DOMESTIC VIOLENCE HOMICIDE-SUICIDE: EXPANDING INTERVENTION THROUGH MENTAL HEALTH LAW

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INTRODUCTION

> [H]e threatened to kill me, himself and our daughter Kaitlyn, who was only a few months old. . . . He was very depressed at the time. He used to drink a lot. He said it would be better if we all died

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> together. He said it wouldn't be that hard to do. . . . Somehow I was able to talk him out of it.[1]

Billy Cotter's threats came early on in a twenty-year pattern of domestic abuse, which included kidnapping, beatings, and strangulation.[2] His ex-wife, Dorothy Giunta-Cotter, vividly described the violence she and her two daughters faced at his hands in this February 22, 2002 testimony before a probate and family court.[3] The court subsequently granted her a partial restraining order, but Billy violated it repeatedly.[4] Yet despite a detective issuing a warrant for Billy's arrest after he broke into Dorothy's house, held her hostage for two and a half hours, and threatened to shoot her, a judge released him on bail of $500.[5] Five days later, Billy violated the restraining order a final time: he broke down the front door to Dorothy's house, swept past their twelve-year-old daughter, and shot Dorothy to death before killing himself.[6]

Dorothy's tragedy is hardly unusual. An average of four domestic homicides occur every day in the United States.[7] As in Dorothy's case, many of these homicides are immediately followed by the perpetrator's own suicide[8]—a phenomenon I will refer to as domestic homicide-suicide.

A tragic aspect of domestic homicides like Dorothy's is that they are frequently preventable.[9] In comparison to other types of homicides, domestic homicides tend to follow a predictable pattern.[10] Medical experts have identified a number of factors—such as suicidal ideation, access to a weapon, a history of psychiatric problems, or substance abuse—that are strongly correlated with domestic homicide.[11] While identifying these factors can allow law enforcement to determine more easily when intervention is necessary, many survivors in the United States are unable to obtain adequate protection from law enforcement. Most states leave domestic violence arrests up to

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[1] Affidavit of Complainant, Cotter v. Giunta-Cotter (2002) (No. 02D-0079-CU1) (Mass. Prob. & Fam. Ct.).

[2] Rachel Louise Snyder, *A Raised Hand*, NEW YORKER, July 22, 2013, at 34.

[3] Affidavit of Complainant, *supra* note 1.

[4] Snyder, *supra* note 2, at 34.

[5] *Id.*

[6] *Id.*

[7] *See* CALLIE MARIE RENNINSON, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE U.S. 1993–2001 (Feb. 2003), *archived at* http://perma.cc/TZ7B-UDQ7. This estimate found that in the year 2000, 1,247 women and 440 men were killed by an intimate partner—an average of more than three women and one man each day. *Id.*

[8] Jacquelyn Campbell, *Prediction of Homicide of and by Battered Women*, *in* ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS 85, 96, 97 (2d ed. 2007).

[9] *See* Diane L. Rosenfeld, *Correlative Rights and the Boundaries of Freedom: Protecting the Civil Rights of Endangered Women*, 43 HARV. C.R.-C.L. L. REV. 257, 260 (2008).

[10] *Id.*

[11] *Id.*

police officers' discretion,[12] and the police commonly decline to arrest even when they have probable cause to do so.[13] Even if a domestic violence victim is able to obtain an order of protection against the abuser, a quarter of all orders of protection are violated and these violations are often ignored by law enforcement.[14] Compounding this problem, the Supreme Court's decision in *Town of Castle Rock v. Gonzales*—holding that a domestic violence victim could not recover damages for police officers' failure to respond to a protection order violation—severely restricted grounds to compel the police to enforce orders.[15] Furthermore, the lack of a nationwide domestic violence database makes it impossible for state authorities to know whether a batterer is subject to an out-of-state protection order unless the victim provides a copy.[16]

In view of these significant obstacles in conventional enforcement models, an effective approach to domestic homicide-suicides must draw on additional means to increase, and possibly compel, law enforcement intervention. One avenue that may present a partial solution is the existing mental health paradigm under U.S. law. Conducting mental health seizures of certain batterers who pose a risk to themselves or others offers a robust mechanism for protecting victims, as a complement to expanded traditional law enforcement protection. This Note argues that recognizing the mental health implications of high-risk domestic violence cases with suicidal perpetrators equips law enforcement with intervention options, and could create constitutional grounds to compel law enforcement to address restraining order violations perpetrated by suicidal batterers.

