably related to the goals of probation. Thus, for example, the Supreme Court of Illinois has defined a reasonable condition of probation as one that is not "overly broad when viewed in the light of the desired goal or the means to that end."[144] However, this should not undermine the importance of applying the correct level of scrutiny to banishment orders. Where fundamental constitutional rights are impinged upon by government action, courts must knowingly and conspicuously apply a heightened level of judicial scrutiny. The central question then, with regard to the type of review courts should apply to banishment orders, is whether there exists a fundamental right to intrastate travel.

C. The Right of Intrastate Travel

In *Shapiro v. Thompson*,[145] the Supreme Court recognized the right of interstate travel. According to the Court, federalism and the concept of liberty "unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[146] The Court then struck down a statute that denied welfare assistance to individuals who had not resided for at least one year in the jurisdiction in which they applied for welfare. In so doing,

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intrastate travel and holding that banishment conditions must therefore be narrowly drawn); State v. Franklin, 604 N.W.2d 79, 82 (Minn. 2000) (stating that banishment orders implicate fundamental rights and are therefore reviewed carefully); Halsted v. Sallee, 639 P.2d 877, 879 (Wash. Ct. App. 1982) (recognizing the right to travel and holding that infringements upon such a fundamental right requires a compelling state interest and narrow tailoring).

[142] 115 P.3d 338, 339 (Wash. Ct. App. 2005).

[143] *See, e.g.*, State v. Muhammad, 43 P.3d 318, 324 (Mont. 2002) ("Since we have determined that the banishment condition is not reasonably related to the goals of rehabilitation and the protection of the victim and society in violation of § 46-18-202(1)(e), MCA (1997), we will not address [the] constitutional arguments.").

[144] *In re* J.W., 787 N.E.2d at 764.

[145] 394 U.S. 618 (1969).

[146] *Id.* at 629.

the Court held that "any classification which serves to penalize the exercise of that right [of interstate travel], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[147] Accordingly, government action that infringes upon an individual's exercise of the right of interstate travel must be reviewed under a heightened level of scrutiny requiring the infringement of this right be "necessary" to achieve a governmental interest that is "compelling." Although the Court has reaffirmed the existence of the right of interstate travel on several occasions, the Court has declined to comment on whether there exists a concomitant right of intrastate travel.

Because the Supreme Court has not specifically commented, federal and state courts have disagreed as to whether a right of intrastate travel exists under the Constitution. A number of courts that have declined to recognize the right of intrastate travel have effectively relied upon the Supreme Court's silence as the basis for declining to recognize such a right. In *Thompson v. Ashe*,[148] the Sixth Circuit upheld a public housing authority order banning the plaintiff from setting foot in any public housing facility within the authority's boundaries. The plaintiff argued this order violated his freedom of movement but the court held that "the 'right to travel,' as recognized by our jurisprudence . . . is essentially a right of interstate travel."[149] Rather than independently analyze whether intrastate travel is protected, the *Thompson* court simply cited precedent explicating the right of interstate travel and held that because the plaintiff was only restricted intrastate, the plaintiff's freedom of travel claim failed.[150] The *Thompson* court is not alone in dismissing the right of intrastate travel with little analysis of the potential source of such a right. For example, in *Doe v. City of Lafayette*,[151] the federal district court found the *Thompson* court's rationale persuasive in holding itself that there is no right of intrastate travel. The Fifth Circuit has similarly refused to recognize a right of intrastate travel with little analysis.[152] Instead, the court held that "nothing in *Shapiro* or any of its progeny stands for the proposition that there is a fundamental constitutional 'right to commute' which would cause the compelling governmental purpose test enunciated in *Shapiro* to apply."[153]

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[147] *Id.* at 634.
[148] 250 F.3d 399 (6th Cir. 2001).
[149] *Id.* at 406.
[150] *Id.*
[151] 160 F. Supp. 2d 996, 1003 (N.D. Ind. 2001).
[152] Wright v. Jackson, 506 F.2d 900 (5th Cir. 1975).
[153] *Id.* at 902.

