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Banishment: Stopping Stalkers at the County Line

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BANISHMENT: STOPPING STALKERS AT THE COUNTY LINE

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INTRODUCTION

For millions of Americans, stalking is a real problem with profound effects on their daily lives. Once thought to be a celebrity phenomenon,[1] stalking has proven to figure prominently in the lives of noncelebrities as well. The National Violence Against Women (NVAW) survey found that eight percent of women and two percent of men in the United States have been stalked at some time in their lives.[2] Further, an estimated 1,006,970 women and 370,990 men are stalked annually.[3] It seems that no one is immune to its attacks, as studies show that stalking crosses lines of gender, race, ethnicity, social class, and age.[4]

In the face of such a prevalent problem, one would expect law enforcement and the courts to be particularly responsive. However, the law has been slow to respond to stalking, unwilling to craft remedies to alleviate its unique problems. Beginning in 1990, every state has passed statutes criminalizing stalking.[5] While these antistalking

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1 *See* Paul E. Mullen & Michele Pathé, *Stalking*, 29 CRIME & JUST. 273, 288 (2002).

2 PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PUBL'N NO. 169592, STALKING IN AMERICA 2 (1998), *available at* http://www.ncjrs.org/pdffiles/169592.pdf.

3 *Id.*

4 *See* Mullen & Pathé, *supra* note 1, at 288. However, though stalking has the potential to reach everyone, the common perception of men as the stalkers and women as the victims actually does hold true. The NVAW survey revealed that seventy-eight percent of stalking victims are women, while men represent eight-seven percent of the stalkers. TJADEN & THOENNES, *supra* note 2, at 5. By contrast, the notion that people are stalked by strangers is not true: most victims know their stalker. *Id.*

5 For the antistalking statutes of all fifty states and the District of Columbia, see The National Center for Victims of Crime's Stalking Resource Center website. The

laws represented an improvement over existing remedies, they are sadly underenforced. Police have difficulty piecing together the many discrete events necessary to a stalking case and, as a result, plenty of stalking conduct goes unremedied.[6] Though the law enforcement community recognizes this deficiency and has adopted proposals for change,[7] these proposals do nothing for victims being stalked today. Thus, many victims must turn to the civil sector for help.

Civilly, the system of protective orders theoretically protects victims against stalkers who have eluded police attention or who have not yet crossed the line into criminal conduct. While the issuance of protective orders is prevalent,[8] their enforcement is not. According to the NVAW survey, sixty-nine percent of women and eighty-one percent of men said that their stalker violated a protective order.[9] One of the main problems is that law enforcement officers are often unaware of either the existence of a protective order or its specific terms.[10]

Frustrated with the inadequacies of current stalking law, one Wisconsin court crafted a unique solution: banishment. The defendant, Margaret O'Connor, had been stalking the plaintiff, Pamela Predick, and her family for a decade.[11] Court orders, injunctions, and stipulations did nothing to keep O'Connor at bay.[12] She made untold numbers of threats and, as the years passed, her behavior grew increasingly

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Nat'l Ctr. for Victims of Crime, Stalking Resource Center, http://www.ncvc.org/src/main.aspx?dbID=DB_State-byState_Statutes117 (last visited Nov. 9, 2005).

6 *See* OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, STALKING 3 (2004) [hereinafter STALKING], *available at* http://www.popcenter.org/Problems/PDFs/stalking.pdf (noting that "most police agencies across the country have not adopted distinct stalking-intervention protocols and procedures").

7 The Office of Community Oriented Policing Services (COPS), a division of the U.S. Department of Justice, has issued two lengthy reports dealing with inadequacies in current police response to stalking and proposals for change. *See generally* OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, CREATING AN EFFECTIVE STALKING PROTOCOL (2002) [hereinafter CREATING AN EFFECTIVE STALKING PROTOCOL], *available at* http://www.cops.usdoj.gov/mime/open.pdf?Item=808; STALKING, *supra* note 6.

8 For example, in Massachusetts, a protective order is issued every two minutes. OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, PUBL'N NO. 189190, ENFORCEMENT OF PROTECTIVE ORDERS 3 (2002) [hereinafter ENFORCEMENT OF PROTECTIVE ORDERS], *available at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin4/ncj189190.pdf.

9 TJADEN & THOENNES, *supra* note 2, at 11.

10 *See* ENFORCEMENT OF PROTECTIVE ORDERS, *supra* note 8, at 2.

11 Predick v. O'Connor, 660 N.W.2d 1, 2 (Wis. Ct. App. 2003).

12 *See id.* at 2–5 (detailing prior court orders entered against O'Connor).

more violent, as is common in many stalking cases.[13] Renting a car for the sole purpose of following Predick and trying to run her off the road,[14] O'Connor made it her "'whole mission in life . . . to destroy the Predicks.'"[15]

In October 2001, the trial court found O'Connor in contempt for her violation of an earlier court order prohibiting her from having any contact with the Predicks.[16] She violated this order when she again used a rental car to stalk the Predick family, this time trying to run another car off the road that contained the Predicks' daughter.[17] As a purge condition of the contempt, the trial court prohibited O'Connor from entering Walworth County unless appearing in court.[18] On appeal, the banishment condition survived attack, notwithstanding the fact that it "seem[ed] like it was taken from the script of some old Grade-B cowboy movie."[19] The Wisconsin Court of Appeals believed that O'Connor's particularly egregious behavior warranted the condition, stating that it "may finally keep the tormentor at bay."[20]

According to the court in *Predick*, stalking victims must be given a "'zone of protection.'"[21] In some cases, the issuance of a protective order may provide that zone of protection, putting the stalker on notice that the victim is taking the threats seriously. By contrast, some stalkers, like O'Connor, show no regard for traditional remedies like protective orders. Given the rate at which protective orders are violated,[22] they provide hollow comfort to victims faced with a stalker's escalating behavior. Criminal prosecution is also possible, but again, enforcement is low. It is here that intrastate banishment, issued

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13 *See* Jennifer L. Bradfield, Note, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 HARV. WOMEN'S L.J. 229, 235–36 (1998) ("Physical attacks usually follow months of harassing, following, or threatening, and repeated violations of civil protection orders.").

14 660 N.W.2d at 3.

15 Jacqueline Seibel, *Woman Told To Stay out of County: Appeals Court Upholds Order in Harassment Case*, MILWAUKEE J. SENTINEL, Jan. 22, 2003, at 1B (quoting Tina Busch, Predick's business partner), *available at* http://www.jsonline.com/news/wauk/jan03/112690.asp.

16 660 N.W.2d at 4.

17 *Id.* at 2, 4.

18 *Id.* at 4–5.

19 *Id.* at 2.

20 *Id.*

21 *Id.*

22 *See supra* note 9 and accompanying text.

under a court's contempt powers, can step in to fill the gap in existing law.[23]

While not suitable in all cases, intrastate banishment is an appropriate remedy for those stalkers who demonstrate that they are unable to abide by court orders. By expanding the zone of safety, a court decreases the possibility that the victim and the stalker will cross paths.[24] The effect is twofold: it removes potential temptation for the stalker and provides ease of mind to victims. Further, as exercised by courts under their contempt power, intrastate banishment has the added effects of coercing compliance with court orders and maintaining the integrity of the judiciary. Used in limited circumstances and with due regard for constitutional rights, intrastate banishment has the potential to become an effective weapon in the antistalking arsenal.

