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That Guy's a Batterer!: A Scarlet Letter Approach to Domestic Violence in the Information Age

ELAINE M. CHIU*

I. Introduction

We have all seen the ads and heard the jingles. Some of us may have even visited the websites. “Come meet your soul mate, come meet your future spouse, come find true love, at Match.com, at eHarmony.com, at Yahoo.” Internet dating is a booming business. In 2005, an estimated sixteen million Americans spent more than $245 million looking for love on the Internet.1 Approximately ten-million Americans are current online daters.2 In addition to these digital matchmakers, social networking sites like Facebook and MySpace and You Tube offer amazing online communities where folks can advertise their best features. Then, there is Google. Many on the dating circuit use that powerful search engine to find information about a person of interest and swear by Google as an essential resource.3 Finally, there is an expanding dating-security industry where background check firms will verify age, identity, address, marital status, and criminal history.4 Some dating sites and social networks have even

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2. See Sara Kehaulani Goo, Dinner, Movie—and a Background Check—for Online Daters, WASH. POST, Jan. 28, 2007.
4. See Goo, supra note 2.
begun incorporating background checks into their business models. Information is the currency of our time. This fact is true in many aspects of our lives today. It comes as no surprise that it is true in our decisions about love and intimacy, too.

Despite the remarkable reliance on the Internet as a source of information, we have yet to fully take advantage of it in our movement against domestic violence. The movement has been around for a long time now, and it has had an enormous impact on the ways we view domestic violence. Nevertheless, domestic violence continues to occur at worrisome levels and to be a serious problem for our communities. As a result, the movement against domestic violence has reached a stage where its members are hotly debating the success of the changes they have implemented. There is significant disagreement and conflict over whether reforms over the past thirty-five years are working or whether the movement needs to find new approaches.

Thus far, information is used as a weapon in the battle against domestic violence in several limited ways. For example, many studies are done on the experiences of domestic violence victims; about the characteristics, backgrounds, and psychiatric profiles of batterers; and on the patterns of violence. Federal and state governments gather lots of statistics on the incidence of domestic violence as reported to or observed by various state actors. They also collect data on the types of interventions states use to respond to domestic violence. Information also appears in awareness campaigns and public service announcements in schools, libraries, hospitals, on billboards, in print media, in television, and on the radio. These publicity efforts educate the public about how to recognize the signs of domestic violence and about the public resources available to help those who are being battered and those who want to stop battering. Lastly, state actors share information about the troubled families experiencing violence in their communities. Their collaboration leads to coordinated monitoring and assistance for these violent families in trouble.

Yet there is still more we can do with information and, specifically, the Internet in combating domestic violence. The Scarlet Letter proposal

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5. MySpace recently agreed to set up checks against sex offender registries while dating site True.com conducts criminal and marital checks on its members. This practice "keeps 2% of applicants from joining because they are convicted felons. . . . [and] three % flunk because they are married." See id.

6. An entire issue of St. John's Journal of Legal Commentary was dedicated to a symposium on this topic, "Thinking Outside the Box: New Challenges and Directions in Domestic Violence." It was held in March 2009 at St. John's University School of Law, and among the written contributors were Cheryl Hanna, Emily Sack, and Elayne Greenberg. They wrote about new approaches, such as mediation and constitutional litigation. See 24 ST. JOHN'S J. LEGAL COMMENT (2010).
seeks to empower potential victims of domestic violence with information so that they themselves can make choices that will avoid years of suffering and abuse. The idea is to allow public access to the data registries maintained by state governments that contain the identities of the batterers who either are or have been the subjects of final orders of protection. Today almost all fifty states have such data registries in place. In some of them, public access already exists, albeit usually with certain restrictions; in other states, there is no public access at all. The novelty of the idea is not in the compilation and storage of the information; rather, the uniqueness of the proposal is its call to expand access and to publicize widely the fact of such access as a way to reduce the future incidence of domestic violence.

Expanding access unleashes the potential of information as a preemptive weapon. When a person meets someone attractive, and with whom she is contemplating a romantic, intimate relationship, she can access the state data registries to see if that person has ever had a final order of protection issued against him. She can do this search alongside the more familiar Internet tools of Google, MySpace and Facebook with the same purpose of finding out more information about the person of interest. The hope is that if she discovers that such person is subject to a final order of protection, she can then preclude any further interactions with that person to avoid being a future victim of intimate partner abuse. Armed with information, hopefully she chooses not to pursue a romantic relationship in her own self-interest.

This proposal is inspired by several different developments in American society and in criminal law, including the increasing use of the Internet to gain information and form judgments about others. The proposal also calls for the criminal justice system to function as a system that not only punishes but also empowers. It does so by using the Internet to expand and deepen the reach of public condemnation and to be more specific in its condemnation. Enhanced public condemnation will deter more tendencies toward violence and provide greater incentives to rehabilitate. Most importantly, it will reduce intimate violence. By doing so, the proposal addresses the stagnancy of the domestic violence movement, particularly in the massive infrastructure states have built upon orders of protection. Building on these trends, this proposal warrants further examination. This article begins that discussion.

Naturally, this discussion will review not only the benefits, but also the negative implications of greater public access to official information about individuals. Many of these implications are not new, but have been part of similar pro-access ideas in other non-Internet contexts.7 I will dis-

7. For example, in August 2007, the ABA's Commission on Effective Criminal Sanctions
cuss these longstanding interests as well as some new ones that are specific to the domestic violence context.

Part II begins with a description of the current state of domestic violence and the movement against it in the United States. It takes a closer look at the history of orders of protection, the massive legal structures that have developed around them, and the disturbing ramifications of the recent Supreme Court case, *Castle Rock v. Gonzalez*.

Part III lays out in greater detail the proposal and its underlying vision for criminal justice. Specifically, I make the argument for why public access to stigmatizing information is appropriate and sensible in the domestic violence context. Given what we know about the realities of domestic violence, a preemptive, preventive measure is a promising new direction. Part IV then discusses the various concerns raised by the proposal. They range from concerns for the victims of domestic violence on an individual as well as collective level to worries about the infringements of the rights of batterers and the implications for society. Finally, part V offers a brief conclusion.

II. Providing Public Access to Order-of-Protection Registries

A. Current Levels of Domestic Violence and the Movement Against It

In 1995 and 1996, surveyors interviewed 8,000 men and 8,000 women from all fifty states and the District of Columbia in a national study on domestic violence, called the National Violence Against Women Survey.8 This important work offered a look at domestic violence, which did not rely on police reports, emergency room statistics, or other sources of information that are susceptible to underreporting and other self-selection problems. The authors of the subsequent report, Patricia Tjaden and Nancy Thoennes, highlighted certain statistics. "Nearly 25% of surveyed women and 7.6% of surveyed men said they were raped and/or physically assaulted by a partner in the previous 12 months. . . . [A]pproximately 1.5 million women and 834,732 men are raped and/or physically assaulted by an intimate partner annually in the United States."9 Although both

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9. See id. at iii.
men and women are victims, they stressed that "[w]omen experience more intimate partner violence than do men" and that "[w]omen experience more chronic and injurious physical assaults at the hands of intimate partners than do men."10

As startling as these numbers may be, they are part of both good and bad news in domestic violence. The good news is that since the mid-1970s, domestic violence has been on the decline. For instance, the number of women killed by their intimate partner has fallen from 1,587 in 1976, to 1,181 in 2005, and the number of men killed by their intimate partner has fallen from 1,304 in 1976, to 329 in 2005.11 Nonfatal partner violence has also experienced a significant decrease from 5.8 per 1,000 persons as victims in 1993, to 2.3 per 1,000 persons in 2005.12 Both the rates of simple and aggravated assaults committed against women by their intimate partners declined by two-thirds between 1993 and 2005.13

The bad news is that there still remains a lot of intimate partner violence. From May through November 1998, the Commonwealth Fund14 conducted a national survey of 2,850 women and 1,500 men on the status of health care for women in this country.15 Almost one out of every three women in the survey reported having been the victim of domestic violence at some point in their lives. The rates varied somewhat across socioeconomic classes, but were still high for all classes: "One of four women with incomes above $50,000 . . . reported domestic abuse in her lifetime by a spouse or boyfriend, as did 37% of women with incomes of $16,000 or less."16 The rates were relatively similar when comparing across education levels, race and ethnicity, and geographic locations.17

10. See id. at iii–iv.
14. "The Commonwealth Fund is a private foundation that aims to promote a high performing health care system that achieves better access, improved quality, and greater efficiency, particularly for society’s most vulnerable, including low-income people, the uninsured, minority Americans, young children, and elderly adults." See http://www.commonwealthfund.org/aboutus/.
16. See id. at 8.
17. See id.
These statistics are still very high despite decades of significant legal change and dedication of public resources to the crisis of domestic violence.\(^\text{18}\) While incidents have decreased, they still occur with alarming regularity. The prospects for much more significant reductions in domestic abuse are weak. Continuing levels of domestic violence indicate a plateau in our fight against domestic violence in the United States.

