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TRESPASS-ZONING: ENSURING NEIGHBORHOODS A SAFER FUTURE BY EXCLUDING THOSE WITH A CRIMINAL PAST

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INTRODUCTION

The combination of the complementary principles of trespass and zoning law can be employed to fight crime on the streets of American cities. While the proper role of this collaboration, which this examination designates as "trespass-zoning," may be more legally circumscribed than that cast by recent and innovative municipal ordinances, its potential effectiveness remains viable within constitutional parameters. Whether trespass-zoning relies upon the same principles that justify restricting an individual's freedom of movement in cases of bail, parole, and probation, or simply upon the right to exclude—the most essential of all property rights[1]—it can be used to legitimately exclude those arrested for, or convicted of, drug-related offenses from designated areas with significantly higher incidents of crime.

The separate aims of zoning and trespass principles lay the groundwork for their seamless combination and ultimate employment by several cities as an innovative crime control device. On its own, zoning law has traditionally been implemented to dictate the acceptable uses of property within a particular zone. When combined with trespass law, however, such zoning measures serve to dictate not

1 *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) ("[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others.").

merely acceptable *uses* of property within a designated area, but also acceptable *users* of that property. By identifying individuals, either by name or criminal pedigree, cities employ "people-based zoning," making the presence of such individuals in designated zones punishable as criminal trespass.

Two municipal methods of achieving these exclusions, and thereby enabling neighborhood revitalization, have arisen in recent years. The first finds city councils designating "drug exclusion zones" in areas with significantly higher incidents of drug-related crime than other areas similarly situated, where individuals arrested for, or convicted of, enumerated offenses may not tread. The second method finds municipalities conveying the public streets and sidewalks of those areas under criminal siege to local property owners so as to afford them the protections of trespass law by way of the property right to exclude. In both cases, municipalities are beginning to enable neighborhoods within their jurisdictions to control access to their streets and common ways, thereby excluding all who cannot demonstrate a legitimate business or social purpose for their presence.

Violation of either of these methods of trespass-zoning results in a crime, criminal trespass, completely independent of the underlying drug offense that qualifies individuals for exclusion. To be apprehended, the excluded individual need not engage in criminal activity, nor even be suspected of it. Rather, it is the individual's mere presence in a particular area that offends. While the exclusion is predicated on a suspicion of sorts, derived from both the individual's membership in a class of persons previously arrested for, or convicted of, drug related crimes, as well as a recognition of the reality of recidivism, a probable cause belief that the excluded individual is committing a repeat offense at the time of apprehension is not required to secure an arrest for running afoul of trespass-zoning.

It is important to note from the outset that this discussion on exclusion does not compromise the higher quantum of probable cause required to arrest an individual for the underlying, drug-related offenses on which these exclusions are based. Indeed, a person apprehended for dealing or possessing illegal narcotics remains subject to standard prosecution for such crimes, and may, in such cases, embrace the incumbent protections of probable cause in asserting a defense. Once legitimately seized for engaging in drug-related behavior that merits a judicial determination of probable cause, however, the individual becomes subject to the aggressive implementation of trespass principles in selected, crime-distressed areas, where it has been predetermined that the person's presence incites such deleterious effects as to justify his or her exclusion.

In Part I, this examination considers the complementary principles of zoning and trespass law in their combined application as tools to counter drug-related crime in certain neighborhoods and public housing developments within American cities, reviewing several examples of these trespass-zoning methods in action. While Part II explores the theoretical justifications for trespass-zoning as a crime control device in crime-ridden neighborhoods, Part III tackles existing and potential legal challenges to these aggressive exclusionary measures. Ultimately, this examination concludes that while municipalities may legitimately employ trespass-zoning through either of these enumerated methods, neighborhood protection and revitalization may be optimized by conveying public streets in well-defined neighborhoods to the property owners of those areas, thus allowing them to eradicate the deleterious criminal element by exercising the most fundamental property right in "the bundle"[2]—the right to exclude.[3]

I. THE CONCEPT OF TRESPASS-ZONING: COMBINING THE COMPLEMENTARY PRINCIPLES OF ZONING AND TRESPASS LAW IN THE FIGHT ON CRIME

Two methods of trespass-zoning have arisen in recent years through municipal efforts to combat drug crime in concentrated areas within their jurisdiction. The first method, the creation of "drug exclusion zones," from which individuals suspected of, or convicted for, drug-related offenses are excluded, has been implemented in

2 *See, e.g.*, Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 774 (2002).

> The law has long used the metaphor of the bundle of sticks as a way to describe and think about the nature of property, especially land. As signified by the bundle, ownership of land does not so much indicate title to a physical portion of earth as it does the power to enforce certain rights in the land. Collectively these rights make up the bundle—the sum total of rights one can have with respect to a parcel of land. Conversely, the various rights, the sticks in the bundle, can be disaggregated, with each stick amounting to a property right.

Id.; *see also* Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1056 (1989).

> Property . . . is a "bundle of sticks." Within the "bundle," each "stick" represents a legally recognized right an individual may have with regard to some thing, tangible or intangible. . . . The "bundle" is a metaphorical characterization of the aggregate of legally recognized rights of an individual in some particular thing. My rights to sell, lease, give, and possess my house are the sticks which together constitute the bundle.

Id.

3 *See supra* note 1.

Portland, Oregon, and Cincinnati, Ohio.[4] The other method, the conveyance of public streets and sidewalks by a municipality to the property owners who live in the neighborhood in which those public ways are located, has been attempted in Richmond, Virginia, and Knoxville, Tennessee, between the cities and their respective public housing authorities.[5] Derivations of the Richmond and Knoxville trespass policies, which are implemented by the housing authorities subsequent to the conveyance, can be found in public housing authorities in Tampa, Florida, and El Paso, Texas.[6] Though the scope of this examination focuses on trespass-zoning as applied by these cities, it is the overarching viability of the basic elements of these methods, and the principles upon which they are founded, that is the true subject of concern. These six cities are progenitors of these unique and innovative measures. As such, the mechanics of their respective efforts to implement this crime control device, as well as their successes and failures, compel prominent attention when considering, ultimately, the feasibility of extending trespass-zoning to other cities across the United States.

A. Drug Exclusion Zones

While there are notable differences to be considered between the two, including the actual name assigned to the zones,[7] the Portland and Cincinnati ordinances delineating drug exclusion zones are predominantly the same. This is due in large part to the fact that the Cincinnati ordinance was patterned after its Portland counterpart.[8] The Portland City Council, which pioneered such ordinances when

4 *See* CINCINNATI, OHIO, CODE ch. 755 (1999); PORTLAND, OR., CODE ch. 14B.20 (2003).

5 *See* Thompson v. Ashe, 250 F.3d 399, 403–04 (6th Cir. 2001) (adjudicating Knoxville conveyance); Commonwealth v. Hicks, 563 S.E.2d 674, 676 (Va. 2002) (adjudicating Richmond conveyance), *rev'd sub nom.* Virginia v. Hicks, 123 S. Ct. 2191 (2003).

6 Daniel v. City of Tampa, 38 F.3d 546, 548 (11th Cir. 1994) (adjudicating Tampa Housing Authority's trespass policy); Vasquez v. Hous. Auth. of El Paso, 103 F. Supp. 2d 927, 929 nn.1–2 (W.D. Tex. 2000), *rev'd*, 271 F.3d 198 (5th Cir. 2001), *reh'g granted en banc*, 289 F.3d 350 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 2274 (2003) (adjudicating El Paso Housing Authority's trespass policy).

7 Portland City Code Chapter 14B.20 designates "drug-free zones," while Chapter 755 of the Cincinnati Municipal Code establishes "drug-exclusion zones." For purposes of this examination, the term "drug exclusion zones" will be used interchangeably to convey the common trespass-zoning concept behind both the Portland and Cincinnati ordinances.

8 Cincinnati, Ohio, Ordinance 229-1996, pmbl. (Sept. 6, 1996) (ordaining CINCINNATI, OHIO, CODE ch. 755).

enacting Portland City Code Chapter 14.100 in 1995,[9] provides the best description of a drug exclusion zone:

> Drug-free zones are those areas of the City . . . where the number of arrests [within a specified period prior to designation] where there was probable cause to believe a person has committed [an offense enumerated within the Code] . . . is significantly higher than that for other similarly sized geographic areas of the City that are not located within a drug-free zone.[10]

While the constitutional parameters that may ultimately circumscribe the breadth of the zones will be considered below,[11] it suffices at this point to focus the examination on the reach of the zones as currently drafted.

What areas are designated as exclusion zones? In both Portland and Cincinnati, the exclusion zones are areas of the city designated by the City Council where the number of arrests for enumerated crimes is "significantly higher than that for other similarly situated/sized areas of the city."[12] Both cities require that the zones be designated by ordinance, and that designation is only valid for a limited period of time.[13] The designation may be extended for additional periods if necessary or appropriate,[14] but the Cincinnati ordinance makes clear that "in no event shall the total [period of designation] be more than ten years" for any of its zones.[15]

Who is excluded? Both the Portland and Cincinnati ordinances specifically enumerate the drug-related offenses by which exclusion zones are identified and for which individuals may be civilly excluded, including, but not limited to, possession, distribution, and solicitation.[16] By linking the identification of problem areas and problem makers, the ordinances attempt to assuage the problem symmetrically.

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9 PORTLAND, OR., CODE ch. 14.100 (1995) (current version at PORTLAND, OR., CODE ch. 14B.20).

10 PORTLAND, OR., CODE ch. 14B.20.010 (2003).

11 *See* discussion *infra* Part III.A.4.b.

12 CINCINNATI, OHIO, CODE ch. 755-1; PORTLAND, OR., CODE ch. 14B.20.010.

13 CINCINNATI, OHIO, CODE ch. 755-3 (requiring that drug-exclusion zones be designated by ordinance, and that said designation be valid for an initial period of two years); PORTLAND, OR., CODE ch. 14B.20.020 (requiring that drug-free zones be designated by ordinance, and that said designation be valid for three years).

14 CINCINNATI, OHIO, CODE ch. 755-3 (providing that the "council may extend the time of designation as it deems appropriate"); PORTLAND, OR., CODE ch. 14B.20.020 (instructing the Portland Chief of Police to report to Council ninety days before end of designation period "as to whether there is a need to re-authorize or re-configure" the enumerated zones).

15 CINCINNATI, OHIO, CODE ch. 755-3.

16 CINCINNATI, OHIO, CODE ch. 755-5; PORTLAND, OR., CODE ch. 14B.20.030.

While this examination limits its focus to drug-related offenses, city councils could conceivably enumerate any offense they wish to eradicate through civil exclusion.[17]

A person "arrested or otherwise taken into custody" for any of the drug-related offenses enumerated by the respective codes "is subject to exclusion for a period of 90 days" from one or more, or possibly all, drug exclusion zones.[18] Both ordinances provide that subsequent conviction for one of the enumerated offenses extends the individual's exclusion to one year.[19] The ordinances provide persons receiving an exclusion notice with a right to appeal the exclusion to municipal officers within a defined period after issuance of the notice.[20] Under the Cincinnati ordinance, "the exclusion shall not take effect during the pendency of the appeal."[21] An excluded person found within an exclusion zone is "subject to immediate arrest for criminal trespass."[22]

Who issues the exclusion? Both the Portland and Cincinnati ordinances provide that the Chief of Police or his or her designees are "in charge of the public streets, sidewalks, and public ways" of the exclusion zones "for purposes of issuing and directing the service of exclusion notices."[23] Such persons may issue the exclusions when a person is arrested for one of the enumerated offenses.[24] The notice of exclusion must be in writing, specify the exclusion zones from which that person is excluded, and "contain information concerning the right to appeal the exclusion."[25]

How broad are the zone variances? Along with the civil exclusion provisions for those apprehended or convicted of committing enu-

17 For example, Portland also employs Prostitution-Free Zoning. *See* PORTLAND, OR., CODE ch. 14B.30.

18 CINCINNATI, OHIO, CODE ch. 755-5 (stating that if a "person has been arrested or taken into custody within any drug exclusion zone," he or she is excluded "from the public streets, sidewalks, and other public ways in all drug exclusion zones designated" by the ordinance). *But see* PORTLAND, OR., CODE chs. 14B.20.030, 14B.20.050 (excluding individuals arrested for committing an enumerated offense within a drug-free zone from "one or more drug-free zones" subject to the discretion of the "Chief of Police and/or designees").

19 CINCINNATI, OHIO, CODE ch. 755-5; PORTLAND, OR., CODE ch. 14B.20.030.

20 CINCINNATI, OHIO, CODE ch. 755-11; PORTLAND, OR., CODE ch. 14B.20.060.

21 CINCINNATI, OHIO, CODE ch. 755-11(2).

22 CINCINNATI, OHIO, CODE ch. 755-5; PORTLAND, OR., CODE ch. 14B.20.030.

23 CINCINNATI, OHIO, CODE ch. 755-7; *see also* PORTLAND, OR., CODE ch. 14B.20.040 (placing the Chief of Police of designee "in charge of the public rights of way and parks in the drug-free zones").

24 CINCINNATI, OHIO, CODE ch. 755-9; PORTLAND, OR., CODE ch. 14B.20.050.

25 CINCINNATI, OHIO, CODE ch. 755-9; PORTLAND, OR., CODE ch. 14B.20.050.

merated drug-related crimes, the ordinances also provide a list of exceptions, allowing excluded individuals with legitimate purposes to enter the exclusion zones from which they are otherwise restricted. While both the Portland and Cincinnati versions of the ordinance provide that these variances, like the exclusion notices themselves, may be issued by the "chief of police and/or designees," the Cincinnati ordinance authorizes certain social service agencies to issue them as well.[26] The ordinances of both cities provide an expansive collection of reasons for which variances must be granted, allowing access to excluded persons who have residential, employment, social service, educational, or otherwise "essential" needs found only within a drug exclusion zone.[27] Because the ordinances themselves provide for the automatic issue of a variance to residents (implicitly including property owners) and business owners, the drug exclusion zones raise no Fifth Amendment takings issues.

Furthermore, the drug exclusion zones have been lauded for their effectiveness. "City officials say drug arrests [in one of Portland's drug-free zones] have dropped to the point that the . . . zone is no longer warranted."[28] The Portland mayor's office maintains that, when it comes to drug-free zones, there is no "better solution for providing relief to drug-affected hot spots."[29] Furthermore, "people living in those hotspots . . . want such enforcement."[30] The City of Cincinnati claims that the policy "cut[s] down on crime."[31]

B. Conveying Streets and Sidewalks to Local Property Owners

The second method of trespass-zoning utilized by municipalities involves the enactment of ordinances by city councils conveying public, city-owned streets and sidewalks to local neighborhood property owners. In turn, the local property owners, enabled by the convey-

26 CINCINNATI, OHIO, CODE ch. 755-11(b)(2); PORTLAND, OR., CODE ch. 14B.20.060(B)(1).

27 CINCINNATI, OHIO, CODE ch. 755-11(b)(2) (stating that while it is mandatory that police issue variances to those excluded individuals who establish residency of employment within the zone, *id.* ch. 755-11(b)(2)(a), (b), the police are given discretion in the issuance of variances for social services, *id.* ch. 755-11(b)(2)); PORTLAND, OR., CODE ch. 14B.20.060(B) (requiring that variances be issued to excluded individuals establishing residential, employment, social services, educational, or otherwise essential needs within the zone).

28 Robin Franzen, *The "Softening" of Drug-Free Zones*, OREGONIAN, May 15, 2002, at D1.

29 *Id.*

30 *Id.*

31 Jan Crawford Greenburg, *Top Court Limits Law on Disabled Workers; Seniority System May Overrule ADA*, CHI. TRIB., Apr. 30, 2002, at 1.

ance to avail themselves of the right to exclude, set forth a trespass policy extending to those newly acquired thoroughfares. Public housing authorities that manage developments enveloping such thoroughfares have been at the forefront of such transactions, and thus account for the bulk of legal activity in this area. In addition, prominent scholars such as George W. Liebmann, Robert C. Ellickson, and Robert H. Nelson have in the past decade provided proposals demonstrating the potential for successful application of this strain of trespass-zoning to preexisting private neighborhoods comprised of a multitude of individually owned units.

1. Conveying Thoroughfares to Public Housing Authorities

This "conveyance" strain of trespass-zoning has been attempted by public housing authorities in both Richmond, Virginia, and Knoxville, Tennessee. In addition, public housing authorities in Tampa, Florida, and El Paso, Texas, have implemented similar trespass policies extending beyond their complexes to the streets and sidewalks that they envelop.