This Note analyzes the use of intrastate banishment as applied to stalking. Part I describes the history of banishment, exploring its use in antiquity and medieval times, as well as during the colonial era. Part II explores the recent use of banishment in the criminal sector, where some states have routinely upheld intrastate banishment as a condition of probation. Part III examines existing legal remedies for stalking, including criminal antistalking statutes and civil protective orders. Part IV demonstrates how intrastate banishment issued under a court's contempt powers is useful and indeed, necessary, in extreme stalking cases. Finally, Part V outlines attacks on banishment, based both on public policy as well as on constitutional grounds. Particular attention will be paid to the possibility of a federal constitutional right to intrastate travel, which represents intrastate banishment's most formidable foe. Ultimately, however, intrastate banishment survives these attacks and emerges in the conclusion as a viable alternative in egregious stalking cases.

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23 Courts uniformly agree that *inter*state banishment is prohibited by either State or Federal Constitution or public policy. *See infra* notes 50–52 and accompanying text. By contrast, *intra*state banishment does not pose the same types of constitutional questions and does not implicate relationships between states so as to invalidate these provisions. *See infra* Part V.

24 *See Predick*, 660 N.W.2d at 8 ("An area smaller than the county would provide [the stalker] with too many opportunities to meet up with her victims, who . . . live and work in that area.").

I. THE HISTORY OF BANISHMENT

A. *The Use of Banishment in Antiquity and Medieval Times*

Banishment existed in ancient civilizations as a punishment for the most severe crimes.[25] Because families and clans were necessary for survival, banishment was "a significant punishment."[26] However, given the nature of other punishments—slavery, prison, mutilation, beatings, and death—banishment appears to be a merciful alternative.[27] Indeed, banishment's development in medieval England was directly related to the Christian institutions of sanctuary and abjuration.[28] Under this system,

> anyone who committed a crime could flee for refuge to a sanctuary. If within forty days after taking sanctuary, the felon confessed his guilt to the coroner and took an oath to leave the kingdom and not to return without the king's permission, he was allowed to proceed in safety to a port assigned to him.[29]

Though widely used from the thirteenth to the sixteenth centuries,[30] abjuration grew out of favor and was eventually abolished in 1623.[31]

B. *English Use of Banishment in the Colonial Era*

In the wake of abjuration's fall in England, a new form of punishment grew in popularity: transportation.[32] Though many British citi-

25 *See, e.g.*, HAMMURABI'S LAWS § 154, at 89 (M.E.J. Richardson trans., 2000) (providing for the exile of a father in the case of incest with his daughter); James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29, 48 (1996) ("The Athenians sometimes imposed perpetual exile for homicide."). While the law of banishment was "on the books" in many ancient civilizations, it is unclear how much it was actually used.

26 Lindgren, *supra* note 25, at 47; *cf.* Lee H. Bowker, *Exile, Banishment and Transportation*, 24 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 67, 67 (1980) ("To many, social death was even more unthinkable than physical death.").

27 *See* Lindgren, *supra* note 25, at 40–51 (discussing alternative punishments).

28 Gerald R. Miller, *Banishment—A Medieval Tactic in Modern Criminal Law*, 5 UTAH L. REV. 365, 365 (1957).

29 *Id.* (citations omitted).

30 *See id.* at 366 ("A large part of England's criminals voluntarily banished themselves in this manner rather than answer to the civil authorities for their crimes.").

31 *Id.* The dissatisfaction with abjuration seems to result from several factors: (1) it began to lose its deterrent effect; (2) Henry VIII imposed restrictions on its use that practically nullified it; and (3) many men were abjuring themselves, "greatly diminishing the strength of the realm." *Id.* at 366 & n.9.

32 *See* Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 461 (1998) ("Transportation, which was simply a different name for banishment, dramatically rose in popularity in seventeenth century England.").

zens viewed prisons as "barbaric," they did not want dangerous criminals roaming the country at large.[33] The compromise was to send criminals abroad—either to America or to Australia.[34] Transportation existed as a possible penalty for many crimes, though it was usually limited to "reasonably threatening criminals."[35] While popular among the British, transportation was understandably criticized by the colonists in those emerging nations.[36] The British gradually abolished the practice between 1853 and 1864.[37]

C. Early Americans' Views of Banishment

Being on the receiving end of a criminal dumping program had a profound effect on early Americans' views of banishment. According to Zechariah Chafee,

> [T]he idea of such laws would have been repulsive to men of [the colonial era]. Banishments were a thing of the remote past . . . . Very likely the Constitution would have failed of ratification if the members of the state conventions had been told that the proposed national government would be able to throw people out of this country.[38]

It must be noted, however, that much of the early debate in America dealt with banishment from the *country*, whereas this Note will focus on banishment from a *county*. The banishments of Roger Williams[39] and Anne Hutchinson[40] for religious heresy suggest that the colonists,

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33 *Id.*

34 *Id.* at 461–62 (detailing the passage of the Transportation Act of 1718). For further discussion of criminal transportation, see generally A. ROGER EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES 1718–1775 (1987).

35 EKIRCH, *supra* note 34, at 31. It is important to note, however, that while transportation's use was limited, it resulted in fifty thousand people banished to America from the British Isles. *Id.* at 27.

36 *See* Miller, *supra* note 28, at 366 (discussing American and Australian critique of the system).

37 Snider, *supra* note 32, at 462–63.

38 ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 205–06 (1956); *see also* Miller, *supra* note 28, at 367 (noting "the bitterness instilled in the colonists . . . by transportation"); *cf.* EKIRCH, *supra* note 34, at 168 (stating that colonists blamed transported convicts for increasing crime).

39 *See* WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY 184 (1954) (noting that Williams was banished from the Massachusetts Bay Colony after the General Court found him guilty of sedition for his criticism of "what the majority called the true faith").

40 *See id.* at 135. Hutchinson was banished from the Massachusetts Bay Colony on November 8, 1637. *Id.* The court's verdict was succinct and severe: "'You are banished from out of our jurisdiction as being a woman not fit for our society.'" *Id.* (quoting the Massachusetts Bay Colony tribunal).

despite their avowed distaste for banishment from the country, had little problem imposing it to preserve the religious purity of the new colonies. Indeed, intrastate banishment existed as a punishment even after the colonial era.[41]

For example, a 1782 Georgia law allowed banishment from the state as punishment for treason.[42] Those defendants who did not comply within sixty days were apprehended and sent to a remote part of Britain.[43] Georgia continued to allow banishment from the state until 1877, when the Georgia Constitution was amended.[44] The 1877 amended version of the Georgia Constitution (currently in force) disallowed interstate banishment,[45] but intrastate banishment in Georgia was then (and still is) allowed.[46] Similarly, a New York law from 1893 allowed judges to impose banishment as a sentence.[47] Reviewing that law, the New York Supreme Court upheld its use in banishing a defendant from a county for ten years as punishment for larceny.[48]

These limited examples serve to highlight the fact that, while intrastate banishment might shock our modern sensibilities, it was an accepted method of punishment in America's early years. Indeed, for some states, like Georgia, intrastate banishment has withstood the test of time, existing in some form since America's founding.[49]

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41 *See* Matthew D. Borrelli, Note, *Banishment: The Constitutional and Public Policy Arguments Against This Revived Ancient Punishment*, 36 SUFFOLK U. L. REV. 469, 471–72 (2003) (discussing the banishment practices of Massachusetts, Georgia, and New York during the nineteenth century).