The plateau is not the only problem. In addition, the domestic violence movement is deeply embroiled in internal conceptual and political contests.\(^\text{19}\) Over the last several years, scholars and advocates have exchanged views on whether the legal reforms of the 1970s, 1980s, and 1990s have been effective at reducing violence. Many agree that the primary legal approach has been to rely on the criminal justice system to combat intimate abuse.\(^\text{20}\) Past that minimum common ground, there are critical disagreements. Has the criminal justice approach been successful?\(^\text{21}\) Have the successes come at the cost of the autonomy of the victims of domestic abuse?\(^\text{22}\) Has the criminal justice approach reached its maximum utility? What other strategies and approaches should we explore? A recent symposium at St. John’s University School of Law gathered some of the

\(^{18}\) "These improvements include legislation authorizing warrantless arrests in domestic violence misdemeanors, increased numbers of shelters for battered women and their children, and more sensitive custody rules in family courts." See Elaine M. Chiu, *Confronting the Agency in Battered Mothers*, 74 So. Cal. L. Rev. 1223, 1224 (2001).


best thinkers in domestic violence to talk about new directions. Among the ideas raised was the use of noncriminal laws. The Scarlet Letter proposal is one such idea because it utilizes civil laws such as restraining orders and public access rules.

B. Orders of Protection: Then and Now

Restraining orders or orders of protection are one of the earliest weapons of the domestic violence movement. They are an engrained part of our popular culture. Celebrities and politicians have them issued against stalkers and in their own intimate disputes. Essentially, orders of protection are special judicial orders prohibiting particular individuals from harming specified victims. They do so through no contact orders, bans on communication, geographic limitations, etc. Judges issue such orders only after they have found credible threats of violence in legal settings with standard procedural protections.

Prior to 1976, restraining orders were only issued for intimate violence where the parties to the order were in the process of getting divorced. In 1976, Pennsylvania was the first state to provide civil restraining orders to battered women, whether or not they were married to their abusers and whether or not they were getting divorced from their abusers. By 1994, all fifty states had followed Pennsylvania’s example.

The first studies on the effectiveness of orders of protection were conducted in the 1980s; their conclusions were mostly negative but optimistic. They noted the failure of restraining orders to reduce violence but attributed the failure to issues of under-enforcement, statutory deficiencies and continued procedural barriers. As legislatures and law enforcement slowly responded with stiffer penalties, streamlined procedures, judicial and police training, and greater police resources, more studies were done to reexamine the effectiveness of restraining orders. Many of these later studies...
studies were still negative and, once again, laid the blame on procedural and enforcement issues.\textsuperscript{29}

The ineffectiveness of restraining orders meant harmful outcomes for victims. Violations of restraining orders can range from a threatening phone call to a vicious assault. More than 66.6\% of the restraining orders issued for women who had been raped or stalked and more than 50\% of the orders issued for assault victims were subsequently violated.\textsuperscript{30} The American Bar Association reported that 60\% of women with temporary restraining orders reported the order violated within one year after the order had been issued.\textsuperscript{31}

The freestanding exception to the chorus of negativity was an exhaustive study conducted in 1994 in three cities (Wilmington, Delaware; Denver, Colorado; and the District of Columbia) by the National Center for State Courts.\textsuperscript{32} Unlike other national studies, researchers in this one measured the effectiveness of protection orders in two ways: the improvement in the quality of women’s lives, as reported by them and the subsequent extent of problems related to the grounds for the order of protection.\textsuperscript{33} The results were positive on both fronts. Almost 75\% of study participants reported positively when asked whether their lives had improved, whether they felt better about themselves, and whether they felt safer.\textsuperscript{34} This number jumped to 85\% when these same questions were asked in six-month follow-up interviews.\textsuperscript{35} Over 70\% and over 65\% of study participants reported no subsequent physical or psychological abuse in the initial and follow-up interviews.\textsuperscript{36} Some 35.5\% of participants who did not return to court to get their temporary restraining orders converted into permanent orders explained that their abusers had stopped bothering them.\textsuperscript{37}

Notably, the incidence of repeated abuse did vary greatly across the three cities that were studied.\textsuperscript{38} Participants were asked whether there were any repeat incidents of the behavior that led them to seek a restraining order in the first place.\textsuperscript{39} They were asked this question within the first

\textsuperscript{29} See, e.g., Peter Finn & Sarah Colson, Civil Protection Orders: Legislation, Current Court Practice, and Enforcement 49 (1990) (stating that enforcement, “the Achille’s heel” of TROs, was not taking place “in most of the jurisdictions examined”).

\textsuperscript{30} See Tjaden & Thoennes, supra note 8, at 53–54.


\textsuperscript{32} See Keilitz, et al., supra note 27, at vii.

\textsuperscript{33} See id. at viii–ix.

\textsuperscript{34} See id at ix.

\textsuperscript{35} See id.

\textsuperscript{36} See id.

\textsuperscript{37} See id. at xiii.

\textsuperscript{38} See id. at ix.

\textsuperscript{39} See id. at viii–ix.
month of securing the protection order and then again, six months later. Some 10.9% of study participants suffered repeated physical abuse in Delaware, and 11.9% of participants in the District of Columbia, whereas only 2% of participants in Denver did so. Psychological abuse recurred at even higher levels, but still showed the same variance across locales (Delaware at 23.6%, the District of Columbia at 1.7%, and Denver at 13.3%). Finally, the most frequently reported problem by participants was phone calls. Abusers called victims at home 16.1% of the time, at work 17.4% of the time, and visited them at home 9% of the time within the first six months of the restraining orders.

The response to the National Center for State Courts study was measured. Eve S. Buzawa and Carl G. Buzawa wrote that TROs were still largely ineffective, despite the study’s findings of positive psychological benefits for victims through empowerment. “If we examine ‘effectiveness’ on the basis of preventing further acts of violence, little positive impact is shown by these studies.” Even the authors of the National Center for State Courts acknowledged that results were mixed and ultimately concluded that much more can still be done to realize the full potential of protection orders.

As of 2005, the effectiveness of restraining orders in reducing domestic violence was tenuous at best. This grim situation took a turn for the worse when the Supreme Court issued its bombshell ruling in the case of Town of Castle Rock v. Gonzalez in 2005. In this case, a state trial court issued a temporary restraining order as part of divorce proceedings between Jessica and Simon Gonzalez, directing the husband not to “molest or disturb the peace of [respondent] or of any child,” and to remain at least 100 yards from the family home at all times. The court then made this restraining order permanent while also providing for visitation time between Simon Gonzalez and his three daughters (ages 10, 9 and 7). The visitation time included midweek dinner visits that were arranged ahead of time by the parties and allowed Simon to come to Jessica’s home to pick up and drop off the girls.

According to the complaint, at about 5:00 or 5:30 p.m. on Tuesday,

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40. See id. at viii.
41. See id. at x.
42. See id.
44. See Keilitz, et al., supra note 27, at xiii–xv.
46. See id. at 751.
47. See id. at 752–53.
48. See id.
June 22, 1999, respondent's husband took the three daughters while they were playing outside the family home. No advance arrangements had been made for him to see the daughters that evening. When respondent noticed the children were missing, she suspected her husband had taken them. At about 7:30 p.m., she called the Castle Rock Police Department, which dispatched two officers. The complaint continues: "When [the officers] arrived . . ., she showed them a copy of the TRO and requested that it be enforced and the three children be returned to her immediately. [The officers] stated that there was nothing they could do about the TRO and suggested that [respondent] call the Police Department again if the three children did not return home by 10:00 p.m."

At approximately 8:30 p.m., respondent talked to her husband on his cellular telephone. He told her "he had the three children [at an] amusement park in Denver." She called the police again and asked them to "have someone check for" her husband or his vehicle at the amusement park and "put out an [all points bulletin]" for her husband, but the officer with whom she spoke "refused to do so," again telling her to "wait until 10:00 p.m. and see if" her husband returned the girls.

At approximately 10:10 p.m., respondent called the police and said her children were still missing, but she was now told to wait until midnight. She called at midnight and told the dispatcher her children were still missing. She went to her husband's apartment and, finding nobody there, called the police at 12:10 a.m.; she was told to wait for an officer to arrive. When none came, she went to the police station at 12:50 a.m. and submitted an incident report. The officer who took the report "made no reasonable effort to enforce the TRO or locate the three children. Instead, he went to dinner."

At approximately 3:20 a.m., respondent's husband arrived at the police station and opened fire with a semiautomatic handgun he had purchased earlier that evening. Police shot back, killing him. Inside the cab of his pickup truck, they found the bodies of all three daughters, whom he had already murdered.49

Jessica Gonzalez on her own and on behalf of her three deceased children sued the police department in a 42 U.S.C. § 1983 action on grounds that they had violated her constitutionally protected rights to substantive and procedural due process under the Fourteenth Amendment by failing to enforce the order of protection.50 Because the lower federal courts had rejected the substantive claim, the Supreme Court only analyzed the procedural claim and specifically considered whether Ms. Gonzalez had any

49. See id. at 753–54 (quoting and citing the appellant's petition for certiorari).
50. See id. at 754–55.
protected property interest in the enforcement of her restraining order. On the back of the orders issued against Simon Gonzalez, there was preprinted language directed to law enforcement officials that the Colorado legislature had approved for every restraining order. Labeled "Notice to Law Enforcement Officials," this language read:

YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER.51

In spite of the plain meaning of this language, Justice Scalia wrote that they "do not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory." Even considering the strong push toward mandatory arrest laws for domestic violence, the Court rested on the fact that Simon Gonzalez was never present at any of the times that Jessica Gonzalez was asking for assistance from the police. They never had the opportunity to arrest him.53 When the subject of the restraining order was not present, it is unclear and ambiguous as to what exact procedures Jessica Gonzalez was entitled. Thus, the Court concluded that there is not a constitutionally protected property interest in the enforcement of orders of protection.54 Without a constitutional right, Jessica Gonzalez and her children did not have a section 1983 claim.