Notwithstanding the lack of Supreme Court precedent, a number of state and federal courts *have* recognized the right of intrastate travel. As previously noted, several California courts have explicitly recognized this right.[154] Additionally, state courts in Washington,[155] Wyoming, Wisconsin, Hawaii, Minnesota, and New York have all recognized the right of free travel within their respective states.[156] Although these states locate this right within their own respective state constitutions, these holdings support the position that the right of intrastate travel is a fundamental right. Federal courts have also recognized a right of intrastate travel emanating from the federal Constitution. Interestingly, notwithstanding its 2001 holding in *Thompson*, the Sixth Circuit revisited the issue in 2002 in *Johnson v. Cincinnati* and held that the Due Process Clause does in fact protect the right of intrastate travel, which the court characterized as "the right to travel locally through public spaces and roadways."[157] Unlike the *Thompson* court a year earlier, the *Johnson* court surveyed historical notions of liberty and the jurisprudence surrounding freedom of travel and grounded its holding on "the historical endorsement of a right to intrastate travel and the practical necessity of such a right."[158] The *Johnson* court did not feel bound by *Thompson* because it read that *Thompson* "says only that neither this court nor the Supreme Court has formally recognized a limited right to intrastate travel."[159] When the *Johnson* court systematically addressed the issue, it unequivocally recognized this right. At issue in *Johnson* was a city ordinance excluding individuals arrested for certain crimes from appearing in public in designated drug-exclusion zones.[160] Because the ordinance infringed upon the right of intrastate travel, the court applied strict scrutiny and invalidated the ordinance because it was not narrowly tailored.[161]

The Supreme Court's unwillingness to comment on the right of intrastate travel leaves the existence of such a right open to debate. Indeed, the Court denied certiorari on *Johnson* and thereby forwent a

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[154] *See, e.g., In re* White, 158 Cal. Rptr. 562, 566 (Cal. Ct. App. 1979) (overturning order banishing defendant from significant portions of municipality); People v. Beach, 195 Cal. Rptr. 381, 381 (Cal. Ct. App. 1983) (overturning intrastate banishment order).

[155] State v. Schimelpfenig, No. 31012-1-II, 2005 WL 1523678, at *** 4 (Wash. Ct. App. June 29, 2005).

[156] *See* Johnson v. Cincinnati, 310 F.3d 484, 496 n.3 (6th Cir. 2002) (citing cases from the above mentioned states that recognize the right of intrastate travel).

[157] *Id.* at 498.

[158] *Id.*

[159] *Id.* at 495.

[160] *Id.* at 487.

[161] *Id.* at 505.

clear opportunity to resolve the issue.[162] However, the fact that the Court has not explicitly recognized the right to intrastate travel does not dictate that the right does not exist.

To begin with, a very strong argument can be made that such a right implicitly emanates from the right of interstate travel. The Second Circuit acknowledged this when it noted that "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."[163] Essentially, the right of interstate travel would go unprotected if states could restrict travel within their borders. One's freedom to travel to a neighboring state would be useless if one were not free to pass through any of the counties bordering that state. In fact, the *Johnson* court found this argument to be irrefutable and declined to rest its holding on these grounds only because the Supreme Court has "not yet definitely located the textual source of the right to interstate travel."[164] Instead, *Johnson* rested its holding on an independent due process analysis.

To decide whether a given right is protected by the Due Process Clause, the Court has inquired if it is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[165] At the onset, it seems clear that the concept of liberty implicitly includes the freedom to travel locally through the public spaces and roadways of the state. Were a state to prohibit its citizens to travel from one county to the next, few would deny that the liberty of the citizens had been impinged. Liberty implies freedom, and freedom implies the ability to travel within and beyond the borders of the state. Additionally, the *Johnson* court presents a compelling argument that the right of intrastate travel has historically been recognized and protected. For example, *Johnson* cites to a 1920 case in which the Court noted that since the Articles of Confederation, state citizens "possessed the fundamental right, inherent in citizens of all free governments . . . to move at will from place to place [within their respective states]."[166] The *Johnson* court also cites to nineteenth century opinions by Chief Justice Taney and Justice Harlan, which

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[162] Cincinatti v. Johnson, 539 U.S. 915 (2003).

[163] *Johnson*, 310 F.3d at 498 n.4 (quoting King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971)).

[164] *Id.*

[165] *Id.* at 495 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[166] *Id.* at 497 (quoting United States v. Wheeler, 254 U.S. 281, 293 (1920)).

both recognized the right of intrastate travel.[167] Indeed, for Justice Harlan, citing Blackstone, "personal liberty consists . . . in the power of locomotion, of changing situation, or removing one's person to whatever place one's inclination may direct, without restraint, unless by due course of law."[168] Beyond these opinions, *Johnson* goes on to cite a number of contemporary state and federal courts that have either recognized a general right to travel, or the specific right of intrastate travel.[169] "In light of these cases," the *Johnson* court correctly held "that the right to travel locally through public spaces and roadways enjoys a unique and protected place in our national heritage."[170]