42 *See* Jason S. Alloy, Note, *"158-County Banishment" in Georgia: Constitutional Implications Under the State Constitution and the Federal Right To Travel*, 36 GA. L. REV. 1083, 1092 (2002).

43 *Id.* Georgia effectively gave the British a taste of their own medicine in banishing its criminals to Britain. This seems to cut against Chafee's interpretation of early Americans' views on banishment from the country. *See supra* note 38 and accompanying text.

44 Alloy, *supra* note 42, at 1092–93.

45 GA. CONST. art. I, § 1, ¶ 21 ("Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime.").

46 The Georgia Supreme Court has interpreted the 1877 Constitution as prohibiting banishment from the state, but not from a more narrowly defined geographical area. *See* State v. Collett, 208 S.E.2d 472 (Ga. 1974) (allowing banishment from seven counties in Georgia). More recently, Georgia courts have instituted 158-county banishment conditions as a probationary measure, where the defendants are banished from 158 out of the 159 counties in Georgia. *See generally* Alloy, *supra* note 42 (examining Georgia's use of 158-county banishment and its constitutional implications).

47 Borrelli, *supra* note 41, at 471.

48 People *ex rel.* Pasco v. Trombly, 160 N.Y.S. 67, 68 (App. Div. 1916).

49 *See supra* notes 42–46 and accompanying text.

II. USE OF INTRASTATE BANISHMENT IN THE CRIMINAL SECTOR

Intrastate banishment is also used in the criminal sector, where it is sometimes imposed as a condition of probation. This Part is intended to reinforce what Part I introduced, namely the existence of banishment in the American legal landscape. In the criminal context, banishment as a condition of probation must be reasonably related to the crime committed or to the defendant's potential future criminality for it to be upheld. Concern for victim safety, as well as the safety of the community, also factors into the analysis in some cases. Once those showings are made, however, courts have upheld intrastate banishment as a condition of probation.

Courts uniformly agree that *inter*state banishment as a condition of probation is prohibited by either State or Federal Constitution or by public policy.[50] According to the court in *People v. Baum*,[51] "To permit one State to dump its . . . criminals into another would . . . tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several States which is the basis of the Union itself."[52] Georgia has pushed the limits of this policy by instituting probation conditions banishing defendants from 158 out of the 159 counties in Georgia.[53]

By contrast, *intra*state banishment is often upheld as a condition of probation, provided it relates to the crime or to future criminality. Therefore, outcomes hinge on the criminal history of the defendant and the unique circumstances of the crime. For example, in *Cobb v. State*,[54] the Mississippi Supreme Court allowed banishment from a county where the defendant was convicted of aggravated assault for shooting his nephew.[55] Given the proximity of the victim's home to the defendant, the court found that the banishment condition was reasonably related to the defendant's crime and to his rehabilita-

50 *See, e.g.*, GA. CONST. art. I, § 1, ¶ 21 ("Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime."); McCreary v. State, 582 So. 2d 425, 428 (Miss. 1991) (holding that banishment from the state "implicates serious public policy questions against the dumping of convicts on another jurisdiction"); State v. Doughtie, 74 S.E.2d 922, 924 (N.C. 1953) ("A sentence of banishment is undoubtedly void.").

51 231 N.W. 95 (Mich. 1930).

52 *Id.* at 96.

53 *See* Alloy, *supra* note 42, at 1107 (arguing that 158-county banishment is de facto interstate banishment).

54 437 So. 2d 1218 (Miss. 1983).

55 *Id.* at 1220.

tion.[56] Similarly, in *Parrish v. State*,[57] the Georgia Court of Appeals allowed banishment from three counties where there was a "rational concern for the safety of others in the community and for [the] defendant's own safety."[58]

On the other hand, courts have overturned banishment from a county where it was unrelated to the defendant's rehabilitation or to the protection of society. For example, in *State v. Muhammad*,[59] the Montana Supreme Court held that banishment from a county was unrelated to the rehabilitation of a sex offender or to the protection of the victim and society.[60] The Oregon Court of Appeals reached a similar result in *State v. Ferre*,[61] holding that banishment from a county was not related to the underlying offenses, nor did it promote public safety.[62] Courts have also invalidated county-wide banishment on the theory that it is void against public policy.[63]

The main area of contention for many courts is whether banishment serves to rehabilitate defendants. Those courts finding that banishment does not function to rehabilitate offenders usually point to the fact that there is no community oversight of the defendant.[64] The community effectively washes its hands of the defendant and pushes him or her elsewhere. In some cases, this is a valid concern, particularly where the banishment condition is not reasonably related to the crime. However, where a defendant has demonstrated a pattern of criminality in a particular locale, it is easier to see why removal from former temptations could serve a rehabilitative purpose. According to

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56 *See id.*

57 355 S.E.2d 682 (Ga. Ct. App. 1987).

58 *Id.* at 684. For other Georgia cases upholding intrastate banishment provisions, see State v. Collett, 208 S.E.2d 472, 474 (Ga. 1974) (banishment from seven counties); Adams v. State, 527 S.E.2d 911, 912 (Ga. Ct. App. 2000) (banishment from four counties); Wyche v. State, 397 S.E.2d 738, 739 (Ga. Ct. App. 1990) (banishment from five counties); Edwards v. State, 327 S.E.2d 559, 561–62 (Ga. Ct. App. 1985) (banishment from seven counties).

59 43 P.3d 318 (Mont. 2002).

60 *See id.* at 324; *see also* Johnson v. State, 672 S.W.2d 621, 623 (Tex. App. 1984) ("[B]anishing appellant from the county . . . is not reasonably related to his rehabilitation, and unduly restricts his liberty.").

61 734 P.2d 888 (Or. Ct. App. 1987).

62 *See id.* at 889.

63 *See, e.g.*, People v. Blakeman, 339 P.2d 202, 203 (Cal. Ct. App. 1959) (stating that fundamental public policy against banishment outweighed the state's argument that the defendant would be given a fresh start).