When enforcement problems have been at the center of why we have not realized the full potential of restraining orders, the Castle Rock ruling is enormously troubling. Mandating certain responses and eliminating human discretion are key components of the criminal justice approach to domestic violence. They are inherent in the mandatory arrest and no-drop prosecution policies, but also are essential for the restraining order regime. Prior to Castle Rock, advocates and victims assumed that the police had to arrest or at least take good faith, reasonable steps toward arrest when informed of a violation of an existing order of protection. After all, without this mandatory enforcement, the restraining order regime would be vulnerable to the same misogynistic stereotypes and biases that plagued family violence prior to the feminist movement.

51. See id. at 752.
52. See id. at 760.
53. See id. at 762–63.
54. See id. at 763–64.
Castle Rock has negated this assumption. Arrest and police action are not mandatory.

Because they are not mandatory, victims of police failures like Jessica Gonzalez and her three young daughters cannot sue for damages. The lack of a financial penalty is also disturbing. An important part of the history of the movement against domestic violence were multimillion dollar lawsuits against police departments for failure to arrest and to prosecute for violent acts committed by husbands against their wives. Only after some plaintiff wives won their lawsuits did police departments around the country begin to transform their practices and adopt mandatory arrest policies for domestic violence. The “money talks” strategy worked. As a result of Castle Rock, it is no longer a viable strategy to secure the enforcement of restraining orders.

Without a constitutional right to mandatory enforcement and the threat of money damages, the future of restraining orders is vulnerable and far from bright. Are protection orders doomed to being ineffective historical relics of an outdated criminal justice approach to intimate violence? The Scarlet Letter proposal hopes to reverse this downward direction by capitalizing on the extant restraining order regime and yet not relying on mandates and enforceable constitutional rights. Instead, the proposal uses the rich compilation of information in our restraining order regime to empower citizens to protect themselves. In part III, I lay out the details and the underlying values of the proposal.

III. The Scarlet Letter Proposal

A. What Is the Proposal?

Once an order of protection is issued, many states record its issuance in a database. The database might be a special database created for orders of protection or the database can be the state’s criminal history database used for all crimes including domestic violence. As a general matter, public access to the specialized databases either does not exist or exists in very limited form. For the criminal history databases, states vary widely in how much access they grant to the public. There are open states, like Minnesota, where anyone can conduct a free search for criminal convictions and sentences. There are also closed states, like Massachusetts,

55. See National Center for State Courts and the Full Faith and Credit Project of the Pennsylvania Coalition Against Domestic Violence, State and U.S. Territory Full Faith and Credit Legislation and Registry Information, at http://www.vaw.umn.edu/documents/ffc/ffc-matrfin/ffc-matrfin.html#id125031 (Jan. 2002); see also State survey conducted by research assistant on file with author.

56. See Minnesota Public Criminal History, https://cch.state.mn.us/.
where only certain members of the public, such as daycare employers can access the criminal history database. Random individuals in Massachusetts cannot. I will focus on New York State as a case study for purposes of explaining how the proposal might work with an actual jurisdiction. New York has both a specialized order of protection database and a general purpose criminal history database.

In 1994, the New York State legislature passed the Family Protection and Domestic Violence Intervention Act. Among its several reforms was the creation of the New York State Family Protection Registry [the "Registry"]. In New York State, the family court, the supreme court, and the criminal court have the authority to issue a restraining order. The Registry, which became operational in October 1995, is the repository for all orders of protection issued by these courts pursuant to various authorizing statutes. In 2005 alone, 123,649 orders of protection (temporary and final) were entered into the Registry. The Registry is a historic record and thus, even expired orders of protection stay in the Registry. As of 2006, the total number of orders of protection in the Registry was 1,411,264.

There is limited access to the Registry. Only designated state officials, such as court personnel, police officers, and assistant district attorney, are allowed access. The system is protected through passwords, and users must be trained. The limited access is explained by the original purpose for the Registry: to aid in the coordination of various state agencies and actors in their interactions with violent families. For instance, when a police officer responds to an emergency call for domestic violence, very often the civilians on the scene will be extremely emotional and distraught. In many instances, the civilians will talk about orders of protection. Equally common is the fact that the civilians will no longer have a


59. In New York State, these statutes include articles four, five, six, and eight of the Family Court Act, § 530.12 of the Criminal Procedure Law, §§ 240 and 252 of the Domestic Relations Law and all arrest warrants issued pursuant to § 827 of the Family Court Act and Art. 120 of the Criminal Procedure Law. See id.

60. See id.


62. See id.
copy of the order of protection. Without concrete evidence of the existence or details of the order of protection, it is difficult for the responding officer to sort out whether a crime has occurred and what crime or crimes have occurred. The Registry is critical as a resource for officers in such situations.

In addition to being recorded in the Registry, orders of protection that are issued as part of a criminal sentence are also noted in New York State’s criminal history records. New York State is an open state that gives public access to its conviction and sentencing records. Thus, members of the public currently can discover information about final orders of protection that are issued as part of the sentence for a criminal conviction. Final orders of protection are valid for eight years from date of issuance for felony convictions or for five years from the date of issuance for misdemeanor convictions. The information about final orders of protection issued by the criminal courts should be duplicative of the information in the Registry, but happens to be accessible by the public only by virtue of appearing in the criminal history records. In contrast, final orders of protection issued by family court or by the supreme court are not accessible by the public.

Operationally, the Scarlet Letter proposal then is fairly simple: to make selective information from the Registry available to the public, along with the information already available from the criminal history records. The public will be able to access the identities of the abusers who received a final order of protection from any court at any time. It would not matter if the final order was issued by a criminal court or a civil court or if the order lasted for five years, three years, or two years. The only requirement is that it is a final order of protection. The reason for this is the greater procedural rigor of final orders over temporary orders. The proposal would not make accessible to the public the identities of the parties in whose protection the orders were issued. This would be kept inaccessible or secret. The database should be searchable by full name along with a date of birth. These search terms are in line with how many open states, including New York, currently allow searches on their criminal history databases.

64. Criminal courts issue temporary orders of protection or ex parte orders of protection only during the pendency of cases.
65. See N.Y. CRIM. PRO. LAW § 530.13(4) (2010).
66. See infra section IV E for a discussion about how rehabilitated batterers may take their names off the list.
67. See infra text accompanying notes.
B. The Underlying Theories and Values of the Proposal

This proposal is based on a particular vision of the criminal justice system that encompasses two specific ideals: (1) the transparency and accessibility of public institutions and (2) the empowerment of the individual citizen.

1. Transparency and Access of Public Institutions

Courts are the originating authority for orders of protection and courts are obviously state institutions. As officers of the court, judges act in the name of the state and are state representatives. Their judicial actions then ought to be known to constituents of the states, namely to individual citizens. Thus, the issuance of an order of protection along with the details of the order should be readily available to the public, barring any other countervailing interests. Indeed, the First Amendment includes a presumptive right of access to court records. On a certain level, current court practice already reflects this commitment to public access and the public right to know. By and large, members of the public can go into any criminal court and watch and listen to the proceedings. They do not need prior approval from the judge or any stake in the proceedings. This includes courtrooms where orders of protection are issued and the names of batterers are announced out loud.

Upholding the public, transparent nature of the courts and judges is important to the pursuit of criminal justice. Both utilitarian and retributivist goals rely on this public nature. For example, specific and general deterrence are more effectively achieved if the penalty imposed for criminal conduct is known to be imposed on certain named individuals. The publicized penalty is arguably more significant for the named individuals because of the additional public shaming. The publicized penalty may also be more tangible and credible for others in the general population. The deterrent effect may be particularly strong for those who know or know of the named individuals. To be aware that robbery is generally

69. See Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) (severely restricting the discretion of judges to seal criminal history records from public view in the Massachusetts open database).

70. For a discussion of other similar practices with respect to accessing written court documents, see supra text accompanying notes 107–15.


73. See Alan Calnan, The Instrumental Justice of Private Law, 78 UMKC L. REV. 559, 594
punished by a ten-year imprisonment is one thing; to be aware that your neighbor, Bob Smith, did ten years in jail for a robbery conviction is another.

