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# PROSECUTION OR FORCED TRANSPORT: MANHATTAN BEACH'S UNCONSTITUTIONAL BANISHMENT OF THE HOMELESS

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*It is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage." – City of Chicago v. Morales<sup>1</sup>*

## INTRODUCTION

On September 4, 2018, the Manhattan Beach City Council unanimously passed Ordinance No. 18-0020.<sup>2</sup> The ordinance states, in relevant part: "It shall be unlawful and a public nuisance for any person to camp" on public property.<sup>3</sup> Its stated purposes, among other things, are to keep all public areas "readily accessible and available . . . for their intended purposes"<sup>4</sup> and to promote the "health, safety, environment and general welfare of the community."<sup>5</sup> Violating the ordinance may be punished as either a misdemeanor or an infraction at the city attorney or city prosecutor's discretion.<sup>6</sup>

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1. *City of Chicago v. Morales*, 527 U.S. 41, 54 (1999) (plurality opinion) (quoting *Kent v. Dulles*, 357 U.S. 116, 126 (1958)) (holding that an ordinance prohibiting a gang member from loitering in any public place with one or more people to be unconstitutionally vague).

2. MANHATTAN BEACH, CAL., MUNICIPAL CODE ch. 4.140 (2019).

3. *Id.* § 4.140.030.

4. *Id.* § 4.140.010.

5. *Id.*

6. *Id.* § 4.140.130.

Coincidentally, on the same day the ordinance was passed, the Ninth Circuit held in *Martin v. City of Boise* that “as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.”<sup>7</sup> The court concluded, “a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.”<sup>8</sup>

In turn, Manhattan Beach announced that it would only enforce the ordinance if an individual refused shelter.<sup>9</sup> However, the city failed to mention that Manhattan Beach lacks homeless shelters and that the city planned to have police transport individuals to shelters in other municipalities.<sup>10</sup> Further, many of its neighboring cities also lack homeless shelters,<sup>11</sup> and those that do are over ten miles away.<sup>12</sup> It is unclear what enforcement actions the city has taken pursuant to the ordinance since it has passed.<sup>13</sup> However, the city did join thirty-two other California counties and cities in an amicus brief petitioning the Supreme Court for review of the Ninth Circuit’s *Martin* decision, which was denied.<sup>14</sup>

Nonetheless, should Manhattan Beach choose to enforce its anti-camping ordinance as planned, this paper argues that doing so would unconstitutionally force individuals to choose between criminal prosecution or banishment. Part I of this paper will briefly provide an overview of homelessness in the United States, particularly in California, and place the Manhattan Beach ordinance within the various laws and practices localities have implemented in response to the rise of homelessness. Part II will

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7. *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019).

8. *Id.* at 618.

9. *Homelessness*, MANHATTAN BEACH, <https://www.citymb.info/government/city-manager/homelessness> [<https://perma.cc/78KC-XQ6U>] (“If the City has arranged for adequate and available shelter, and an individual chooses not to use it, the City will enforce the new Ordinance.”). The city steadfastly maintained its ability to enforce the ordinance. Emily Holland, *Manhattan Beach Makes it Illegal to Live On the Street*, PATCH (Sept. 13, 2018, 10:10 AM), <https://patch.com/california/manhattan-beach/anti-camping-ordinance-adopted-manhattan-beach> [<https://perma.cc/4F8J-3FAZ>] (“The City still retains the authority to arrest any individual who has committed a crime, regardless of his or her status, and will continue to exercise that authority . . .”).

10. Mark McDermott, *Anti-Camping Ordinances Aimed at Homeless under Scrutiny*, EASY READER NEWS (Sept. 21, 2018), <https://easyreadernews.com/anti-camping-ordinances-aimed-at-homeless-under-scrutiny> [<https://perma.cc/ZV8W-33UK>] (“[T]here are no homeless shelters in Manhattan Beach. MBPD offers homeless transport to regional homeless shelters.”).

11. This author’s search could not locate any homeless shelters in the nearby cities of El Segundo, Redondo Beach, Hermosa Beach, or Gardena.

12. For example, the Doors of Hope Women’s Shelter in Wilmington, California, is a 15.9 mile drive from Manhattan Beach’s city center; the Beacon Light Mission, also in Wilmington, is a 16.5 mile drive; and Jordan’s Disciples Community Service is 16.9 miles from Manhattan Beach.

13. The author’s email to the city’s homeless liaison went unanswered.

14. For this brief, see generally Brief for Cal. State Ass’n of Counties & 33 Cal. Counties & Cities as Amici Curiae Supporting Petitioner, 140 S. Ct. 674 (2019) (No. 19-247) (mem.).

examine the use of banishment in criminal law and explore various challenges to such conditions. Finally, Part III will demonstrate that Manhattan Beach's ordinance and planned enforcement constitute banishment and are invalid for many of the same reasons courts have used to invalidate conditions of banishment imposed in criminal law.

## I. BACKGROUND

Manhattan Beach's potential transportation of the homeless out of its jurisdiction should not be viewed in isolation. Instead, it should be evaluated within the current state of homelessness and the laws and practices used to criminalize and control the homeless.

### A. CURRENT STATE OF HOMELESSNESS

Before discussing homelessness in America, it is important to understand the U.S. Department of Housing and Urban Development's ("HUD") definitions of homelessness and its Point-In-Time Count. According to HUD, "homeless describes a person who lacks a fixed, regular, and adequate nighttime residence," "sheltered homelessness refers to people who are staying in emergency shelters, transitional housing programs, or safe havens," "unsheltered homelessness refers to people whose primary nighttime location is a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for people," and "Point-in-Time Counts" ("PIT") "are unduplicated [one]-night estimates of both sheltered and unsheltered homeless populations" done every year by local planning bodies during the last week of January.<sup>15</sup>

In 2019, HUD's PIT counted 567,715 people experiencing homelessness.<sup>16</sup> Approximately 62 percent (356,422) were sheltered while the other 38 percent (211,293) were unsheltered.<sup>17</sup> In California, the PIT counted 151,278 individuals experiencing homelessness,<sup>18</sup> but only 136,839 year-round beds.<sup>19</sup>

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15. U.S. DEP'T OF HOUS. & URBAN DEV., ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS pt. 1, at 2-3 (2017), <https://files.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf> [<https://perma.cc/EG3Q-DYRM>].

16. U.S. DEP'T OF HOUS. & URBAN DEV., HUD 2019 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS: ALL STATES, TERRITORIES, PUERTO RICO AND DISTRICT OF COLUMBIA 1 (2019), [https://files.hudexchange.info/reports/published/CoC\\_PopSub\\_NatlTerrDC\\_2019.pdf](https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2019.pdf) [<https://perma.cc/HB2V-EJEM>].

17. *Id.*

18. U.S. DEP'T OF HOUS. AND URBAN DEV., HUD 2019 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS: CALIFORNIA 1 (2019), [https://files.hudexchange.info/reports/published/CoC\\_PopSub\\_State\\_CA\\_2019.pdf](https://files.hudexchange.info/reports/published/CoC_PopSub_State_CA_2019.pdf) [<https://perma.cc/M9N8-FHF6>].