64 *See* Snider, *supra* note 32, at 479; *see also* People v. Beach, 195 Cal. Rptr. 381, 387 (Ct. App. 1983) (stating that banishment as a condition of probation "is not necessarily rehabilitative").

the Georgia Court of Appeals in *Wyche v. State*,[65] "[B]anishment obviously serves a rehabilitative function in that it removes the offender from a locale in which he previously succumbed to the temptation of drugs."[66]

The "removal from temptation" theory is arguably even stronger in cases where victim safety is at issue. Dissenting in *State v. Muhammad*,[67] Judge Rice believed that the inadequacies prevalent in the restraining order regime served to further legitimize the need for intrastate banishment: "Interpreting our statute to allow [banishment] conditions fulfills an important public policy. . . . Cases abound where . . . defendants fail to abide by restraining orders. Police have insufficient resources to maintain 24 hour surveillance of such individuals. In such cases, banishment power in the courts provides additional security for victims . . . ."[68] Thus, particularly in cases where victim safety is a factor, intrastate banishment as a condition of probation serves to simultaneously remove a defendant from temptation and increase the zone of protection around victims.

III. EXISTING LEGAL REMEDIES FOR STALKING

Stalking is an escalating behavior.[69] A report by the National Institute of Justice found that stalkers "often commit a series of increasingly serious acts, which may become suddenly violent, and result in the victim's injury or death."[70]

This kind of escalation in violence was present in *Predick v. O'Connor*.[71] Over the course of nearly a decade, O'Connor engaged in

65 397 S.E.2d 738 (Ga. Ct. App. 1990).

66 *Id.* at 739 (upholding banishment from five counties); *see also* State v. Collett, 208 S.E.2d 472, 474 (Ga. 1974) (holding that banishment from seven counties was not shown to lack "a logical relationship" to rehabilitation for a drug crime); *cf.* Oyoghok v. Anchorage, 641 P.2d 1267, 1270 (Alaska Ct. App. 1982) (prohibiting a convicted prostitute from being within a certain radius of a known prostitution area was reasonably related to the crime and to rehabilitation). *But cf.* Edison v. State, 709 P.2d 510, 512 (Alaska Ct. App. 1985) (holding that banishment from a town was not reasonably related to rehabilitation for a drunk driving offense).

67 43 P.3d 318 (Mont. 2002) (invalidating intrastate banishment in the case of a sex offender).

68 *Id.* at 328 (Rice, J., dissenting). As Part III.B will demonstrate, Judge Rice's characterization of the inadequacies of restraining orders is sadly true.

69 *See supra* note 13.

70 NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PROJECT TO DEVELOP A MODEL ANTI-STALKING CODE FOR STATES 49 (1993) [hereinafter MODEL CODE], *available at* http://www.popcenter.org/Problems/Supplemental_Material/Stalking/NCJA_1993.pdf.

71 660 N.W.2d 1 (Wis. Ct. App. 2003).

various methods of stalking. Her primary methods of harassment in the early years included phoning the victim, her friends and family, as well as coworkers, medical providers, and utility services.[72] However, after four years of this behavior, O'Connor grew violent, renting cars for the sole purpose of finding the victim and running her off the road.[73] Not surprisingly, the Wisconsin Court of Appeals found that O'Connor harbored a "dangerous fixation on the people she torments."[74]

Given a stalker's likely ascent into physical violence, the law must be prepared to respond in kind. The challenge for courts and law enforcement is in affording a proper amount of attention to a stalker's threats, while at the same time dealing with limited resources. For those who assess the situation correctly, the stalking can be stopped in its incipiency. An incorrect analysis, however, can prove to be fatal for a victim.[75]

States currently deal with stalking in two ways: criminal antistalking statutes and civil protective orders. As will be demonstrated below, there is a significant amount of stalking that goes unremedied. This is most evident in cases where a defendant continually violates civil protective orders, but the conduct at issue either is not severe enough to qualify as criminal or does not receive adequate attention from law enforcement officers. It is here that courts should use intrastate banishment under their powers of civil contempt to fashion a remedy that is at once severe in its effects and easy to enforce.

A. The Criminal Sector's Attempts To Deal with Stalking

1. Antistalking Statutes

Beginning with California in 1990,[76] every state has adopted an antistalking statute making stalking a crime.[77] Though most states passed such legislation in the early 1990s, they later revised the statutes to reflect the National Institute of Justice's Model Anti-Stalking

72 *See id.* at 2–3.

73 *See id.* at 3.

74 *Id.* at 2.

75 *See* Mullen & Pathé, *supra* note 1, at 303 ("Several well-publicized stalking cases have culminated in homicidal violence.").

76 California's passage of an antistalking statute was directly related to a number of high profile stalking incidents, particularly the murder of actress Rebecca Schaeffer by an obsessed fan. *See* Bradfield, *supra* note 13, at 243–44. For the current California antistalking statute, see CAL. PENAL CODE § 646.9 (West 1999).

77 *See supra* note 5.

Code (the "Model Code").[78] As adopted by the states, antistalking legislation varies[79] and a full survey of each state's statute is beyond the scope of this Note. Generally, however, antistalking statutes require three basic elements: (1) a course of conduct, (2) the intent to cause fear, and (3) actually causing fear to the victim.[80] Implicit in these requirements is the fact that stalking is not a one-time occurrence.[81] This requires the piecing together of events taking place over the course of days, months, and sometimes even years. By its very nature, therefore, stalking is a difficult crime to police.[82]

2. Enforcement Deficiencies

The most carefully drafted of antistalking statutes is of no value without police support.[83] In drafting its antistalking statute, the Colorado General Assembly explicitly encouraged police to intervene before stalking escalates.[84] The law enforcement community, while

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78 According to the Model Code:

> Any person who:
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> (a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and
>
> (b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and
>
> (c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family;
>
> is guilty of stalking.

MODEL CODE, *supra* note 70, at 43–44.

79 While the Model Code provided guidance to the states, the resulting effects were less than uniform. *See* Carol E. Jordan et al., *Stalking: Cultural, Clinical and Legal Considerations*, 38 BRANDEIS L.J. 513, 554–63 (2000) (discussing antistalking legislation in a number of states).

80 *See supra* note 78.

81 *See, e.g.*, CAL. PENAL CODE § 646.9(f) ("For the purposes of this section, 'course of conduct' means a pattern of conduct composed of a series of acts occurring over a period of time, however short, evidencing a continuity of purpose."); *see* TJADEN & THOENNES, *supra* note 2, at 2 (noting that "most States require that the alleged stalker engage in a course of conduct showing that the crime was not an isolated event").

82 *See, e.g.*, CREATING AN EFFECTIVE STALKING PROTOCOL, *supra* note 7, at 13–14.

83 *Id.* at 3 ("[W]hile enacting legislation is a critical step, laws alone accomplish little without clear anti-stalking policies and effective enforcement on the ground.").

84 COLO. REV. STAT. ANN. § 18-9-111(4)(a) (West 2004 & Supp. 2005) ("The general assembly hereby recognizes the seriousness posed by stalking and adopts the pro-

well aware of its task,[85] has experienced difficulties dealing with stalking. Recent studies show that most stalking enforcement problems are directly tied to low victim reporting rates and ineffective police response.