There are, of course, countervailing interests that may outweigh the ideal of a publicly accessible criminal justice system. For example, long and heated debates have taken place over cameras in the courtrooms, and in particular, criminal courtrooms.\(^{74}\) Another discussion has been the accommodation of the need to maintain the secret identities of undercover law enforcement agents when they are called as witnesses in otherwise public trials.\(^{75}\) Later in part IV, I discuss the particular countervailing interests posed by the Scarlet Letter proposal. However, none of these concerns rise to a level that outweighs the public safety benefits of the proposal. Indeed, unlike the undercover witness situation, the safety concerns lead to public access to the orders of protection. The more the public is aware of the identities of batterers, the more individual citizens can take measures to protect themselves. The more transparent the criminal justice system, the more deterrence is achieved. This leads to the second ideal espoused by the Scarlet Letter proposal.

2. EMPOWERMENT OF INDIVIDUAL CITIZEN

There are thousands of individuals employed in law enforcement in the United States.\(^{76}\) While we undoubtedly need their services to enforce our penal laws, we do not leave our penal laws and the larger criminal justice system in their hands alone. There are numerous instances where individual citizenry are called to participate. One example is the criminal trial jury.\(^{77}\) Another is the power of citizen arrests whereby the direct enforcement of penal laws by citizens is recognized and respected.\(^{78}\)

The proposal agrees with this vision of a responsible and empowered citizenry. Individuals should not have to rely solely on law enforcement

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\(^{75}\) See, e.g., Brown v. Artuz, 283 F.3d 492, 502 (2d Cir. 2002) (interest in preserving secrecy of undercover officer's identity and ensuring his safety justified closure during his testimony).


\(^{77}\) The Sixth Amendment guarantees the right to be judged by a jury of peers in a criminal prosecution. U.S. CONST. amend. VI.

\(^{78}\) Similar to other states, New York State provides a formal defense for the use of physical force by a citizen in effecting an arrest. See, e.g., N.Y. PENAL L. § 35.30(3) & (4) (2009).
officials to enforce restraining orders but rather they should be able to "enforce" these orders themselves. By providing access to the registries, the proposal arms citizens with information—namely, the identities of known batterers. Citizens are then able to preempt being a victim of domestic abuse by either steering clear of such batterers or by being more wary in their interactions with them. If the goal of the restraining orders is to reduce domestic violence, citizens can help to do that themselves.

Equally important to the empowerment of citizenry is respect for that citizenry. While this proposal enables individual citizens, it does not oblige them. In other words, providing access to information does not require an individual to modify his or her behavior accordingly, but rather, offers the opportunity to do so. The proposal gives prospective victims a critical tool to avoid known batterers and thus, to avoid the likelihood of intimate violence in their lives; but, it also respects their autonomy. Potential victims can choose not to access the database or, even if they do and discover negative information, they can choose to ignore this information and to have intimate relationships, nonetheless, with known abusers. The choice is entirely up to them. While the proposal does rely heavily on the self-interest of prospective victims, it is designed as a tool of respectful empowerment and not of obligation. Thus, the proposal nimbly traverses the treacherous dilemma between treating victims as autonomous, rational beings, and regarding them as dysfunctional, untrustworthy, irrational actors. This dilemma has long divided the domestic violence community and is often a criticism lodged against various laws and policies.

The proposal is deliberately designed to be a prime example of the libertarian paternalism theory espoused by Professors Richard Thaler and Cass Sunstein in their recent book, *Nudge: Improving Decisions About Health, Wealth and Happiness.* By designing thoughtful choice archi-

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79. If some individuals choose not to access the information or to ignore the revelation that their intimate partner has a history of battering, it may well turn out that they will be actual victims themselves. The proposal, though, does not contemplate that because they failed to heed the warning, that they would then lose the protection of the laws. Other existing mechanisms, such as mandatory arrest and custody presumptions, should certainly still be available. In a real meaningful sense, the proposal respects the autonomy of individuals to make their own intimate choices without punishing them for having made bad choices.

80. See, e.g., Epstein, *Effective Intervention, supra* note 21 (discussing in part an antidomestic violence victim bias among court professionals in the context of mandatory intervention laws); Mills, *Killing Her Softly, supra* note 21 (providing a comparison between interactions by court professionals and interactions by medical professionals dealing with domestic violence victims, and noting that mandatory intervention laws can be harmful because they remove power from victims, somewhat mirroring the domestic violence dynamic between abuser and victim); Mordini, *Note Mandatory State Interventions, supra* note 21 (analyzing the effect that mandatory intervention laws have on domestic violence victim safety and autonomy).

ecture in its laws and policies, society can nudge individuals to make beneficial decisions for themselves without restricting their freedom of choice. Access to information is the choice architecture that provides that nudge. An empowered, participatory citizenry is yet another ideal for a criminal justice system, and this public access proposal helps to achieve it.

In addition to these two ideals, the Scarlet Letter proposal also works towards a final and ultimate goal: the very real reduction of the incidence of domestic violence beyond our present plateau. Part III C now turns to why the proposal has a realistic chance of success in achieving this goal.

C. How the Proposal Works with the Realities of Domestic Violence

During the past three decades, we have learned a great deal from the many studies about violent families. One powerful observation is that violent families vary widely in their composition, in the frequency of their abuse, in the intensity of the violence, in the pattern of their fighting, in their economic and social characteristics, in their educational backgrounds, etc. Although Dr. Lenore Walker's work on the battered women syndrome is the most broadly known theory, it is far from being the only one and for many violent families, it is far from accurate.

At the risk of essentializing all violent families to one model, I set forth two recurring observations that we see in many (although not all) violent families and relationships. The first observation is that many batterers will batter again. The second observation is that when the violence or abuse first occurs, and then at each subsequent abusive incident, couples are often already in a close and entangled relationship. The dependencies and emotions of such relationships make it extremely difficult to exit the relationships. These two observations combine to make domestic violence such a difficult social problem to solve. The Scarlet Letter proposal is unlike many other past reforms because its potential lies in working within these realities and not against them.

1. Batterers Will Batter Again

Knowing the identities of individuals who have been subjected to a final order of protection is only helpful if that information has a predictive value. Because the truth is that a high proportion of batterers abuse victims over and over, there is tremendous predictive value.

The phrases repeat batterers and serial batterers describe abusers who

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engage in two distinct phenomena. Repeat batterers are those abusers who keep abusing their victims, even though they have already been the subject of legal actions, whether civil or criminal, for their behavior toward those victims. Repeat battering is also known as reabuse. Serial batterers are abusers who have multiple victims. They batter more than one person with whom they are intimate or romantically involved. Serial batterers can commit such abuse serially meaning they move from one victim to the next and, thus, are only abusing one victim at a time. In actuality though there are "serial" batterers who abuse multiple victims at the same time. They would still be categorized as "serial" batterers in studies.

An abuser can be either a repeat or a serial batterer or both or neither. The two categories are not mutually exclusive. For example, Adam can physically attack and emotionally torment Beatrix, and Beatrix can go into court and obtain a civil restraining order against Adam. If Adam continues to emotionally and physically abuse Beatrix, despite the issuance of the order, then he is a repeat batterer. If he also batter another victim, Cindy, at the same time he is battering Beatrix, or shortly thereafter, he is also a serial batterer.

Many batterers are repeat batterers.84 This has been well-documented by numerous studies.85 Its incidence is not questioned;86 instead, what continues to stir controversy are the predictors of reabuse. Numerous studies have examined individual level characteristics, including demographics and criminal history, interpersonal variables about the nature of the relationship between the batterer and the victim, and systemic variables that cover myriad ways a batterer and victim may engage with the legal system.87 The results of these studies are inconclusive and not helpful as to the exact causes of repeat battering. For instance, in 2000, Professors White and Gondolf published a paper that allegedly confirmed that most men who recidivate exhibit dysfunctional personality types.88 but then in 2001, the same two professors published a second article stating that the causal connection between recidivism and psychopathic tendencies is

84. Studies of reabuse report that it occurs in 20.5% to 93% of relationships they observed. The wide variance of the results is due to many design differences, including source of sample population, length of follow-up, and retention rate. See Lauren Bennett Cattanco & Lisa A. Goodman, Risk Factors for Reabuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review 6 TRAUMA, VIOLENCE & ABUSE 141, 158–59 (2005).
85. See id. at 141. This work has been done by criminologists, clinical and community psychologists, and public health professionals among others. See id. at 142.
86. See id. at 158 (describing how studies vary on how they measure or document reabuse; some use rearrest, some use arrest for any new crime, some use new physical assaults as reported by victims, even when they do not result in arrests).
87. See id. at 159–64.
more attenuated than first conceived.  

In contrast to repeat battering, serial battering has received much less empirical and scholarly attention. In my days as an assistant district attorney prosecuting domestic violence cases, I often heard about serial batterers from their victims. Many women would tell me about the day they finally met their abuser's ex-wife or ex-girlfriend and how they learned that he had actually battered and abused them, too, in much the same way. Specially trained domestic violence police officers at the local precincts would describe their familiarity with the abuse patterns of certain batterers because of the revolving door of victims who would be hurt by them.