19. U.S. DEP'T OF HOUS. AND URBAN DEV., HUD 2019 CONTINUUM OF CARE HOMELESS

HUD's numbers most likely undercount the homeless population. First, the PIT count of unsheltered individuals uses visual counting, resulting in a sizeable portion of the homeless population being excluded from the statistics on account of being unseen.<sup>20</sup> Second, HUD's measures do not include either those living with others in temporary "doubled up" situations or those who are currently incarcerated or institutionalized but were homeless prior to arrest.<sup>21</sup> Therefore, it is unsurprising that the population has been estimated to be between 2.5 to 10.2 times greater than the PIT count.<sup>22</sup>

Certain localities have seen dramatic growth in not just the numbers of homeless but also the visibility and awareness of such individuals. For instance, the number of unique homeless encampments reported in the media from 2007 to 2016 has increased by 1,342 percent.<sup>23</sup> While some of these encampments are temporary, many others became at least semi-permanent if not fully permanent fixtures within cities.<sup>24</sup>

#### B. PUNITIVE RESPONSE TO RISE OF HOMELESS POPULATION

In response to these overwhelming numbers, cities have largely favored punitive measures over less costly rehabilitative ones.<sup>25</sup> These measures

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ASSISTANCE PROGRAMS HOMELESS HOUSING INVENTORY COUNT REPORT: CALIFORNIA 1 (2019), [https://files.hudexchange.info/reports/published/CoC\\_HIC\\_State\\_CA\\_2019.pdf](https://files.hudexchange.info/reports/published/CoC_HIC_State_CA_2019.pdf) [<https://perma.cc/727M-ERDB>].

20. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, DON'T COUNT ON IT: HOW THE HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESS CRISIS 6 (2017), <https://nlchp.org/wp-content/uploads/2018/10/HUD-PIT-report2017.pdf> [<https://perma.cc/RE4P-ACTM>] [hereinafter DON'T COUNT ON IT]. One New York study found that 31 percent of the homeless slept in areas "not visible" at the time of the count. Kim Hopper et al., *Estimating Numbers of Unsheltered Homeless People Through Plant-Capture and Postcount Survey Methods*, 98 AM. J. PUB. HEALTH 1438, 1440 (2008).

21. DON'T COUNT ON IT, *supra* note 20, at 6. Such exclusions are not trivial as Houston's 2017 PIT count increased 57 percent when including individuals in county jails who reported being homeless at the time of arrest. *Id.*

22. *Id.*

23. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, TENT CITY, USA: THE GROWTH OF AMERICA'S HOMELESS ENCAMPMENTS AND HOW COMMUNITIES ARE RESPONDING 7 (2017), [https://nlchp.org/wp-content/uploads/2018/10/Tent\\_City\\_USA\\_2017.pdf](https://nlchp.org/wp-content/uploads/2018/10/Tent_City_USA_2017.pdf) [<https://perma.cc/K9N5-Y2D8>] [hereinafter TENT CITY]; see also Phil Willon & Taryn Luna, *California's Homelessness Crisis Is 'A Disgrace,' Newsom Says in State of the State Address*, L.A. TIMES (Feb. 19, 2020), <https://www.latimes.com/homeless-housing/story/2020-02-19/governor-gavin-newsom-state-of-state-california-speech-homelessness> [<https://perma.cc/T84S-XNWX>].

24. See TENT CITY, *supra* note 23, at 7 ("Close to two-thirds of reports which recorded the time in existence of the encampments showed they had been there for more than one year, and more than one-quarter had been there for more than five years.").

25. See NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 71-73 (2019), <https://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [<https://perma.cc/U6EH-L5AS>] (estimating that the annual cost per homeless person of arrests, jail stays, ER visits, and hospital stays costs Central Florida \$31,000 in comparison to \$10,000 per year to provide permanent housing and a case manager).

roughly fit into four categories<sup>26</sup>: (1) ordinances prohibiting sitting, lying down, sleeping, or camping in public places; (2) anti-panhandling laws; (3) trespass admonishments and exclusionary orders; (4) homeless encampment sweeps.

Many cities—like Manhattan Beach—have enacted ordinances banning or limiting a citizen’s ability to sit, sleep, or camp in public places. According to the National Law Center on Homelessness & Poverty’s (“NLCHP”) 2016 survey of 187 cities across the country, 18.2 percent of cities banned sleeping in public city-wide and 26.7 percent prohibited sleeping in particular public places. Moreover, the same survey found that 32.6 percent of cities surveyed restricted camping in public city-wide and 49.7 percent did so in particular areas.

Boise, Idaho’s ordinances on sitting, lying, and sleeping in public places—challenged by plaintiffs in *Martin*—are illustrative of such laws. One law makes “standing, lying, or sitting down on any of the sidewalks, streets, alleys or public places” in an obstructive manner a misdemeanor upon refusal of an authority’s request to “immediately move on.”<sup>27</sup> Sleeping and camping are also covered:

It shall be unlawful for any person to use any of the streets, sidewalks, parks or public places as a camping place at any time . . . . The term “camp” or “camping” shall mean the use of public property as a temporary or permanent place of dwelling, lodging or residence, or as a living accommodation at any time between sunset and sunrise, or as a sojourn.<sup>28</sup>

As NLCHP’s survey demonstrates, Boise is not an anomaly.<sup>29</sup> Consequently, a 2016 survey found that 75 percent of homeless people do not know a place where it is safe and legal for them to sleep.<sup>30</sup> These laws collectively punish the homeless for engaging in the elementary human need for rest and sleep.

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26. Cf. Farida Ali, Note, *Limiting the Poor’s Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. ON POVERTY L. & POL’Y 197, 212–16 (2014) (categorizing criminalization of homelessness into the following: (1) sleeping ordinances, (2) loitering ordinances, (3) panhandling ordinances, (4) sanitation ordinances).

27. BOISE, IDAHO, CITY CODE § 7-3A-1 (2019).

28. *Id.* § 7-3A-2.

29. See, e.g., DURANGO, COLO., CODE OF ORDINANCES § 17-60(c) (2019) (outlawing—with only limited exceptions—sitting, kneeling, reclining, or lying down “in the downtown business area upon any surface of any public right-of-way, or upon any bedding, chair, stool, or any other object placed upon the surface of any public right-of-way between the hours of 7:00 a.m. and 2:30 a.m. of the next day”); see also SANTA MONICA, CAL., MUNICIPAL CODE § 4.08.095 (2020); BEVERLY HILLS, CAL., CITY CODE § 5-6-1501–5-6-1502 (2019); SEATTLE, WASH., MUNICIPAL CODE § 18.12.250 (2020).

30. W. REG’L ADVOCACY PROJECT, NATIONAL CIVIL RIGHTS OUTREACH FACT SHEET 2 (2016), <https://wraphome.org/wp-content/uploads/2017/10/NationalCivilRightsFactSheetOctober2016.pdf> [<https://perma.cc/KLC8-2GJ4>].

Panhandling and loitering laws further allow the state to exert control over the homeless.<sup>31</sup> The following example from the Los Angeles Municipal Code exemplifies this approach:

No person shall stand in or upon any street, sidewalk or other public way open for pedestrian travel or otherwise occupy any portion thereof in such a manner as to annoy or molest any pedestrian thereon or so as to obstruct or unreasonably interfere with the free passage of pedestrians.<sup>32</sup>

Other localities, such as Bakersfield, California, more specifically target panhandling, by making “aggressive” panhandling a crime in any public place and placing time and manner restrictions on non-aggressive forms of soliciting.<sup>33</sup> Critics contend that cities have used the wide-ranging latitude such ordinances offer to “target and harass” the homeless for the simple and involuntary act of being in public.<sup>34</sup>

Trespass admonishments are different from previously discussed measures in that they involve private business interests using the power of the state to ban unwanted individuals from private, semi-public, and public locations, including “the public transportation system, hospitals and religious institutions, libraries and recreation centers, neighborhood stores, and social service agencies.”<sup>35</sup> In these arrangements, private businesses band together and deputize local police officers to banish “unauthorized” individuals from places for up to one year under threat of arrest, prosecution, and conviction for violating the trespass admonishment.<sup>36</sup> Likewise, exclusion orders provide localities with another method to keep out homeless individuals from certain areas. For example, in Seattle, any individual violating one of the many rules governing behavior in public parks can be subject to an exclusion order prohibiting entry into the park—and possibly all city owned parks—for up to a year.<sup>37</sup>

Finally, in response to the rise of homeless encampments, cities have resorted to forcibly removing and clearing out these campsites.<sup>38</sup> These

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31. Terry Skolnik, *Homelessness and the Impossibility to Obey the Law*, 43 *FORDHAM URB. L.J.* 741, 759–61 (2016) (noting that while not all persons who panhandle are homeless, studies have shown that many panhandlers are).