The NVAW survey found that only fifty-three percent of stalking cases are actually reported to the police.[86] According to that survey, "[w]hen asked why they chose not to report their stalking to the police, victims were most likely to state that their stalking was not a police matter, they thought the police would not be able to do anything, or they feared reprisals from their stalkers."[87] Another potential reason for not reporting stalking is that victims "may minimize the risk a stalker poses or blame themselves for the stalker's behavior."[88]

Those victims actually reporting stalking to the police often meet with low response rates. For example, in the NVAW survey, in nearly twenty percent of reported stalking cases, the police "[d]id nothing."[89] Further, only twenty-two percent of stalkers in the NVAW survey were criminally prosecuted.[90] At the risk of completely undermining police response to stalking, it should be noted that fifty-four percent of stalkers criminally tried were convicted, and of those convicted nearly two-thirds were in jail or prison.[91] The problem, therefore, lies not in securing a conviction, but rather in getting there. That is, in identifying and piecing together the events of a stalking case.

For its part, the law enforcement community recognizes the deficiencies in existing stalking policing and has attempted to develop a model stalking protocol.[92] Early identification is listed as a crucial factor for improvement,[93] as is threat assessment.[94] To further simplify police response to stalking, a four-level intervention system has been

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visions of this . . . section with the goal of encouraging and authorizing effective intervention before stalking can escalate into behavior that has even more serious consequences.").

85 *See supra* note 7 and accompanying text.

86 TJADEN & THOENNES, *supra* note 2, at 9.

87 *Id.* at 9–10.

88 STALKING, *supra* note 6, at 3.

89 TJADEN & THOENNES, *supra* note 2, at 9.

90 *Id.* at 10.

91 *Id.* at 11.

92 CREATING AN EFFECTIVE STALKING PROTOCOL, *supra* note 7.

93 *See id.* at 28 ("Early recognition of potential stalking cases is critical to aid in victims' safety."); STALKING, *supra* note 6, at 17 ("[T]he sooner police identify stalking, the greater the chance of protecting the victim from physical harm.").

94 STALKING, *supra* note 6, at 20 ("Threat assessment is crucial to controlling stalking.").

suggested, with level one as "[f]irst police awareness"[95] and level four as "[e]mergency intervention."[96]

Law enforcement's recognition of and proposals to the problem are to be commended. However, 150 pages of suggestions for the future[97] do nothing to help those dealing with stalking today. Thus, victims are often forced to turn to the civil sector, where they meet with equally inefficient systems of response.

B. Underenforcement of Civil Protective Orders

In the face of the criminal system's inability to deal with stalking, it is shocking that the civil system has proven equally unable to answer stalking victims' cries for help. Protective orders[98] theoretically protect stalking victims, but as will be demonstrated, underenforcement renders them virtually meaningless in many stalking cases. Recall that according to the NVAW survey, sixty-nine percent of women and eighty-one percent of men said that their stalker violated a protective order.[99]

The underenforcement of protective orders can be attributed in part to administrative difficulties. When responding to calls for help, law enforcement officers are often unaware of either the existence of a protective order or its specific terms.[100] Because they are individually tailored to the specific stalker (e.g., prohibiting the stalker from being within a certain number of feet from a victim or from being at certain places like the victim's home or work), it is not surprising that officers do not have the time or the resources to deal with the particularities of protective orders. Massachusetts sought to remedy this by creating the Massachusetts Registry of Civil Restraining Orders, which is used by both law enforcement personnel and courts.[101] Following Massachusetts's lead, other states attempted to standardize the protective order process.[102]

Despite these efforts, though, the proliferation of protective orders undoubtedly slows the system.[103] It stands to reason that law en-

95 *Id.* at 22.

96 *Id.* at 23.

97 *See generally* CREATING AN EFFECTIVE STALKING PROTOCOL, *supra* note 7; STALKING, *supra* note 6.

98 Protective orders are also referred to as "restraining orders" or "injunctions." ENFORCEMENT OF PROTECTIVE ORDERS, *supra* note 8, at 1.

99 *See supra* text accompanying note 9.

100 *See supra* text accompanying note 10.

101 ENFORCEMENT OF PROTECTIVE ORDERS, *supra* note 8, at 2.

102 *See id.* at 3.

103 *See supra* note 8 and accompanying text.

forcement officers and courts are going to be constantly behind when attempting to ascertain the existence and terms of a protective order. While the inevitable delay might cause only inconvenience or annoyance in some cases, it might prove to be a severe deficiency in extreme stalking cases.

A final problem with protective orders is that they must be renewed in order to remain effective. Most states limit the duration of a protective order to one to three years.[104] To renew a protective order, a victim must usually face the stalker in court, having the effect of reconnecting a stalker with his or her victim.[105] Such a result is particularly unsavory where a victim has gone into hiding to avoid the stalker.[106]

IV. INTRASTATE BANISHMENT UNDER COURTS' CONTEMPT POWERS

Clearly, the existing criminal and civil systems leave much stalking behavior unremedied. While law enforcement has taken steps towards curing deficiencies in the respective systems, victims need security now. It is here that intrastate banishment, imposed under a court's contempt power, can fill the gap. Properly reserved for those cases where a defendant has demonstrated unwillingness to comply with court orders, intrastate banishment issued as a purge condition of contempt simultaneously punishes the disobedient defendant, creates a zone of safety for the victim, and encourages respect for the court.

Courts possess inherent powers of contempt[107] which they use to coerce recalcitrant defendants to comply with court

104 ENFORCEMENT OF PROTECTIVE ORDERS, *supra* note 8, at 5. Some states have extended the duration of a protective order. *See, e.g.*, CAL. PENAL CODE § 646.9(k) (West 1999) (granting the sentencing court the power to issue a restraining order that is effective for up to ten years); IOWA CODE ANN. § 708.12.2 (West 2003) (authorizing a five-year protective order). However, both of these extensions are only available if the stalker has committed the *crime* of stalking and do not extend to the civil sector.

105 *See* ENFORCEMENT OF PROTECTIVE ORDERS, *supra* note 8, at 5; *see also* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, PUBL'N NO. 189192, STRENGTHENING ANTI-STALKING STATUTES 5 (2002), *available at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin1/ncj189192.pdf (stating that "reapplying for a protective order may inadvertently reconnect stalkers with their victims").

106 *See* ENFORCEMENT OF PROTECTIVE ORDERS, *supra* note 8, at 5.

107 *See, e.g.*, State v. Roll, 298 A.2d 867, 875 (Md. 1973) (noting history of the courts' "inherent" contempt powers); Zakany v. Zakany, 459 N.E.2d 870, 873 (Ohio 1984) ("[C]ertain powers . . . are necessary for the orderly and efficient exercise of justice . . . . Such inherent power includes the authority to punish the disobedience of the court's orders with contempt proceedings." (citations omitted)).

orders.[108] Whereas criminal contempt punishes a defendant for previous misconduct, civil coercive contempt is designed to encourage future compliance.[109] Because a finding of contempt depends on the existence of a prior court order, this remedy necessarily assumes that a court has already issued a court order, which the defendant has disobeyed. In an extreme stalking case, where the defendant has demonstrated a marked disrespect for court orders, the case for coercive contempt is especially strong. The court would issue an intrastate banishment provision as a condition to purge the contempt, just as the court did in *Predick v. O'Connor*.[110]

An intrastate banishment provision is simple in its terms and allows law enforcement officers to act immediately without being forced to peruse pages of protective order conditions. Particularly where the stalker is an egregious violator of court orders, police need provisions that are easy to understand and to apply in the face of escalating violence. Intrastate banishment is such a provision: if the stalker is found in the county, he or she will be in contempt. In some situations, this immediacy of action might successfully stop a stalker's violent behavior in its incipiency.