The Richmond Redevelopment and Housing Authority (Housing Authority) maintained a public housing development for low-income residents, comprised of several blocks within an area known as Whitcomb Court.[32] This area had been described as "an open-air drug market."[33] The City of Richmond owned the streets located within the development, but in response to the inordinate level of drug crime in the project, the City enacted an ordinance that "'closed to public use and travel and abandoned as streets of the City of Richmond,' streets in Whitcomb Court because those streets were 'no longer needed for the public convenience.'"[34] "In an effort to eradicate illegal drug activity" by transforming the area into a quasi-gated-community, "[t]he City conveyed the streets by a recorded deed to the Housing Authority," leaving the Housing Authority "in its capacity as owner of the private streets" to authorize the Richmond Police to serve notice to any person found on the development's property "when such person [was] not a resident, employee, or such person [could] not demonstrate a legitimate business or social purpose for being on the premises."[35] To effectuate the exclusion of those who did not have a legitimate purpose for entering the development, "in-

32 Commonwealth v. Hicks, 563 S.E.2d 674, 676 (Va. 2002), *rev'd sub nom.* Virginia v. Hicks, 123 S. Ct. 2191 (2003).

33 *Id.*

34 *Id.* (quoting Richmond, Va., Ordinance 97-181-197 (June 23, 1997)).

35 *Id.*

dividuals who sought access to the Housing Authority's property, including the streets, needed to obtain [a public housing authority official's] permission for such access."[36] The teeth of the Housing Authority's trespass procedures was the "notice-barment rule," which authorized the Richmond Police "to arrest any person for trespassing after such person, having been duly notified, either [remained] upon or return[ed] to" any property owned by the Housing Authority.[37]

A similar thoroughfare conveyance took place in Knoxville, where, "[p]ursuant to statutory authorization, the City . . . leased to [a public housing authority] certain interior streets and sidewalks within the housing developments for one dollar per year."[38] As in Richmond, the Knoxville public housing authority instituted a no-trespass policy "[t]o further address the problem of crime on its properties."[39] This no-trespass policy included "a list of individuals who [were] prohibited from entering" its premises, which, by virtue of the public housing authority's lease with the city, extended to those streets and sidewalks within the development.[40] The list was compiled by a housing authority official, who added names to the list "when he receive[d] 'reliable information' that an individual ha[d] been involved in drug activities or violent criminal activities."[41] Accordingly, "officers [were] instructed by [the public housing authority] to arrest any individual found on [its] property whose name [was] on the no-trespass list."[42]

Public housing authorities in Tampa, Florida, and El Paso, Texas, have employed similar trespass policies. The Tampa Housing Authority limited access to one of its properties "to residents, invited guests of residents, and those conducting official business," and "[e]nforcement of this limited access policy [was] accomplished through enforcement of Florida's trespass after warning statute."[43] Thereafter,

> the Tampa Police Department [was] authorized by the Housing Authority to issue warnings to persons trespassing upon Housing Authority property. Once an individual [has been] issued a trespass

36 *Id.*

37 *Id.*

38 Thompson v. Ashe, 250 F.3d 399, 404 (6th Cir. 2001).

39 *Id.* at 403.

40 *Id.* at 403–04.

41 *Id.* at 403.

42 *Id.* at 404.

43 Daniel v. City of Tampa, 38 F.3d 546, 548 (11th Cir. 1994).

> warning, he [would be] placed on a list and [would be] subject to arrest if found on Housing Authority property again.[44]

While "the City-owned streets and sidewalks surrounding and intersecting with the Housing Authority property [remained] open to the public,"[45] the Tampa Housing Authority's trespass policy remains an apposite example of a measure enabling a local property owner to exercise the property right to exclude. Likewise, in defense of its residents' security, a public housing authority in El Paso implemented a similar "trespass after warning" policy extending to the "walks, ways, playgrounds, parking lots, drives and other common areas of the development premises."[46]

The effect of the trespass policies utilized by public housing authorities in these four cities has been positive. The "undisputed" purpose of the trespass policy developed by the Richmond Housing Authority was to "to create a safe, drug-free environment for the residents" of the public housing development,[47] and early indicators from similar measures in other cities suggest this is a goal well within reach. For example, the Tampa Housing Authority's application of Florida's criminal trespass statute to its premises successfully "decreased the number of non-residents engaging in criminal activity on Housing Authority property."[48]

2. Conveying Thoroughfares to Preexisting Neighborhoods—The Inner City Gated Community

Expounding upon a proposition first advanced by George Liebmann in 1993, Robert H. Nelson proposed the "enactment of legislation to facilitate the establishment of neighborhood associations in existing neighborhoods."[49] According to Professor Nelson, such legislation would enable the creation of private neighborhoods that could ultimately "administer the collective controls over neighborhood qual-

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44 *Id.* at 548.

45 *Id.* at 548 n.3.

46 Vasquez v. Hous. Auth. of El Paso, 103 F. Supp. 2d 927, 929 nn.1–2 (W.D. Tex. 2000), *rev'd*, 271 F.3d 198 (5th Cir. 2001), *reh'g granted en banc*, 289 F.3d 350 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 2274 (2003).

47 Commonwealth v. Hicks, 563 S.E.2d 674, 685 (Va. 2002), *rev'd sub nom.* Virginia v. Hicks, 123 S. Ct. 2191 (2003).

48 *Daniel*, 38 F.3d at 550.

49 Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning With Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 828, 858 (1999) (citing George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335 (1993)).

ity now exercised through land use controls at the municipal level."[50] This legislation could include the "transfer of ownership of municipal streets, parks, swimming pools, tennis courts, and other existing public lands and facilities located within the proposed newly private neighborhood" to a newly elected neighborhood association which would be vested with the responsibility to effect neighborhood quality controls.[51] Such a "privatization of zoning" would allow these associations "precise control over neighborhood character."[52] This character control, as Professor Nelson posits, could extend to the neighborhood's criminal element, enabling inner city residents "to exclude criminals, hoodlums, drug dealers, truants, and others who undermine the possibilities for a peaceful and vital neighborhood existence there."[53]

Professor Robert C. Ellickson furthers the ideas of Nelson and Liebmann, proposing the design of "new micro-institutions for old neighborhoods" called "Block Improvement Districts," or "BLIDs," that would "enable [residents] to take collective action at the block level."[54] By allowing the residents of these preexisting neighborhoods to exercise the right to exclude, the municipalities simultaneously enable their police to protect, and ultimately revitalize, those neighborhoods by enforcing the property rights of those residents through criminal trespass law.

With these practical uses of civil exclusion in mind, the examination turns to the principles upon which the combined application of trespass and zoning laws is based.

II. THEORETICAL JUSTIFICATIONS FOR TRESPASS-ZONING AS A CRIME CONTROL DEVICE

There exists a widely held and largely unquestioned belief in an unfettered freedom of movement, to which the idea of trespass-zoning may seem anathema. Such platitudes should give way, however, to the need to revitalize crime-ridden neighborhoods. Namely, allowance must be made for measures that legitimately embrace and combine the complimentary principles of zoning and trespass law for the purpose of returning these crime-ridden neighborhoods to both physical

50 *Id.* at 829.

51 *Id.* at 833.

52 *Id.* at 828.

53 *Id.* at 865 (citing James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29).

54 Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 76–77 (1998).

and social order. A look at the aims of both of these principles reveals how each lends itself to the other when applied together to fight crime and revitalize communities.

A. *"Broken Windows"—The Tie That Binds Trespass and Zoning Law*

Traditional zoning law prescribes a physical order to a particular zone by dictating acceptable uses of land within that zone.[55] Zoning law preserves preferred "physical" characteristics and order of neighborhoods by designating areas for a particular kind of physical order and use, thereby restricting all other kinds of uses.[56] Traditional trespass principles, on the other hand, designate those members of society permitted to be in a particular area for the purpose of preserving social order and property rights.[57] By dictating which members of society have access to a designated area, trespass law supports private property owners in restricting and excluding the presence of others.

Essentially, zoning restricts *uses* within a designated zone to preserve *physical* order, and trespass law restricts *access* to a designated

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55 City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 732 (1995) ("Land-use restrictions designate 'districts in which only compatible uses are allowed and incompatible uses are excluded.' These restrictions typically categorize uses as single-family residential, multiple-family residential, commercial, or industrial.") (quoting DANIEL R. MANDELKER, LAND USE LAW § 4.16, at 113–14 (3d ed. 1993), and citing *id.* § 1.03, at 4; 1 E.C. YOKLEY, ZONING LAW AND PRACTICE § 7-2, at 252 (4th ed. 1978); 1 E. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 8.01, at 8-2 to 8-3 (4th ed. 1995)).

56 *Id.* at 732–33 ("Land-use restrictions aim to prevent problems caused by the 'pig in the parlor instead of the barnyard.' In particular, reserving land for single-family residences *preserves the character of neighborhoods* . . . .") (emphasis added) (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)).

57 *See, e.g.*, Boyd v. United States, 116 U.S. 616, 627 (1886).

> The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . [E]very invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing . . . .

Id. (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (C.P. 1765) (Camden, L.C.J.)); *see also* Oliver v. United States, 466 U.S. 170, 190–91 (1984) (Marshall, J., dissenting) (noting that trespass law across the nation "not only recognizes the legitimacy of [private property owners'] insistence that strangers keep off their land, but subjects those who refuse to respect their wishes to the most severe of penalties—criminal liability"); Rakas v. Illinois, 439 U.S. 128, 144 n.12, 153 (1978) ("[P]roperty rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas," and "[o]ne of the main rights attaching to property is the right to exclude others.") (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *1–*15).

zone to preserve *social* order. Though the two separate property principles have developed to protect two separate ends, those ends are in no way inapposite. James Q. Wilson and George L. Kelling's "Broken Windows" theory of crime postulates that the loss of preferred *physical* order, through vandalism and other quality of life crimes, may not only result in a change in the physical character of the land, but may also have the deleterious effect of *social* disorder that escalates to the commission of more serious crimes.[58] Thus, according to Wilson and Kelling, physical order and social order are inextricably intertwined, in that by restoring physical order, cities may restore social order.

Recent municipal measures employing trespass principles that dictate which persons may be permitted to use property in designated areas simply seek to extinguish those catalysts identified by the "Broken Windows" theory of crime. The presence of drug dealers who flagrantly conduct their nefarious trade under the clear blue sky reflects both social disorder and *physical* disorder. Their presence becomes a sort of fixture within the neighborhood, their availability as certain as the houses on the block. The deleterious effects of such miscreants are two-fold: the social disorder they actively inflict, and the social disorder they passively inspire. It is this second effect that rightly merits the classification of the troublemakers themselves as "broken windows." In an effort to break this self-perpetuating cycle toward social disorder and improve the streets for the innocent victims that reside within these areas, municipalities have begun to treat the troublemakers themselves as "broken windows" to be fixed. Their repair entails their removal and exclusion.

The "Broken Windows" theory, in its call to make neighborhoods less hospitable to social disorder by preserving physical order, naturally lends itself to the restrictive and exclusionary principles of both zoning and trespass law. Linked by the "Broken Windows" theory, zoning laws and trespass laws find complementary roles in the fight against street crime, leading to recent city measures to employ what can best be termed "trespass-zoning," whereby it is not merely the *use* or *physical* order of a particular area which the zoning ordinances restrict, but also the *users* and *social* order of that area.

B. Distinguishing Trespass-Zoning from Banishment

The exclusion of criminals from defined areas may call to mind the controversial measure of banishment. Pawning off an area's criminal element to a neighboring area has been criticized as an injustice

58 James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 32.

to those neighbors and as a pseudo-solution that fails to address the root causes of crime.[59] Any asserted injustice to neighboring areas must be tempered, however, by the manner in which these exclusion zones are designated. As discussed above, exclusion zones are designated by their higher incidence of crime. In contrast, neighboring areas with fewer incidents of crime maintain a greater appearance of social and physical order, providing little to no encouragement for the displaced criminal element to relocate their trade.[60] Thus, to avoid the injustice of burdening ill-equipped neighborhoods with individuals who pose a deleterious threat, the excluded persons should not merely be excluded from the exclusion zone in which they were apprehended, but from all exclusion zones in the city that, by designation, suffer from high crime rates as well.[61] Of course, civil exclusion does not address pertinent issues of narcotics supply and demand that plague the war on drugs. While excluding drug criminals from certain areas may not arrest their criminal activities, it will, by forcing them into areas better equipped to meet their illegal behavior, make it harder for them to do business. Civil exclusion not only flushes criminals out into the light of day where they may be more readily apprehended, but it also allows those more crime-ridden neighborhoods to resuscitate themselves as they become, like their neighbors, less hospitable to crime.

Furthermore, exclusion may be distinguished from banishment. Whereas banishment has historically been considered a criminal penalty or a form of punishment, exclusionary zoning is best classified as a civil sanction. As discussed below, this distinction is quite important in considering the double jeopardy issues raised by such ordinances. The divergence turns not only on the definitional differences between the two concepts, but also in the professed aims of their proponents. While banishment serves to "promote the traditional aims of punishment, *i.e.* retribution and deterrence," the exclusion zones seek "to

59 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 (1998) ("Banishment does nothing to solve the problems of crime, but merely forces the criminal element and the attendant root cause of crime upon another community.").

60 Wilson & Kelling, *supra* note 58, at 29, 32.

61 CINCINNATI, OHIO, CODE ch. 755-5 (1999) (excluding "person[s] [that] ha[ve] been arrested or taken into custody within any drug exclusion zone" from "the public streets, sidewalks, and other public ways in all drug exclusion zones designated" by the ordinance). *But see* PORTLAND, OR., CODE chs. 14B.20.030, 14B.20.050 (2003) (excluding individuals arrested for committing enumerated offenses within a drug-free zone from "one or more drug-free zones" subject to the discretion of the "Chief of Police and/or designees").

achieve legitimate civil goals" in response to the reality that "drug activities contribute[ ] to the degradation of the designated areas and ha[ve] a negative effect on the quality of life for the residents, businesses, and visitors."[62] This "degradation" undermines civil interests, raising "[c]oncerns about property values and citizens' quality of life."[63] Recognition of these legitimate ends emphasizes not only the correlation between social and physical disorder upon which trespass-zoning and the "Broken Windows" theory of crime are based, but also the aim of the drug exclusion zones as civil protection rather than criminal punishment, ultimately setting this civil exclusion apart from banishment.[64]

III. THE LEGITIMATE SCOPE OF TRESPASS-ZONING: OVERCOMING LEGAL CHALLENGES TO MUNICIPAL ATTEMPTS TO EXCLUDE THE DELETERIOUS ELEMENT

A. The Propriety and Limits of Drug Exclusion Zones

While the effectiveness of the drug exclusion zones on the streets has been lauded, their reception in courtrooms has been tepid. The Courts of Appeals of Oregon have upheld the Portland ban on several occasions, but, in so doing, have gradually narrowed its scope.[65] Until recently, there had been no cases allowing the Oregon courts to reach the constitutionality of the Portland ban.[66] Furthermore, in light of

62 State v. James, 978 P.2d 415, 420 (Or. Ct. App. 1999) (citing Hudson v. United States, 522 U.S. 93, 99 (1997)). The distinction between civil and criminal punishment, and the zones' proper classification as civil exclusion, is explored further in Part III.A.1, with respect to double jeopardy challenges.

63 *Id.*

64 *See* discussion *infra* Part III.A.1.

65 State v. Collins, 39 P.3d 925, 930 (Or. Ct. App. 2002) (holding that the drug-free zone ordinance requires that the police first request that an excluded person leave the zone before arresting the individual for criminal trespass); State v. Vaughn, 28 P.3d 636, 640 (Or. Ct. App. 2001) (holding that drug-free zone restrictions did not apply to a plea agreement requiring defendant to stay out of drug-free zones because it was uncertain whether excluded individual was apprehended for underlying drug offense within a drug-free zone—accordingly, excluded individual's entry into drug-free zone constituted a probation violation rather than a criminal act).