Part I of this Note will explore the limitations of the current law enforcement mechanisms for domestic violence intervention. Part II will then lay the groundwork for my discussion of the utility of the mental health paradigm to improve domestic homicide-suicide prevention by analyzing the link between these crimes and mental illness, discussing in particular the need for suicide intervention for high-risk batterers with suicidal ideation.

Part III of this Note will argue that law enforcement officers would likely be constitutionally permitted to conduct mental health seizures for many suicidal batterers. It further contends that the mental health legal framework not only permits law enforcement to seize a suicidal batterer, but in many cases may obligate them to do so under an expanded understanding of a "duty to care." This Part argues that both case precedents and the Americans with Disabilities Act (ADA) provide a basis for extending police

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[12] *See* COMM'N ON DOMESTIC VIOLENCE, AM. BAR ASS'N, DOMESTIC VIOLENCE ARREST POLICIES BY STATE (Nov. 2007), *archived at* http://perma.cc/FGZ3-7PYX.

[13] ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 184 (2000).

[14] Rosenfeld, *supra* note 9, at 260.

[15] 545 U.S. 748, 751, 755 (2005).

[16] David Hench, *Response from Police Key to Safety*, PORTLAND PRESS HERALD (Maine), Dec. 18, 2000, at 1A.

officers' recognized "duty to care" to suicidal individuals who are under a restraining order. The ADA may further create a basis for holding municipalities liable when law enforcement officers do not receive appropriate training for handling suicidal batterers, on the grounds that such an omission constitutes discrimination against individuals with mental illness.

Part IV of this Note will address some concerns or challenges around the application of the mental health paradigm to domestic homicide-suicides. One issue is the need for more research to provide empirical support for this proposal. Some counterarguments include the claims that the paradigm may minimize the seriousness of domestic violence crimes, prioritize the batterer's needs over the victim's, place the burden to take action on the victim, and ignore the practical limitations of the current mental health system.

I. Domestic Violence and the Current Law Enforcement Approach

Available statistics on domestic homicides and domestic homicide-suicides demonstrate the need for adequate intervention. As reported by the Federal Bureau of Investigation (FBI), almost one-third of all homicides of women documented in police records had been perpetrated by an intimate partner.[17] In roughly 70–80% of these homicides, the victim's intimate partner had physically abused her prior to the murder.[18] These numbers are likely an underrepresentation because the FBI's Uniform Crime Reports do not take into account murders perpetrated by the victim's ex-intimate partner, which account for as much as 20% of domestic homicides.[19] The exact number of these homicides that also constituted homicide-suicides is unclear. Dr. David Adams, a Boston-based psychologist who has worked with homicidal batterers, estimates that 30% of intimate partner murders of American women are followed by the perpetrator's suicide.[20] Studies have estimated that 1000 to 1500 homicide-suicides in general occur in the United States each year,[21] most of which occur in the context of domestic violence. In its most recent report, the Violence Policy Center estimated that 72% of the homi-

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[17] Fed. Bureau of Investigation, Uniform Crime Reports: Crime in the United States 2000, at 18 (2001), *archived at* http://perma.cc/3CMF-YPL6.

[18] Jacquelyn C. Campbell, et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 Nat'l Inst. Just. J. 14, 18 (2003).

[19] Campbell, *supra* note 8, at 86.

[20] David Adams, Why Do They Kill?: Men Who Murder Their Intimate Partners 4 (2007); *see also* Joanne Kimberlin, *Record Number of Murder-Suicides Here Last Year*, Virginian-Pilot, Jan. 8, 2012, *archived at* http://perma.cc/U3HA-YCVX (there are on average 18 domestic violence homicide-suicides each year in the state of Virginia); Violence & Injury Prevention Program, *Domestic Violence*, Utah Dep't of Health, http://health.utah.gov/vipp/domesticViolence/overview.html (last visited Apr. 7, 2014), *archived at* http://perma.cc/E66D-RTMU (about one-third of domestic violence homicides in Utah are followed by the suicide of the perpetrator).

[21] Laura Ungar & Chris Kenning, *Murder-Suicides Are in a Class by Themselves*, USA Today (July 21, 2013 12:07 AM), http://www.usatoday.com/story/news/nation/

cide-suicides that occurred between January 1, 2011 and June 30, 2011 involved an intimate partner[22]—a proportion seen repeatedly in the Violence Policy Center's reports throughout the last decade.[23]

It is also important to consider that the reported statistics likely underestimate the number of domestic homicide-suicides due to the difficulty of obtaining data.[24] The data is limited because of a lack of a comprehensive national surveillance system documenting these incidents.[25] Furthermore, not every incident will have been reported or published for public access, and some reports may have overlooked the homicide's connection to domestic violence.[26]