Of course, the effectiveness of intrastate banishment as a condition of contempt invariably hinges on the responsiveness of law enforcement officers. Though intrastate banishment provisions are easier to ascertain and to apply than protective orders, they will do no good without the help of capable police officers to enforce them. Nevertheless, given the gross inadequacies in current law, it appears that a remedy that at once simplifies response and strongly coerces compliance is necessary.

V. ATTACKS ON BANISHMENT

Intrastate banishment is only useful, however, if it can withstand defendants' legal attacks. Courts and commentators alike criticize banishment on several different grounds, usually discussing the constitutional implications and public policy concerns. This Part will outline a number of those arguments against banishment, ultimately concluding that intrastate banishment, when reserved for egregious cases of court order violations, withstands these attacks and is therefore an important additional remedy for courts.

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108 *See, e.g.*, *Roll*, 298 A.2d at 876 ("A civil contempt proceeding is intended to preserve and enforce the rights of private parties to a suit and to compel obedience to orders and decrees . . . .").

109 *See, e.g.*, *id.*

110 660 N.W.2d 1, 4 (Wis. Ct. App. 2003).

A. The Right To Travel

1. Federal Constitutional Right To Travel

Although not explicitly mentioned in the Constitution, the right to travel has been recognized by the Supreme Court as a fundamental right.[111] The Court's discussion of the right to travel has been limited to the issue of *inter*state travel, with the Court most recently attributing the right to such travel to either the Privileges or Immunities Clause of the Fourteenth Amendment,[112] the Privileges and Immunities Clause of Article IV,[113] or the Equal Protection Clause of the Fourteenth Amendment.[114] As to *intra*state travel, however, the Court has only considered the issue in passing.[115]

The Circuit Courts of Appeal are split on intrastate travel, with the majority of courts finding that there is a federal constitutional right to intrastate travel.[116] As will be demonstrated in this Part, those

111 United States v. Guest, 383 U.S. 745, 757 (1966) ("The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."). That the right to travel is not explicitly mentioned in the Constitution was of no import to the Court in *Guest*, mainly because it was seen as "a right so elementary" that it was a "necessary concomitant" of life in the Union. *Id.* at 758. The Court in *Guest* never attributed the right to travel to any particular constitutional provision, finding simply that "[a]ll have agreed that the right exists." *Id.* at 759.

112 *See* Saenz v. Roe, 526 U.S. 489, 509 (1999) (finding unconstitutional a California law basing welfare benefits for the first year of California residence on the level of benefits the recipient had in his or her former state of residence). Given the narrow interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*, 83 U.S. 36 (1873), it is surprising that the Court used it to find a right to interstate travel. *Saenz* marks the second time that the Privileges or Immunities Clause of the Fourteenth Amendment has been invoked in finding a right to travel. *See* Edwards v. California, 314 U.S. 160, 178 (1941) (Douglas, J., concurring) ("The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and [sic] immunities clause of the Fourteenth Amendment against state interference.").

113 *Saenz*, 526 U.S. at 501.

114 Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 911 (1986) (plurality opinion) (invalidating a New York law that gave hiring preference to veterans who were New York residents); Martinez v. Bynum, 461 U.S. 321, 333 (1983) (upholding a law denying free public education based on residency requirements).

115 Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 255–56 (1974) ("Even were we to draw a constitutional distinction between interstate and intrastate travel, [it is] a question we do not now consider . . . .").

116 Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002) (recognizing a federal constitutional right to intrastate travel); Lutz v. City of York, 899 F.2d 255, 267 (3d Cir. 1990) (same); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d

cases finding a federal right to intrastate travel stand on shaky ground when examined for precedents used and reasoning employed. Further, even if the reasoning were to be accepted, it should be confined to the factual scenarios of those cases. Prior cases finding a federal right to intrastate travel have examined it in the context of drug exclusion zones,[117] cruising,[118] and public housing durational residency requirements.[119] Stalking is distinguishable, representing safety concerns entirely absent in those cases. Therefore, there should be no federal right to intrastate travel when evaluating banishment in the context of stalking.

In *Johnson v. City of Cincinnati*,[120] the Sixth Circuit invalidated a city ordinance that excluded an individual with a drug conviction from certain drug exclusion zones in the city.[121] Recognizing the right to intrastate travel, *Johnson* specifically distinguished an earlier case,[122] *Wardwell v. Board of Education of Cincinnati*,[123] where the same court had held that there was no federal constitutional right to intrastate travel.[124] Ultimately settling on substantive due process as the source of the right to intrastate travel,[125] the *Johnson* court attributed the existence of the right to historical endorsement and practical necessity.[126]

Johnson has been criticized for its reasoning, particularly for its use of the "freedom of movement" cases in finding a right to intrastate travel.[127] Basing the existence of the right to intrastate travel on cases

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Cir. 1971) (same). *But see* Wright v. City of Jackson, 506 F.2d 900, 901 (5th Cir. 1975) (denying the existence of a federal constitutional right to intrastate travel). Other courts have avoided the intrastate travel inquiry altogether by narrowly framing the issues of the case. *See, e.g.*, Doe v. City of Lafayette, 377 F.3d 757, 769 (7th Cir. 2004) (en banc) (construing a sex offender's desire to enter and to remain in public parks as a right to loiter, not to travel).

117 *Johnson*, 310 F.3d at 487–88.

118 *Lutz*, 899 F.2d at 256–57.

119 *King*, 442 F.2d at 646–47.

120 310 F.3d 484.

121 *Id.* at 487. The Supreme Court of Ohio struck down the same ordinance one year earlier in *State v. Burnett*, 755 N.E.2d 857, 868 (Ohio 2001).

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

123 529 F.2d 625 (6th Cir. 1976).

124 *Id.* at 627 (upholding a city ordinance requiring all Cincinnati teachers to establish residency in the city school district within ninety days of employment).

125 310 F.3d at 498.

126 *Id.* ("In view of the historical endorsement of a right to intrastate travel and the practical necessity of such a right, we hold that the Constitution protects a right to travel locally through public spaces and roadways.").