The Massachusetts Office of the Commissioner of Probation has conducted two studies that provide some statistical evidence of serial battering. In the first study, they looked at the identities of the offenders and victims of all restraining orders issued for intimate violence from 1992 to 1998 and found that almost one out of every four offenders had two or more unrelated victims. One serial batterer had as many as eight different victims over a six-year period. This first study noted that these offenders either victimized more than one person at a time or moved serially from one victim to the next, and so on. A second study released in 2004 looked at all the restraining orders that were issued in 1998 and followed the criminal history of those offenders thereafter. This study produced even more alarming numbers. Some 43% of these offenders had two or more victims who were unrelated in their history of civil restraining orders. Anywhere from one out of four batterers to two out of five batterers are serial batterers with multiple victims.

For the purposes of the Scarlet Letter proposal, the phenomenon of serial battering is more interesting than repeat battering. Serial battering supports the view that abuse goes beyond simply interpersonal factors or the interaction between two particular people. It suggests that abusers themselves have certain demographics, personalities, afflictions, or problems that they carry around as they move from one romantic partner to the next. What is most appalling about these stories and statistics, though, is the ease with which serial batterers move from one victim to the next to the

91. See id.
92. See id.
93. See STEPHEN BOCKO ET AL., RESTRAINING ORDER VIOLATORS, CORRECTIVE PROGRAMMING AND RECIDIVISM at i (2004).
94. See id. at iii.
next in the status quo. As abuse victims told me again and again in my
days as a state prosecutor, they often had no idea about the history of bat-
tering and were completely unsuspecting when they decided to get
involved with their abusers. Some eventually communicated with former
wives, partners, or girlfriends of their batterers and shared the similarities
in their experiences of violence and abuse by the same batterer. However,
these conversations happened too late.

2. Nipping Love in the Bud

What do I mean by too late? Consider the standard definition of domes-
tic violence: emotional, physical, and psychological abuse and violence
that takes place within the context of a physically intimate relationship. In
many instances, this physically intimate relationship is based on emotion-
al love or at least emotional affection. These relationships start off with-
out any abuse. This initial violence-free period can be thought of as an incu-
bation period\(^95\) or probationary period in the relationship.

What triggers the end of this period is often a change of circumstances.
The change typically represents several things: a source of stress to the
abuser, a symbolic loss of control for the abuser, and also a deepening
bond or commitment of the victim to the abuser.\(^96\) Classic examples of
such triggers include marriage and pregnancy. Both empirical studies and
anecdotal evidence show that many victims are first abused on their wed-
ding nights or during their honeymoon.\(^97\) There are numerous accounts of
victims being hit for the first time during a pregnancy.\(^98\) Once married or
pregnant, victims often have deep emotional ties to the abuser. In addi-
tion, there are other concomitant bonds between them, including serious
financial dependencies, extended family relationships, and sometimes
reliance on one another for lawful immigration status. After marriage,
pregnancy, and the birth of children in common, it is no longer easy to
leave your abuser. A permanent end to the relationship will frequently
require formal legal actions, such as divorce or a child support and cus-
tody actions in family court.

The Scarlet Letter proposal intervenes before these triggering events,
before the formation of these complicated bonds, and before the difficult

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95. I thank my research assistant, Michael Schordine, for coming up with this term.
96. See Weissman, supra note 19, at 417–22 (linking domestic violence to increased eco-
nomic stress within households due to recent unemployment and job loss).
97. See, e.g., Mackenzie Carpenter, Experts Say Wedding Days Aren’t Always a Piece of
877410-54.stm.
98. See Rachelle Drouin, Domestic Violence in Pregnancy, http://www.womensweb.ca/vio-
lence/ dv/pregnancy.php (describing several studies including the statistic that one out of six
abused women report that their abuse began during pregnancy).
exit options. Information will be available to the public at all times, including during the incubation period in those very early moments of a budding relationship, so that individuals can learn about the battering history of their potential romantic partners.99 If they were to learn of a troubling past record, the individuals can then decide not to pursue the relationships any further. At these early moments, there are no deep ties to stand in the way of relatively easy exits. Public access to order of protection databases then is a powerful preventive measure to reduce the incidence of domestic violence.

3. Three Levels of Prevention

In this final section of part III, I want to detail some additional ways in which the Scarlet Letter proposal will reduce domestic violence. I have already described a potential victim’s self-interest in avoiding intimate abuse. Family and friends share the potential victim’s interest in avoiding such abuse. Because the system will be accessible to anyone in the public, even friends and family of potential victims will be able to run searches of the databases. If they learn of a history of battering, then they too will attempt to terminate these relationships in the interest of preventing their loved ones from becoming future victims. This is a critical feature of the proposal because unlike most reforms in domestic violence law, it addresses the pervasive isolation of victims in domestic violence. Studies have shown that this isolation is for many batterers a significant part of their abusive control and power over their victims. By empowering friends and family with awareness and information, the proposal breaks down this dangerous isolation of victims.

Increased general deterrence is yet another way in which the proposal will be able to reduce the incidence of domestic violence. Under the current system, the issuance of an order of protection certainly disrupts the relationship between the batterer and his instant victim and perhaps their children in common; however, the batterer’s relationships with others, specifically potential future victims, are largely unaffected. Effectively there is anonymity in our current criminal justice systems. Interestingly, although the last thirty-five years have seen the “outing” of domestic violence from being a private family problem to now being a public social crisis, there still is individual anonymity. We have shamed domestic violence generally, but we have done very little to shame individual batterers specifically.

99. Again, I propose that the variables needed to conduct a search be minimal: only a full name and date of birth. This is purposeful so as to enable even people who barely know one another to utilize the database.
This anonymity protects batterers from feeling the full sting of public moral condemnation. The Scarlet Letter proposal eliminates this anonymity. Potential batterers who are contemplating abuse of their intimate partners may now think twice because the public nature of the punishment adds a stigma, namely the "Scarlet Letter," that is not there under the status quo. The result is a more onerous penalty that will disrupt the life of a batterer much more significantly. This incremental increase in the penalty, under utilitarian theory, should deter more potential batterers from engaging in domestic violence.

Finally, the proposal can also be designed to achieve additional specific deterrence. In many states with open criminal record databases, there are forgiveness provisions. These provisions enable the removal of old convictions from public databases. To qualify for this forgiveness, criminals have to stay crime-free for a certain amount of time. The amount of time can be set at whatever a state believes makes sense for domestic violence. Examples of time periods from current forgiveness provisions range from ten to fifteen years. The point is that forgiveness provisions enhance specific deterrence because they motivate known batterers to avoid future incidences of battering and to be "good" so that their names can be removed from the database.

IV. The Costs and Concerns

Part IV addresses negative concerns raised by the proposal. They divide into two broad categories: concerns for the victims of domestic violence and concerns for the perpetrators of domestic violence. Underlying these concerns are serious social values and commitments, such as the due process of law, the right to privacy, the need to forgive, and the desire to rehabilitate. Some of the concerns are met by existing patterns and mechanisms in the current order-of-protection regime. Other worries are addressed by analogizing to other types of public databases. Still other issues suggest the possibility of additional modifications to improve the proposal. Ultimately, I conclude that the benefits of the proposal outweigh these costs or concerns.

A. Fewer Victims Will Seek Orders of Protection

Often when there is an aggressive change being proposed for the legal toolbox against domestic violence, there is the prediction that victims will

react by rejecting the change as being too aggressive. This rejection will be expressed as a disengagement from the system. For example, when mandatory arrest was first circulated as a proposal for law enforcement agencies, opponents doubted its potential to reduce violence because they believed that many victims do not desire the arrest of their batterers and, thus, would react to a mandatory arrest policy by simply not calling 911 or their local police departments for help. This prediction was particularly frightening because for most victims, calling 911 is often the only means through which they are able to halt the assaults and to secure medical attention for their injuries. Similar concerns were articulated when mandatory prosecution policies were proposed and when domestic violence crimes were elevated to felony categories punishable by significant imprisonment.

Likewise, the Scarlet Letter proposal is vulnerable to the same line of criticism. Again, many domestic violence victims may not desire the public outing of their batterers and their situations. Knowing that final orders of protection will mean the entry of their batterers' names into a public database, these victims may not seek orders of protection in the first place. This outcome would be a serious setback to the gains achieved by the order-of-protection regime in this country. The universal concern here is that policies and laws cannot be too aggressive and must be flexible enough to accommodate the varying wishes of domestic violence victims. Rejection by victims leads to disengagement from the legal system and disengagement dangerously leads to further isolation of domestic violence victims.

Rejection by victims is a particularly difficult problem in the domestic violence context because of the inherently private nature of the abuse. Unlike robberies or burglaries, domestic violence takes place behind closed doors and between intimate parties. Thus, the legal system only becomes aware of the violence when it spills over into public spaces or when one of the intimate parties, usually the victim, chooses to reveal the violence and to engage the public legal system. The legal system, therefore, is beholden to the cooperation of victims for any success in reducing the incidence of domestic violence. Any proposal to escalate the legal tactics has to work with victims and not alienate them.

My response to this perennial concern is based on an empirical understanding of the behavior of victims. Studies show that under the current system, many victims do not seek orders of protection at the first instance

102. See id. at 757-58.
103. See Alisa Smith, Domestic Violence Laws: The Voices of Battered Women, 16
of violence. Instead, they seek orders of protection at a much later point in time when many other less aggressive strategies have failed. This may be after several or even many episodes of physical, emotional, and sexual abuse, stalking, threats, etc.