A. Inadequate Domestic Violence Intervention

Although domestic homicide and domestic homicide-suicide are relatively common occurrences, law enforcement frequently fails to protect domestic violence victims from abuse, including homicide, even after receiving notice that the victim is at risk of future harm. This inadequate intervention arguably has root causes in historical attitudes towards domestic violence. These historical attitudes, which permeated the U.S. legal system, ignored criminal activity that occurred within the private sphere, or "domestic spaces."[27] While U.S. law has since then been reformed to acknowledge domestic violence, some persisting cultural sentiments still reflect historical attitudes that view domestic violence as a private matter and place blame on the victim for not leaving the relationship.[28]

The historical assumption that domestic violence should be addressed in the privacy of the home, rather than through the public criminal justice system, underlies at least two obstacles for adequate domestic violence intervention: discretionary arrest laws and barriers for enforcing restraining order violations. Most states allow police officers to use their discretion when re-

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2013/07/21/murder-suicides-are-in-a-class-by-themselves/2572133, *archived at* http://perma.cc/J94D-H2WM.

[22] MARTY LANGLEY, VIOLENCE POLICY CTR., AMERICAN ROULETTE: MURDER-SUICIDE IN THE UNITED STATES 5 (4th ed. 2012), *archived at* http://perma.cc/PK7X-9CMC.

[23] The Violence Policy Center reported that percentages of murder-suicides by an intimate partner in 2002, 2006, and 2008 were 73.7%, 74%, and 73% respectively. KAREN BROCK, VIOLENCE POLICY CTR., AMERICAN ROULETTE: THE UNTOLD STORY OF MURDER-SUICIDE IN THE UNITED STATES 6 (2002), *archived at* http://perma.cc/FUS-9SG8; VIOLENCE POLICY CTR., AMERICAN ROULETTE: MURDER-SUICIDE IN THE UNITED STATES 5 (2006), *archived at* http://perma.cc/5EXF-4KP9; VIOLENCE POLICY CTR., AMERICAN ROULETTE: MURDER-SUICIDE IN THE UNITED STATES 5 (3d ed. 2008), *archived at* http://perma.cc/7CD3-NSV4.

[24] LANGLEY, *supra* note 22, at 5.

[25] LANGLEY, *supra* note 22, at 8.

[26] *See* LANGLEY, *supra* note 22, at 5.

[27] SCHNEIDER, *supra* note 13, at 185.

[28] Diane L. Rosenfeld, *Why Doesn't* He *Leave?: Restoring Liberty and Equality to Battered Women*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 535, 542 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

sponding to domestic violence.[29] In these states, domestic violence is commonly under-enforced, as the police frequently decline to take action even when probable cause exists for arrest.[30]

Even when the police do make an arrest, the victim has limited tools available for her protection. A court may issue an order of protection, sometimes referred to as a restraining order, against her abuser, but these orders have had limited success. Roughly one-quarter of all orders of protection are violated.[31] Law enforcement officers frequently ignore violations, and as a result, many victims do not report when they occur, believing the criminal justice system will not respond.[32] Police inaction in the face of protection order violations creates a heightened danger for domestic violence victims, who not only must face the risk of serious harm that necessitated the order, but also the risk that the batterer will retaliate against them for having obtained the order at all.[33] Even when the police do not knowingly fail to enforce protection orders, the lack of a nationwide database for domestic violence limits their effectiveness if the victim decides to leave the state where the order was issued.[34] Because information is not shared across jurisdictions, out-of-state law enforcement must rely on the victim to provide a copy of a protection order.[35] Not only does this burden the victim to carry a protection order at all times, but out-of-state law enforcement is unaware if abusers who commit a domestic violence crime in its jurisdiction are subject to an out-of-state restraining order.[36]

B. Weak Constitutional Guarantees for Protective Order Enforcement

The ineffectiveness of protective orders is compounded by the Supreme Court's refusal to recognize a victim's constitutional right to their enforcement as a protected property interest in *Town of Castle Rock v. Gonzales*.[37] In 1999, a state trial court assigned a restraining order to Jessica Lenahan's (then Gonzales) abusive ex-husband, Simon Gonzales.[38] The restraining order included a "Notice to Law Enforcement Officials" prescribed by Colorado law, which said the following:

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[29] DAVID HIRSCHEL, NAT'L INST. OF JUSTICE, DOMESTIC VIOLENCE CASES: WHAT RESEARCH SHOWS ABOUT ARREST AND DUAL ARREST RATES (2008), http://www.nij.gov/publications/dv-dual-arrest-222679/documents/dv-dual-arrest.pdf, *archived at* http://perma.cc/EFM9-HW9C.