32. L.A., CAL., MUNICIPAL CODE § 41.18(a) (2019).

33. BAKERSFIELD, CAL., MUNICIPAL CODE § 9.32.020 (2019).

34. Ali, *supra* note 26, at 212–213.

35. ABA COMM’N ON HOMELESSNESS & POVERTY, NO SUCH PLACE AS “AWAY:” WHY BANISHMENT IS A WRONG TURN ON THE PATH TO BETTER AND SAFER CITIES 1–2 (2010), [https://www.americanbar.org/content/dam/aba/migrated/homeless/PublicDocuments/ABA\\_CHP\\_Banishment\\_White\\_Paper\\_February\\_2010.pdf](https://www.americanbar.org/content/dam/aba/migrated/homeless/PublicDocuments/ABA_CHP_Banishment_White_Paper_February_2010.pdf) [<https://perma.cc/4TYT-GWGU>].

36. *Id.* at 1.

37. *Id.* at 2.

38. NAT’L COAL. FOR THE HOMELESS, SWEEP AWAY: REPORTING ON THE ENCAMPMENT CLOSURE CRISIS 2 (2016), <http://nationalhomeless.org/publication/view/swept-away-2016> [<https://perm>

sweeps frequently result in the destruction or confiscation of people's only property, including important items such as tents, sleeping bags, valuables, documents, and even medications.<sup>39</sup> Cities argue that these sweeps are necessary to limit crime, prevent environmental degradation, and promote public health.<sup>40</sup> While these sweeps do allow a city to clean areas,<sup>41</sup> they do so at a steep budgetary and human cost.<sup>42</sup> Even worse, there is evidence that these sweeps are an ineffective means to clear out areas<sup>43</sup> or induce individuals to seek out shelters.<sup>44</sup>

## II. BANISHMENT OVERVIEW

### A. BANISHMENT IN THE CRIMINAL CONTEXT

Historically, banishment was a form of punishment whereby an individual was deported and exiled from a specific area, typically a state or country.<sup>45</sup> As others have noted,<sup>46</sup> perhaps the most famous banishment known to Western culture occurred when God banished Adam and Eve from Eden.<sup>47</sup> The Greeks, Romans, Chinese and Russians applied such punishment throughout the world.<sup>48</sup> Furthermore, this tradition was prevalent during colonial times as England "transported" criminals to the colonies.<sup>49</sup>

a.cc/7FEQ-HGTX].

39. *Id.*; see also Jennifer Wadsworth, *San Jose Dramatically Increases Sweeps of Homeless Camps*, SAN JOSE INSIDE, (Nov. 2, 2018), <http://www.sanjoseinside.com/2018/11/02/san-jose-dramatically-increases-sweeps-of-homeless-camps> [https://perma.cc/PV6N-W75X].

40. NAT'L COAL. FOR THE HOMELESS, *supra* note 38, at 5.

41. Dakota Smith, *L.A. Wants More Money for Homeless Encampment Sweeps*, L.A. TIMES (Feb. 21, 2018, 4:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-homeless-clean-backlog-20180221-story.html> [https://perma.cc/7QC3-5WQ6].

42. OFFICE OF THE CITY AUDITOR, REPORT TO THE CITY COUNCIL CITY OF SAN JOSE, AUDIT OF THE CITY'S HOMELESS ASSISTANCE PROGRAMS 41 (2018), <https://www.sanjoseca.gov/Home/ShowDocument?id=33914> [https://perma.cc/TT3P-QZQK]. The City of San Jose spent over two million dollars during the 2017–2018 fiscal year. *Id.* at 37.

43. Laura Waxmann, *Homeless Advocates Claim April Sweeps Led to More Encampment Complaints*, S.F. EXAM'R (May 25, 2018, 12:00 AM), <http://www.sfexaminer.com/homeless-advocates-claim-april-sweeps-led-encampment-complaints> [https://perma.cc/59KD-BHNC] (noting that an analysis of homeless encampment complaints in an area affected by a major sweep actually increased 8 percent the month after tents were removed).

44. See NAT'L COAL. FOR THE HOMELESS, *supra* note 38, at 7 ("Seattle's Human Services Department admitted that the majority of campers displaced in sweeps *did not* end up in city shelters, and a Honolulu survey revealed that more encampment residents stated that sweeps made them *less* likely or able to seek shelter than the reverse." (footnote omitted)).

45. 1 SHIRELLE PHELPS & JEFFREY LEHMAN, WEST'S ENCYCLOPEDIA OF AMERICAN LAW 462 (2d ed. 2005).

46. 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, 1085 (2002).

47. Genesis 3:22–23 (New International Version).

48. PHELPS & LEHMAN, *supra* note 45, at 462.

49. *Id.*

While it is often viewed as an outdated and primitive mode of punishment, banishment is not unheard of in the United States.<sup>50</sup> Today, banishment conditions are generally encountered as a condition imposed on parole, probation, or suspended sentence.<sup>51</sup> It has been theorized that banishment promotes rehabilitation, deterrence, and public safety.<sup>52</sup> Banishment conditions vary in degree and scope, ranging from state exile<sup>53</sup> to banishment from smaller delineated geographic areas within cities.<sup>54</sup>

Despite the continued use of banishment in the United States, the majority of jurisdictions have found at least some forms of banishment to be void, especially in cases involving interstate banishment and banishment by deportation.<sup>55</sup> In fact, twenty-seven of the thirty-six state courts that have evaluated the legality of banishment orders have held that at least some forms of banishment are illegal.<sup>56</sup> Generally, the larger the area a banishment order covers, the increased likelihood a court will find that the condition is void.<sup>57</sup>

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50. See Brian McGinnis, *This Is Why Some U.S. Judges Banish Convicts From Their Home Communities*, WASH. POST (Mar. 16, 2017, 4:00 AM), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/16/this-is-why-some-u-s-judges-banish-convicts-from-their-home-communities/?no\\_redirect=on&utm\\_term=.1b630b8931b2](https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/16/this-is-why-some-u-s-judges-banish-convicts-from-their-home-communities/?no_redirect=on&utm_term=.1b630b8931b2) [<https://perma.cc/6TET-JPVD>] (“Houston County, for instance, has banished more than 500 people since 1998.”).

51. Robert E. Haffke, Note, *Intrastate Banishment: An Examination and Argument for Strict Scrutiny of Judicially and Executively Imposed Banishment Orders*, 57 CASE W. RES. L. REV. 896, 903 (2007).

52. *Id.* at 903–08.

53. *Reeves v. State*, 5 S.W.3d 41, 42 (Ark. 1999) (reviewing an appeal of a seven-year exile from the state of Arkansas as a probation condition imposed on a defendant convicted of stalking).

54. *State v. Morgan*, 389 So. 2d 364, 366 (La. 1980) (affirming a special probation condition that banned a defendant convicted of prostitution from the French Quarter neighborhood for the length of the defendant’s probation).

55. 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, 466 (1998) (“The majority of courts, both federal and state, which have addressed the legality of banishment, have held that banishment is illegal.”).