66 The Portland exclusion zones recently came under "right to travel" fire when a Multnomah County Circuit Court judge found the ordinance in contravention of this purported constitutional right in October 2002. Ashbel S. Green, *Drug-Free Zone Law Violates Right to Travel, Judge Rules*, OREGONIAN, Oct. 18, 2002, at C6. Prior to this ruling, the closest that the Oregon courts had come to reaching the constitutionality of the Portland drug exclusion zone ordinance had been *Frederick v. Portland*, 38 P.3d 288, 290 (Or. Ct. App. 2002), in which the constitutional challenges to the ordinance were found moot because the order of exclusion no longer applied to the petitioner.

the courts' narrowing of the council's ordinance, debate within the Portland City Council over the scope of the drug-free zone ordinance is ongoing.[67]

Though Chapter 755 of the Cincinnati Municipal Code was patterned after the Portland ordinance when enacted in September 1996, it has met with far greater judicial resistance. Unlike the courts in Oregon, the Ohio courts have had occasion to reach the constitutional issues raised by this strain of trespass-zoning. The Cincinnati Code has been struck down outright by not only the U.S. District Court in *Johnson v. City of Cincinnati*,[68] but also by the Supreme Court of Ohio in *State v. Burnett*.[69] The district court found that the Code's exclusion of a grandmother from her daughter and grandchildren, and a homeless person from his essential social services, amounted to violations of their constitutional rights to freedom of association, freedom of travel, and freedom from double jeopardy.[70] The Sixth Circuit affirmed the district court's ruling on the freedoms of travel and association, but did not reach the double jeopardy challenge.[71] Though the Supreme Court of Ohio determined under principles of federalism that it was not compelled to follow the federal district court's prior pronouncements on the U.S. Constitution, it nevertheless reached most of the same conclusions in its disposition of another excluded defendant's challenge to the Code, finding that Chapter 755 violated the defendant's right to intrastate travel and exceeded the local authority granted to municipalities by the Ohio Constitution to enact laws that do not conflict with the Ohio General Assembly.[72]

As the status of these exclusion ordinances suggests, the legal challenges to these zones have been many and various. The exclusion zones have been subject to several procedural attacks, including the legitimacy of arresting an excluded individual without first requesting that the individual leave the zone,[73] and the propriety of civil exclu-

67 Robin Franzen, *Changes Debated in Exclusion Zones*, OREGONIAN, Sept. 27, 2002, at B3.

68 119 F. Supp. 2d 735 (S.D. Ohio 2000), *aff'd*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003).

69 755 N.E.2d 857 (Ohio 2001).

70 *Johnson*, 119 F. Supp. 2d at 744, 747, 749. On the constitutional origins of these freedoms see U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb"), discussion *infra* Part III.A.2 (freedom of association), and discussion *infra* Part III.A.3 (freedom of movement).

71 Johnson v. City of Cincinnati, 310 F.3d 484, 504–05, 505–06, 506 n.10 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003).

72 *Burnett*, 755 N.E.2d at 863, 867, 868.

73 *See, e.g.*, State v. Collins, 39 P.3d 925, 930 (Or. Ct. App. 2002) (holding that the drug-free zone ordinance requires that the police first request that an excluded per-

sion measures enacted at the municipal, rather than state, level.[74] While these procedural objections are well-taken and their resolution essential in charting the legitimate implementation of exclusionary zoning, this examination will focus on those constitutional provisions potentially implicated by zone enforcement that threaten to render these aggressive measures inoperative. Indeed, whether these zones stand or fall rests on their ability to navigate properly the right to free-

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son leave the zone before arresting the individual for criminal trespass). The *Collins* ruling has significantly hamstrung Portland police who, as a result, "can only arrest previously excluded people if they first refuse an officer's order to leave. If the banished comply, only to return to the zone again a short while later, the game begins all over again." Franzen, *supra* note 28, at D1. The Oregon courts' whittling down of the exclusion zones has not escaped the attention of the targeted criminal element either, as "even drug buyers and sellers know that the city's once powerful landmark zones aren't as mighty as they used to be, thanks to a couple of recent legal rulings that have undercut police enforcement and caused drug activity in the area to resurge." *Id.* To circumvent this seemingly endless "game" imposed by the Oregon Court of Appeals, the Portland City Council in May, 2002, began considering a proposal to create a new crime—"the crime of violating an ordinance." *Id.*

74 The only ground on which the Ohio Supreme Court unanimously agreed in striking down Cincinnati's exclusion ordinance was that the City Council's measure "exceed[ed] the local authority granted to the city by" its state constitution. *Burnett*, 755 N.E.2d at 868. The purported power usurpation turned on whether exclusion constituted banishment, and thus ultimately criminal punishment. The Ohio Supreme Court found that the Cincinnati City Council, by enacting the drug exclusion ordinance, had authorized a punishment (exclusion) for a state statute (that statute criminalizing the underlying and enumerated drug-related offense for which the excluded defendant was originally convicted) that had not been provided for by that state statute. *Id.* ("By authorizing a punishment not provided by statute for violation of a statute, Cincinnati's drug exclusion ordinance has permitted something that is prohibited under the state criminal code."). The Ohio Supreme Court reasoned that because exclusion is tantamount to banishment, and "banishment is historically considered to be punishment," exclusion is therefore a form of punishment (i.e., criminal penalty). *Id.* (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 474 (1977)). Having equated exclusion with punishment, the Ohio Supreme Court held such action by the City Council as ultra vires, because "there is no authority for the proposition that a municipality may, by way of ordinance, add a penalty for a violation of a *state criminal statute* that is not otherwise provided for by the [state legislature]." *Id.* For that reason, the court held the ordinance invalid under the Ohio Constitution. As this ruling was based on the flawed equating of zone exclusion with banishment, *see* discussion *infra* Part III.A.1., city councils such as Cincinnati's should remain free to employ exclusionary zoning without exceeding their local, state prescribed, authority. Indeed, the Ohio Court of Appeals had embraced this distinction between exclusion and criminal penalty in its ill-fated *Burnett* decision. State v. Burnett, No. C-981003, 2000 WL 955614 (Ohio Ct. App. Dec. 23, 1999) (rejecting the defendant's state constitutional challenge "insofar as it is dependent upon a characterization of Chapter 755's exclusion as a criminal penalty"), *rev'd*, 755 N.E.2d 857 (Ohio 2001).

dom from double jeopardy, the right to freedom of association, and the purported right to intrastate travel.

1. The Double Jeopardy Challenge

Establishing the distinction between exclusion and banishment is crucial in resolving challenges to exclusion ordinances under the Double Jeopardy Clause of the Fifth Amendment, which provides that "[n]o person . . . [shall] be subject for the same offense to be twice put in jeopardy of life or limb."[75] In *Johnson*, the excluded individual argued before the district court that the "exclusion . . . constitutes criminal punishment," and as such:

> [It] would constitute double jeopardy to convict and punish a person for the underlying drug offense after issuing the ninety day exclusion notice to him or her. Similarly, it would constitute double jeopardy to issue the one year exclusion notice to a person who has been convicted and sentenced for the underlying drug offense.[76]

The federal district court noted in ruling on the Cincinnati ordinance that "[t]he critical issue in determining whether the prohibition against double jeopardy applies to . . . exclusion ordinance[s] is whether the exclusion is a criminal or a civil punishment."[77]

For the purposes of a double jeopardy challenge, the U.S. Supreme Court in *Hudson v. United States*[78] and *United States v. Ward*[79] set forth a two-prong test for determining "[w]hether a particular punishment is criminal or civil."[80] Using statutory construction, a court must first determine whether the punishment was "expressly or impliedly" intended to be criminal or civil.[81] If the court finds that the lawmaking body intended the measure to be a civil punishment, it must "inquire[ ] further [to ascertain] whether the statutory scheme was so punitive either in purpose or effect as to negate that intention."[82] In applying this *Hudson/ Ward* analysis, the district court in *Johnson* found that though the Cincinnati City Council "expressly intend[ed] for exclusion to be a civil remedy," the drug exclusion ordinance

75 U.S. CONST. amend. V.

76 Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 747 (S.D. Ohio 2000), *aff'd*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003). The Sixth Circuit did not reach the double jeopardy issue. *See Johnson*, 310 F.3d at 506 n.10.

77 *Johnson*, 119 F. Supp. 2d at 747.

78 522 U.S. 93 (1997).

79 448 U.S. 242 (1980).

80 Hudson, 522 U.S. at 99.

81 *Id.* (quoting United States v. Ward, 448 U.S. 242, 248 (1980)).

82 *Ward*, 448 U.S. at 248–49 (citing Flemming v. Nestor, 363 U.S. 603, 617–21 (1960)).

failed the second prong of the analysis because it "is analogous to banishment, a penalty historically regarded as punishment," thus negating all intentions the City Council may have had in making exclusion a civil remedy.[83] Accordingly, the lower *Johnson* court found that the exclusion ordinance impermissibly constituted double jeopardy.[84]

In coming to its conclusion, the *Johnson* court explicitly declined to follow the Oregon Court of Appeals, which in *State v. James*[85] found a distinction between exclusion and banishment. *James* also applied the *Hudson/ Ward* analysis, but reached a dramatically different conclusion that the *Johnson* court refused to follow. In ruling on a double jeopardy challenge to the ninety-day exclusion provision of the Cincinnati ordinance's Portland counterpart, the Oregon Court of Appeals found that the exclusion provision did not constitute punishment, but rather was a civil sanction. It came to this conclusion by refusing to equate the exclusion with banishment, noting that "[b]anishment . . . has traditionally been '[s]ynonymous with exilement or deportation, importing a compulsory loss of one's country.'"[86] The exclusion at issue here is different from banishment, according to the Oregon Court of Appeals, because exclusion "is of limited duration" and, due to the broad variances made available by the ordinance, "does not involve the 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."[87] The *James* court further distinguished exclusion from punishment by noting that the ends of the drug exclusion zone ordinance were not "to promote the traditional aims of punishment, *i.e.* retribution and deterrence," but rather "to achieve legitimate civil goals" in response to city findings that "drug activities contributed to degradation of the designated areas and had a negative effect on the quality of life for the residents, businesses, and visitors."[88] Recognition of these goals recalls the "Broken Windows" correlation between social and physical disorder that trespass-zoning seeks to redress, and properly places exclusionary zoning ordinances in the context of neighborhood revitalization as opposed to criminal banishment.

While accepting the proposition that banishment historically constitutes a criminal penalty, the *James* court's distinction between ban-

83 *Johnson*, 119 F. Supp. 2d at 748 (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 474 (1977)).

84 *Id.* at 749.

85 978 P.2d 415 (Or. Ct. App. 1999).

86 *James*, 978 P.2d at 419 (citing BLACK'S LAW DICTIONARY 131 (5th ed. 1979)).

87 *Id.* at 419.

88 *Id.* at 420 (citing Hudson v. United States, 522 U.S. 93, 99 (1997)).

ishment and exclusion leaves the drug exclusion zones beyond double jeopardy reproach, denying exclusion criminal penalty categorization. Accordingly, the *James* court found that the drug exclusion zone ordinance did not violate the double jeopardy provisions of either the federal or Oregon state constitution. Indeed, the reasoning of the Oregon Court of Appeals in *James* on the exclusion/banishment distinction was recently confirmed in a related ruling by the Oregon Supreme Court, which held in *State v. Lhasawa* that the Portland prostitution-free zone ordinance[89] does not violate double jeopardy.[90]

2. The Freedom of Association Challenge

The Cincinnati drug exclusion zone ordinance was also attacked as an infringement upon the constitutional right to freedom of association in both *Johnson* and *Burnett.* In each, the challenge met with varied results. As the federal district court in *Johnson* makes clear, "The right to freedom of association is not enumerated in the Constitution, but arises as a necessary concomitant to the Bill of Right's [sic] protection of individual liberty."[91] The U.S. Supreme Court's pronouncements on the freedom of association have found that the freedom protects (1) "choices to enter into and maintain certain intimate human relationships" as "a fundamental element of personal liberty," and (2) "a right to associate for the purpose of engaging in those activities protected by the First Amendment" as "an indispensable means of preserving other individual liberties."[92] In examining the "as applied" freedom of association challenge to the ordinance, the federal district court in *Johnson* considered whether the plaintiffs' ability to "maintain certain intimate human relationships" was implicated.[93] The U.S. Supreme Court provided "some relevant limitations on the [certain intimate human] relationships that might be entitled to this sort of constitutional protection," focusing on "personal affiliations that . . . attend the creation and sustenance of a family."[94]

Both *Johnson* courts found that, as applied to the plaintiff grandmother and plaintiff homeless person, the drug exclusion zones impermissibly impaired their abilities to maintain protected relationships, such as assisting in the raising of grandchildren and ac-

89 PORTLAND, OR., CODE ch. 14B.30 (2003).

90 State v. Lhasawa, 55 P.3d 477, 488 (Or. 2002).

91 Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 741 (S.D. Ohio 2000).

92 Roberts v. United States Jaycees, 468 U.S. 609, 617–18 (1984).

93 *Johnson*, 119 F. Supp. 2d at 741 (quoting *Roberts*, 468 U.S. at 617–18).

94 *Roberts*, 468 U.S. at 619.

cessing social services.[95] Noting that the right to freedom of association is not absolute, the lower *Johnson* court nonetheless went on to find that the exclusion ordinance was not "narrowly tailored to serve compelling state interests" and therefore unconstitutional.[96]

Consideration of whether these ordinances are indeed "narrowly tailored to serve compelling state interests" will be revisited in conjunction with the right to intrastate travel challenge. Both there and here in the context of freedom of association, it is important to note the crucial role variances play in narrowly tailoring the drug exclusion zones to meet compelling state interests. The proper drafting of broad variances that envelop legitimate purposes could vitiate the ordinances' purportedly improper implication of constitutional rights. As to the homeless plaintiff in *Johnson*, the broader provisions of the Portland exclusion ordinance include not only a "social services variance," but also an "essential needs variance," which, along with access to social services, should be read to include, among other things, access to counsel.[97] Furthermore, it is possible to envision the drafting of a variance that would allow for extended family member visitation that would cover the otherwise implicated plaintiff grandmother. In the absence of such variances protecting familial relationships and First Amendment related activities, the Cincinnati drug exclusion zone ordinance, according to the *Johnson* courts, was not narrowly tailored to its compelling governmental interest, and thus was unconstitutional as applied. On the other hand, as will be discussed below, proper analysis of the exclusion ordinances under a Fourth Amendment reasonableness standard obviates these freedom of association concerns, strict scrutiny, and, as will be seen, implication of the purported right to intrastate travel.

Furthermore, the extent of damage inflicted upon the Cincinnati ordinance by the *Johnson* ruling on freedom of association is limited insofar as the Sixth Circuit and the federal district court accepted the plaintiffs' challenge only "as applied." As opposed to a successful facial challenge that would have incapacitated the ordinance in its entirely, the associational challenge presented in *Johnson* merely prompted the court to find that the ordinance interfered with protected relationships as applied to the excluded plaintiffs appearing

95 *Johnson*, 119 F. Supp. 2d at 742; Johnson v. City of Cincinnati, 310 F.3d 484, 504–05 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003).

96 *Johnson*, 119 F. Supp. 2d at 742 (citing Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)); *id.* at 743–44.

97 PORTLAND, OR., CODE ch. 14B.20.060(B)(3) (2003) (essential needs variance); *id.* ch. 14B.20.060(B)(5) (social services variance).

before it.[98] This was made clear when the Ohio Supreme Court in *Burnett* rejected the excluded plaintiff's freedom of association claim as a facial-overbreadth challenge. After examining issues of federalism and concluding that it was not bound by the federal district court's *Johnson* ruling, the Ohio Supreme Court held:

> On its face, the ordinance does not prohibit or interfere with fundamental, personal relationships. Nor does the ordinance facially infringe the rights of a citizen to associate with other citizens for the purpose of engaging in protected First Amendment activities. Instead, the ordinance simply prohibits access to [the drug exclusion zone].[99]

Having rejected the plaintiff's facial challenge to the ordinance, the court went on to reject potential "as applied" challenges as well, concluding that "because the ordinance prohibits access only to a particular area of the city, . . . [it] does not burden the right of association guaranteed by the First Amendment to the United States Constitution."[100]

3. The Right to Intrastate Travel Challenge

The drug exclusion zones have also been challenged as an impermissible burden on the purported constitutional "right to intrastate travel." The Cincinnati ordinance was struck down as a violation of this right in both the Ohio Supreme Court's *Burnett* decision and the Ohio federal district court ruling in *Johnson*. The Portland exclusion zones recently came under "right to travel" fire when a Multnomah County Circuit Court judge found the ordinance in contravention of the purported constitutional right in October 2002.[101] But before considering whether the exclusion zones contravene, or even implicate, the right to intrastate travel, it must first be determined whether such a right even exists.

a. The Dubious Existence of a Fundamental Right to Intrastate Travel

"The word 'travel' is not mentioned within the text of the Constitution."[102] Nonetheless, the Supreme Court has found the right to

98 *Johnson*, 119 F. Supp. 2d at 744; *Johnson*, 310 F.3d at 506.

99 State v. Burnett, 755 N.E.2d 857, 863 (Ohio 2001).

100 *Id.*

101 Green, *supra* note 66, at C6.

102 *Burnett*, 755 N.E.2d at 865.

travel from state to state to be constitutionally protected.[103] The *Burnett* and *Johnson* courts both went a step further, holding not only that the right to travel exists, but also that the right protects *intrastate* travel as well. The *Burnett* court found "the right of travel is most likely protected from state interference by the Due Process Clause of the Fourteenth Amendment."[104] If so, then the issue properly becomes "whether the asserted right [to intrastate travel] is 'so rooted in the traditions and conscience of our people as to be ranked fundamental.'"[105] By analyzing the legitimacy of the well-established right to interstate travel in substantive due process terms, the Ohio Supreme Court availed itself of an opportunity to extend that interstate right to include the right to intrastate travel as well, finding "the right to travel within a state is no less fundamental than the right to travel between the states."[106]

The Ohio Supreme Court's attempt to stretch the well-recognized right to interstate travel to include a right to intrastate travel by extending substantive due process analysis must fail. To constitute a "fundamental right" under due process, the putative freedom must be "'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.'"[107] Indeed, the right to travel arguably satisfies both of these requirements. The U.S. Supreme Court decisions in *Washington v. Glucksberg*[108] and *Saenz v. Roe*[109] suggest, however, that the general right to travel and substantive due process in fact have nothing to do with each other, thus rendering attempts to root the freedom of movement in substantive due process groundless.