[30] SCHNEIDER, *supra* note 13, at 185.

[31] Rosenfeld, *supra* note 9, at 258.

[32] *Id.*

[33] *Id.*

[34] Hench, *supra* note 16.

[35] *Id.*

[36] *Id.*

[37] 545 U.S. 748, 751 (2005).

[38] *Id.*

> 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 . . . .[39]

Later that year, Simon took their three young daughters in violation of the restraining order.[40] Jessica made repeated calls for help to the police in Castle Rock. However, despite their mandate to use every reasonable means to enforce the restraining order, they failed to take any steps to respond.[41] Ten hours after Jessica's first call to the police, Simon drove to the Castle Rock Police Department and began firing his gun at the police station.[42] The police returned fire and killed Simon.[43] Afterwards, the police searched Simon's truck and found the bodies of Jessica's daughters, who had been shot dead.[44] Local authorities failed to conduct a proper investigation into the children's deaths, including the cause and location.[45]

Jessica filed a lawsuit against Castle Rock claiming that the town violated her constitutional rights protected by the Due Process Clause because it "tolerated the non-enforcement of restraining orders by its police officers."[46] Jessica argued that she had an enforceable right to protection: the instruction to law enforcement to enforce the restraining order, she argued, created a "property interest" under the Due Process Clause.[47] The Tenth Circuit concluded that Jessica had a "protected property interest in the enforcement of the terms of her restraining order" and Castle Rock deprived her of due process because the police did not take reasonable steps to enforce the restraining order.[48]

The Supreme Court overturned the Tenth Circuit's opinion.[49] It held that law enforcement officers' refusal to enforce a restraining order does not deprive its beneficiary of his or her due process rights.[50] Although Simon's restraining order directed the police to "use every reasonable means" to en-

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[39] *Id.* at 752.

[40] *International Commission Finds United States Denied Justice to Domestic Violence Survivor*, Am. Civil Liberties Union (Aug. 17, 2011), https://www.aclu.org/womens-rights/international-commission-finds-united-states-denied-justice-domestic-violence-survivor, *archived at* http://perma.cc/A6Y2-Y2CE.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Town of Castle Rock v. Gonzales, 545 U.S. 748, 754 (2005).

[47] Linda Greenhouse, *Justices Rule Police Do Not Have a Constitutional Duty to Protect Someone*, N.Y. Times, Jun. 28, 2005, at A17, *archived at* http://perma.cc/99PD-X44C.

[48] *Castle Rock*, 545 U.S. at 754.

[49] *Id.* at 750.

[50] *Id.* at 755.

force it, the Court concluded that the police may still refuse or deny to do so at their discretion, such that the enforcement was not a protected entitlement.[51] The Court emphasized that despite the order's seemingly unambiguous language, there is a "well established tradition of police discretion" that "has long coexisted with apparently mandatory arrest statutes."[52] In *Castle Rock*, the Court effectively condoned police discretion to ignore restraining order violations even when enforcement is ostensibly mandatory, and created a challenging barrier for victims to assert a constitutional right to the order's protection.

C. GPS Monitoring and Domestic Violence

While *Castle Rock* puts severe constitutional restrictions on a victim's ability to rely on a protection order, some states have emerged with legislative alternatives to improve enforcement. For example, many jurisdictions have begun assigning GPS monitoring to perpetrators who have violated their orders of protection.[53] At least some of these jurisdictions have used widely recognized "lethality" factors to determine when a domestic violence case is sufficiently high risk to make GPS monitoring is appropriate.[54] Lethality factors correlated with higher levels of domestic homicide-suicide include whether the abuser has made threats to kill the victim, whether the abuser owns a weapon, and whether the victim is attempting or has attempted to leave the abuser.[55]

Some GPS monitoring programs aimed at high-risk domestic violence cases have had some success. For example, the Newburyport Program in Massachusetts—founded after Dorothy Giunta-Cotter's murder—has effectively used lethality assessments for GPS monitoring to reduce domestic homicides in the communities it serves.[56] Current GPS legislation, however, has its own limitations, which demonstrates the need for further legal reform in domestic violence intervention. A significant impediment is the fact that not all states have some form of GPS legislation.[57] GPS monitoring may also give rise to other legal challenges. The assignment of GPS monitoring raises unresolved constitutional concerns such as the protection of privacy, due process concerns, and cruel and unusual punishment.[58]

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[51] *Id.*

[52] *Id.* at 760.