56. See *Brown v. State*, 660 So. 2d 235, 236 (Ala. Crim. App. 1995); *Jones v. State*, 727 P.2d 6, 7–9 (Alaska Ct. App. 1986); *Reeves*, 5 S.W.3d at 44–45; *Alhusainy v. Super. Ct.*, 48 Cal. Rptr. 3d 914, 919 (Ct. App. 2006); *State ex rel. Baldwin v. Alsbury*, 223 So. 2d 546, 547 (Fla. 1969); *People v. Harris*, 606 N.E.2d 392, 397 (Ill. App. Ct. 1992); *Burnstein ex rel. Burnstein v. Jennings*, 4 N.W.2d 428, 429 (Iowa 1942); *Weigand v. Commonwealth*, 397 S.W.2d 780, 781 (Ky. Ct. App. 1965); *State v. Sanchez*, 462 So. 2d 1304, 1309–10 (La. Ct. App. 1985); *Howard v. State*, No. 1909, 2016 Md. App. LEXIS 1370, at \*37–38 (Md. Ct. Spec. App. Oct. 12, 2016) (unpublished); *Commonwealth v. Pike*, 701 N.E.2d 951, 960–61 (Mass. 1998); *People v. Baum*, 231 N.W. 95, 96 (Mich. 1930); *State ex rel. Halverson v. Young*, 154 N.W.2d 699, 701–02 (Minn. 1967); *Mackey v. State*, 37 So. 3d 1161, 1166–67 (Miss. 2010); *State v. Muhammad*, 43 P.3d 318, 324 (Mont. 2002); *Ex parte Thornberry*, 254 S.W. 1087, 1089–1090 (Mo. 1923); *State v. J. F.*, 621 A.2d 520, 522 (N.J. Super. Ct. App. Div. 1993); *State v. Charlton*, 846 P.2d 341, 344 (N.M. Ct. App. 1992); *People v. Marcial*, 577 N.Y.S.2d 316, 317 (App. Div. 1991); *State v. Doughtie*, 74 S.E.2d 922, 924 (N.C. 1953); *State v. Mose*, No. 11CA0083-M, 2013 Ohio App. LEXIS 562, at \*7 (Ohio Ct. App. Feb. 25, 2013); *State v. Jacobs*, 692 P.2d 1387, 1389 (Or. Ct. App. 1984); *State v. Karan*, 525 A.2d 933, 934 (R.I. 1987); *State v. Baker*, 36 S.E. 501, 502 (S.C. 1900); *Johnson v. State*, 672 S.W.2d 621, 623 (Tex. Ct. App. 1984); *State v. Schimelpfenig*, 115 P.3d 338, 339 (Wash. Ct. App. 2005); *Crabtree v. State*, 112 P.3d 618, 622 (Wyo. 2005).

57. See, e.g., *Schimelpfenig*, 115 P.3d at 339 (“An order banishing an individual from a large

Each of the seven state courts that have reviewed banishment conditions requiring a defendant to self-deport from the United States as a condition of probation or suspended sentence have overturned such conditions because they violated the Supremacy Clause and exceeded the trial court's judicial authority.<sup>58</sup> Further, all fifteen state courts that have ruled on state banishment as a condition of probation or suspension of a sentence have found it illegal.<sup>59</sup> However, at least five states distinguish conditions of parole or pardon from conditions of probation or suspension of a sentence, primarily arguing that banishment is a valid condition of parole and pardon because both involve an individual voluntarily agreeing to the banishment condition.<sup>60</sup>

As for multi-county, county, and city banishments, the results are more mixed. No court has held they are per se illegal, though seven of the ten appellate state courts that have reviewed such conditions have refused to uphold a county or city-wide banishment order.<sup>61</sup>

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geographical area is bound to raise both societal and legal concerns.”).

58. See *In re Babak S.*, 22 Cal. Rptr. 2d 893, 898 (Ct. App. 1993); *Weigand*, 397 S.W.2d at 781; *Sanchez*, 462 So. 2d at 1309–1310; *State v. Pando*, 921 P.2d 1285, 1286–87 (N.M. Ct. App. 1996); *Commonwealth v. Nava*, 966 A.2d 630, 635–36 (Pa. Super. Ct. 2009); *State v. Karan*, 525 A.2d 933, 934 (R.I. 1987); *Gutierrez v. State*, 354 S.W.3d 1, 7 (Tex. Ct. App. 2011).

59. *Warren v. State*, 706 So. 2d 1316, 1318 (Ala. Crim. App. 1997); *Reeves*, 5 S.W.3d at 44–45; *Alhusainy*, 48 Cal. Rptr. at 919; *Burnstein*, 4 N.W. 2d at 429; *Harris*, 606 N.E.2d at 397; *Q.M. v. Commonwealth*, 459 S.W.3d 360, 370 (Ky. 2015); *Pike*, 701 N.E.2d at 960–61; *Baum*, 231 N.W. at 96; *Halverson*, 154 N.W.2d at 701; *J. F.*, 621 A.2d at 522; *Charlton*, 846 P.2d at 344; *Marcial*, 577 N.Y.S.2d at 317; *Doughtie*, 74 S.E.2d at 924; *Mose*, 2013 Ohio App. LEXIS 5621 at \*7; *Baker*, 36 S.E. at 502; *Snider*, *supra* note 55, at 466 (“Almost without exception, courts reviewing a plan of probation requiring a person to leave the state or a large geographical subdivision of the state, have found the plan to be illegal.”).

60. *Beavers v. State*, 666 So. 2d 868, 871–72 (Ala. Crim. App. 1995) (holding county banishment was valid because there was no statutory or constitutional authority proscribing banishment as a condition of parole, the parole board had statutory authority to set parole rules, and had defendant turned down parole he would have faced banishment anyways, so there was no loss of liberty); *Dougan v. Ford*, No. 04-623, 2005 Ark. LEXIS 519, at \*3–4 (Ark. Sept. 29, 2005) (holding a parole condition requiring defendant not return to a specific county valid because there was no constitutional right or entitlement to parole, the parole board was provided statutorily authorized discretion to set parole conditions, and defendant was free to decline and serve out his sentence instead); *In re Petition for Cammarata*, 67 N.W.2d 677, 682–83 (Mich. 1954); *Ex parte Snyder*, 159 P.2d 752, 754 (Okla. Crim. App. 1945); *Mansell v. Turner*, 384 P.2d 394, 395 (Utah 1963) (“If the conditional termination were void, petitioner has no complaint as to recommitment to prison, since the compact was nudum pactum.”); see also *Snider*, *supra* note 55, 466 (1998) (“[A] number of states have drawn a distinction between banishment as a condition of probation or suspension of sentence, and banishment as a condition of a pardon or parole.”).

61. Alabama, California, Maryland, Missouri, Montana, Ohio, Washington and Wyoming have all rejected each county and city banishment reviewed. See *Brown*, 660 So. 2d at 236 (“Our statutes do not permit courts to impose sentences of banishment. Such an agreement is beyond the jurisdiction of the court and is void.”); *Ex parte Scarborough*, 173 P.2d 825, 827 (Cal. Ct. App. 1946); *Howard*, 2016 Md. App. LEXIS 1370, at \*37–38; *Thornberry*, 254 S.W. at 1089–90; *Muhammad*, 43 P.3d at 324; *State v. Jerido*, No. 1997CA00265, 1998 Ohio App. LEXIS 2482, at \*2–3 (Ohio Ct. App. May 26, 1998); *State v. Schimelpfenig*, 115 P.3d 338, 341 (Wash. Ct. App. 2005); *Crabtree*, 112 P.3d at 622. On the other hand, Mississippi has both upheld and invalidated such banishments dependent on the circumstances of the case. See *Mackey v. State*, 37 So. 3d 1161, 1166–67 (Miss. 2010) (holding that a condition prohibiting

More limited banishment restrictions—specific areas within a city—have been viewed less suspiciously by courts. In five states, such narrower restrictions have been upheld in every instance these types of banishments were challenged.<sup>62</sup> On the other hand, Alaska and Illinois have both invalidated and upheld intracity restrictions dependent on the attendant circumstances,<sup>63</sup> while California, Florida, and Minnesota have voided intracity banishment conditions each time they have been challenged.<sup>64</sup>

At the state constitutional level, fifteen state constitutions explicitly prohibit interstate banishment,<sup>65</sup> and another six state constitutions forbid banishment without some form of due process.<sup>66</sup>

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defendant from coming within 100 miles of a city for 30 years was invalid because the trial court's order lacked factual findings in support of banishment); *Cobb v. State*, 437 So. 2d 1218, 1221 (Miss. 1983) (upholding banishment condition requiring defendant to stay at least 125 miles away from a county). Georgia and Wisconsin have upheld city or county banishments each time they have been reviewed. *De Terry v. Hamrick*, 663 S.E.2d 256, 258–59 (Ga. 2008); *State v. Nienhardt*, 537 N.W.2d 123, 125–26 (Wis. Ct. App. 1995); *State v. Johnson*, No. 02-2793-CR, 2003 Wis. LEXIS App 188 (Wis. Ct. App. July 15, 2003) (unpublished), *aff'd* 681 N.W.2d 901 (Wis. 2004).