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103 Shapiro v. Thompson, 394 U.S. 618, 629 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal 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.

Id.

104 *Burnett*, 755 N.E.2d at 864 (citing Kent v. Dulles, 357 U.S. 116, 125 (1958); Williams v. Fears, 179 U.S. 270, 274 (1900)).

105 *Id.* (citing Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

106 *Id.* at 865.

107 Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

108 521 U.S. 702 (1997).

109 526 U.S. 489 (1999).

In *Washington v. Glucksberg*, the Court was presented with a substantive due process challenge to a state statute banning assisted suicide.[110] In ruling that there was no fundamental right to assistance in committing suicide, the Court listed specific freedoms specially protected by the Due Process Clause.[111] Conspicuously absent from this list of substantive due process freedoms is the right to travel. As Justice Cook stated in her concurring opinion to *Burnett*, "*Glucksberg*'s list appears to be exhaustive" and the "omission [of the right to travel] strongly suggests that the right to travel is *not* one of the fundamental liberties subjected to heightened scrutiny under substantive due process."[112]

Nor has the U.S. Supreme Court, when elucidating the possible constitutional sources of the right to travel, identified substantive due process as one of those sources. In *Saenz v. Roe*, the Supreme Court considered "the validity of a California statute that limited the level of welfare benefits available to California residents who had only recently moved to the state."[113] Though the right to interstate travel had been recognized as a constitutional right prior to *Roe*,[114] the Supreme Court "had been less than clear about the textual source of that right in the Constitution."[115] The Court in *Roe* took strides to clarify the

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110 *Glucksberg*, 521 U.S. at 723–28.

111 *Id.* at 720.

> [I]n addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights [1] to marry, [2] to have children, [3] to direct the education and upbringing of one's children, [4] to marital privacy, [5] to use contraception, [6] to bodily integrity, and [7] to abortion.

Id. (citations omitted); *see also* Lawrence v. Texas, 123 S. Ct. 2472, 2481, 2484 (2003) (reaffirming the Due Process clause protected liberties of "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," while adding to that list the right of homosexuals to engage in consensual sexual activity at home).

112 State v. Burnett, 755 N.E.2d 857, 869–70 (Ohio 2001) (Cook, J., concurring).

113 *Id.* at 870 (Cook, J., concurring) (citing Saenz v. Roe, 526 U.S. 489 (1999)).

114 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal 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.

Id.

115 *Burnett*, 755 N.E.2d at 870 (Cook, J., concurring); *see also, e.g.*, *Shapiro*, 394 U.S. at 630 (finding "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision" despite upholding that right therein).

sources of that right. It began by delineating three different "components" embraced by the "right to travel":

> [1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[116]

Having so categorized the right to travel, the Court proceeded to identify "which specific provision of the United States Constitution provides the source for each component of the right to travel."[117] The Court identified the source of the second component as the Privileges and Immunities Clause, Section 2 of Article IV of the U.S. Constitution.[118] The source of the third component, according to the Court, could be found in the Privileges or Immunities Clause of the Fourteenth Amendment.[119] While the Court declined to identify the source of the right of a citizen of one State to enter and to leave another State, it suggested that "[t]he right of 'free ingress and regress to and from' neighboring States . . . may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'"[120]

The significance of *Roe*'s "right to travel" source findings is that:

> [The U.S. Supreme Court] conspicuously fails to categorize any aspect of the right to travel as being rooted in substantive due process. When read in conjunction with *Glucksberg*'s omission of the right to travel from its list of fundamental rights, *Roe*'s failure to identify substantive due process leads to the negative inference that substantive due process is *not* the constitutional source of the right.[121]

With substantive due process eliminated as a possible source of the right to travel, the majority holding of *Burnett* cannot hold.

Nonetheless, the district court in *Johnson* found "at least a limited fundamental right to intrastate travel in the form of a right to freedom of movement."[122] The Sixth Circuit went so far as to "hold that the Constitution protects a right to travel locally through public

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116 Saenz v. Roe, 526 U.S. 489, 500 (1999).

117 *Burnett*, 755 N.E.2d at 870 (Cook, J., concurring).

118 *Id.* (Cook, J., concurring) (citing *Roe*, 526 U.S. at 501).

119 *Id.* at 870–71 (Cook, J., concurring) (citing *Roe*, 526 U.S. at 503–04).

120 *Id.* at 871 (Cook, J., concurring) (citing *Roe*, 526 U.S. at 501).

121 *Id.* (Cook, J., concurring); *see also* Johnson v. City of Cincinnati, 310 F.3d 484, 508 (6th Cir. 2002) (Gilman, J., dissenting) ("Noticeably absent from this passage is a recognition of any right to *intrastate* travel."), *cert. denied*, 123 S. Ct. 2276 (2003).

122 Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 745 (S.D. Ohio 2000), *aff'd*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003).

spaces and roadways."[123] Both courts drew upon the expressive language of a litany of Supreme Court cases to imply this freedom.[124] One such case was *Kent v. Dulles*, where the Supreme Court, in analyzing the constitutionality of a regulation that denied passports, proclaimed, "Freedom of movement is basic in our scheme of values."[125] Both courts cited *Kolender v. Lawson* as well, which involved a statute that rendered loitering a misdemeanor if loiterers refused to identify themselves and account for their presence when requested to do so by police.[126] While the Court in *Kolender* noted that the loitering statute implicated the right to freedom of movement, it ultimately struck down the statute as unconstitutionally vague.[127] With these authorities in mind, both *Johnson* courts concluded that the right to intrastate travel could be rooted in this right to freedom of movement.[128]

The right to freedom of movement that has developed from Supreme Court cases such as these cannot, however, be extended to envelop the purported right to intrastate travel. As Justice Cook found in her concurring opinion in *Burnett*, the Supreme Court "cases suggesting some broad right of 'free movement,'" particularly those cited by the *Johnson* courts, "have involved either travel across borders (whether state or international) [e.g., *Kent v. Dulles*] or First Amendment vagueness issues [e.g., *Kolender v. Lawson*]."[129] Intrastate travel alone implicates neither.

Indeed, while the U.S. Supreme Court has long recognized the right to interstate travel,[130] it has never recognized the extension of

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123 *Johnson*, 310 F.3d at 498.

124 *Johnson*, 119 F. Supp. 2d at 744–45; *Johnson*, 310 F.3d at 495–97.

125 Kent v. Dulles, 357 U.S. 116, 126 (1958); *see Johnson*, 310 F.3d at 497 (citing *Kent*, 357 U.S. at 126); *Johnson*, 119 F. Supp. 2d at 744 (quoting *Kent*, 357 U.S. at 125).

126 Kolender v. Lawson, 461 U.S. 352, 353 (1983); *see Johnson*, 310 F.3d at 497 (citing *Kolender*, 461 U.S. at 358); *Johnson*, 119 F. Supp. 2d at 744–45 (discussing *Kolender*).

127 *Kolender*, 461 U.S. at 358, 361–62.

128 *Johnson*, 119 F. Supp. 2d at 745; *Johnson*, 310 F.3d at 497–98.

129 State v. Burnett, 755 N.E.2d 857, 872 (Ohio 2001) (Cook, J., concurring).

130 *See* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 262–69 (1974) (holding that a statute providing residency requirement as a condition to non-emergency hospital care at the government's expense infringed upon the right of interstate travel); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (holding that a law conditioning voting eligibility on a durational residency requirement constituted an unconstitutional infringement of the right to interstate travel); Shapiro v. Thompson, 394 U.S. 618, 629 (1969) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal 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."), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974); United States v. Guest, 383

that freedom to embrace a right to intrastate travel.[131] While there are several Circuit Court cases recognizing a constitutional right to intrastate travel,[132] those cases do not reflect a consensus view among the Circuits,[133] and "were decided before the Supreme Court's clarification of the right to travel in *Roe*."[134] In fact, the U.S. Supreme Court has explicitly declined to decide this issue,[135] and even went so far as to hold that a purely intrastate restriction on movement does not violate the right to interstate travel.[136] Of course, the right to in-

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U.S. 745, 757 (1966) ("The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.").

131 *See* Lutz v. City of York, 899 F.2d 255, 259 (1990) (noting that right to travel cases to date have "presented the Supreme Court with no opportunity squarely to consider the question whether the right to travel includes the right to travel *intra* state"); Keith E. Smith, *Constitutional Law—Cruising for a Bruising—An Attack on the Right to Interstate Travel*, 36 VILL. L. REV. 997, 997 (1991) ("The United States Supreme Court has consistently held that there is a constitutionally protected fundamental right to interstate travel, but has never decided whether this right extends to intrastate travel or 'localized intrastate movement.'" (citations omitted)).

132 *Johnson*, 119 F. Supp. 2d at 745 (citing Spencer v. Casavilla, 903 F.2d 171 (2d Cir. 1990); Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975)).

133 *See, e.g.*, Wardwell v. Cincinnati Sch. Dist. Bd. of Educ., 529 F.2d 625, 627–28 (6th Cir. 1976) (rejecting a fundamental right to intrastate travel); Wright v. Jackson, 506 F.2d 900, 902–03 (5th Cir. 1975) (rejecting a fundamental right to intrastate travel); Townes v. St. Louis, 949 F. Supp. 731, 734–35 (E.D. Mo. 1996) (noticing the circuit split over the existence of the fundamental right to intrastate travel and expressing doubt as to whether the Eighth Circuit would recognize it), *aff'd*, 112 F.3d 514 (8th Cir. 1997).

134 *Burnett*, 755 N.E.2d at 872 (Cook, J., concurring) (referencing Saenz v. Roe, 526 U.S. 489 (1999)).

135 Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 255–56 (1974) ("[Whether] to draw a constitutional distinction between interstate and intrastate travel [is] a question we do not now consider . . . ."); *Burnett*, 755 N.E.2d at 872 (Cook, J., concurring) (rejecting the majority's attempt to bootstrap the right to intrastate travel onto the "firmly embedded" fundamental right to interstate travel by noting that, when given the opportunity, "the Supreme Court has specifically *declined* to consider whether the right to interstate travel includes the right to intrastate travel") (citing *Mem'l Hosp.*, 415 U.S. at 255–56). Nor can the Supreme Court's plurality opinion striking down Chicago's gang loitering ordinance in *Chicago v. Morales* extend the right to freedom of movement to include a right to intrastate travel. Though Justice Stevens propounded that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment . . . [and] this right to remove from one place to another according to inclination [is] an attribute of personal liberty protected by the Constitution," only Justices Souter and Ginsburg joined him on this finding. 527 U.S. 41, 53 (1999) (Stevens, J., concurring).

136 Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993) (holding that anti-abortion demonstrations near abortion clinics that "restrict[ ] movement

terstate travel "protects interstate travelers against two sets of burdens: 'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers."[137] Accordingly, the right to interstate travel forbids the implementation of exclusionary zoning in a manner that would render it impossible for an excluded individual to leave a state without passing through a drug exclusion zone. Such implementation would effectively create an impermissible barrier to interstate travel by criminalizing it. Short of "imprisoning" excluded individuals within their own state, however, drug exclusion zones do not trammel upon any recognized travel rights.

Ultimately, as the Ohio Court of Appeals rightly found in its ill-fated *Burnett* decision, "*intrastate* travel, . . . unlike *interstate* travel, has never been officially recognized by the United States Supreme Court as a constitutionally guaranteed fundamental right."[138] The legitimacy of the purported right is dubious at best.

b. Exclusion Zones and Strict Scrutiny

Nonetheless, peaceful coexistence is possible between drug exclusion zones and the right to intrastate travel. Assuming that there is indeed a fundamental right to intrastate travel, the drug exclusion zone ordinances could still survive the incumbent heightened scrutiny that the implication of such a fundamental right would entail. While the level of scrutiny triggered by infringements upon the right to intrastate travel is uncertain,[139] examination of exclusionary zoning's ability to surpass the highest level of scrutiny—strict scrutiny—demonstrates that the measure can exist beyond right to intrastate travel reproach.

For an ordinance infringing upon the right to travel to survive a strict scrutiny, it must be "[1] narrowly tailored [2] to serve a compelling state interest."[140] Both the *Johnson* and *Burnett* courts agree that the Cincinnati City Council's drug exclusion zones serve a compelling

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from one portion of the Commonwealth of Virginia to another" constitute "a purely intrastate restriction [that] does not implicate the right to interstate travel").

137 *Id.* at 277 (quoting Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982)).

138 State v. Burnett, No. C-981003, 2000 WL 955614, at *3 (Ohio Ct. App. Dec. 23, 1999), *rev'd*, 755 N.E. 2d 857 (Ohio 2001).

139 Justice Cook argued that the compelling interest test is not automatically triggered by infringements on the right to travel, noting that "the Supreme Court has applied strict scrutiny *only* to certain impediments to *interstate* travel." *Burnett*, 755 N.E.2d at 873 (Cook, J., concurring) (citing Saenz v. Roe, 526 U.S. 489, 504 (1999); Shapiro v. Thompson, 394 U.S. 618, 642 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974)).

140 Reno v. Flores, 507 U.S. 292, 302 (1993).

state interest. The federal district court stated that "improving the quality of life in neighborhoods by preventing repeat drug offenders from violating drug abuse laws time and time again is a compelling interest."[141] The Ohio Supreme Court likewise found the governmental interest compelling, noting: "The destruction of some neighborhoods by illegal drug activity has created a crisis of national magnitude, and governments are justified in attacking the problem aggressively."[142]

While both the *Johnson* and *Burnett* courts found the interest prompting the Cincinnati City Council's exclusion ordinance to be compelling, neither found it to be narrowly tailored. The federal district court reached this conclusion because drug exclusion zones exclude "persons [who] may have innumerable lawful reasons to enter [the drug exclusion zone]."[143] The Ohio Supreme Court employed slightly more evocative words in reaching the same conclusion:

> A person subject to the exclusion ordinance may not enter a drug exclusion zone to speak with counsel, to visit family, to attend church, to receive emergency medical care, to go to a grocery store, or just to stand on a street corner and look at a blue sky.[144]

Because the ordinances proscribe activities that are both innocuous and law-abiding, these courts held that the ordinances were not narrowly tailored to meet the acknowledged compelling governmental interest.

As was seen in the discussion on associational challenges, the importance of variances that contemplate legitimate purposes for excluded individuals to enter the exclusion zones cannot be understated. Such variances serve to narrowly tailor these drug exclusion zones to a compelling state interest, insulating this strain of trespass-zoning from substantive due process challenges. For this reason, as discussed below in considering the bounds of the exclusion zones, variances should be readily available for issue by police, and even, in

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141 Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 746 (S.D. Ohio 2000); *see also* Johnson v. City of Cincinnati, 310 F.3d 484, 502 (6th Cir. 2002) ("We agree with the district court's conclusion that the City's interest in enacting the Ordinance—to enhance the quality of life in drug-plagued neighborhoods and to protect the health, safety, and welfare of citizens in those areas—represents a compelling government interest."), *cert. denied*, 123 S. Ct. 2276 (2003).

142 *Burnett*, 755 N.E.2d at 866.

143 *Johnson*, 119 F. Supp. 2d at 747; *see also Johnson*, 310 F.3d at 503 ("[T]he Ordinance . . . presents constitutional tailoring problems because it broadly excludes individuals from [the drug exclusion zone] without regard to their reason for travel in the neighborhood.").

144 *Burnett*, 755 N.E.2d at 867.

many cases, issued simultaneously with the exclusion. Allowing for zone access in cases of meeting with counsel, accessing social services, or receiving emergency medical care should be, and in Portland is, provided for.[145] Of course, for the zones to maintain their effectiveness, and for the rule not to be swallowed by its exceptions, there must be a limit as to the variances' breadth. On the spectrum of legitimate purposes meriting variances, visits with relatives beyond immediate family and church attendance should be considered borderline, and patronage of grocery stores and staring at blue skies should be deemed illegitimate outright. Whereas the Constitution will provide a baseline of legitimate purposes for which variances should be issued, the balance of exceptions should be left to the discretion of the city councils who must answer directly to the affected constituents on Election Day.