[53] Ariana Green, *More States Use GPS to Track Abusers*, N.Y. Times, May 9, 2009, at A10, *archived at* http://perma.cc/J8W4-SU77.

[54] Rosenfeld, *supra* note 9, at 263.

[55] *Id.*

[56] *Id.* at 264.

[57] Green, *supra* note 53.

[58] Mary Ann Scholl, *GPS Monitoring May Cause Orwell to Turn in His Grave, but Will It Escape Constitutional Challenges? A Look at GPS Monitoring of Domestic Violence Offenders in Illinois*, 43 J. Marshall L. Rev. 845, 855–60 (2010).

II. Applying the Mental Health Paradigm to Domestic Violence

In light of the weaknesses of both the legislative tools for intervention and the constitutional guarantees for protection order enforcement, this Note argues that expanding domestic violence intervention should incorporate an alternative avenue for intervention: mental health policy. In many high-risk domestic violence situations, the mental health of the perpetrator—who may pose a risk to him or herself and/or to others—may be a basis for civil commitment. Civil commitment may be an effective tool for a partial preventative intervention in situations where law enforcement would traditionally fail to act.

This Note argues that the police can be compelled to intervene in potential domestic homicide-suicides by extending their existing obligations—namely, under the duty to care doctrine and the Americans with Disabilities Act—to high-risk domestic violence perpetrators with suicidal ideation. After examining existing research on the link between domestic batterers and mental health concerns, this Note describes the process for civil commitment and its constitutional basis. It then argues that existing legal doctrine and legislation in the mental health context can be extended to certain domestic violence perpetrators, providing a basis for compelling law enforcement to intervene in high-risk situations, even where traditional mechanisms fall short.

A. The Relationship Between Domestic Violence and Mental Health

Researchers and practitioners have increasingly recognized that a relationship may exist between the incidence of domestic violence and the mental health of perpetrators. As a result, there is a growing acceptance that domestic violence intervention should encompass mental health treatment not only for the victim, but also for the perpetrator.[59] For example, many state guidelines for batterer treatment programs recommend that participants be assessed for mental health problems.[60]

The nature of the relationship between domestic violence and psychiatric disorders has been widely debated.[61] Some researchers suggest that while mental illness may sometimes be an aggravating factor, it is not directly linked to domestic violence.[62] Certain studies have suggested that mental illness is a poor predictor of propensity to domestic violence or multiple assaults.[63] David Adams, for example, has suggested that despite the common stereotype of abusive men as having unusually high levels of mental

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[59] Edward W. Gondolf, Supplemental Mental Health Treatment for Batterer Program Participants ii (2008), *archived at* http://perma.cc/RGR2-A38H.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *E.g.*, Adams, *supra* note 20, at 24.

illness, the proportion of batterers with a diagnosable mental illness is lower than popularly believed.[64] On the other hand, while no distinct profile of mental illness has been identified within the context of domestic violence,[65] there is at least some preliminary research suggesting that mental health disorders are associated with re-assault and more severe abuse.[66]

While the correlation between mental illness and domestic violence in general is still inconclusive, the link is clearer when it comes to batterers who have expressed suicidal ideation. Suicide and suicidal ideation is strongly associated with mental illness, with over 90% of suicide victims having been diagnosed with a mental illness.[67] Some studies specific to domestic batterers have corroborated this link. For example, some studies have found that batterers who committed homicide-suicides had more mental health problems than batterers who only committed homicides.[68] One study found that 38% of the subjects who were homicide-suicide batterers in the study had poor mental health while only 28% of homicidal batterers had poor mental health.[69]

Batterers who have expressed suicidal ideation are a significant focus for domestic violence intervention efforts. A batterer's suicidal intention—along with indicating potential harm to him or herself—is recognized as a risk factor that may increase the chance of intimate partner homicide.[70] Given the potential danger suicidal ideation represents for both the perpetrator and the victim, a batterer's suicidality signals a strong need for mental health intervention.

B. Mental Health Seizures and High-Risk Domestic Violence

Existing mental health law provides law enforcement and medical practitioners with possible tools for robust intervention in high-risk domestic violence cases where the perpetrator exhibits mental illness. Law enforcement may civilly commit an individual to a mental hospital if that individual is found to be dangerous to him- or herself or to others.[71] This action is known as a "mental health seizure." The commitment can last up to seventy-two

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[64] *Id.*

[65] GONDOLF, *supra* note 59, at ii.

[66] *Id.*

[67] *Mental Illness: Suicide*, NAT'L ALLIANCE ON MENTAL ILLNESS (Jan. 2013), http://www.nami.org/Template.cfm?Section=By_Illness&Template=/ContentManagement/ContentDisplay.cfm&ContentID=23041, *archived at* http://perma.cc/FPB4-XNHN.