62. *People v. Brockelman*, 933 P.2d 1315, 1320–21 (Colo. 1997); *Tyson v. State*, 687 S.E.2d 284, 287 (Ga. Ct. App. 2009); *State v. Morgan*, 389 So. 2d 364, 366 (La. 1980); *State v. James*, 978 P.2d 415, 419 (Or. Ct. App. 1999); *State v. McBride*, 873 P.2d 589, 592–94 (Wash. Ct. App. 1994).

63. For Alaska, compare *Oyoghok v. Anchorage*, 641 P.2d 1267, 1270–71 (Alaska Ct. App. 1982) (holding that a two-block radius restriction as condition of probation for prostitution conviction was not overbroad as applied, was reasonably related to rehabilitation, and did not unduly impinge upon probationer's liberty), with *Jones v. State*, 727 P.2d 6, 7–9 (Alaska Ct. App. 1986) (holding that a forty-five block restriction was invalid as there was no nexus between location and defendant's crime and the banishment was unnecessarily severe and restrictive). For Illinois, compare *People v. Pickens*, 542 N.E.2d 1253, 1257 (Ill. App. Ct. 1989) (holding that banishment from a fifty-block area of downtown absent written permission from a probation officer was not invalid and was reasonable), with *In re J.G.*, 692 N.E.2d 1226, 1229 (Ill. App. Ct. 1998) (holding that banishment was invalid because it was not reasonably related to rehabilitation).

64. *In re White*, 158 Cal. Rptr. 562, 555–57 (Cal. Ct. App. 1979) (holding that a probation restricting a convicted prostitute from known areas of prostitution too broad and unrelated to rehabilitation, and thus unreasonable and unconstitutional); *State ex rel. Baldwin v. Alsbury*, 223 So. 2d 546, 547 (“[O]ut-of-town or informal banishment . . . from the city is cruel and unusual punishment and is prohibited by the Federal and Florida Constitutions.”); *State v. Holiday*, 585 N.W.2d 68, 71 (Minn. Ct. App. 1998) (holding that an order banning defendant from reentering all public housing within the city after a charge of minor trespass was an unconstitutional violation of defendant's right of association).

65. *Snider*, *supra* note 55, at 465; *see also* ALA. CONST. art I, § 30 (“[N]o citizen shall be exiled.”); ARK. CONST. art. II, § 21 (“[N]or shall any person, under any circumstances, be exiled from the State.”); GA. CONST. art. I, § 1, para. XXI (“Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime.”); ILL. CONST. art I, § 11 (“No person shall be transported out of the State for an offense committed within the State.”); NEB. CONST. art. I, § 15 (“[N]or shall any person be transported out of the state for any offense committed within the state.”); OHIO CONST. art. I, § 12 (“No person shall be transported out of the state, for any offense committed within the same.”); TEX. CONST. art. I, § 20 (“No person shall be transported out of the State for any offense committed within the same.”); VT. CONST. ch. I, art. XXI (“[N]o person shall be liable to be transported out of this state for trial for any offence committed within the same.”); W. VA. CONST. art. III, § 5 (“No person shall be transported out of, or forced to leave the State for any offence committed within the same.”).

66. *Snider*, *supra* note 55, at 465. MD. CONST. art. XXIV (“[N]o man ought to be . . . exiled . . . but by the judgment of his peers, or by the Law of the land.”); MASS. CONST. pt. 1, art. XII (“No subject shall be . . . exiled . . . but by the judgment of his peers, or the law of the land.”); N.H. CONST. pt. 1, art. XV (“No subject shall be . . . exiled . . . but by the judgment of his peers, or the law of the land.”); N.C. CONST.

Federal courts have largely followed the same pattern as state courts—exhibiting a decreasing reluctance to void banishment orders the more limited their scope. The two federal district courts to have ruled on the legality of state banishments as conditions of *probation* each determined that banishment from an entire state is unconstitutional.<sup>67</sup> On the other hand, in 1983, the Ninth Circuit upheld a *parole* condition requiring a defendant—a resident of Washington prior to incarceration—to complete parole in Iowa, and not enter Washington without the parole commissioner’s permission.<sup>68</sup> There, the court reasoned that the constitutional right to travel is not “revived by the change in status from prisoner to parolee.”<sup>69</sup> In 1982, an Ohio district court held, under the “very peculiar circumstances” of the case, that a convict’s commutation granted by the governor—conditioned upon state banishment—was valid because the defendant waived his constitutional rights when accepting the commutation, and moreover, the government may impose certain conditions of liberty on individuals released early.<sup>70</sup>

Like state courts, federal courts are much more likely to uphold conditions of banishment from a county or specific area within a state than those banishing an offender from an entire state. The First,<sup>71</sup> Third,<sup>72</sup> Sixth,<sup>73</sup>

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art. I, § 19 (“No person shall be . . . exiled . . . but by the law of the land.”); OKLA. CONST. art. II, § 29 (“No person shall be transported out of the State for any offense committed within the State, nor shall any person be transported out of the state for any purpose, without his consent, except by due process of law.”); TENN. CONST. art. I, § 8 (“[N]o man shall be . . . exiled . . . but by the judgment of his peers, or the law of the land.”).

67. *Rutherford v. Blankenship*, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) (holding that a ten-year banishment from Virginia was void on both public policy and cruel and unusual punishment grounds); *Naked City, Inc. v. Aregood*, 667 F. Supp. 1246, 1261 (S.D. Ind. 1987) (holding—without any reasoning provided—that a ten-year banishment from the state was in violation of the Constitution).

68. *Bagley v. Harvey*, 718 F.2d 921, 924–25 (9th Cir. 1983).

69. *Id.* The court also relied on the fact that the parolee suggested he complete parole in Iowa, and he was free to return to Washington after parole concluded.

70. *Carchedi v. Rhodes*, 560 F. Supp. 1010, 1017–19 (S.D. Ohio 1982).

71. *United States v. Garrasteguy*, 559 F.3d 34, 43–44 (1st. Cir. 2009) (upholding a condition of supervised release requiring defendants to not enter the county—without any exceptions—where they distributed cocaine for eight and twelve years, respectively, despite the breadth of the banishment giving the court “pause”).

72. *United States v. Sicher*, 239 F.3d 289, 292 (3d Cir. 2000) (upholding prohibition from two counties, with limited ability to enter with a probation officer’s permission, because it was reasonably related to the rehabilitative goal of keeping defendant away from influences that would engage her in further criminal activity).

73. *United States v. Alexander*, 509 F.3d 253, 256–58 (6th Cir. 2007) (approving a requirement that defendant live hundreds of miles away from the city where his child and other family members reside after defendant had committed five supervised-release violations); *United States v. Rantanen*, 684 Fed. Appx. 517, 520–22 (6th Cir. 2017) (mem.) (upholding a special banishment condition from a county because geographic restrictions are expressly authorized by federal sentencing guidelines set out in 18 U.S.C. § 3563(b)(13) and the county restriction was not plain error despite the court’s discomfort with the nine-year length of banishment and lack of exceptions, such as obtaining permission to enter the county).