Nonetheless, the Sixth Circuit found that "the Ordinance's variance mechanism [could] not save the Ordinance from constitutional infirmity because it only protects the constitutional right to localized travel for a limited group of affected individuals."[146] This holding fails to account for the fact that the alleged constitutional rights of the excluded remainder have been legitimately abrogated in keeping with the important principles upon which trespass law rests. While a trespasser may not *consciously* trespass "with illegal intention,"[147] it is the trespasser's very presence that is illegal. The conduct of otherwise constitutionally protected activities can nonetheless become illegal in certain areas when the legislature, in an expression assigning a societal value to a prescribed piece of land, rightly implements trespass laws to protect that greater societal land use. Trespass laws may be designed for any number of social reasons, be it capitalistic protection of private property,[148] or national security protection of a military base.[149] With drug exclusion zones, trespass law is employed to pro-

145 PORTLAND, OR., CODE ch. 14B.20.060(B) (2003).

146 *Johnson*, 310 F.3d at 505.

147 *Burnett*, 755 N.E.2d at 867.

148 *See, e.g.*, W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 13, at 67 (5th ed. 1984).

> In the bundle of rights, privileges, powers, and immunities that are enjoyed by an owner of real property, perhaps the most important is the right to the exclusive "use" of the realty. An interference with this exclusive possessory interest brought about in a direct way from an act committed by the defendant was regarded legally as actionable.

Id. That cause of action sounded in "trespass to land." *Id.*

149 United States v. Albertini, 472 U.S. 675, 677 (1985) (upholding statute designed to maintain security on military bases through the enforcement of trespass law).

tect neighborhoods and the people who live within them from destruction by illegal drug activity. Variances narrowly tailor the zones to that end.

Of course, it is not enough that constitutionally protected behavior may properly be restrained in areas of restricted access. The legitimacy of the imposition of trespass law on a particular public area, and by extension, the categorization of a particular person as a trespasser, must also be established. This application of trespass law on targeted areas calls to mind Euclidean zoning, which had also been "assailed on the grounds that it [was] in derogation . . . of the Fourteenth Amendment to the Federal Constitution in that it deprived appellee of liberty and property without due process of law."[150] There, the City Council of Euclid, Ohio, assigned by ordinance acceptable physical uses to particular areas within its jurisdiction.[151] According to the U.S. Supreme Court, this assignment by the City Council found "justification in some aspect of the police power" in that it has "substantial relation to the public health, safety, morals, or general welfare."[152] Exclusionary zoning may also find justification in the police power, in that the aggressive attack on likely repeat offenders waged by drug exclusion zones bolsters the "public health, safety, morals, or general welfare" of distressed neighborhoods otherwise endangered by the heel of drug crime.[153] Just as Euclid's zoning distinguished by area physical uses that were welcome from those that were not based on a use's potential for detrimental effect on an area's public health, safety, morals, or general welfare, Cincinnati and Portland have, in exercising their police power, legitimately distinguished by area those persons who are welcome from those who are not based on an individual's deleterious predisposition to drug crime. As posited by the "Broken Windows" theory of crime, that deleterious predisposition has not only an adverse effect on the neighborhood's social welfare, but also, like those uses targeted by Euclidean zoning, its physical welfare. Thus, courts could interpret the imposition of trespass law upon endangered neighborhoods as justified by a legitimate city council exercise of the police power, leaving a trespasser's otherwise constitutionally protected behavior properly restrained in those areas.

Furthermore, courts could instead look at the drug exclusion zones in a manner akin to legitimate First Amendment time, place, and manner restrictions. For example, in *City of Renton v. Playtime*

150 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926).

151 *Id.* at 379–83.

152 *Id.* at 387, 395.

153 *Id.* at 395.

Theatres, the Supreme Court considered the city of Renton's zoning ordinance prohibiting adult theatres from locating within 1000 feet of schools, homes, churches, or parks.[154] The Court rejected the adult theater owner's claim that the ordinance was in derogation of his First Amendment rights because the ordinance was an acceptable "time, place, and manner regulation" that was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community."[155] Essentially, though the Renton ordinance by definition targeted adult film theaters, it was unrelated to the suppression of free speech, standing instead as a content-neutral prohibition "designed to combat the undesirable secondary effects of such businesses."[156] While in *Renton*, the right at issue was that of free speech, the reasoning behind First Amendment content-neutral time, place, and manner regulations could similarly be invoked to address the drug exclusion zone ordinances' purported infringement upon the right to intrastate travel. Though drug exclusion zone ordinances by definition target for exclusion individuals with a criminal record including drug related offenses, these ordinances are unrelated to the suppression of the right to intrastate travel. Rather, they are a neutral prohibition "designed to combat the undesirable secondary effects" of the excluded individual's presence. Aimed at secondary effects rather than the excluded individuals themselves, the zones' neutral prohibitions cannot be painted as impermissibly criminalizing status. By considering exclusionary zoning as a regulation of time, place, and manner, courts may find the drug exclusion zones to be narrowly tailored to meet a compelling governmental interest.

Whether it be through broad variances embracing constitutionally protected activities, the legitimate restraint of such activities by proper exercise of the police power, or framing as time, place, and manner regulations, the drug exclusion ordinances are narrowly tailored to exclude, or to remove, those elements of a neighborhood that contribute in their mere presence to the derogation of social order. In so doing, these ordinances brace vulnerable neighborhoods against the vicious downward spiral otherwise enabled by allowing social and physical disorder to feed off of each other.

154 475 U.S. 41, 44–45 (1986).
155 *Id.* at 46–47, 49.
156 *Id.* at 49.

4. Rooting Exclusionary Zoning in the Principles of Bail, Parole, and Probation: Bypassing the Purported Right to Intrastate Travel and Other Constitutional Concerns

While Supreme Court jurisprudence has not yet made clear whether the right to intrastate travel is a fundamental right under the U.S. Constitution, perhaps, in deference to the unique role that free movement played in the founding of this country, it should be. Whether the right exists or not, whether it is fundamental or not, this examination has demonstrated that drug exclusion zones could nonetheless survive even the most heightened constitutional scrutiny. It is now submitted that even if these exclusionary zones cannot survive strict scrutiny, even if they are not narrowly tailored to serve a compelling governmental interest, municipalities may still legitimately employ them in their fight against drug crime. Ultimately, the exclusion of those arrested for, or convicted of, drug-related offenses does not implicate the aforementioned constitutional protections. As a result of their arrest or conviction, the excluded individuals are transformed from standard citizen status into that of an arrestee or detainee. As such, these seized individuals have forfeited those protections discussed above, leaving the adjudication of the legitimacy of their restriction from designated zones to Fourth Amendment "reasonableness" analysis. Essentially, the limitations imposed by the exclusion ordinances are intended only for those properly seized in keeping with the Fourth Amendment. Therefore, this examination is informed by a consideration of those restraints placed on seized individuals that have historically passed Fourth Amendment muster—namely, the principles behind bail, parole, and probation.

It must be noted from the outset that bringing the discussion of drug exclusion zones within the province of Fourth Amendment analysis may not necessarily preclude consideration of other purported constitutional infringements. Nonetheless, while the U.S. Supreme Court in *United States v. James Daniel Good Real Property* "rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another,"[157] the Court's treatment of alleged Fourth Amendment violations suggests an exception. The U.S. Supreme Court has repeatedly found that claims asserting a violation of a

157 United States v. James Daniel Good Real Prop., 510 U.S. 43, 49–50 (1993) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn." (quoting Soldal v. Cook County, 506 U.S. 56, 70 (1992)).

Fourth Amendment protection should be analyzed under "that Amendment, not the more generalized notion of 'substantive due process.'"[158] Regardless of whether an alleged Fourth Amendment abrogation merits concurrent examination of other protections rooted in "more generalized" constitutional rights, the developed legal principles of bail, parole, and probation have repeatedly recognized that a properly seized individual retains only limited, if any, access to those rights.

By rooting the legitimacy of the drug exclusion zones in terms of Fourth Amendment seizure, important restraints limiting to whom the zones may be applied must be recognized. Such restraints will be discussed below in examining the theoretical boundaries of exclusionary zoning. But first the examination will consider how, in their relation to concepts of bail, parole, and probation, the exclusion zones meet Fourth Amendment "reasonability."

a. The Constitutionality of Seizure with Respect to Bail, Parole, Probation, and Drug Exclusion Zones

Even if exclusion zones fail to survive the strict scrutiny analysis incumbent upon a governmental attempt to abrogate a fundamental right, their legitimacy nonetheless survives because the zones fail to implicate the right to intrastate travel or freedom of association whatsoever—thus failing to trigger strict scrutiny analysis. Exclusion zones circumvent these asserted rights in the same manner as the body of law on which bail, parole, and probation firmly stand. The principles behind bail, parole, probation, and, it is submitted, exclusion zones, rest upon the notion that the individual, in committing a crime, forfeits many of his or her rights, including freedom of association and the purported right to intrastate travel. Indeed, the U.S. Supreme Court's rejection of a First Amendment challenge to the Richmond public housing authority's street-based trespass policy in *Virginia v. Hicks* validates the connection drawn between exclusionary zoning and the loss of rights due to prior bad acts.[159] In fact, those principles

158 Graham v. Connor, 490 U.S. 386, 395 (1989); *see also* County of Sacramento v. Lewis, 523 U.S. 833, 842–43 (1998) (citing *Graham* with approval); Albright v. Oliver, 510 U.S. 266, 273 (1994) (citing *Graham* with approval).

159 Virginia v. Hicks, 123 S. Ct. 2191, 2199 (2003).

> Punishing . . . violation [of a trespass policy] by a person who wishes to engage in free speech no more implicates the First Amendment than would the punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration.

Id.

of bail, parole, and probation stand in stark contrast to the unfettered freedom of movement that Americans are widely professed to enjoy.

In defending its drug exclusion ordinance, Cincinnati argued "that exclusion is a form of seizure and its constitutionality must be determined under the reasonableness standard of the Fourth Amendment," which proscribes only those governmental seizures of persons which are "unreasonable."[160] The district court in *Johnson* rejected this argument, refusing to "believe that an arrestee released upon bond or a convicted person released from prison or on probation with restrictions on their [sic] liberty is being seized in the same way a person in detention is seized."[161] However, though municipalities "cannot continue to argue that [an excluded] person has no more rights than a seized person;"[162] that is not to say that a person excluded pursuant to his or her arrest has as many rights as does a person who was never seized at all. As the City of Cincinnati argued before the district court in *Johnson*, "arrestees do not have the same right to freedom of movement as non-arrestees may have."[163]

While the freedom of movement of an arrestee out on bail, probation, or parole is not as severely restricted as that of a detainee, it is still to a significant extent legitimately restrained. It is upon this premise that the drug exclusion zones most effectively stand. It is well accepted that "[t]he post-arrest phase consists of . . . restrictions on day-to-day freedom of movement depending on the conditions of pretrial release."[164] The Bail Reform Act of 1984 provides just one example of the extent to which significant restraints on movement may be placed on criminal defendants released pending trial.[165] Should the

160 Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 739 (S.D. Ohio 2000), *aff'd*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003).

161 *Id.* at 740.

162 *Id.*

163 *Id.* at 744.

164 Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 61 (2000) (citing JOHN L. WEINBERG, FEDERAL BAIL AND DETENTION HANDBOOK 6-6 (1999)).

165 Bail Reform Act of 1984, 18 U.S.C. § 3142(c)(1)(B)(iv) (2000) (permitting judicial officers to order the pretrial release of persons charged with committing offenses against the United States subject to the condition that such persons "abide by specified restrictions on personal associations, place of abode, or travel").

The Sixth Circuit rejected the analogous relationship shared between exclusion zones and the Bail Reform Act's pretrial conditional release provision. In doing so, the court invoked *United States v. Salerno*, which, in affirming the constitutionality of the Bail Reform Act's pretrial detention provision, held: "When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable that arrestee from executing that threat."

arrestee be convicted of the underlying drug crime and imprisoned, the legitimacy of that newly designated *detainee's* exclusion is made patent by penal confinement. As for the post-conviction period, Fourth Amendment analysis does not apply.[166] Nonetheless, courts have found that parolees: (1) enjoy "only . . . conditional liberty properly dependent on observance of special parole restrictions";[167] (2) do not have a constitutional right to travel;[168] and (3) whatever right to

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481 U.S. 739, 751 (1987). From this holding, the circuit court in *Johnson* discerned a safeguard in the Bail Reform Act that it assumed to be lacking in the exclusion zones. According to the Sixth Circuit, while the Bail Reform Act accounts for the arrestee's likelihood of recidivism, the exclusion zones do "not require any particularized finding that the arrested or convicted individual is likely to repeat his or her drug crime." Johnson v. City of Cincinnati, 310 F.3d 484, 503 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003). Thus, the court found that "failure to include procedural safeguards resembling the protections incorporated into the Bail Reform Act, weighs heavily against finding the Ordinance constitutional." *Id.* at 504.

The Sixth Circuit's reliance on *Salerno* to impose upon the zones a prerequisite "likelihood of recidivism" determination is misplaced, however. The *Salerno* Court's call for such a determination was based on the Bail Reform Act's pretrial *detention* provision on which it was passing, not the pretrial *conditional release* provision to which the drug exclusion zones more aptly relate. Furthermore, even if such a determination is required to issue exclusions, there is "general evidence that individuals arrested and/or convicted for drug activity in [the drug free zones] typically return to the neighborhood and repeat their offenses." *Id.* at 503. The Sixth Circuit, determined to conjure a right to intrastate travel, failed to give this evidence due credit. *Id.* at 503–04.

166 *Johnson*, 310 F.3d at 491 ("[T]here is simply no reasonable basis for the City's assertion that the Fourth Amendment provides the exclusive analytical framework to evaluate the post-conviction provision of the Ordinance.").

167 Morrissey v. Brewer, 408 U.S. 471, 480 (1972); *see also* James G. Gentry, *Review of Selected 2000 California Legislation: Crimes, The Interstate Compact for Adult Offender Supervision: Parolee and Probationer Supervision Enters the Twenty-First Century*, 32 McGEORGE L. REV. 533, 536 n.28 (2001).

168 *See, e.g.*, Bagley v. Harvey, 718 F.2d 921, 924 (9th Cir. 1983) ("[A]n individual's constitutional right to travel, having been legally extinguished by a valid conviction followed by imprisonment, is not revived by the change in status from prisoner to parolee.") (citing Greenholtz v. Neb. Penal Inmates, 442 U.S. 1 (1979), holding that a person constitutionally convicted cannot invoke due process guarantees for the denial of liberty not presently possessed); Rizzo v. Terenzi, 619 F. Supp. 1186, 1189 (E.D.N.Y. 1985) ("While the right to travel from state to state is indeed constitutionally protected, an individual's right to travel, extinguished by conviction and subsequent imprisonment, is not revived upon parole." (citations omitted)); Landman v. Royster, 333 F. Supp. 621, 643 (E.D. Va. 1971) ("Criminal activity, it is thought, once proved by legal procedures, fairly works a forfeiture of any rights the curtailment of which may be necessary in pursuit of these ends, such as the right of privacy, association, travel, and choice of occupation."); Gentry, *supra* note 167, at 536 n.28.

travel they might hold is no greater than a prisoner's.[169] Indeed, states can place severe restrictions on parolees, including limits on their rights to association and travel.[170]

The Supreme Court has also passed on the validity of right to travel restrictions imposed upon a person convicted of a crime. The Court in *Jones v. Helms*, upon considering the constitutionality of a Georgia statute that transformed willful abandonment of a child from a misdemeanor to a felony when the accused parent leaves the state, held:

> Despite the fundamental nature of [the] right [to interstate travel], there nonetheless are situations in which a State may prevent a citizen from leaving. Most obvious is the case in which a person has been convicted of a crime within a State. . . . Indeed, even before trial or conviction, probable cause may justify an arrest and subsequent temporary detention.[171]

The lower *Johnson* court failed to recognize the significance of the Supreme Court's language in *Helms*. The federal district court interpreted the *Helms* decision as applying strict scrutiny to the Georgia statute, assuming that the statute merely survived as narrowly tailored to meet a compelling state interest.[172] Contrary to the lower *Johnson* court's assumption, the Supreme Court in *Helms* does not focus on the implications of the statute, but rather the status of the right itself. The Court does not find that the statute survives despite implicating the right (as would be the case when a measure survives strict scrutiny), but rather that the right is so qualified by past criminal conduct as to not be implicated by the statute at all.[173] *Helms* makes clear that

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169 *See, e.g.*, Paulus v. Fenton, 443 F. Supp. 473, 476 (M.D. Pa. 1977) ("Parole is, in many respects, a continuation of confinement. . . . As a matter of constitutional requirements, [a parolee] would appear to have no more choice over his parole residence than he had in serving his federal time in [prison] . . . ."); Gentry, *supra* note 167, at 536 n.28.

170 NEIL P. COHEN & JAMES J. GOBERT, THE LAW OF PROBATION AND PAROLE §§ 6.09–6.18, at 244–57 (1983) (discussing limits on parolees' rights to association); *id.* §§ 6.19–6.24, at 257–66 (discussing restrictions on parolees' freedom of movement).