[68] ADAMS, *supra* note 20, at 86.

[69] *Id.*

[70] Campbell, *supra* note 8, at 111. *See also* Rosenfeld, *supra* note 9, at 263 (describing risk factors for domestic violence homicide, including suicidal ideation).

[71] *See* Addington v. Texas, 441 U.S. 418, 425–26 (1979).

hours, in which the patient is detained for a psychiatric evaluation and medical experts can determine whether or not additional care is necessary.[72]

In order to civilly commit an individual, the State must meet a sufficient burden of proof to satisfy the Fourteenth Amendment's Due Process protections. Namely, it must demonstrate that the civil commitment serves the legitimate interests of both the committed individual and the State.[73] The individual does not need to be seized on suspicion of criminal activity.[74] While the State does not have to prove beyond a reasonable doubt that the individual is mentally ill,[75] the burden of proof must be a degree greater than the "preponderance-of-the-evidence" standard applicable to other categories of civil cases.[76] The mental health seizure must also satisfy the Fourth Amendment's probable cause standard. Many circuits have held that the Fourth Amendment requires "an official seizing and detaining of a person for a psychiatric evaluation to have probable cause to believe that the person is dangerous to himself or others."[77] The Supreme Court has determined that for mental health seizures, "showing probable cause" requires demonstrating "probability or substantial chance of dangerous behavior," rather than demonstrating that such behavior actually occurred.[78]

The State would likely be able to meet the constitutional standard in the decision to commit a batterer who has expressed suicidal ideation. While imminent suicidal intent is commonly sufficient evidence for civil commitment, the State may be able to justify a mental health seizure for a domestic batterer even when his or her suicidal ideation is not imminent. In order to assess whether the batterer poses a danger to him- or herself or to others, law enforcement should consider factors commonly used by clinicians to assess the lethality risk in domestic violence cases.[79] Commonly recognized indicators in "dangerousness assessments" used to help predict the risk of homi-

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[72] Brian Stettin et al., *Mental Health Commitment Laws: A Survey of the States*, Treatment Advocacy Ctr. 14 (2014), http://tacreports.org/storage/documents/2014-state-survey-abridged.pdf, *archived at* http://perma.cc/RKH5-WNKR.

[73] *Addington*, 441 U.S. at 430. But the Supreme Court recognized that due process "does not require every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Id.* The Court reasoned that the reasonable doubt standard is inappropriate for civil commitment proceedings because the uncertainties of psychiatric diagnosis may impose an unreasonable burden on the state. *Id.* at 432–33.

[74] *See* Vitek v. Jones, 445 U.S. 480, 491–92 (1980).

[75] *Addington*, 441 U.S. at 429.

[76] *Id.* at 432–33. The Court distinguishes between civil commitments and criminal prosecution and justifies the lower standard of proof afforded to the State in civil commitments. *Id.* at 428.

[77] Simon v. Cook, 261 F. App'x 873, 879 (6th Cir. 2008) (citing Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997)); *accord* Ahern v. O'Donnell, 109 F.3d 809, 817 (1st Cir. 1997) (per curiam); Sherman v. Four Cnty. Counseling Ctr., 987 F.2d 397, 401 (7th Cir. 1993); Glass v. Mayas, 984 F.2d 55, 58 (2d Cir. 1993); Gooden v. Howard Cnty., 954 F.2d 960, 967–68 (4th Cir. 1992) (en banc); Maag v. Wessler, 960 F.2d 773, 776 (9th Cir. 1991).

[78] Illinois v. Gates, 462 U.S. 213, 245 n.13 (1983).

[79] *See* Rosenfeld, *supra* note 9, at 263.

cide or homicide-suicide in domestic violence typically include threats of suicide or homicide, use and threats to use weapons against the victim,[80] serious injury in prior incidents, and prior rape of the intimate partner.[81] Applied in the context of mental health seizures, lethality factors such as these can help law enforcement and medical professionals make more informed assessments of the risk a domestic batterer may pose. Furthermore, taking these factors into account can help satisfy the burden of proof requirements related to the Fourth and Fourteenth Amendments. For example, in situations where the batterer's expressed suicidal ideation on its own is insufficient to justify civil commitment—for example, it is not imminent enough—combining his statements with a consideration of the accompanying lethality factors may, in some cases, shed better light on the risk he poses to himself or others for a clearer constitutional analysis. Further, while this Note focuses on batterers who express suicidal ideation, using lethality risks to expand mental health seizures for non-suicidal batterers who may be dangerous to their domestic violence victims is worth further consideration.