Although the Scarlet Letter proposal certainly adds new public stigma to the issuance of final orders of protection, I believe that it does little to alter the calculus of a victim who is in the midst of experiencing domestic violence and is deciding whether to seek such orders or not. A victim who has already tried numerous, less aggressive strategies, such as counseling, temporary voluntary physical separation, and discussions with family and friends and who is now on the brink of petitioning for a restraining order, is already contemplating the escalation of her situation beyond simply the public stigma. She is ready to engage in a legal intervention involving a court and a judge and perhaps even attorneys. She is ready to submit sworn written and oral testimony about the violence and abuse she has suffered. She is ready to invite the public into her private sphere. Upon the issuance of a warrant and a temporary order, her batterer is already subject to the burden of court appearances, forced physical separation, limited contact with their children in common, of possibly hiring a lawyer, of mounting a defense in a court of law, and, perhaps most importantly, of potential jail time should he violate the order.

The additional public stigma of an accessible database strives to change the calculus significantly for future victims of domestic violence, but it has limited impact for current victims. The limited impact that avoids the doomsday predictions of those who worry that victims will not seek orders of protection. Indeed, although similar predictions were made in response to the adoption of mandatory arrest and prosecution policies, there are still many family disturbance calls made to 911. This doomsday prediction is either not as dire as described or not true.

B. Victims Will Be Blamed for Post-Registry Violence

A second concern about the welfare of victims is that the Scarlet Letter proposal will lead to greater blame being placed on victims. It is true that the proposal’s commitment to victim autonomy means that the released information will not necessarily persuade all individuals to end their relationships with known batterers; some will choose to take the risk and to pursue these relationships. They may believe that the past should be kept

105. See id.
in the past; that the batterer has changed and that past violence was not his fault, but rather the fault of past victims; that they will be able to change the bad behavior of the batterer, that domestic violence would never happen to them, etc. There are numerous rationalizations and excuses that may counter the warning provided by the order-of-protection databases. However, empirical data about serial battering strongly indicates that a number of these risk-takers are sure to be victims themselves of the same batterers.\textsuperscript{106} The concern then is that these "risk-takers turned victims" will be blamed for their own abuse since they did not heed the warnings provided by the database. Arguably the proposal threatens to take societal attitudes back to the blame game that existed prior to the reforms of the movement against domestic violence.

This second concern is troubling because we certainly do not want to return to the past bad attitudes surrounding victims of domestic violence; however, I have two problems with this concern. First, I do not think this is a concern uniquely raised by my proposal. The status quo still has remnants of the "blame the victim" attitude. For example, some observers have speculated that this attitude may have been consciously or unconsciously present in the law enforcement officers who mishandled the Jessica Gonzalez tragedy described above. Believing that Jessica Gonzalez was at least partly responsible for the situation with her ex-husband may have reduced the will of these officers to help her and led them to ignore her pleas. Blame is still around, and this proposal is not responsible for bringing it back. It may create another outlet to articulate the blame attitude, but it does not create the attitude in the first place.

The additional problem with this concern about blaming victims is that it exaggerates the consequences of the "blame the victim" attitude. Notwithstanding the \textit{Castle Rock} and Jessica Gonzalez tragedy, progress has been made by the domestic violence movement to eliminate the "blame the victim" attitude and to reduce its implications for victims. For instance, mandatory policies are universally applied whether the victims are to blame or not for the abusive incident. In a mandatory arrest jurisdiction, police officers are to arrest perpetrators of domestic violence even if the victims arguably should not have stayed with their batterers where the violence has been long-term and ongoing. The same is true for mandatory prosecution policies. The central point of these mandates is to reduce the discretion of key players, such as police officers and prosecutors, because individual discretion may be undesirably influenced by things like the "blame the victim" attitude. The Scarlet Letter proposal does not reverse these mandates and other similar achievements of the domestic violence movement to counter the blame problem.

\textsuperscript{106} See ADAMS, supra note 90.
C. The Innocent Will Be Stigmatized

In addition to the interests of victims, there are the interests of batterers to consider in evaluating the Scarlet Letter proposal. These next two items identify specific ways in which the proposal may unduly harm batterers. The first possible harm is the branding of innocent individuals as batterers and the second is the invasion of privacy.

Since the late 1990s, the domestic violence movement has witnessed a significant backlash from various interest groups. One particular area of concern has been the ease with which judges issue orders of protection. As one of the pioneering states in building an extensive legal infrastructure for restraining orders, Massachusetts saw an outpouring of petitions for orders of protection, followed by a relaxation of procedure. The Boston Globe reported in 1998 that “[g]etting an order was supposed to require a hearing, but with crowded courts, restraining orders have for the most part been routinely granted if a judge gets an affidavit from a woman saying she is in fear.”

Even Massachusetts’ judges agree that they may be granting orders of protection too easily, but they say with overburdened court systems, “it is hard to find time to decide who to believe, much less hold a full hearing.” One judge, in particular, describes the dilemma of orders of protection:

It’s an awful problem, because while there’s more domestic violence than we like to think there is, our sense is that the [restraining orders] are not infrequently abused . . . This law is having the side effects that aren’t intended. On the other hand, we’re at risk of terrible things happening. Nobody wants to be the one who denies one of these orders when something terrible happens.

The seeming ease with which orders of protection are issued has been exacerbated by divorce gamesmanship. Prior to the use of orders of protection in domestic violence settings, individuals who wanted their spouses out of the house would have to file for divorce first and then file a motion to vacate the home. This was a costly and lengthy process. Today very few individuals file motions to vacate in Massachusetts. Instead, divorce attorneys in that state describe restraining orders as a far more expedient means to get spouses out of marital homes and thus, a new popular weapon to gain the upper hand in bitter divorces and custody disputes.

108. See id.
109. See id. (quoting Middlesex Probate Judge Beverly Boorstein from Massachusetts).
110. See id.
111. See id.
112. See id.
113. See id.
The result of all these contributing factors (the crowded court systems, the “better safe than sorry” caution of judges, and the divorce gamesmanship) is that innocent individuals who did not commit an act of abuse are nevertheless subject to orders of protection. It is probably impossible to know exactly what percentage of the total number of orders of protection is meritless, but at a minimum, the anecdotal evidence reveals that there are enough instances to be concerned. The particular consideration then for the Scarlet Letter proposal is that it aggravates this situation by now publicly mislabeling certain innocent individuals as batterers.

Recognizing this problem, the proposal specifies that the publicly accessible databases contain only the identities of batterers against whom final orders of protection have been issued. The databases will not contain the names of batterers against whom only temporary restraining orders are placed. Temporary orders last from one court date to the next court date and are in place during the pendency of cases. Rarely do they last for more than one to two months at a time. On the other hand, judges issue final orders at the conclusion of cases, and they can last for as long as five years. The length of time varies with the type of court that is issuing the order, the specific substantive resolution of the cases, the state jurisdiction, etc. For example, in the criminal setting, a final order is part of the final sentence for a criminal conviction. This conviction can be for a felony or a misdemeanor and in some states, even for a violation.

Including the identities of only those batterers subject to final orders of protection is a design specification premised upon the greater procedural steps in place for final restraining orders. To use the criminal example again, a felony or misdemeanor conviction is an expression of societal condemnation and frequently subject to incarceration. Thus, there are many procedural protections provided by statute and under state and federal constitutions to ensure the integrity of these convictions. It is therefore much more difficult to get a final order of protection than a temporary one in criminal court. Similar heightened processes further provide for the integrity of final civil restraining orders too. By limiting its information only to final orders of protection, the databases in the Scarlet Letter proposal minimize the risk of wrongly stigmatizing innocent individuals.

D. The Threat to Privacy

Another concern about the welfare of batterers is an oft-repeated concern about the incredible access to information made possible through the

114. Fathers’ rights groups have rallied around such experiences and have grown in numbers and in political strength. See id.
115. In the civil setting, final orders are issued only after judges have been satisfied that there was a past incident of domestic violence and that there is a continuing threat to the petitioner.
global Internet revolution: the threat to privacy. Privacy is a ubiquitous and powerful concept in the law that often eludes satisfactory definition. Long before computers and the Internet, Samuel Warren and Louis Brandeis wrote their famous law review article, The Right to Privacy, in 1890. Building on their articulation of dignitary harm, William Prosser in 1960 made the first notable attempt to organize the notion of privacy into four causes of action in tort law. While these early works are an important foundation in the legal development of the concept of privacy, they have become outdated due to proliferation of law concerning privacy and the rapidly changing technologies of the information age. Today, contemporary scholars, such as Anita Allen, Jerry Kang, and Dan Solove, provide new insights into privacy that are helpful, meaningful frameworks for assessing the threat to privacy posed by my proposal.