171 Jones v. Helms, 452 U.S. 412, 419 (1981).

172 Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 746 (S.D. Ohio 2000) ("The implication this Court draws from *Helms* is that the Supreme Court recognized that in some instances the state may have a compelling interest in preventing criminals from leaving their jurisdiction and that the Georgia statute at issue was narrowly tailored to achieve this goal."), *aff'd*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003).

173 *Helms*, 452 U.S. at 421 ("[A]ppellee's criminal conduct within the State of Georgia necessarily qualified his right thereafter freely to travel interstate.").

an individual's criminal conduct can circumscribe that individual's right to travel.

The Sixth Circuit in *Johnson* also rejected Cincinnati's attempt to bring the drug exclusion zones under Fourth Amendment analysis. Disproportionately relying on Justice Ginsburg's concurrence in *Albright v. Oliver*, the appellate court found that the only purpose of arrest was "to compel an appearance in court."[174] Finding that the drug exclusion zones were not designed to compel a court appearance, the Sixth Circuit disqualified the zones from the Fourth Amendment's analytical framework for evaluating a restriction's constitutionality.[175] Justice Ginsburg's concurrence limiting seizure to only those measures designed to compel attendance at trial, however, breaks with a more expansive understanding of the term expressed by binding Supreme Court precedent. To be seized, a person need only be restrained from his or her freedom of movement "by means of physical force or *a show of authority*."[176] As drug exclusion zones do constitute a further form of seizure, they are properly subject to Fourth Amendment "reasonableness" review—a standard to which they readily rise.

Drug exclusion zones are simply an extension of bail, parole, and probation principles. Nonetheless, to root these innovative and aggressive tools in such well-established concepts, boundaries to their application must be recognized. If drug exclusion zones are to find their legitimacy in bail, parole, and probation principles, only a seized individual can be an excluded individual. Put differently, only those individuals walking the streets on bail, on parole, or on probation may be subject to exclusion from otherwise public spaces. Furthermore, the extent to which an excluded individual's liberty may be restricted must not exceed that which is permissible for other properly seized arrestees or detainees. If it is to rely upon the principles of bail, parole, and probation, the implementation of exclusion zones in most respects must fit within the mold cast by those principles. Where the zones cannot fit, those differences must be noticed and justified. With this in mind, the outer boundaries of the exclusion zones may now be considered.

174 Johnson v. City of Cincinnati, 310 F.3d 484, 492 (6th Cir. 2002) (quoting Albright v. Oliver, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring)), *cert. denied*, 123 S. Ct. 2276 (2003).

175 *Id.* at 493.

176 United States v. Mendenhall, 446 U.S. 544, 553 (1980) (emphasis added).

b. Testing the Limits of Exclusion Zoning

The assertion that the legitimacy of drug exclusion zones are rooted in the principles of bail, parole, and probation demands that such zones not exceed the parameters set by those same concepts. Accordingly, it must be determined how well drug exclusion zones fit within the construct set by these seizure principles that fall just short of detainment. This may be done by revisiting the questions raised above to inform the reach of the zones as currently drafted.[177]

Who may be excluded? The policy decision on which individuals should be subject to exclusion, insofar as identifying offenses justifying exclusion, lies best within the discretion of the local city councils who are elected by those people most affected by the zoning, most harmed by the crime, and most assuaged by this application of trespass-zoning. Upon identifying the offenses meriting exclusion, local governments must enumerate those offenses.

As the above discussion identifying the proper source of exclusionary zoning suggests, the exclusions must revolve around either a conviction or pending prosecution so as to not implicate the right to freedom of movement in whatever form. This ideological tethering mandates temporal boundaries on the exclusion, beyond those explicitly provided by the ordinances (ninety days for arrest, one year for conviction). In keeping with principles of bail, parole, and probation, there are three phases that must be considered in delimiting which individuals may legitimately be excluded and subject to arrest for criminal trespass in defined public areas. The first is the post-arrest/pre-trial phase. This phase begins upon the arrest of the individual, and lasts up until the underlying charges are dropped by the prosecutor, dismissed by a judge, or reach verdict by a trier of fact. During this phase, exclusion is entirely acceptable insofar as it recalls the parameters of bail principles.

For reasons discussed below related to who may legitimately issue exclusion notices, the exclusion cannot begin until after a judicial determination of probable cause. It necessarily follows that these civil exclusions should not "allow[ ] police to exclude people based on evidence that they know is insufficient to get a conviction" for the underlying crime,[178] and certainly should not be applied to individuals who have secured an acquittal.

The Cincinnati ordinance predicates the ninety-day pre-conviction exclusion of individuals "arrested or otherwise taken into custody within any drug exclusion zone" for enumerated activities upon the

177 *See* discussion *supra* Part I.A.1.

178 Green, *supra* note 66.

condition that such "exclusion cease immediately if the person arrested or otherwise taken into custody for [the enumerated crimes] is subsequently acquitted of the charge(s), said charge(s) is/are dismissed, or the charge(s) is/are no longer being pursued by law enforcement."[179] Ironically, the Portland Code, which, unlike its Cincinnati counterpart, survives today, has no such immediate cessation provision. For this reason, the Portland provision could conceivably be applied to an individual who had secured an acquittal, or against whom the charges have been dismissed or dropped. Application of ordinances restricting movement of such individuals cannot be based on bail, parole, and probation principles, and thus would be illegitimate restrictions under Fourth Amendment reasonableness analysis. But should the excluded individual enter a guilty plea, or upon reaching trial be convicted for the underlying charges, the exclusion will enter the second phase with a duration of one year as prescribed by the ordinances. As the discussion regarding the next two stages will make clear, however, that one-year, post-conviction exclusion is subject to further limitations based upon bail, parole, and probation principles.

The second phase to be considered in defining the limits of exclusionary zoning is the post-conviction period after release and before the conclusion of probation or parole. This is the simplest of the three phases, as it will likely involve a one-year exclusion taking effect upon the date of the individual's conviction for the underlying crime.[180] During this phase, the excluded individual will either be in jail serving the sentence for the secured conviction, or out on the streets subject to probation or parole. The individual's exclusion throughout this phase is legitimate insofar as it recalls those principles that validate restrictions on the movement of parolees and individuals on probation.

The third, and most problematic, phase is the period that follows the individual's release, probation, and parole. During this period, the convicted individual *cannot* be excluded, regardless of the fact that this phase may begin within the ordinances' one-year exclusion period. Quite simply, these individuals have served their time and may at that point be considered "out of the system." It is at this point that their fundamental rights, such as travel and association,[181] are no

179 CINCINNATI, OHIO, CODE ch. 755-5 (1999). *But see* PORTLAND, OR., CODE ch. 14B.20 (2003) (failing to provide for exclusion to cease upon acquittal, or dismissed or dropped charges).

180 CINCINNATI, OHIO, CODE ch. 755-5; PORTLAND, OR., CODE ch. 14B.20.30(B).

181 *See* discussion *supra* Part III.A.2, 3.

longer qualified, and the formerly excluded individual may be considered fully reinstated with rights. Despite the fact that they remain a threat as "potential recidivists," their exclusion upon reaching this phase must end. Of course, this phase is merely conceptual, and perhaps in practice, or in keeping with the spirit of the exclusion ordinances, probationary periods and paroles are or could be set to cover the duration of the intended year of exclusion. In such an event, this third phase could conceivably be defined out of existence. In any event, and in keeping with the principles of bail, parole, and probation upon which this examination founds the legitimacy of the exclusion zones, the exclusion of those targeted offenders must end upon the conclusion of their penance for the commission of the underlying crime.[182]

Who may issue the exclusion? When analyzed as a form of reasonable seizure consistent with the Fourth Amendment, the most controversial aspect of the exclusion zones becomes determining who is to be entrusted with the authority to impose the restraint. The U.S. Supreme Court held in *Gerstein v. Pugh* that "the Fourth Amendment requires a *judicial* determination of probable cause as a prerequisite to extended restraint of liberty following arrest."[183] The U.S. District Court in *Johnson v. City of Cincinnati* took note of *Gerstein* when rejecting Cincinnati's argument that the constitutionality of its drug exclusion zones should be determined under the Fourth Amendment reasonableness standard for governmental seizures of persons, concluding that "the City Council usurped judicial authority when it attempted to regulate the status of a class of arrestees and convicted persons."[184] The primary concern of *Gerstein*, however, was not the identity of the entity "regulat[ing] the *status* of a class of arrestees and convicted persons," but simply the identity of the entity issuing the *probable cause determination.* The Court's holding requires that "extended restraint of liberty following arrest" be preceded by a magistrate's neutral determination of probable cause, but it does not

182 Interestingly, this is an area where acceptance of the ordinances' implication of the right to travel, as well as other fundamental rights, would come to the exclusion zones' aid because triggering the compelling interests test returns the discussion to an analysis of the validity of an infringement upon a fundamental right, as opposed to the reliance of bail/parole/probation principles upon the qualification of the right itself. Rooted in analysis directed at the infringement rather than the right, the zones' ability to survive strict scrutiny as narrowly tailored to meet a compelling state interest would justify that infringement and allow a court to sustain the exclusion beyond the conclusion of a probationary period.

183 420 U.S. 103, 114 (1975) (emphasis added).

184 Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 740 (S.D. Ohio 2000), *aff'd*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003).

preclude a City Council's ability to restrain the movement of an individual once probable cause has been so determined. Though *Gerstein* requires a magistrate's neutral judgment on probable cause prior to imposing "extended restraint[s] of liberty following arrest," the decision does not mandate that it be a magistrate who imposes those restraints. Contrary to the Fourth Amendment holding in *Johnson*, a City Council that assumes a pro-active role in restraining the movement of an individual whom police had probable cause to apprehend for an enumerated drug crime does not run afoul of *Gerstein*. City councils, so closely accountable to their electorate,[185] are precisely the authority to be entrusted to "regulate the status of a class of arrestees and convicted persons."

Therefore, a slight tailoring of the exclusion process would effectively bring the drug exclusion zones in accord with *Gerstein* without sacrificing any of the ordinance's potency. Simply delaying the commencement of the exclusion until after the state prevails in a probable cause hearing before a neutral magistrate would satisfy *Gerstein*, while maintaining the integrity of the ordinance's fight against crime. The apprehended suspect remains in police custody in the interval between arrest and the probable cause hearing, posing no threat of returning to the endangered community protected by the drug exclusion zone ordinance. If probable cause is found to be lacking, the suspect is released and the exclusion never commences, in keeping with the provision that "exclusion cease immediately if the person arrested or otherwise taken into custody for [the enumerated crimes] is subsequently acquitted of the charge(s), said charge(s) is/are dismissed, or the charge(s) is/are no longer being pursued by law enforcement."[186]

The prerequisite judicial determination of probable cause would, however, require the abandonment of one particular use of exclusion notices. As the Portland ordinance now stands, and as the Cincinnati ordinance formerly provided, police could issue an exclusion notice to an individual while foregoing pursuit of the underlying drug-re-

185 *See, e.g.*, George Bush, *Federalism: Restoring the Balance*, 18 CUMB. L. REV. 125, 128 (1987) (arguing that some social programs may be more effectively run by local governments because they have closer ties to the people and are thus more accountable to the electorate); Scott Fruehwald, *If Men Were Angels: The New Judicial Activism in Theory and Practice*, 83 MARQ. L. REV. 435, 451 (1999) ("One person has a greater voice when the government unit is smaller, and local governments are more accountable to their citizens."); *see also* THE FEDERALIST NOS. 45, 46 (James Madison) (exhibiting the Founding Fathers' concern for centralized government and preference for the greater accountability of state and local governments).

186 CINCINNATI, OHIO, CODE ch. 755-5 (1999).

lated charges.[187] In such instances of "exclusion alone," the excluded individual may, as always, appeal the exclusion to a neutral magistrate,[188] which would be overturned if the city could not show "that the exclusion is based upon *probable cause* to believe that the appellant committed any of the offenses enumerated" by the Code.[189] It may be argued that the individual excluded without being charged for the triggering offense is nonetheless afforded the opportunity to avail himself of a probable cause hearing by way of the exclusion notice appeal, and, by waiving that opportunity, has in a sense pled guilty to the behavior that prompted his exclusion. As compelling as this reasoning may be, however, the exclusion inescapably remains an "extended restraint of liberty following arrest," and thus runs counter to *Gerstein*'s requirement that a judicial determination of probable cause *precede* such a restraint.

This limitation may be severe, but not fatal, to the effectiveness of the drug exclusion zones. The probable cause requirement allowing exclusions alone to survive appeal is the very same requirement of probable cause in arresting an individual for the underlying enumerated offenses.[190] Therefore, though it is the exclusion alone that is appealed, it is in fact the underlying crime giving rise to the exclusion that must survive a probable cause challenge, and thus, in theory, there should be no reason to pursue the exclusion of an individual without also pursuing conviction for the underlying offense. In the real world, however, there may be many reasons that police would choose to pursue exclusion alone rather than in conjunction with the underlying enumerated offense. Simple "on-the-spot" exclusion

187 CINCINNATI, OHIO, CODE ch. 755-9; PORTLAND, OR., CODE ch. 14B.20.050 (2003).

188 *See* CINCINNATI, OHIO, CODE ch. 755-11 ("The person to whom an exclusion notice is issued shall have a right to an appeal from the issuance of the notice."); *id.* ch. 755-11(a)(1) ("A hearing on the appeal shall be had to the safety director or the safety director's designee."); *id.* ch. 755-13(h) ("The decision [of the safety director or the safety director's designee] is final subject to appeal to a court of competent jurisdiction or reconsideration."); PORTLAND, OR., CODE ch. 14B.20.060(A) ("A person to whom notice of exclusion is issued shall have a right to appeal . . . ."); *id.* ch. 14B.20.060(A)(1) ("Appeals shall be made to the Code Hearings Officer of the City of Portland."); *id.* ch. 22.10.060 ("[A]ppeals from any determination by the Code Hearings Officer shall be by writ of review to the Circuit Court of Multnomah County, Oregon . . . .").

189 PORTLAND, OR., CODE ch. 14B.20.060(A)(8) (emphasis added); *see also* CINCINNATI, OHIO, CODE ch. 755-11(a)(3) (requiring that the exclusion be "based on conduct which constitutes any of the crimes enumerated" by the ordinance).

190 PORTLAND, OR., CODE ch. 14B.20.060(A)(8); *see also* CINCINNATI, OHIO, CODE ch. 755-11(a)(3).

would probably prove less taxing to a municipality's resources than dogged judicial pursuit of a conviction for every violation of a minor enumerated offense, such as possession of a small quantity of narcotics. Cynics may argue that the exclusion alone would present the police with the opportunity to abuse the ordinance by issuing the exclusion notices in borderline cases that skirt the edge of probable cause, hedging their bets that the excluded individual will not take the effort and cost to challenge the exclusion. Regardless of the practical reasons for foregoing the prosecution of underlying offenses when issuing exclusion notices, the proper operation of these aggressive zones requires that the police, to whom the zones are most directly entrusted, be held to the highest of standards, so as to avoid any appearance of impropriety or abuse, and thereby engage the safeguards of the judiciary at least in the minimal capacity required by *Gerstein.*

Why should police, rather than judges, issue the exclusions? Though the legality of vesting city councils, and the police acting through them, with the power to exclude certain criminal offenders has been established, the wisdom of such a power allocation remains to be considered. This proposed vesting does not call for a tectonic shift in the powers to issue terms of bail, parole, and probation. Rather, it is submitted that an extremely narrow and limited area based upon those principles be reserved to local city councils and their police for the implementation of these drug exclusion zones, and for very good reason. First, in light of the aggressive and controversial nature of exclusion, the implementation of exclusion zones should remain subject to the highest level of accountability. The police, to whom the powers and enforcement of the exclusion zones are most directly entrusted, derive their powers and authority from the municipal ordinances enacted by the city councils. The city councils are most subject to the will of the local people affected by the zones, both positively and negatively, by way of elections. The subjugation of such political entities to the check and balance of the affected electorate serves as a safeguard, allowing for the success or failure of the zones and their implementation to be reflected at the ballot box.

Furthermore, the accountability inherent in the electoral process is a check unknown to most judges. Indeed, the creation of laws mandating judicial sentences including identical exclusion provisions for the same time period from the same zones could arguably serve the same end as the civil exclusions designed by Portland and Cincinnati. Exclusions courtesy of judges would likely even meet less judicial resis-

tance.[191] Mandatory sentencing provisions, however, are creatures of federal and state, rather than municipal, legislatures. As such, accountability to the affected electorate of both the judges and those who vest them with such sentencing provisions is more diffused. Considering the delicate nature of this aggressive crime-fighting device, and the many dangers inherent in its implementation, electoral accountability is one of exclusionary zoning's greatest assets and should not be diluted by misallocation to the judiciary.