Given the expanded tools mental health seizures provide for domestic violence intervention, law enforcement officers should be trained to approach domestic violence incidents with that mechanism in mind and employ it when applicable, especially as an emergency response. Each law enforcement jurisdiction should adequately train police officers to conceptualize domestic violence as partially a mental health issue and recognize that domestic violence intervention may have a suicide prevention component. Law enforcement should understand the prevalence of domestic homicide-suicide and apply the lethality factors associated with a danger assessment.[82]

In application of these proposed policies, police officers should be required to conduct a danger assessment whenever they respond to a domestic violence incident. Regardless of whether the perpetrator has been placed

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[80] Campbell, *supra* note 8, at 93.

[81] *Id.* at 103. It should be noted that the dangerousness assessment is not without criticism. For example, Dr. Neil Websdale, Director of the National Domestic Violence Fatality Review Initiative, has criticized its efficacy, arguing that there are no clear characteristics that distinguish lethal from non-lethal abusive relationships. Neil Websdale, *Lethality Assessment Tools: A Critical Analysis*, VAWNET (Feb. 2000), http://www.vawnet.org/Assoc_Files_VAWnet/AR_lethality.pdf, *archived at* http://perma.cc/8ATN-YQAW. He also points out that dangerousness assessments rely on victims to provide information to determine whether a lethality factor is present, a problematic assumption because certain groups of women—and women of color in particular—are less likely to disclose that information. *Id.* He further argues that the clinical assessments oversimplify and obscure personal experiences when individualized care is most needed. *Id*. While Dr. Websdale acknowledges the potential utility of risk assessments for reducing incidents of serious injury or even death, he cautions that they should be used critically and with greater sensitivity to victims' needs and the complexities of abusive relationships. *Id.*

[82] For example, Dr. Jackie Campbell provides trainings to help recognize dangerousness factors. *See Training Options: Live Training Sessions*, DANGER ASSESSMENT, http://www.dangerassessment.org/TrainingOptions.aspx (last visited Apr. 7, 2014), *archived at* http://perma.cc/T6KT-7AQT.

under an order of protection, police officers should recognize that they may intervene through a mental health seizure if a batterer has demonstrated a certain number of lethality factors, including suicide ideation. While mental health seizures are conducted at an officer's discretion, law enforcement should be strongly encouraged, at the minimum, to consider using these options when responding to a high-risk domestic violence incident. Jurisdictions located in states without mandatory domestic violence arrest policies and/or GPS monitoring should be especially cognizant of civil commitment options.

III. Creating an Obligation to Enforce Through Mental Health Law

Given that cultural attitudes supporting suicide intervention are more widely established than for domestic violence intervention, law enforcement officers may be more willing to exercise their discretion to enforce mental health seizures than they are to enforce domestic violence statutes. Discretionary intervention through the mental health framework, however, may be susceptible to the same challenges that discretionary domestic violence intervention evidenced in *Castle Rock*, with the police declining to intervene even in high-risk situations. The mental health paradigm provides several possible legal theories for holding the police liable for failing to intervene when a suicidal batterer is likely to be a threat to himself and/or others. In particular, by expanding the doctrine of law enforcement's "duty to care" to include suicidal individuals placed under protection orders, the mental health paradigm can demand more robust intervention in high-risk domestic violence.

A. Expanding Law Enforcement's Duty to Care

Courts have recognized that law enforcement has a "duty to care" through suicide intervention for certain groups of people, like prisoners and pretrial detainees.[83] For example, an officer who is deliberately indifferent to an inmate's substantial suicide risk can face liability for the suicide.[84] Such a duty has not been applied to individuals who are placed under an order of protection—a class of individuals that likely includes a significant proportion of suicidal batterers in high-risk domestic violence cases. Expanding the duty of care to suicidal batterers under a protection order could prompt law enforcement to intervene in more high-risk domestic violence cases. When

[83] McLaughlin v. Sullivan, 461 A.2d 123, 125 (N.H. 1983).

[84] Coleman v. Parkman, 349 F.3d 534, 538 (8th Cir. 2003); *see also* Drake *ex rel.* Cotton v. Koss, 445 F.3d 1038, 1042 (8th Cir. 2006) (treating allegations that jail officials failed to prevent suicide among prisoners as claims for their failure to provide adequate medical treatment).

law enforcement is on reasonable notice that a batterer is suicidal, an expanded duty of care doctrine may require them to intervene once they have been notified that he has violated a restraining order, including through civil commitment. The failure to respond to restraining order violations perpetrated by suicidal batterers could be seen as a "deliberate indifference" to that batterer's vulnerability, especially when the batterer continues to perpetuate dangerousness (to himself and the victim). In accordance with this duty to care, state and local governments could reform their policies to mandate law enforcement intervention whenever a suicidal batterer violates his restraining order, on the condition that law enforcement is already on notice that the batterer is suicidal before the restraining order violation or at the time the violation has been reported.