There can be no doubt that a banishment order infringes upon an individual's fundamental right of intrastate travel. However, one may note that incarceration is itself the ultimate restriction upon this right. Imprisonment, by its very nature, extinguishes an individual's freedom of travel. Banishment orders issued in lieu of imprisonment are in fact lesser restrictions on the right of intrastate travel than the prison terms they supplant. Generally, prison sentences are not subject to heightened judicial scrutiny. Arguably then, a banishment order, which involves a lesser infringement on the right of intrastate travel, should likewise not be held to a heightened level of review.[171] If the greater power of imprisonment is not subject to strict scrutiny, why should the lesser power of banishment be so subjected? The answer is twofold. In the first, a banishment order issued as a condition of probation or parole may be viewed as an independent government action. A sentencing court has the choice of imposing imprisonment *or* probation (just as a parole board has a choice between continuing incarceration or offering parole). The fact that a court elects to impose probation and to utilize banishment as a probationary condition does not dictate that any analysis of these conditions must be subsumed by the fact that the court *could have* sent the offender to prison. In reality, by banishing an offender eligible for imprisonment a sentencing court concludes that for whatever reason, the offender *should not* be sent to prison. Accordingly, the court concludes that the offender should retain more of his or her individual rights, including the right of intrastate travel,

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[167] *Id.* (citing Smith v. Turner, 48 U.S. (7 How.) 283 (1849) (Taney, C.J., dissenting); Civil Rights Cases, 109 U.S. 3, 39 (1883) (Harlan, J., dissenting)).

[168] *Id.* (quoting Civil Rights Cases, 109 U.S. at 39) (internal quotation marks omitted).

[169] *Id.* at 496–98.

[170] *Id.* at 497–98.

[171] *See* Smith, *supra* note 30, at 582–86 (arguing that banishment orders should not be subject to strict scrutiny).

than the imprisoned convict. The fact that a sentencing court chooses not to imprison an offender represents a judgment that the offender should not have his or her freedom of intrastate travel totally restricted. The decision to banish the offender then represents an independent judgment by the court as to the appropriate restrictions on the offender's individual rights. Therefore, the decision to banish an individual as a condition of probation or parole represents an independent government act, conceptually distinct from the power of the government to imprison that individual. Because a banishment order by definition infringes upon the offender's fundamental right of intrastate travel, a right that a court implicitly acknowledges the offender retains when the court chooses against imprisonment, such orders should always be subject to strict judicial scrutiny.

There is also a strong process and policy based reason to subject judicially and executively imposed banishment orders to strict scrutiny even where the greater power to imprison the defendant would not be subject to such review. When an offender is sent to prison, communities other than those directly impacted by the offender and the offense have a somewhat remote and general interest in the sentence. These interests are limited primarily to a general interest in state law enforcement and a pecuniary interest in the cost of the imprisonment system. However, where a banishment order has been issued, communities outside those directly affected by the crime or criminal may be burdened by having the offender live and work among them. While these communities may be so burdened, they have no voice in the sentencing decision. Heightened judicial scrutiny may the be the best means to protect the interests of communities forced to house banished offenders by ensuring that banishment orders will only be imposed in narrowly drawn terms. Moreover, as previously noted in Part II (B), banishment orders are liable to create inter-community dissension and retaliation. If county "X" becomes aware that its neighboring county "Y" has been banishing criminals and these criminals have been ending up in county X, county X may well become antagonistic towards its neighbor and regional cooperation may be imperiled. While such a situation does not offend the federal Constitution,[172] it is nevertheless undesirable. Strict scrutiny of banishment orders may thus be necessary to ensure that it is not overly-employed to the above described effect. Moreover, such scrutiny may help allay concerns of outlying communities that banishment is being imposed indiscriminately. In short, strict judicial scrutiny of banishment orders may be necessary to mollify the

[172] *See supra* Part II(B).

potential inter-community strife that banishment orders might engender.

CONCLUSION

Banishment orders clearly infringe upon the fundamental right to "travel locally through public spaces and roadways." Just as the Supreme Court subjects state action that infringes upon the right of interstate travel to strict scrutiny, banishment orders should likewise be subject to this heightened level of review. Moreover, intrastate banishment orders implicate concerns about inter-local dumping of criminals that independently suggests a need for strict judicial scrutiny of such orders. A banishment order should only be upheld when it is narrowly tailored to serve a compelling state interest. Because most banishment orders are issued as conditions of probation or parole, the compelling interest element will often be a formality. Probation and parole conditions must be aimed at rehabilitating the offender and protecting the public, both of which are clearly compelling state interests. The importance of strict scrutiny in this context is to require that banishment orders be narrowly tailored to serve these interests. In making this judgment, courts should consider the smallest geographical banishment area that will effectively serve to remove the offender from corrupting influences and that will adequately protect victims from unwanted contact with the offender. Courts should also consider the offender's economic and social ties to the area from which he or she is to be banished: if the offender has family in that area or is employed in that area, banishment may be inappropriate. Finally, in almost all cases, courts should require procedures by which individuals can temporarily enter banishment zones for specific and limited purposes. Ultimately, applying strict scrutiny to banishment orders strikes an effective balance between the state's need for penological flexibility and every individual's constitutional right to both interstate and intrastate travel.

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