The particular conception of privacy that is the most relevant here is informational privacy as opposed to decisional privacy. In his article, A Taxonomy of Privacy, Dan Solove develops a new scheme for privacy by dividing into four groups the different types of activities that invade an individual's privacy. Three of the four groups focus exclusively on informational privacy (information collection, information processing, and information dissemination). Within the categories of information


119. These four torts are intrusions upon seclusion, public disclosure of private facts, false light, and appropriation. See William L. Prosser, Privacy, 48 CAL. L. REV. 383, 389 (1960).

120. See Anita L. Allen, Privacy in American Law in PRIVACIES: PHILOSOPHICAL EVALUATIONS 19, 26 (Beate Rössler ed., 2004).


123. Informational privacy is the right to be free from unwanted disclosure of personal data while decisional privacy concerns the right to be free from government interference in making important personal choices. See Morrison, Privacy Accountability, supra note 117, at section II.B1.


125. The fourth group bridges informational privacy to decisional privacy (invasions). See id. at 488–91.
processing and information dissemination, Professor Solove articulates three specific activities that are at issue in my proposal. The first is the aggregation of information where the state gathers together information about a person; the second is the disclosure of information whereby the state reveals truthful information about a person that will impact the way others judge her; and the third is the increased accessibility of information where the state makes such disclosures to more people.

Since its early recognition of privacy as decisional privacy in cases such as *Griswold v. Connecticut* and *Roe v. Wade*, the Supreme Court has gone on to wrestle with the boundaries of legal protection for informational privacy in several cases relating to criminal justice information. This has been a gradual process in which the Court at first distinguished informational privacy from decisional privacy and refused to provide constitutional protection. Later, the Court recognized statutory protection for the distinct and varied ways in which the state can harm informational privacy.

In 1976, in the case of *Paul v. Davis*, the plaintiff sued his local police departments for displaying his name and photograph on a list of active shoplifters and for distributing that list to neighborhood merchants. The plaintiff had indeed been arrested and thus was not disputing the accuracy of his inclusion on a list of shoplifting arrestees. In the language of Professor Solove’s schema, the plaintiff protested the disclosure of this truthful information about himself to others because it would likely impact negatively the way that others judge him.

Following the footsteps of *Roe* and other related cases, the plaintiff charged that his right to privacy had been infringed by such disclosure. Justice Rehnquist held that “none of our substantive privacy decisions hold” “that the State may not publicize a record of an official act such as an arrest.” This was a simple refusal to extend the protection of decisional privacy to informational privacy without any further elaboration. However, Justice Rehnquist’s emphatic description of the arrest as an

126. *Id.* at 505–09.
127. *Id.* at 527–32.
128. *Id.* at 536–38.
129. See 381 U.S. 479, 484 (1965) (concerning the use of contraceptives by married couples).
130. See 410 U.S. 113, 154 (1973) (protecting the pregnant woman’s decision to have an abortion).
132. See *id.* at 695–96.
133. The exact language describing the individuals was: “These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.” *See id.* After the list had already been circulated, the shoplifting charge against the plaintiff was dismissed. *See id.*
134. *See id.* at 714.
official act of the state suggests that there is a distinction between the disclosure of public information and the disclosure of personal information. If an arrest is a public act of a public actor, then there should be no problem in making the fact of the arrest public, too. I discussed this approach to disclosure in the context of the proposal to broaden access to order-of-protection registries earlier. Finally, it bears emphasis that none of the dissenting justices in Paul v. Davis believed that the state was constitutionally barred from publicizing the fact of an arrest.

As for the plaintiff’s due process claims about the injury to his reputation, Justice Rehnquist held that mere injury to reputation is not enough to trigger the protection of the due process clause. It is only when an alteration of legal status accompanies the injury to reputation that procedural and substantive due process safeguards are triggered. This part of the decision received a lot of attention from the dissenting justices who believed that reputation alone, without any change in legal status, should be a protected liberty interest under the due process clause. However, the Supreme Court recently relied on the majority’s more restrictive view of reputational harm and due process in Paul v. Davis when it upheld Connecticut’s procedures in its Megan’s Law registry for convicted sex offenders.

Thirteen years later in 1989, the Supreme Court progressed beyond decisional privacy and broadened the legal protection of informational privacy in United States Department of Justice v. Reporters Committee for Freedom of the Press. Here the issue is whether an application under the Freedom of Information Act [hereinafter FOIA] for the rap sheet on a particular person violates the protection of personal privacy provided by that statute. This case is remarkable for several reasons. First, the Court recognized a difference between scattered pieces of information in local courthouses and precincts and a fully assembled, compiled dossier. Even though the dossier included bits of information that are otherwise publicly available, the Court found that there still was an infringement of privacy within the privacy protections of FOIA. Noting the limited access to FBI-generated rap sheets, the Court held that the “careful and limited pattern of authorized rap-sheet disclosure fits the dictionary definition of privacy . . . [and] evidence[s] a congressional intent to protect the privacy of rap-sheet subjects, and a concomitant recognition

135. See infra text accompanying notes 69–75.
136. See Paul, 424 U.S. at 708.
139. See id at 764–65.
140. See id.
of the power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within.” 141 The Court hereby acknowledged the particular harms that can arise when the state engages in the activity described by Professor Solove as the aggregation of information. 142

Another remarkable point in the Reporters Committee opinion is the Court’s recognition of the separate harm due to increased accessibility. The compiled rap sheet kept by the FBI is more easily accessible than the individual conviction records and arrest logs maintained by different law enforcement agencies at the local and state level. “Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.” 143 The Supreme Court found that this difference also placed the interests of the rap-sheet subject squarely within the privacy protection of FOIA.

Clearly today the Supreme Court is mindful of the harms to informational privacy. However, it is important to note that the legal context of the Reporters Committee decision was the Freedom of Information Act and that the holding was based entirely on this federal statute and thus, did not extend to constitutional law. I am certain that there will be cases in the future to test the Supreme Court’s willingness to increase the constitutional protections for informational privacy; 144 for now, though, I offer a preliminary analysis of whether my proposal about order of protection databases unduly infringes upon the privacy rights of batterers.

It is ironic that one of the chief concerns of the proposal is about privacy. Arguably this concern is similar to the original premise that the state and society should not intervene in matters of domestic violence because such violence is a private family affair. Better known as the doctrine of nonintervention, this premise kept intact families out of the reach of the law. It was powerful in the context of domestic abuse because it operated in conjunction with a longstanding belief that husbands had the right to limited corporal discipline of their wives. Family privacy, nonintervention and chauvinistic entitlement effectively isolated domestic abuse from law enforcement for centuries. It was not until the national feminist movement of the 1960s and 1970s that an alternative vision of domestic violence as a public crisis and as a crime took hold.

141. See id. at 765.
143. See Reporters Committee, 489 U.S. at 763–64.
144. See Whalen v. Rose, 429 U.S. 589, 607 (Brennan, J., concurring).
Again, the proposal involves the disclosure and increased accessibility of information and perhaps even additional aggregation of information. States currently maintain databases of the orders of protection that they issue on behalf of domestic violence victims. The proposal calls for allowing public access to the identities of batterers to whom such orders are issued where there is no such access and also for broadly publicizing the accessibility to such information where there is already such access. This is clearly about the disclosure and increased accessibility of information. To be a workable database, further aggregation of the information also may be necessary. For instance, it may be helpful to pool the databases of all the states so that users can access all of them at once, as opposed to running fifty separate searches.

Will there be harm done to the reputations of these batterers? Of course. The very success of the proposal depends on it. After all, the goal of the proposal is not simply to spread more information for information's sake, but rather it envisions those who access the information using the information to make better decisions about their intimate relationships. Better decision-making would steer potential victims away from being involved with known batterers. This would indeed be harmful from the perspective of the batterers.

Should the law protect batterers from such harm? Do batterers have a right to insist on their informational privacy in this context? As Professor Solove explains, acknowledging that batterers will suffer harm does not necessarily mean that the law should eliminate, minimize, prevent, or provide redress for such harm. There are several important countervailing interests that outweigh this concern for the privacy of batterers. The first is the public nature of final orders of protection and the right of the public to know about their public institutions and public actors. The second is the need to safeguard future victims of domestic violence, and the third is the attenuated privacy rights of batterers. Arguably, they deserve a more limited or lesser right to conceal their harmful activities from the public eye.

Final orders of protection are issued by judges in both criminal and civil settings. The civil and criminal judges are state actors, their issuance of protective orders are public acts, such orders are made in public courtrooms, and the context of the orders are publicly filed and indexed litigation matters. The enforcement of such orders are local police who serve the protective orders, respond to emergency calls concerning the orders, and, if necessary, arrest those who violate such orders. Prosecutors on the

145. "Of course, declaring that an activity is harmful or problematic does not automatically imply that there should be legal redress, since there may be valid reasons why the law should not get involved or why countervailing interests should prevail." See Solove, A Taxonomy of Privacy, supra note 116, at 484.
local, state, and federal levels charge batterers with such crimes as contempt and violations of orders of protection. Because the order-of-protection regime is a creature of the state, the public has the right to know about it. This is precisely the type of information that needs to be disclosed. Transparency about the inner workings of our public institutions and actors is necessary for a robust exercise of the First Amendment and for effective monitoring by citizenry of their government.146

Perhaps the most powerful argument about the public nature of orders of protection is the fact that there is already public access to such information in paper records maintained by courthouses and local law enforcement agencies. Although commentators are probably correct when they describe paper access to rap-sheets as quite limited and enabling of “practical obscurity,” the paper access exists not because it is rarely used, but rather because access is a testament to the public nature of the information being disclosed and the importance of such disclosure. If certain information is already available to the public, albeit in non-digital form, then the privacy interests of the individual are either moot or outweighed by these more societal interests.