Ninth,<sup>74</sup> and Eleventh Circuits<sup>75</sup> as well as the Southern District of Mississippi<sup>76</sup> have all upheld conditions banishing an individual from a particular county on grounds that such conditions were authorized by Federal statute, reasonably related to rehabilitation, not contrary to public policy, or some combination of these factors.<sup>77</sup>

Federal and state courts, in addition to various legal authorities, disagree on what constitutes banishment.<sup>78</sup> For example, an Oregon court held:

Banishment, however, has traditionally been “synonymous with exilement or deportation, importing a compulsory loss of one’s country.” The 90-day exclusion at issue here differs from traditional banishment in two important respects. First, it is of limited duration. Second, it does not involve loss of one’s country or even one’s place of residence or one’s ability to carry out lawful business within the drug free zones. As noted, variances are available for those who live within the drug free zones or have legitimate business there.<sup>79</sup>

On the other hand, the Supreme Court of Arkansas defined banishment “as an order which compels a person ‘to quit a city, place, or county for a specific period of time, or for life.’”<sup>80</sup> Generally, courts, like the Oregon court cited above, that apply a more extreme definition of banishment—an absolute, unqualified, and long-term ban from a large geographical area—are more likely to uphold banishment orders on a limited scale, whereas courts, like the Arkansas court cited above, that apply a less extreme definition of banishment, are less likely to uphold banishment orders.<sup>81</sup>

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74. *United States v. Watson*, 582 F.3d 974, 985 (9th Cir. 2009) (holding that a condition of supervised release to not return to San Francisco or a county for the entirety of defendant’s supervised release without permission of the probation officer was reasonably related to goals of rehabilitation and deterrence and was no broader than reasonably necessary to serve those purposes).

75. *United States v. Cothran*, 855 F.2d 749, 753 (11th Cir. 1988) (upholding a banishment from a county because it was expressly authorized by statute and “simply not contrary to public policy”).

76. *Watts v. Brewer*, No. 2:09cv122-KS-MTP, 2012 U.S. Dist. LEXIS 52775, at \*26 (S.D. Miss. Mar. 16, 2012) (upholding a sentence suspended on condition defendant remain outside a hundred-mile radius from the courthouse because such a condition did not violate any constitutional rights).

77. *See infra* notes 71–75.

78. *See* Peter Edgerton, Comment, *Banishment and the Right to Live Where You Want*, 74 U. CHI. L. REV. 1023, 1039–40 (2007) (listing various definitions of banishment found in multiple legal dictionaries); Matthew D. Borrelli, Note, *Banishment: The Constitutional and Public Policy Arguments Against This Revived Ancient Punishment*, 36 SUFFOLK U. L. REV. 469, 480–81 (2002–2003) (“The broadened definition of probation allows states to avoid calling punishment ‘banishment’ and escape the regulations that the courts set as precedent. This creates potential confusion over what banishment entails . . . .” (footnote omitted)).

79. *State v. James*, 978 P.2d 415, 419 (Or. Ct. App. 1999) (quoting BLACK’S LAW DICTIONARY 131 (5th ed. 1979)).

80. *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)).

81. *Key v. State*, No. 01-01-01051-CR, 2002 Tex. App. LEXIS 7980, at \*7 (Tex. Ct. App. Nov. 7,

*Johnson v. City of Cincinnati* presents a unique example of generalized banishment. In *Johnson*, the Sixth Circuit held that an ordinance mandating banishment from all “public streets, sidewalks, and other public ways” within a city’s drug-exclusion zones for anyone arrested or taken into custody on certain drug-related offenses in these zones was unconstitutional.<sup>82</sup> Specifically, the court took issue with the ordinance’s lack of individualized consideration prior to exclusion,<sup>83</sup> and its infringement on the right to intrastate travel.<sup>84</sup>

*Ketchum v. West Memphis* also involved an individual being banished without a conviction or judicial order. In *Ketchum*, a man sufficiently stated a claim supporting a violation of his federal constitutional right to travel when he alleged police officers arrested him for loitering in West Memphis, Arkansas, drove him across the Mississippi River, and then “dumped” him in Memphis, Tennessee.<sup>85</sup>

#### B. CHALLENGES TO BANISHMENT CONDITIONS

Banishments have been invalidated for: (1) infringing the constitutional right to travel,<sup>86</sup> (2) lacking a reasonable relation to rehabilitation,<sup>87</sup> (3) violating public policy,<sup>88</sup> and (4) exceeding the statutorily authorized range of punishment.<sup>89</sup>

Banishment conditions have been found to unconstitutionally infringe on an individual’s right to travel.<sup>90</sup> The Supreme Court has recognized a right to “be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this

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2002) (unpublished) (holding that conditions requiring defendant to serve community supervision in a particular county and obtain permission to enter a separate county do not constitute banishment and are therefore valid).

82. *Johnson v. City of Cincinnati*, 310 F.3d 484, 506 (6th Cir. 2002).

83. *Id.* at 503.

84. *Id.* at 498.

85. *Ketchum v. West Memphis*, 974 F.2d 81, 83 (8th Cir. 1992).

86. *See, e.g., State v. Schimelpfenig*, 115 P.3d 338, 339 (Wash. Ct. App. 2005) (“At the most, banishment orders encroach on an individual’s constitutional right to travel, which includes the right to travel within a state.”).

87. *Reeves v. State*, 5 S.W.3d 41, 45 (Ark. 1999) (holding a seven-year exile from the state as a condition of probation is, among other things, “repugnant to the underlying policy of the probation law, which is to rehabilitate offenders without compromising public safety” (quoting *State v. Young*, 154 N.W.2d 699, 702 (1967))).

88. *See, e.g., People v. Baum*, 231 N.W. 95, 96 (Mich. 1930) (“[Banishment] is impliedly prohibited by public policy.”).

89. *See e.g., People v. Blakeman*, 339 P.2d 202, 202–03 (Cal. Ct. App. 1959) (“It was beyond the power of the court to impose banishment as a condition of probation. The provision therefor was a void and separable part of the order granting probation.”).

90. *In re Babak S.*, 22 Cal. Rptr. 2d 893, 898 (Ct. App. 1993); *State v. Schimelpfenig*, 115 P.3d 338, 339 (Wash. Ct. App. 2005).

movement.”<sup>91</sup> While the right to interstate travel is a fundamental freedom, not all courts apply a strict scrutiny analysis to banishment as a condition of parole, probation, suspended sentence, or pardon.<sup>92</sup> Some apply rational review<sup>93</sup> and others strict scrutiny.<sup>94</sup> Further, parolees may be subject to harsher travel restrictions than what could be imposed on a citizen not on parole.<sup>95</sup>

One potential reason why courts are more likely to uphold county or city banishment orders over state banishment orders could be a reluctance to explicitly recognize a constitutional intrastate right to travel.<sup>96</sup> The Supreme Court has not ruled on whether there is an implicit right to intrastate travel inherent from the right to interstate travel.<sup>97</sup> However, multiple state and federal courts have expressly found such a right, including California,<sup>98</sup> Washington, Wyoming, Wisconsin, Hawaii, Minnesota, and New York at the state level and the Sixth Circuit<sup>99</sup> at the federal level.<sup>100</sup> “[T]he right to intrastate travel (which includes *intramunicipal* travel) is a basic human right protected by the United States and California Constitutions as a whole. Such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law.”<sup>101</sup> Moreover, “[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.”<sup>102</sup>

Given that many courts do not recognize a fundamental right to travel, or have held that probationers and parolees are subject to stricter restrictions

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91. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

92. *Borrelli*, *supra* note 78, 473; *see also* *United States v. Soltero*, 510 F.3d 858, 866 (9th Cir. 2007) (“A restriction on a defendant’s [constitutional right] is nonetheless valid if it: (1) ‘is reasonably related’ to the goals of deterrence, protection of the public, and/or defendant rehabilitation; (2) ‘involves no greater deprivation of liberty than is reasonably necessary’ to achieve these goals; and (3) ‘is consistent with any pertinent policy statements issued by the Sentencing Commission . . . .’” (citations omitted)).