127 *See* Peter M. Flanagan, Note, *Trespass-Zoning: Ensuring Neighborhoods a Safer Future by Excluding Those with a Criminal Past*, 79 NOTRE DAME L. REV. 327, 353 (2003)

like *Kent v. Dulles*[128] and *Kolender v. Lawson*[129] resulted in a "mixed bag" of rights, commingling protections found in other cases but not specifically implicated in *Johnson.* For example, the issue in *Kent* was whether passports could be denied to Communists.[130] This implicates the right to foreign travel, a right that, while deserving of constitutional protection, has not enjoyed the same status as the right to interstate travel.[131] *Kolender* dealt with First Amendment vagueness issues in an antiloitering statute.[132] To ground the right to intrastate travel in these cases[133] raises well founded suspicions and *Johnson* cannot withstand the attack that it impermissibly drew on protections acknowledged in other cases but necessarily limited to those spheres.[134]

Yet a survey of the Supreme Court's cases on the right to travel demonstrates that the Court has been markedly lenient in its reasoning here.[135] Do these allowances in the realm of *inter*state travel translate to *intra*state travel reasoning? The answer, it seems, may be found in *Bray v. Alexandria Women's Health Clinic,*[136] where the Court again distinguished between *inter*state and *intra*state travel.[137] This distinguishing, seen in *Memorial Hospital*[138] and again in *Bray,* reveals

("The right to freedom of movement that has developed from Supreme Court cases such as [*Kent* and *Kolender*] cannot . . . be extended to envelop the purported right to intrastate travel.").

128 357 U.S. 116, 126 (1958) ("Freedom of movement is basic in our scheme of values."), *cited with approval in Johnson,* 310 F.3d at 497.

129 461 U.S. 352, 358, 361 (1983) (finding a loitering statute unconstitutional on vagueness grounds), *citied with approval in Johnson,* 310 F.3d at 497.

130 357 U.S. at 117–20.

131 *See, e.g.,* Califano v. Aznavorian, 439 U.S. 170, 178 (1978) (upholding a provision of the Social Security Act that denied benefits during any month during which the individual was out of the United States).

> The constitutional right of interstate travel is virtually unqualified. By contrast, the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. . . . Thus, legislation which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel . . . .

Id. at 176–77 (internal quotation marks omitted) (citations omitted).

132 461 U.S. at 353–54.

133 *Johnson,* 310 F.3d at 497–98 ("In light of these cases, we find that the right to travel locally through public spaces and roadways enjoys a unique and protected place in our national heritage.").

134 *See supra* note 127 and accompanying text.

135 *See supra* notes 111–14 and accompanying text.

136 506 U.S. 263 (1993).

137 *Id.* at 277 (holding that prohibitions against anti-abortion demonstrations are "purely intrastate restriction[s]" that do "not implicate the right of interstate travel").

138 415 U.S. 250 (1974); *see supra* note 115.

that the Court does not view *intra*state travel as a necessary concomitant of *inter*state travel that is worthy of federal constitutional protection.[139] This analysis has not garnered support in the majority of the Courts of Appeals, however, where courts insist on finding a right to intrastate travel.[140]

This stubborn insistence on finding a right to intrastate travel inevitably opens the door to an ad hoc analysis. The *Johnson* court's appeal to history and practical necessity illustrates the analytical struggles that ensue when the courts attempt to attribute the right to intrastate travel to a particular constitutional source.[141] The court in *Lutz v. City of York*[142] found that the right to travel has been attributed to seven different sources: "the Article IV Privileges and Immunities Clause, the Fourteenth Amendment Privileges and Immunities Clause, a conception of national citizenship said to be implicit in 'the structural logic of the Constitution itself,' the Commerce Clause, the Equal Protection Clause, and each of the Due Process Clauses."[143] Like the court in *Johnson*,[144] the *Lutz* court ultimately determined that the right to intrastate travel should be ascribed to substantive due process.[145] The reasoning used, however, is admittedly ad hoc[146] and not without criticism.[147]

The appropriate inquiry in substantive due process cases is whether the right at issue is "fundamental." That is, whether the right is "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[148] The courts in *Johnson*

139 *See* Johnson v. City of Cincinnati, 310 F.3d 484, 508 (6th Cir. 2002) (Gilman, J., dissenting) (construing *Bray* as meaning that there is no fundamental right to intrastate travel); *see also* Mary LaFrance, *Constitutional Implications of Acquisition-Value Real Property Taxation: Assessing the Burdens on Travel and Commerce*, 1994 UTAH L. REV. 1027, 1054 ("Without explicitly saying so, *Bray* appears to reject the existence of a right to intrastate travel . . . ."). However, it could also be argued that *Bray* focused on whether the right to *inter*state travel was *violated*, not whether the right to *intra*state travel *existed*. *See* Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 44 n.341 (1996).

140 *See supra* note 116 and accompanying text.

141 *See supra* note 126 and accompanying text.

142 899 F.2d 255 (3d Cir. 1990).

143 *Id.* at 260–61 (citations omitted).

144 *See supra* note 125 and accompanying text.

145 *See* 899 F.2d at 267.

146 *Id.* at 268 (admitting that ascribing the right to intrastate travel to substantive due process is "unquestionably ad hoc").

147 Flanagan, *supra* note 127, at 349–55.

148 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted) (declining to find a fundamental right to physician-assisted suicide).

and *Lutz* determined that the right to intrastate travel did, in fact, enjoy such stature.[149] This is surprising because the Supreme Court has never ruled that the right to intrastate travel is a fundamental right.[150]

Cases like *Johnson* and *Lutz* can be distinguished on the grounds that they did not implicate the same safety concerns as stalking. Therefore, even if a court were to recognize intrastate travel as a fundamental right, the state's compelling interest in victim safety would present a difficult hurdle for a defendant to cross. Under a proper analysis of the Supreme Court's case law, there is no right to intrastate travel, but even those circuits finding it in the past should recognize the qualitatively different considerations that stalking presents. In sum, federal constitutional law should not prevent a court from imposing a county-wide banishment provision in egregious stalking cases.

2. State Constitutional Right To Travel

Of course, this leaves open the possibility that the right to intrastate travel might be protected by states. While a full survey of state cases examining the right to intrastate travel is beyond the scope of this Note, it should be noted that some states have recognized the right to intrastate travel.[151] This should not be seen as a complete bar to intrastate banishment, however, for the right recognized by those states is surely subject to some restriction, particularly in the face of egregious stalking conduct. In other words, stalkers' rights to travel between counties without interference should not trump victims' rights to do the same.[152] Additionally, in some cases, the safety of society as a whole might be at issue, further counseling courts to restrict the defendant's right to intrastate travel.[153]

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149 *See* Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002); *Lutz*, 899 F.2d at 267.

150 *See, e.g.*, *Glucksberg*, 521 U.S. at 720 (listing as fundamental rights the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion).

151 *See, e.g.*, State v. Cuypers, 559 N.W.2d 435, 437 (Minn. Ct. App. 1997); Brandmiller v. Arreola, 544 N.W.2d 894, 899 (Wis. 1996); Watt v. Watt, 971 P.2d 608, 615 (Wyo. 1999).

152 *See* Predick v. O'Connor, 660 N.W.2d 1, 10 (Wis. Ct. App. 2003) (Anderson, J., concurring) (noting that the trial court "had to balance [the defendant's] right to travel throughout [the] county against the right of the victims to move freely and safely throughout [the] county").