Electronic access to what is otherwise already out in the public marketplace of ideas should not otherwise create privacy rights. To block electronic access while allowing paper access mocks the idea of public access and undermines our commitment to the First Amendment and to the effective monitoring of government. This “public is public” approach to the issue of electronic dissemination may be simple and intuitive,147 but in this particular context of orders of protection, it is also appropriate because of the harmful acts of batterers.

The information contained in order-of-protection registries is not only public, it also offers a prediction of harm. It is powerful evidence that a prospective or current intimate partner is likely to engage in domestic abuse and violence again. Given the strong tendencies toward serial or repeat battering exhibited by many abusers, this information could be used to avoid many future incidents of physical, psychological, and emotional damage. Thus, outweighing the privacy needs of batterers is the obligation of the state to prevent others from becoming the future victims of serial and repeat batterers.

The third reason the law should not protect the informational privacy of batterers is the attenuated nature of their claim to privacy. They are in


147. See Morrison, Privacy Accountability, supra note 117, at 41 (describing the “public is public” approach as enviably simple and intuitive).
such registries because of a judicial finding that they have engaged in some past domestic violence and because of the continuing threat they pose to a past victim. If the law were to protect the right of batterers to remain anonymous, then the law would be concealing from the public the fact of past abuse and the likelihood of future abuse. Abusers would be able to present themselves to others as if they had a “clean” or “good” reputation. This would be a dangerous deception. As Professor BeVier explains, “[t]he ability to conceal discreditable facts about oneself permits one to acquire that benefit without having to pay the full behavioral price.”

The full behavioral price should include injury to reputation and a loss of privacy; those who receive a final order of protection should be paying the full price.

Some scholars and jurists have been more forgiving toward bad actors. Instead of seeing a forfeiture of privacy rights and the need to protect innocent victims from future harm, they articulate a community where individuals should be allowed to remake themselves and not have their past acts follow them for all eternity. Perhaps that is because they are not specifically addressing the population of batterers or addressing a different population altogether. Professor Caren Morrison makes such an argument for government cooperators. She worries that electronic access with its limitless dissemination and permanent accessibility inflicts particular injuries on informational privacy and prevents beneficial forgetting.

The Supreme Court made similar arguments in recognizing the privacy exemptions of FOIA in denying the request for the FBI-generated rap sheet for a particular individual.

This argument is a good one that deserves more consideration than simply the fact that batterers are harmful actors who do not have the right to conceal their harmful behavior under the cover of privacy. There should be a space for forgiveness and rehabilitation, which are important parts of a criminal justice system, independent of the right to privacy. Therefore, I will explore this concern about the need to forgive and forget more fully in the next part.

E. A Permanent “Loveless” Underclass and the Need to Forgive and Forget

The final objection to the proposal is based on the welfare of individual batterers, but also on a vision of social welfare. If the identities of individuals who have committed past acts of violence are made known to the

148. See BeVier, Information About Individuals, supra note 117, at 470.
149. See Morrison, Privacy Accountability, supra note 117, at 44–45.
150. See supra text accompanying notes 138–44.
public and the response of others is to avoid any intimacy with them, then the outcome is the creation of a “loveless” underclass. The proposal contemplates that the population of known batterers will find it much more difficult, and perhaps even impossible, to have intimate relationships. I readily admit that the success of the Scarlet Letter proposal in reducing the incidence of domestic violence depends on some variation of this outcome. The objection then is the undesirability of a permanent “loveless” underclass, from the perspectives of the individual batterers and also society.

While the protest from individual batterers is easily understood, the argument about social welfare is a little less obvious. The central thesis is that it is not in the interest of society to shun permanently a group of people from the general population in matters as critical and necessary as human intimacy. It is overly alarmist to extend this central thesis to predict increased incidence of rape or predatory sexual abuse of children; however, there are serious moral, religious, and public policy reasons to heed the warning about a permanent “loveless” underclass. Forgiveness and opportunities for redemption are aspects of the human condition that are arguably necessary for any healthy, successful community. There are two responses to this social welfare argument.

First, as described above in part II(C)(3), the Scarlet Letter proposal features its own forgiveness provisions. The proposal contemplates that any individual featured in the public database can have his name removed, but only after avoiding any bad behavior for a designated period of time. Every jurisdiction can decide its exact terms. For instance, New York State may choose to remove the names of known batterers only if they have avoided any acts of violence, whether domestic or otherwise, for a period of five years. Connecticut may choose to forgive batterers if they have refrained from any domestic violence for a period of ten years. Still other states may decide to forgive only if there have been no subsequent criminal convictions of any kind.

Again, this type of provision is modeled after the forgiveness provisions that currently exist in the criminal history databases of some states. The provisions create a specific incentive for good behavior in individual batterers and they preserve the forgiveness and redemption aspects of humanity. The type of forgiveness secured by these provisions is superior to the status quo where the de facto anonymity of the criminal justice

151. One weakness of the hypothetical Connecticut version is that avoidance of additional domestic violence may not be difficult if others who are accessing the public database deliberately avoid any intimacy with the known batterers. Without new intimate relationships, known batterers may have very limited to no opportunities to engage in domestic violence. Hence, the hypothetical New York version may be better in that it insists that known batterers rise to a more genuine challenge of no violence in their lives at all.
and family court systems constitute automatic, blanket forgiveness for all batterers. Under this proposal, individual batterers have to earn their forgiveness. Those who manage to behave go back into the general population and are able to have intimate relationships free of any stigma; those who do not behave remain appropriately stigmatized and shunned.

Second, there are countervailing interests that justify the long-term shunning of a subpopulation. For example, we in the United States have long made public individuals' credit histories so that vendors can share information and be protected from the unpaid obligations of debtors. Likewise, under the Scarlet Letter proposal, there are the interests of future victims of domestic violence to balance against these concerns about the welfare of batterers. Future victims have the right and the need to know the same information that their governments know about the violent tendencies of potential romantic partners. Domestic violence takes an enormous toil upon individuals, families, children, and greater society and is in many ways more important than bad debt. Empowering citizen members of our communities to avoid it in their own lives is worth the relatively lesser problem of a permanent underclass.

V. Conclusion

The impact of this proposal will be significant on several different levels. First, the number of individuals whose identities would be included in the database will be quite high. As mentioned above in the New York State example, as of 2006, the total number of orders of protection in the New York State Registry was 1,411,264. This number includes both temporary and final orders of protection and does not distinguish between them; thus, it is hard to know exactly how many final orders of protection there would be in the publicly accessible database. However, with a total of over a million restraining orders, it is certain that the publicly accessible database will have hundreds of thousands of names.

Secondly, the Scarlet Letter proposal will change the direction of the domestic violence movement. Instead of being reactive to past acts of violence, the proposal is preemptive and strives to avoid violence and abuse in the first place. This alone could be a huge reduction in the amount of physical, emotional, and sexual harm suffered by victims of domestic violence. Instead of forcing victims to live with undesirable consequences, such as the potential imprisonment of their batterers, the proposal leaves victims in control. Respect for the autonomy of victims is a feature of libertarian paternalism and critical to acceptance of the proposal by potential victims. In addition, the proposal bridges the gap between those in the domestic violence movement who continue to support the legal approach
and those who want to dismantle that approach. The proposal builds upon the existing legal structures of the restraining order regime, but does so in a way that does not add to legal penalties or mandates. Instead, publicly accessible databases operate in that space between public law and private action. This space is typically very difficult to negotiate, but this proposal ambitiously tries.

The final momentum of the proposal lies in its goal to shift the way that society and individual victims think about how to combat domestic violence. Many of the earlier reforms of the domestic violence movement have increased and enhanced the options that individual victims have to try and end the violence in their lives. However, these reforms largely asked the victims to take action themselves to take advantage of their benefits. The state and other individuals, such as prosecutors and social workers and counselors would be there to help but only after violence and abuse have already occurred and only after deep bonds have already formed between the victims and their batterers. The heart of the Scarlet Letter proposal is the collective sharing of information among past, present, and future victims of domestic violence and, in a sense, relies on the ethos of women helping each other. Critically then, the proposal asks the state to join this community effort and facilitate the distribution of information by opening up its existing databases.

I want to close this initial discussion of the Scarlet Letter proposal with one last provocative thought. Not only is the Scarlet Letter proposal a good idea, but because the state knows of the strong likelihood of serial battering and knows the identities of past batterers, the state has an obligation to share that information with its citizens. Keeping such information from citizens is ultimately dangerous and unjustified. The state exists to protect the health and safety of its citizens and, many of its female citizens still suffer from the wrath of domestic violence. It is time for the state to face its obligations and to empower its citizens to protect themselves.