93. *See, e.g.*, *State v. Morgan*, 389 So. 2d 364, 366 (La. 1980) (“[T]he condition of probation [of banishment from French Quarter neighborhood] is reasonably related to Ms. Morgan’s rehabilitation.”).

94. *See, e.g.*, *Schimelpfenig*, 115 P.3d at 339 (Wash. Ct. App. 2005) (“Because of its constitutional implications, we apply strict scrutiny in reviewing a banishment order.”).

95. *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972).

96. *Haffke*, *supra* note 51, at 919.

97. *Id.* at 921; *see also* *Johnson v. City of Cincinnati*, 310 F.3d 484, 496 (6th Cir. 2002) (“The Supreme Court has not yet addressed whether the Constitution also protects a right to intrastate travel.”).

98. *In re White*, 158 Cal. Rptr. 562, 567 (Ct. App. 1979) (holding that the intrastate right to travel, including an intramunicipal right to travel, are protected by the United States and California Constitutions).

99. *Johnson*, 310 F.3d at 498 (“In view of the historical endorsement of a right to intrastate travel and the practical necessity of such a right, we hold that the Constitution protects a right to travel locally through public spaces and roadways.”).

100. *Haffke*, *supra* note 51, at 922.

101. *In re White*, 158 Cal. Rptr. at 567 (emphasis added).

102. *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971).

on their constitutional rights, banishment orders have also been challenged as not being reasonably related to states' dual goals to rehabilitate convicts and protect the public at large.<sup>103</sup> Generally, such challenges are roughly analyzed via an application of the attendant facts and circumstances of the underlying criminal offense, banishment, and the connection between the two. However, some courts, such as Washington<sup>104</sup> and Mississippi,<sup>105</sup> apply a specific set of factors to aid in this analysis. A Texas court held that "banishing appellant from the county . . . when he is broke and unemployed is not reasonably related to his rehabilitation," especially considering the appellant was a resident of the area prior to his conviction for the unauthorized use of a vehicle.<sup>106</sup> On the other hand, a Wisconsin court upheld a banishment condition prohibiting a convicted stalker from entering a city where his victim resided because it was reasonably related to rehabilitation and the defendant had no reason to enter the city, making the banishment a mere "inconvenience."<sup>107</sup>

In addition to challenging the penological purposes of a banishment order, courts have held that such orders violate public policy.<sup>108</sup> In 1930, the Michigan Supreme Court, in *People v. Baum*, articulated how interstate banishment violates public policy:

To permit one State to dump its convict criminals into another would entitle the State believing itself injured thereby to exercise its police and military power in the interest of its own peace, safety, and welfare, to repel such an invasion. It 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. Such a method of punishment . . . is impliedly prohibited by public policy.<sup>109</sup>

103. See, e.g., *State v. Nienhardt*, 537 N.W.2d 123, 125–26 (Wis. Ct. App. 1995).

104. *State v. Schimelpfenig*, 115 P.3d 338, 340–41 (Wash. Ct. App. 2005) (citing the following factors: "(1) whether the restriction is related to protecting the safety of the victim or witness of the underlying offense; (2) whether the restriction is punitive and unrelated to rehabilitation; (3) whether the restriction is unduly severe and restrictive because the defendant resides or is employed in the area from which he is banished; (4) whether the defendant may petition the court to temporarily lift the restriction if necessary; and (5) whether less restrictive means are available to satisfy the State's compelling interest").

105. *Mackey v. State*, 37 So. 3d 1161, 1165 (Miss. 2010) ("[T]he banishment provision herein bears a reasonable relationship to the purposes of the suspended sentence or probation, that the ends of justice and the best interest of the public and the Defendant will be served by such banishment during the period of the suspended sentence, that the banishment provision of the suspended sentence does not violate the public policy of the State of Mississippi, that the banishment provision of the suspended sentence herein does not defeat the rehabilitative purpose of the probation and/or suspended sentence, and such provision does not violate the Defendant's rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution." (citation omitted)).

106. *Johnson v. State*, 672 S.W.2d 621, 623 (Tex. Ct. App. 1984).

107. *State v. Nienhardt*, 537 N.W.2d 123, 125–26 (Wis. Ct. App. 1995).

108. *Borrelli*, *supra* note 78, at 478–79; *Haffke*, *supra* note 51, at 910.

109. *People v. Baum*, 231 N.W. 95, 96 (Mich. 1930); see also *State v. Sanchez*, 462 So. 2d 1304,

*Baum* is often cited when courts invalidate a banishment order on public policy grounds.<sup>110</sup> In 1946, a California court applied the same reasoning to invalidate county or city banishments on public policy grounds.<sup>111</sup> Conversely, state courts in Mississippi and Georgia have held that intrastate banishments do not violate public policy.<sup>112</sup>

Finally, banishments have been challenged for exceeding the range of punishment authorized by statute. “A common tenet of criminal law . . . is that the judge can only sentence the defendant to that which the legislature has deemed within the permissible range of punishment . . . .”<sup>113</sup> Thus, absent statutory authorization, a judge may not impose a condition of banishment on probation or suspension of a sentence.<sup>114</sup>

### III. MANHATTAN BEACH’S ORDINANCE AND PRACTICES AS AN ILLEGAL FORM OF BANISHMENT

The Manhattan Beach Ordinance and its planned enforcement protocol is unconstitutional because it is a form of banishment, burdens the right to travel, is not reasonably related to rehabilitation or public safety, and violates public policy. This is true regardless of whether the city only enforces it when an individual in violation of the ordinance refuses transportation to a shelter arranged for by the city.

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1310 (La. Ct. App. 1985) (“[T]he portion of trial judge’s sentence in the instant case which imposes banishment as a special condition of probation is unconstitutional.”); *State v. Doughtie*, 74 S.E.2d 922, 924 (N.C. 1922) (holding that a suspended sentence conditioned upon a two-year exile from the state for was void because it was effectively a banishment and such punishment is “not sound public policy to make other states a dumping ground for our criminals”).

110. *Snider*, *supra* note 55, at 467–68; *see also* *Rutherford v. Blankenship*, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) (“[Banishment] is impliedly prohibited by public policy.” (citing *People v. Baum*, 231 N.W. 95 (Mich. 1930))); *Doughtie*, 74 S.E.2d at 924 (N.C. 1953); *State v. Charlton*, 846 P.2d 341, 344 (N.M. Ct. App. 1992) (quoting *Baum* to support holding that state banishment violates public policy); *State v. Gilliam*, 262 S.E.2d 923, 924 (S.C. 1980) (holding a suspension of sentence conditioned on indefinite banishment from the state was invalid because it was beyond the power of a circuit judge and “such a sentence is impliedly prohibited by public policy”).

111. *Ex parte Scarborough*, 173 P.2d 825, 827 (Cal. Dist. Ct. App. 1946) (“The same principle which prohibits the banishment of a criminal from a state or from the United States applies with equal force to a county or city.”).

112. *State v. Collett*, 208 S.E.2d 472, 474 (Ga. 1974); *Cobb v. State*, 437 So. 2d 1218, 1221 (Miss. 1983).

113. *Snider*, *supra* note 55, at 466.

114. *Brown v. State*, 660 So. 2d 235, 236 (Ala. Crim. App. 1998) (“No. Our statutes do not permit courts to impose sentences of banishment. Such an agreement is beyond the jurisdiction of the court and is void.”); *Ex parte Scarborough*, 173 P.2d at 826; *see also* *State ex rel. Baldwin v. Alsbury*, 223 So. 2d 546, 547 (Fla. 1969) (“The court was without power to indefinitely suspend a sentence in return for petitioner’s promise to stay out of town.”); *Weigand v. Kentucky*, 397 S.W.2d 780, 781 (Ky. 1965) (“The Commonwealth concedes it is beyond the power of a court to inflict banishment as an alternative to imprisonment.”); *Bird v. State*, 190 A.2d 804, 438 (Md. Ct. App. 1963) (“We hold therefore that the suspension of sentence conditioned on banishment was beyond the power of the trial court and void . . .”).