153 *See id.* ("The court also properly considered the safety of all who travel in [the] county. Because [the defendant] had endangered others while exercising her right to travel, the court appropriately concluded that to ensure the victims and the citi-

B. Freedom of Association

Stalkers may also try to challenge intrastate banishment under the freedom of association. Seen not as an enumerated right, but rather as a necessary concomitant to the protection of individual liberty interests,[154] freedom of association has long been recognized as an important right.[155] Associational rights are of two types: (1) intimate association, and (2) expressive association.[156]

As to intimate association, the freedom of association protects the right "to enter into and maintain certain intimate human relationships."[157] Protected intimate associations include those "personal bonds [that] have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs,"[158] thereby serving to "foster diversity and act as critical buffers between the individual and the power of the State."[159] In the intrastate banishment context, the outcome under an intimate associational challenge will inevitably hinge on the relationship claimed to have been infringed.[160] In *Predick v. O'Connor*,[161] the defendant claimed an infringement of this type of associational right because her mother lived in Walworth County and she was unable to see her

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zenry as a whole could freely and safely travel within [the] county, [the defendant] had to be banished from the county.").

154 *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) ("The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.").

155 *See, e.g.*, Snider, *supra* note 32, at 493 (discussing the importance of freedom of association).

156 *See Roberts*, 468 U.S. at 617–18.

157 *Id.* at 617.

158 *Id.* at 618–19.

159 *Id.* at 619.

160 *See id.* at 620 (suggesting the limits of the intimate association doctrine). According to *Roberts*, some important factors to consider in determining whether the association at issue is deserving of protection are

> relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection.

Id.

161 660 N.W.2d 1 (Wis. Ct. App. 2003).

there.[162] However, she also conceded that "her right to associate with her mother is not absolute."[163] Because the mother's house was across the street from the victims' residence, the court found that there was an appropriate balancing in tailoring the banishment provision.[164] Thus, the right to intimate association should be tempered by the threat a stalker poses to the victim.

As to expressive association, the issue is whether banishment places undue limits on the rights enjoyed under the First Amendment, namely those of "speech, assembly, petition for the redress of grievances, and the exercise of religion."[165] It has been suggested that banishment "unconstitutionally deprive[s] that [banished] individual of the ability to affect the political process in the geographical area in which his speech would be most relevant."[166] In this regard, banishment is seen as harmful not only to the person banished, but also to the community that might otherwise have benefited from his or her opinions.[167] Yet in the case of stalking—where the defendant's forms of expression are the problem—it must be questioned whether banishment represents such a societal detriment.[168] A community is not "deprived" when stalkers with violent tendencies must express themselves elsewhere.

Associational rights are not absolute, and they are properly circumscribed where stalkers, through their conduct, have forfeited those rights. Because intrastate banishment should be imposed through courts' contempt powers only in cases where defendants have demonstrated an unwillingness to comply with court orders, associational concerns will not likely be at issue. Therefore, intrastate banishment should survive this constitutional attack as well.

C. Public Policy Concerns

Some courts considering banishment in the criminal context have determined that it is void against public policy.[169] These courts argue that banishment simply shifts the burden of criminal monitor-

162 Brief of Defendant-Appellant at 12–14, *Predick*, 660 N.W.2d 1 (No. 02-0503), 2002 WL 32329883. According to the defendant, "there is no justification for barr[ing] [her] from associating with her mother anywhere in Walworth County." *Id.* at 14.

163 *Id.* at 13.

164 *See* 660 N.W.2d at 2, 8.

165 *Roberts*, 468 U.S. at 618.

166 Snider, *supra* note 32, at 495.

167 *See id.*

168 *See id.* at 496.

169 *See, e.g.*, People v. Blakeman, 339 P.2d 202, 203 (Cal. Ct. App. 1959).

ing to another community.[170] Even where the defendant suggests banishment as a condition of probation, these courts believe that the public policy against the practice is so strong that banishment should not be allowed.[171] Further, though banishment may remove a defendant from former temptations, the possibility exists that new ones will arise. The combination of these factors has led some courts to determine that banishment is void against public policy.

While these concerns are legitimate, they are not enough to outweigh victim security in stalking cases. Though a defendant's "fresh start"[172] in *People v. Blakeman*[173] was not enough to justify banishment, the safety of victims should properly counsel in favor of intrastate banishment in the stalking context. Further, the *possibility* of new temptations arising is certainly not enough to outweigh the *probability* that, left unchecked, a stalker will become increasingly violent.[174] In cases where traditional court orders have done nothing to remedy the situation, the stronger policy by far is to turn to a more severe remedy, namely intrastate banishment.

CONCLUSION

Given the current deficiencies in the criminal and civil system, additional protections are necessary if stalkers are to be kept away from their victims. In the face of continual protective order violations and escalating violence, courts need to be equipped with more effective remedies. It is here that intrastate banishment can serve as an alternative weapon in extreme stalking cases. This is not to say that every stalking case merits banishment for the stalker. Rather, banishment must be reserved for the truly egregious cases. For example, in *Predick v. O'Connor*,[175] the defendant's behavior had continued over a period of a decade and resulted in numerous violations of protective orders.[176] There are many other cases across the nation with frighteningly comparable results.

Additionally, intrastate banishment provisions must be attuned to the particular facts of the case. An order banishing a stalker from an entire county might not be reasonable where all of the activities have taken place in a concentrated geographic area, like a neighborhood

170 *See* Borrelli, *supra* note 41, at 484.
171 *See Blakeman*, 339 P.2d at 203.
172 *Id.*
173 339 P.2d 202.
174 *See supra* note 13.
175 660 N.W.2d 1 (Wis. Ct. App. 2003).
176 *See supra* notes 11–17 and accompanying text.

or a town. On the other hand, county-wide banishment is appropriate in a case like *Predick*, for example, where the stalker is mobile and does not confine the stalking behavior to a narrow region. The court in *Predick* found dispositive the fact that the stalker frequently rented cars to drive around Walworth County,[177] despite having no reason to be there,[178] and "pose[d] a constant and dangerous threat any time she [was] present in the county."[179]

Though banishment presents a number of challenges—on both constitutional and public policy grounds—the need for victim safety should trump these challenges in the extreme cases. Where stalkers have proven unwilling to abide by court orders, a court should be able to resort to a measure such as banishment to simultaneously create a zone of protection around the victim and engender respect for court orders.

Nevertheless, it is unknown whether intrastate banishment would be effective as employed. Though it carries a severe bark, its bite is dependent on law enforcement support and victim communication. However, for a police department with useful stalking strategies and a simplified system of response, an intrastate banishment provision could be easily implemented. Still, banishment does not necessarily assure victims complete security, as they might receive unwanted phone calls or e-mails. Yet the most grievous problem—the potential for physical attack—will be greatly reduced by widening the zone of protection around victims. For those who have lived in fear for so long, a remedy is needed. In proper cases, intrastate banishment might indeed be that remedy.

177 *See* 660 N.W.2d at 7.

178 O'Connor did not live or work in the county from which she was banished. *Id.*

179 *Id.* at 8.