Second, the police who walk the affected streets can offer greater insights into the social landscape of the exclusion zones, allowing for more nimble, apt, and timely distribution of exclusion notices. The hands-on knowledge of beat cops makes effective application of trespass-zoning possible. As Professor Robert C. Ellickson suggests: "[A] city's first-best approach is . . . to employ trustworthy police officers and to give them significant discretion."[192] Of course, legitimate concerns may be raised that the police are not dispassionate in this cause to clean up drug-ridden streets, and perhaps, to counter their susceptibility to over-zealous exercise of their exclusion duties, the neutral judicial issuance of exclusion notices should be preferred. These concerns can expeditiously be met by delaying the commencement of exclusion until the state's prosecution for the underlying charge survives a probable cause hearing, thus ensuring that a neutral adjudication of the exclusion will be reached in every individual's case. If the underlying charge cannot stick, then that charge will be dropped or dismissed, and the exclusion will disappear with it. The judiciary will thus supplement the good judgment of the police.

What areas may be designated as exclusion zones? The limits to the actual size of the exclusion zones are worth noting. Just how big can these exclusion zones be? Certainly, they can extend no farther than the city limit—the municipal authority's jurisdiction extends only so far. For fear of treading too far into the taboo realm of banishment,

191 Even the district court in *Johnson*, which, in ultimately holding the ordinance unconstitutional, rejected the argument that the zones constituted a reasonable seizure of a person under the Fourth Amendment, "expresse[d] no opinion as to whether a trial court, in appropriate circumstances, could restrict the right of an individual arrestee or convict from entering an area known for high incidents of crime." Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 740 n.4 (S.D. Ohio 2000), *aff'd*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003). In addition, the court noted that "a federal district court stated that 'a state *court* clearly has the right to restrict the travel of convicted individuals within its jurisdiction.'" *Id.* at 740 (quoting Jones v. Evans, 932 F. Supp. 204, 207 (N.D. Ohio 1996)) (emphasis added by *Johnson* court).

192 Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165, 1173 (1996).

the zones cannot comprise the whole city. First and foremost, as is the case in Portland and formerly in Cincinnati, the zones must be designated as well-defined areas where there are higher incidents of drug related crime than in other similarly situated areas within that same city. By defining the zones' areas in "similarly situated" terms, banishment from the city as a whole would not be possible, as the zones would be designated through their relation to other areas not in need of such zoning. As incidents of crime decrease in those areas as a result of the zoning, the areas would be brought to crime levels more proportionate to the levels of other similarly situated areas.[193]

This selection by proportion of crime also ties into the "Broken Windows" theory of crime that provides the overall justification for exclusionary zoning. The zoning, by excluding those individuals whose presence would create physical or social disorder, facilitates the restoration of those areas otherwise unable to break the self-perpetuating cycle of crime. Left to neighboring areas enabled by a physical order that inhibits social disorder, excluded individuals find communities more immune to the otherwise deleterious effects of their presence.

The "Broken Windows" theory of crime also emphasizes the need to extend the individual's exclusion not only to the zone in which he or she has been apprehended, but also to all designated drug exclusion zones. This universal exclusion has not been embraced by the Portland ordinance, where police currently are given discretion to exclude from one or more zones if not all, and the City Council considered a proposal in May 2002 to limit "the area of banishment to the zone where the person was initially arrested, instead of banishing the person from all drug-free zones" in order to insulate zones from further civil rights challenges.[194] Such gaps in exclusion leave not only the equally endangered neighborhoods susceptible to the ill effects of an individual only partially excluded, but also the individual susceptible to recidivism by leaving open avenues supportive of his illegal trade. In both events, the failure to apply exclusion evenly across the neighborhoods in need would defeat the underpinnings of trespass-zoning, and, for this reason, the exclusion from one must mean an exclusion from all similarly situated.

193 Franzen, *supra* note 28 (reporting that one of Portland's drug exclusion zones was slated to "disappear . . ., apparently a victim of its own effectiveness. City officials say drug arrests there have dropped to the point that the . . . zone is no longer warranted.").

194 *Id.*

How broad must zone variances be? While the importance of broad variances reflecting legitimate purposes for excluded individuals to enter the drug exclusion zones has been discussed above in regard to assisting the zones in surviving strict scrutiny, under the principles of bail, parole, and probation they simply serve to demonstrate good policy. Variances for legitimate purposes allow the zones to be flexible and responsive to all concerns raised by this aggressive crime-control device. They allow the zones to respond to important civil rights concerns and implications without sacrificing the needs of the communities for which the zones are designed to protect and restore. The variances should be enumerated in advance within the drug exclusion zone ordinance, and they should be made readily available for issue by police officers, either on the spot and simultaneous with the exclusion notice, or at a police station in advance of entering the area for non-emergencies. The Portland City Council considered a proposal to this effect in May 2002 in hopes of insulating the zones from further civil rights challenges.[195] This Portland idea for "instant variances," again trusting in police discretion and making variances for legitimate purposes more easily attainable by excluded individuals, sufficiently meets legitimate civil rights concerns while at the same time respecting the rights of residents living within those zones to live free from inordinate fear of drug crime.

For all the benefits that drug exclusion zones provide within the confines of the U.S. Constitution, their failure to reach likely recidivists who are beyond conviction, probation, and parole leaves a glaring practical problem for cities seeking to employ trespass-zoning to fight crime. For this reason, the second, and even more compelling, municipal utilization of trespass-zoning should be considered and ultimately employed. This second method, enforcing trespass policies that follow on the heels of a municipal conveyance of public streets and thoroughfares in select neighborhoods to neighborhood property owners, should allow for a broader application of trespass-zoning, allowing municipalities and neighborhoods to confront the reality of recidivists head-on.

195 *Id.* ("[In g]ranting automatic waivers to all banished individuals who can show a legitimate need to travel in the zones, . . . [p]olice would issue the waivers, called variances, on the spot, along with the exclusion. Banished individuals no longer would have to go to a police precinct to request an application.").

B. A Better Alternative: The Circumspect Solution of Conveying Public Streets and Sidewalks to Neighborhood Property Owners

To meet the concern undeniably raised by the reality of recidivists and the failure of drug exclusion zones to reach such individuals once beyond their periods of parole, the role of trespass-zoning in the fight against drug crime must shift away from designations of public areas as either open access or restricted access, in favor of wholesale conversion of those areas from public to private. By doing so, municipalities will enable police to arrest for criminal trespass any individuals found on those premises who do not have a legitimate purpose for being there. Police protection of these premises, which extends to the formerly public thoroughfares, would enforce the private property rights of the neighborhood property owners without implicating the constitutional concerns otherwise raised by similar action conducted pursuant to the enforcement of drug exclusion zones. Municipalities may legitimately employ trespass-zoning by conveying public streets in well defined, preexisting neighborhoods to the property owners of those areas.

This method of trespass-zoning involves the enactment of ordinances by city councils that convey public, city-owned neighborhood streets and thoroughfares to local, neighborhood property owners. In so doing, the property owners with title to those streets and thoroughfares would be afforded the right to exclude. By enabling the most troubled municipal areas to invoke the protections of trespass law, those neighborhoods will be able both to engage in restoration of their social and physical order in the same manner made possible by the drug exclusion zones, and to extend the exclusions to likely recidivists beyond the reach of public drug exclusion zones.

1. Thoroughfare Conveyance To, and Trespass Policy Enforcement By, Public Housing Authorities

Despite the demonstrated success of trespass policies in reducing crime when employed within public housing developments, the Virginia Supreme Court in *Commonwealth v. Hicks* abrogated the public thoroughfare conveyance and corresponding trespass policy of the recipient Richmond Housing Authority.[196] It is important to note here that the conveyance and trespass policy at issue in *Hicks* involved a *public* housing authority—a quasi-governmental entity.[197] The govern-

196 Commonwealth v. Hicks, 563 S.E.2d 674, 681 (Va. 2002), *rev'd sub nom.* Virginia v. Hicks, 123 S. Ct. 2191 (2003).

197 *Id.* at 676.

mental posture of such housing authorities carries with it the possibilities of constitutional implications not present in the absence of governmental action, and therefore merits consideration separate from similar conveyances to private neighborhood property owners. It is also important, however, not to gloss over the daunting crime problems faced by public housing, where "drug dealers 'increasingly impos[e] a reign of terror on public and other federally assisted low-income housing tenants.'"[198] Public housing has proven to be the front line for this second strain of trespass-zoning, and as such provides great insights into its potential for success and strategies for its implementation both in public and private application.[199]

In *Hicks*, the excluded defendant, who had received written notification of his exclusion from the Housing Authority property prior to his ultimate apprehension for criminal trespass, mounted a facial challenge to the Housing Authority's trespass procedures and policy, asserting that the measures "inhibit[ed] the exercise of First Amendment rights [because] the impermissible applications of the law [were] substantial when 'judged in relation to the [policy's] plainly legitimate sweep.'"[200] Having accepted the facial challenge, the Virginia Supreme Court found that the public housing authority official who was entrusted with the discretion to determine which individuals had a legitimate purpose for entering the development could "even prohibit speech that [was] political or religious in nature."[201] Because "a citizen's First Amendment rights cannot be predicated upon the unfettered discretion of a government official," the Housing Authority's trespass policy was struck down as overly broad.[202]

198 Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 127 (2002) (quoting Anti-Drug Abuse Act of 1988, 42 U.S.C. § 11901(3) (2000)).

199 *See* Virginia v. Hicks, 123 S. Ct. 2191 (2003) (rejecting First Amendment challenge to housing authority trespass policy enveloping streets and sidewalks within a complex previously conveyed to the public housing authority from the City of Richmond); Vasquez v. Hous. Auth. of El Paso, 271 F.3d 198 (5th Cir. 2001) (finding that public housing authority's trespass policy enveloping the complex's thoroughfares violated the First Amendment by banning door-to-door campaigners from the premises), *reh'g granted en banc*, 289 F.3d 350 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 2274 (2003); Thompson v. Ashe, 250 F.3d 399 (6th Cir. 2001) (upholding public housing authority's list naming individuals to be excluded from premise's streets and sidewalks based on their likely prior involvement in criminal activities); Daniel v. City of Tampa, 38 F.3d 546 (11th Cir. 1994) (upholding public housing trespass policy extending to the streets and sidewalks within a housing development).

200 *Hicks*, 563 S.E.2d at 681 (Kinser, J., concurring in part and dissenting in part) (quoting City of Chicago v. Morales, 527 U.S. 41, 52 (1999) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973))).

201 *Id.* at 680–81.

202 *Id.*

The dissenting opinion in this six to five decision noted, however, that the court should not have heard the defendant's facial challenge to the conveyance and trespass policy. Facial challenges to statutes or, as at issue here, trespass policies, can proceed under two different doctrines—overbreadth or vagueness.[203] Because the trespass "policy's legitimate sweep prohibit[ed] trespassing, an activity that is not protected by the First Amendment," and its "legitimate reach dwarf[ed] its arguably impermissible applications," the dissent found that the defendant did not have standing to assert a facial challenge to the policy under the overbreadth doctrine.[204] The dissent also argued that the defendant could not assert a facial challenge under the vagueness doctrine, as his conduct in trespassing "was clearly proscribed" both by the policy itself and in the written "no trespass" notice he had previously received.[205] Therefore, the *Hicks* dissent found that the defendant did not have standing to assert a facial challenge to the conveyance and corresponding trespass policy under either the overbreadth or vagueness doctrines.[206]

In the end, the *Hicks* dissenters prevailed when the U.S. Supreme Court, in reversing the Virginia Supreme Court, rejected this facial challenge to the public housing authority's trespass policy. The Court found no showing of overbreadth, noting that the defendant "failed to demonstrate that this notice [of exclusion] would even be given to anyone engaged in constitutionally protected speech. . . . '[L]egitimate business or social purpose' evidently includes leafleting and demonstrating; otherwise, [the public housing official] would lack authority to permit those activities on [the public housing authority's] property."[207] Finding that the trespass policy did not bar entry for the exercise of any First Amendment activity, the Court held that

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203 *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 52 (1999).

> [I]mprecise laws can be attacked on their face under two different doctrines. First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.

Id. (citations omitted).

204 *Hicks*, 563 S.E.2d at 683 (Kinser, J., concurring in part and dissenting in part) (quoting York v. Ferber, 458 U.S. 747, 773 (1982)).

205 *Id.* (Kinser, J., concurring in part and dissenting in part).

206 *Id.* (Kinser, J., concurring in part and dissenting in part).

207 Virginia v. Hicks, 123 S. Ct. 2191, 2198 (2003).

this form of trespass-zoning was not substantially overbroad in relation to its plainly legitimate sweep.[208]

The U.S. Supreme Court also found that the trespass policy extending to the streets and sidewalks of the public housing authority would not even violate the First Amendment as applied to excluded persons whose purpose for entry would be to engage in constitutionally protected speech.[209] In fact, the Court found that such punishment for trespass carried no First Amendment implications whatsoever:

> Even assuming the streets of [the public housing authority] are a public forum, the notice-barment rule subjects to arrest those who reenter after trespassing and after being warned not to return—*regardless* of whether, upon their return, they seek to engage in speech. Neither the basis for the barment sanction (the prior trespass) nor its purpose (preventing future trespasses) has anything to do with the First Amendment. Punishing its violation by a person who wishes to engage in free speech no more implicates the First Amendment than would the punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration. Here, as there, it is [defendant's] nonexpressive *conduct*—his entry in violation of the notice-barment rule—not his speech, for which he is punished as a trespasser.[210]

The Supreme Court here crystallizes the crucial point behind trespass-zoning. As a result of one's prior bad behavior, and pursuant to lawful regulation, the extent of an individual's constitutional rights may be legitimately circumscribed. It is not the exercise of those rights in general that is abrogated, however, but simply the exercise of those rights in a particular place. As a creature of trespass law, these measures are not concerned with the purpose of entry, but rather the entry itself. Trespass-zoning is, at its core, a land-based restriction.

Furthermore, the Virginia Supreme Court's holding that the trespass policy contravened the First Amendment was deficient in several other respects. First, it failed to distinguish the potential duality of governmental action. In upholding the constitutionality of a public housing authority's eviction of public housing tenants on the basis of drug-related criminal activity committed by those tenants' household members, the U.S. Supreme Court in *Department of Housing and Urban Development v. Rucker* distinguished government action as a sovereign

208 *Id.* at 2198–99.
209 *Id.*
210 *Id.*

from its acts as a proprietor.[211] While the Court of Appeals cited cases suggesting that the housing authority's evictions contravened Fourteenth Amendment Due Process by permitting "tenants to be deprived of their property interest without any relationship to individual wrongdoing,"[212] the Supreme Court found those cases inapposite in that they centered upon "the acts of government as *sovereign*."[213] Rather, in *Rucker*, "the government," in the form of the public housing authority, was "not attempting to criminally punish or civilly regulate [the evicted tenants] as members of the general populace. It [was] instead acting as a *landlord of property that it owns*, invoking a clause in a lease to which [the tenants had] agreed."[214] As the Court in *Rucker* makes clear, the extent to which government action implicates constitutional rights may be contingent upon the nature of government action. Where the government acts "as a landlord of property that it owns," as did the Richmond Housing Authority in *Hicks*, the breadth of constitutional implications is far less wide than when it acts as a sovereign.[215]

As the dissent in *Hicks* noted, the Housing Authority's trespass policy did not "directly regulate activity protected by the First Amendment, but instead *limit[ed] access to government property*."[216] Limiting access to property to those with a legitimate purpose for being there, for the purpose of providing a safe, drug-free environment for residents, is firmly within the bounds of appropriate landlord action, perhaps even more so than the upheld invocation of a lease clause in *Rucker*. As the Supreme Court found in *Adderley v. Florida*:

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211 Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 135 (2002).

212 Rucker v. Davis, 237 F.3d 1113, 1124–25 (9th Cir. 2001) (citing Scales v. United States, 367 U.S. 203, 224–25 (1961); Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 490 (1915)), *rev'd*, 535 U.S. 125 (2002).

213 *Rucker*, 535 U.S. at 135 (emphasis added).

214 *Id.*

215 *Id.* Indeed, the *Rucker* Court implicitly affirmed Justice O'Connor's plurality opinion in *United States v. Kokinda*, in which the Court upheld a Postal Service prohibition of soliciting contributions on postal premises—including postal sidewalks. United States v. Kokinda, 497 U.S. 720, 737 (1990). The plurality noted that "[i]t is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s].'" *Id.* at 725 (plurality opinion) (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 896 (1961)).

216 Commonwealth v. Hicks, 563 S.E.2d 674, 682 (Va. 2002) (Kinser, J., concurring in part and dissenting in part) (emphasis added), *rev'd sub nom.* Virginia v. Hicks, 123 S. Ct. 2191 (2003).