A. THE MANHATTAN BEACH ORDINANCE AND ENFORCEMENT PROTOCOL  
CONSTITUTE BANISHMENT

Banishment should be understood as “an order which compels a person ‘to quit a city, place, or county for a specific period of time, or for life.’”<sup>115</sup> By forcing a homeless individual to leave Manhattan Beach, the ordinance and its enforcement plan undoubtedly “compels” an individual to quit the city. Further, by arranging mandatory shelter services for the individual, the city has specified a period of time—at minimum overnight—the person may not return given that Manhattan Beach lacks homeless shelters. Despite the seemingly fleeting nature of the banishment involved—one might argue a homeless individual can return to Manhattan Beach after spending the night in a shelter—the realities of being homeless make the banishment substantial. By virtue of being impoverished and homeless, an individual forced to acquiesce to a police officer’s offer of relocation under threat of fine or imprisonment most likely lacks the resources to return in a timely manner. Furthermore, the homeless often have jobs they must return to,<sup>116</sup> nearby families or loved ones that require care or visitation, and vital social services close to where they live, albeit without shelter.<sup>117</sup> As researchers Katherine Beckett and Steve Herbert have documented in their interviews with homeless individuals in Seattle banished from certain city zones, ostensibly temporary and limited forms of banishment have a profound impact on the homeless akin to more traditional forms of banishment<sup>118</sup>

Furthermore, it should make no difference whether or not a person “chooses” to accept Manhattan Beach’s offer to accept shelter under threat of prosecution. Just as courts have ruled that a defendant’s “agreement” to a banishment condition on probation does not make it valid,<sup>119</sup> consent given by a homeless person—who unlike a probationer has not just been convicted

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115. *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)).

116. *See, e.g.*, METRO. WASH. COUNCIL OF GOV’TS, HOMELESSNESS IN METROPOLITAN WASHINGTON 21–22 (2017) (noting that 22 percent of single homeless adults and 32 percent of adults in homeless families are employed).

117. KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 115–16 (2010) (“For many others, though, the fear of going to jail was simply not enough to compel compliance [with exclusion orders]. This was not because they particularly enjoyed jail, but rather that the locales from which they were excluded housed many important amenities, including social networks, contacts, and relationships; social services; a sense of safety and security; and a place they called home.”).

118. *Id.* “[The judge] said, ‘Oh, there are other places.’ I said, ‘Your Honor, I don’t know how, understand? This is my home.’” *Id.* at 115 (alteration in original). “I mean as far as being homeless, that’s the only area you know.” *Id.*

119. *Warren v. State*, 706 So. 2d 1316, 1318 (Ala. Crim. App. 1997) (holding that it made no difference that the defendant had agreed to this condition as a term of his negotiated plea agreement because the defendant could not consent to a sentence that was beyond the authority of the trial court).

of a crime—to accept shelter elsewhere does not make the forced transportation out of Manhattan Beach legal. Therefore, the relocation under threat of prosecution should be categorized as a form of banishment.

B. THE ORDINANCE AND MANDATED SHELTER BEYOND MANHATTAN BEACH'S JURISDICTION IS INVALID

California has recognized not only an intrastate but also an intra-municipal right to travel under the United States and California constitutions.<sup>120</sup> Therefore, one is precluded from arguing that the forced relocation to a nearby shelter is too geographically narrow to run afoul of the constitutionally provided right to travel. Moreover, while probationers, parolees and prisoners may be subject to “limitations on liberty from which ordinary persons are free,”<sup>121</sup> homeless individuals—like housed individuals—not convicted of a crime may not be. Given the *Martin* decision, Manhattan Beach cannot prosecute an individual for sleeping outside if the city lacks shelter beds. Therefore, homeless individuals in Manhattan Beach have not relinquished their full constitutional right to travel and the city would violate this right by mandating an individual leave a municipality where a person wants to remain.

While judges are often legally bound by sentencing guidelines requiring punishment to be reasonably related to rehabilitation and public safety at large, the Manhattan Beach City Council is generally not under such constraints when enacting ordinances and city practices. Nonetheless, the city should apply this type of analysis to its anti-camping ordinance. In this case, the homeless individual is not an incarcerated or supervised criminal, so the city should not be concerned with a criminal rehabilitation, but rather a more holistic rehabilitation aiming to help an individual obtain safe and stable housing. Unfortunately, Manhattan Beach's plan as currently constructed will most likely fail to achieve this aim. As previously discussed, homeless people live in areas where they have social, familial, and employment ties. Thus, forcing someone to immediately accept shelter at a city determined location—potentially with no input from the homeless individual—seems to bear little relation to the goal of getting a person off the streets. At best it might be a temporary and shortsighted fix for the city at the expense of the individual. At worst, a person will refuse the offer and be arrested by the police, requiring the city to use its resources to house the individual in jail, waste administrative capacity on processing, and most likely end up with the individual back living unsheltered in its jurisdiction.<sup>122</sup>

120. *In re White*, 158 Cal. Rptr. 562, 556–57 (Ct. App. 1979).

121. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975).

122. See BECKETT & HERBERT, *supra* note 117, at 114. (“Many reported that they resisted their

Instead of forcing an individual to choose between prosecution and forced relocation, the city should proactively apply city services, including its newly hired homeless liaison, to homeless prevention, not criminalization or banishment.

Additionally, Manhattan Beach's planned policies are void for public policy for the same reasons criminal banishment orders violate public policy. It invokes the same problems identified by the *Baum* court in its critique of banishing criminals: sending one's homeless to neighboring jurisdictions would most definitely "tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several States [or municipalities] which is the basis of the Union itself. Such a method of punishment . . . is impliedly prohibited by public policy."<sup>123</sup>

Finally, Manhattan Beach's planned enforcement exceeds the range of punishment provided by statutory authority. A violation of the ordinance is punishable "as a misdemeanor or an infraction at the discretion of the City Attorney or City Prosecutor."<sup>124</sup> The ordinance does not authorize the forced relocation of an individual upon pain of punishment. Similar to how judicial banishment orders were found to exceed the court's authority,<sup>125</sup> the city's planned enforcement exceeds the city's statutory authority. Further, a potential unlawful seizure could result should a person "accept" transportation to an area shelter.<sup>126</sup>

In conclusion, Manhattan Beach's plan constitutes banishment because it impermissibly compels an individual to quit Manhattan Beach for a period of time. Furthermore, the planned practices are illegal because they unduly burden the constitutional rights of interstate and intrastate travel, are void for public policy, and exceed the statutorily authorized range of punishment. Finally, the city council should alter its practices given how its plan is not reasonably related to achieving a long-term decrease in the homeless population or increasing public safety.

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banishment order because they needed access to important services. In particular, both parks and [exclusionary] zones housed services that rendered compliance with an exclusion order impractical . . .").

123. *People v. Baum*, 231 N.W. 95, 96 (Mich. 1930).

124. MANHATTAN BEACH, CAL., MUNICIPAL CODE § 4.140.130 (2019).

125. *Warren v. State*, 706 So. 2d 1316, 1318 (Ala. Crim. App. 1997) (holding that it made no difference that the defendant had agreed to this condition as a term of his negotiated plea agreement because the defendant could not consent to a sentence that was beyond the authority of the trial court).

126. "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave . . ." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In this case a reasonable person would not have believed he was free to leave. Moreover, under *Martin*, a homeless individual caught sleeping outside may not be prosecuted in Manhattan Beach because it has no shelter beds. Therefore, an arrest is improper and transportation to a nearby shelter would constitute a seizure.