> Nothing in the Constitution of the United States prevents [the government] from even-handed enforcement of [a] general trespass statute [with respect to public property]. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.[217]

The property under the control of the Richmond Housing Authority was lawfully dedicated to be used for residential purposes, and even-handed enforcement of its trespass policy to exclude those who did not have a legitimate purpose for being in the buildings or on the streets and sidewalks owned by the Housing Authority fall squarely within the authority's proprietary power as set forth by *Adderley*.

The *Adderley* decision notwithstanding, "[t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints."[218] Recognizing that "the standards by which limitations upon [a right of access to public property] differ depending on the character of the property at issue," the Court in *Perry Education Association v. Perry Local Educators' Association* announced a forum-based approach to determining the constitutionality of such governmental restrictions.[219] The Court identified three types of government-owned property: (1) traditional public fora, "which by long tradition or by government fiat have been devoted to assembly and debate"; (2) "property which the State has opened for use by the public as a place for expressive activity"; and (3) nonpublic fora, "which is not by tradition or designation a forum for public communication."[220] Noting that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government," the Supreme Court held that "the State may reserve [a nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[221]

Public Housing developments are widely recognized as nonpublic fora. In enforcing similar no-trespass restrictions of a Tampa public housing authority against a leafleteer, the Eleventh Circuit found:

> The official mission of the Housing Authority is to provide safe housing for its residents, not to supply non-residents with a place to disseminate ideas. Further, in practice, access to Housing Authority

217 Adderley v. Florida, 385 U.S. 39, 47 (1966).

218 *Kokinda*, 497 U.S. at 725 (plurality opinion).

219 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

220 *Id.* at 45–46.

221 *Id.* at 46 (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129, 131 n.7 (1981)).

> property is carefully limited to lawful residents, their invited guests, and those conducting official business. We therefore have little difficulty concluding that the Housing Authority property is a nonpublic forum.[222]

Though public housing developments such as that in *Hicks* may be comprised of many buildings adjoined by several streets and sidewalks, that does not preclude such complexes from nonpublic fora categorization. Even a Fifth Circuit ruling hostile to a trespass policy similar to that at issue in *Hicks* recognized in *Vasquez v. Housing Authority of El Paso* that "[c]haracterizing [a unit owned by the El Paso, Texas Housing Authority] as a public forum simply because of its streets and sidewalks . . . would be inconsistent with our understanding of the Court's forum analysis jurisprudence."[223]

Having placed public housing developments that envelop streets and sidewalks within the category of nonpublic fora, it must now be asked whether the Richmond Housing Authority's trespass policy, insofar as it regulates speech by enabling a public official in the course of assessing legitimate presence purposes to "prohibit speech that is political or religious in nature,"[224] was "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[225] This calls for an examination of the policy's reasonableness and viewpoint neutrality.

Although the Virginia Supreme Court in *Hicks* completely avoided forum analysis, other courts passing on similar exclusion policies have recognized the viewpoint neutrality of such measures. The Fifth Circuit found that the El Paso housing authority's trespass measures, which excluded a political candidate, were "viewpoint neutral because they appl[ied] to all nonresidents who [sought] to go door-to-door distributing literature," and prohibited such "campaigning regardless of party affiliation or the viewpoint espoused by the nonresident."[226] The Tampa Housing Authority's trespass policy that led to the arrest of the leafleteer in *Daniel* was found viewpoint-neutral be-

222 Daniel v. City of Tampa, 38 F.3d 546, 550 (11th Cir. 1994) (citing *Kokinda*, 497 U.S. at 727).

223 Vasquez v. Hous. Auth. of El Paso, 271 F.3d 198, 203 (5th Cir. 2001); *see also* United States v. Kokinda, 497 U.S. 720, 727 (1990) ("The presence of sidewalks and streets within the [military] base did not require a finding that it was a public forum.") (citing Greer v. Spock, 424 U.S. 828, 835–37 (1976)), *reh'g granted en banc*, 289 F.3d 350 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 2274 (2003).

224 Commonwealth v. Hicks, 563 S.E.2d 674, 680–81 (Va. 2002) (emphasis added), *rev'd sub nom.* Virginia v. Hicks, 123 S. Ct. 2191 (2003).

225 *Perry*, 460 U.S. at 46 (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)).

226 *Vasquez*, 271 F.3d at 203–04.

cause there was "no evidence that the police arrested [the leafleteer] because they disagreed with his message."[227] As the dissent in *Hicks* noted, the Richmond Housing Authority's trespass policy was an effort to "prohibit[ ] trespassing" and "limit[ ] access to government property" for the greater end of providing a "safe, drug-free environment" for its residents.[228] The trespass policy was in no way directed at suppressing expression, and thus passed the viewpoint-neutral prong of this test in that it applied equally to all non-residents, regardless of their message.

Greater controversy arises when considering the reasonableness of public housing trespass policies. In *Daniel*, the Tampa Housing Authority's exclusion of the leafleteer was found reasonable not only as a "means of combating the rampant drug and crime problems within the Housing Authority property," but also because the leafleteer had "unlimited access to the City-owned streets and sidewalks adjacent to the housing complex, allowing him an alternative means for distributing information to residents."[229] Such access to adjacent thoroughfares also featured prominently in the *Vasquez* trial court's finding that the El Paso Housing Authority's trespass policy excluding a political candidate was reasonable.[230]

The Fifth Circuit Court of Appeals in *Vasquez*, however, was unmoved by the availability of alternative access, finding the trespass measures of the El Paso Housing Authority unreasonable because "the citizens who reside in the [public housing] developments deserve access to political information in the same manner as other citizens of El Paso."[231] Unfortunately, the court of appeals ignored the trial court's cogent point that all of the public housing residents retained "the unfettered right to invite any political candidate to [their] residence[s] to discuss that individual's candidacy, without running afoul of the rules."[232] Nonetheless, the Fifth Circuit's *Vasquez* decision is but a minor setback to trespass-zoning. In striking down the El Paso Housing Authority's trespass measures as applied to the door-to-door politi-

227 *Daniel*, 38 F.3d at 550.

228 *Hicks*, 563 S.E.2d at 682, 683, 685 (Kinser, J., concurring in part and dissenting in part).

229 *Daniel*, 38 F.3d at 550.

230 Vasquez v. Hous. Auth. of El Paso, 103 F. Supp. 2d 927, 933 (W.D. Tex. 2000) ("The Court further notes that [the excluded individual] has access to the city-owned streets and sidewalks which are adjacent to [the housing authority's] complexes, and in some instances, are contained within those complexes, to disseminate his political message."), *rev'd*, 271 F.3d 198 (5th Cir. 2001), *reh'g granted en banc*, 289 F.3d 350 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 2274 (2003).

231 *Vasquez*, 271 F.3d at 204.

232 *Vasquez*, 103 F. Supp. 2d at 933.

cian, the court offered a means to resuscitate the policy in a manner that would not jeopardize the housing authority's proprietary interest of protecting its residents from nonresident crime:

> Although [the El Paso Housing Authority's] outright ban on door-to-door campaigning by nonresidents is unreasonable, requiring political campaigners to seek the same authorization as other individuals that have 'legitimate business on the premises' would be reasonable in light of [the Housing Authority's] goals of preventing crime by nonresidents.[233]

Thus, as was the case with drug exclusion zones, the viability of thoroughfare conveyance may depend upon the extent to which this trespass-zoning measure allows for otherwise-excluded individuals to gain entry into protected zones for the purpose of conducting legitimate activities therein. Requiring public housing authorities to open up their premises to political or religious solicitors, provided that those solicitors, like all other nonresidents, first report to the proper official for clearance and produce "sufficient credentials,"[234] would not hamper these communities from fighting drug crime and facilitating a safe and drug-free neighborhood. In reflecting on its *Vasquez* ruling, the Fifth Circuit admitted that "in [*Daniel*], the Eleventh Circuit reached an opposite conclusion with respect to a nearly identical statute."[235] But regardless of which line of reasoning is followed—be it the more lenient Eleventh Circuit or the more demanding Fifth—the legitimacy of public housing trespass policies extending to development streets and sidewalks survives First Amendment scrutiny.

Furthermore, public housing authority trespass policies extending to development streets and sidewalks also survive Fourteenth Amendment substantive and procedural due process challenges. In fact, they have done so in the even more poignant circumstances found in Knoxville, where the trespass policy was not a blanket restriction of all nonresidents without a legitimate purpose for being on the premises, as seen in Richmond, Tampa, and El Paso, but rather an exclusion directly targeted at specifically named individuals based on reliable information that linked those individuals to certain criminal activities. The Sixth Circuit upheld the Knoxville public housing authority's no-trespass list against, among other challenges, a substantive and procedural due process challenge by one of the excluded individuals who had been arrested for criminal trespass in violation of the

233 *Vasquez*, 271 F.3d at 205.

234 *Id.*

235 *Id.*

policy.[236] The *Thompson* court rejected the Fourteenth Amendment substantive due process challenge asserting that the policy "violate[d] [the excluded individual's] right to enter into and maintain certain intimate or private relationships" with family members who lived in the development because such visits do not constitute a fundamental right.[237] Furthermore, the court held that the excluded individual's "claimed interest [was] not sufficient to require procedural due process protection" because, in contrast to the Knoxville housing authority's "mandate[ ] [under] Tennessee law to provide its residents a safe place to live," the trespasser could neither establish that "his visits [were] welcome" nor that "his ability to visit with [family members] w[ould] be substantially limited if he [could] not visit them in that particular place."[238] In the absence of an established fundamental right or significant private interest, individuals, excluded from the streets and sidewalks of public housing developments cannot successfully assert a substantive or procedural due process right to perambulate on those thoroughfares.

2. Thoroughfare Conveyance To, and Trespass Policy Enforcement By, Preexisting Communities Comprised of Individually Owned Units

As the discussion above confronting the legal challenges to the conveyance of public thoroughfares to public housing authorities demonstrates, such use of trespass-zoning is not only constitutional, but also effective. Furthermore, its legitimacy need not be limited to public housing developments, and should in fact be extended to preexisting neighborhoods that choose to avail themselves of these effective problem-oriented solutions to street crime. While private neighborhoods can employ trespass-zoning over conveyed streets and sidewalks with far less legal implications than public housing authorities, the procedural impediments in its implementation are exponentially greater. Unlike public housing authorities, for private neighborhoods to utilize these trespass-zoning protections, a group of individual property owners must collectivize to take joint custody of their adjoining streets and sidewalks; these owners must allocate own-

236 Thompson v. Ashe, 250 F.3d 399, 407–08 (6th Cir. 2001).

237 *Id.* at 406–07.

238 *Id.* at 408. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

ership and the duties that come with it; and they must subsequently enforce the protective trespass policies. While these transaction costs are high, they are not insurmountable, as scholars such as George W. Liebmann, Robert C. Ellickson, and Robert H. Nelson make clear in setting forth a procedural checklist for preexisting communities to utilize in going private.[239]

Of course, the privatization of formerly public spaces properly raises a raft of civil rights concerns. However, just as gated communities are subject to the rule of law, so too will be those preexisting neighborhoods that choose to avail themselves of this trespass-zoning strain—for "a well-developed body of law" will be readily at hand.[240] As Professor Ellickson states:

> The operation of a [privatized preexisting neighborhood] would involve a fistful of legal issues. Fortunately the law of homeowners associations and other [residential community associations] can be consulted for guidance. Community association law provides precedents on, among other issues: procedures for electing directors; duties of directors; record-keeping and access to records; judicial review of decision making; amendments of the articles; annexations and disannexations of territory; and the creation of an umbrella association that encompasses smaller ones.[241]

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239 *See* Ellickson, *supra* note 54, at 100–06 (proposing that privatization of neighborhoods be made possible through (1) "Circulation of a Petition" to form a BLID; (2) "City Consideration of the Petition"; (3) "Submission [of the petition] for Approval in Referendum by Owners of a Supermajority of the District's Assessed Property Value"; (4) provision for the "Ongoing Administration" of the BLID; and (5) the institution of procedures for termination or "Disestablishment" of the BLID); George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335, 382–83 (1993) (pioneering the idea of the urban gated community by proposing that state governments enact enabling legislation permitting existing neighborhoods to form block associations upon two-thirds approval by neighborhood residents); Nelson, *supra* note 49, at 833–34 (providing for neighborhood privatization following (1) petition of state government to form a neighborhood association by owners owning more than sixty percent of the neighborhood property value; (2) state government consideration and approval of the petition under "standards of reasonableness"; (3) state authorization of the neighborhood to negotiate with the "appropriate municipal government" for the "transfer of ownership of municipal streets, parks, swimming pools, tennis courts, and other existing public lands and facilities located within the proposed newly private neighborhood"; (4) state scheduling of a neighborhood association election upon certifying transfer agreement worked out between state and local municipality; and (5) state supervision of the election).

240 Ellickson, *supra* note 54, at 100.

241 *Id.* at 104 (citing WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW (2d ed. 1988); ROBERT G. NATELSON, LAW OF PROPERTY OWNER ASSOCIATIONS (1989)).

Thus, those victimized by abuses of trespass-zoning conveyances may still secure redress by availing themselves of a circumspect body of law that has developed alongside the rise in gated communities.

Professor Nelson has found that "[m]any inner city residents would like to exclude criminals, hoodlums, drug dealers, truants, and others who often undermine the possibilities for a peaceful and vital neighborhood existence there."[242] He notes that "[p]rivate neighborhoods 'virtually guarantee . . . greater safety from crime: No criminals need apply, strangers are stopped before entering, and troublemakers are easily evicted.'"[243] Professor Nelson concludes that "[i]n inner city areas, creation of new private neighborhood associations would help greatly to improve the quality—including reducing the rate of crime—in these often deteriorated environments."[244] Professor Ellickson notes that "[t]he resounding success of [residential community associations] in new housing developments suggests the merits of enabling the stakeholders of inner-city neighborhoods to mimic—at the block level—the micro-institutions commonly found in the suburbs."[245] In this vein, Professor Nelson laments:

> Politically, rather than join the suburbs, civil rights groups and other organized supporters of inner city residents often seek to undermine suburban powers of exclusion. A wiser approach, could they overcome their ideological straight jackets, might be to bring suburban powers of exclusion—the rights of private property, if now in a collective form—into the inner city.[246]

The proposals of both Professors Ellickson and Nelson seek to explore means to enable preexisting and distressed communities to reap the advantages long enjoyed by newer and often suburban developments. Together in advancing their proposals for implementation of their respective neighborhood association or BLID, Professors Nelson and Ellickson provide a roadmap for conveying streets and sidewalks to preexisting private neighborhoods that is not only legally possible and transactionally efficient, but also socially desirable in enabling neighborhoods to fight crime with problem-oriented solutions.

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242 Nelson, *supra* note 49, at 865 (citing Wilson & Kelling, *supra* note 58, at 29).

243 *Id.* at 866 (quoting John DiIulio, Jr., *A More Gated Union*, WKLY. STANDARD, July 7, 1997, at 14).

244 *Id.* at 879.

245 Ellickson, *supra* note 54, at 109.

246 Nelson, *supra* note 49, at 866 (citing CHARLES MONROE HAAR, SUBURBS UNDER SIEGE (1996); MICHAEL N. DANIELSON, THE POLITICS OF EXCLUSION (1976)).

CONCLUSION

Drug exclusion zones work both on the streets and within the fabric of constitutional law. Even those courts most hostile to such zoning have in one form or another dispatched most of the constitutional objections raised under double jeopardy and freedom of association challenges. Though a compelling objection to the exclusion zones has arisen under the purported right to intrastate travel, the zones nonetheless survive that challenge by meeting it in three different and independently sufficient ways. First, the uncertain existence of the right to intrastate travel casts doubt on the cogency of challenges based on this purported fundamental freedom. Second, even if a fundamental right to intrastate travel does exist, the zones, narrowly tailored in combination with their many and broad variances to meet a compelling governmental interest, are able to withstand the required and more exacting strict scrutiny. Finally, and most significantly, this form of trespass-zoning bypasses altogether the fray otherwise implicated by the right to intrastate travel when rooted in those well-established principles upon which bail, probation, and parole are founded.

The drug exclusion zones' ability to evade constitutional challenges, however, constrains their effective breadth to only those phases between arrest and trial, and between release and the conclusion of probation or parole. These limitations hamstring the zones by leaving potential recidivists, who remain a crucial category for exclusion from sensitive areas in their statistically substantial contribution to both social and physical disorder, outside the zones' reach. Therefore, a more favorable alternative exists in the conveyance of public streets and sidewalks of logically and well-defined areas to neighborhood property owners. Whether they be public housing authorities or private associations, such thoroughfare conveyances promise the most circumspect eradication of drug crime, and crime in general, in those most severely distressed areas.

To counter the corrosive interplay of social and physical disorder that is destroying too many of their communities, local municipalities must aggressively target those dysfunctional areas within their jurisdiction with the same zeal and relentless determination as those who push the poisons. In offering problem-oriented solutions, these municipalities may finally make great strides in turning this crisis of national magnitude, and spell the beginning of the end for an otherwise endless cycle.