While a duty to intervene to protect suicidal individuals from self-harm is typically limited to situations where the person is held in physical custody, the placing of a person under a protection order is analogous in certain ways that justify extending this duty to cover batterers under orders of protection who express suicidal ideation.

The justification for a duty to care in the custodial context is twofold. First, when the police have physical custody of a person, it is more feasible for the police to spot suicidal intent and intervene. Second, a person in state custody is to some extent subject to its control. Both of these factors are also present in the domestic violence protection order context. While a person is under a protective order, a judge has determined that he or she poses a substantial risk to another person and thus that some restriction of their freedom is warranted. The legal effect is such that the police are given grounds to monitor the activities of the person subject to the order. As a result, the police are situated to become aware of a batterer's suicidality in several direct ways—through the judicial process of the order itself, and through the enforcement of the order. Likewise, persons who are under orders of protection are actually subject to State control. While they are not held physically, their liberty is restricted in that they are legally prohibited from engaging in otherwise legal conduct, such as being physically present in particular locations and interacting with certain persons.

Some might argue that there are critical differences between police custody and protection orders, which warrant limiting the duty of care to situations where a person is held in physical custody. For example, such persons have limited access to suicide prevention services and must rely on the State for that access in such a way that is not applicable to a person under a protection order. However, the particular context of domestic violence offers good reasons why an expansion of a duty to care is appropriate. Unlike with other crimes, protective orders often act as a substitute for police custody in domestic violence cases. While the police can effectively prevent harm to a victim in other kinds of violence by intervening and taking a perpetrator into temporary custody, domestic violence tends to be an ongoing and reoccurring crime. As a result, even when the police do intervene in a particular

incident of domestic violence and arrest the perpetrator, the risk of harm to the victim continues. Faced with this reality, protection orders provide a critical substitute for the security that keeping a perpetrator in physical custody would otherwise provide.

This special reliance on protective orders in domestic violence cases is heightened by the tendency for police inaction. As discussed earlier, the national arrest record for domestic violence is not favorable—many states leave arrest policies to the discretion of law enforcement. While law enforcement officers tend to take violence between two strangers very seriously, when it occurs between intimate partners or ex-intimate partners, the police often see it instead as a mere "domestic dispute" and choose to do nothing. When the police fail to intervene, and thus do not take a batterer into police custody, the only thing a victim can do to enlist the help of the state in preventing threatened harm is go to court and seek a protection order. Because much of domestic violence enforcement depends on protection orders instead of solely on police custody, there should be a special expansion for the duty to care for suicidal batterers under protection orders.

While the case law of *Castle Rock* suggests the courts are reluctant to extend the State's affirmative duty to provide services to individuals in a protective order context, states have the authority to expand this duty to care. As the Court stated in *Castle Rock*, a protective order can theoretically have "mandatory" enforcement if a statute properly gives indication of statutory entitlement.[85] This acknowledgement is significant because states can create a duty to care that arises from a statutory entitlement for a protection order to be mandatorily enforced when the batterer is suicidal. As a result, the Court's reluctance to extend State liability for protective order non-enforcement should not be seen as a barrier to legislative expansion of the duty to care.

Protection order violations by suicidal batterers are a relevant ground to expand the duty to care, because when such violations occur, law enforcement receives notice that a batterer poses a danger to himself and others, including the victim. This "notice" should be seen as sufficient enough to create state liability in a similar manner to suicidal individuals under police custody. Further, a violation of a protective order should be a sufficient trigger to compel suicide intervention given that restraining order violations tend to indicate that the victim is at risk of serious injury or even death, and that the batterer may be at greater risk for suicide.

In terms of liability for failing to exercise the duty to care, this should only be assigned in circumstances when the batterer's victim, as opposed to solely the batterer, is likely to suffer harm. In litigation for liability, compensation should be awarded to domestic violence victims who have been harmed by a suicidal batterer because there is a sufficient nexus between the harm and negligence for not exercising the duty to care.

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[85] Town of Castle Rock v. Gonzales, 545 U.S. 748, 749 (2005).

An extended duty to care could also create obligations for municipalities. In *Kirby v. City of East Wenatchee*, the Eastern District Court of Washington acknowledged the possibility of a city being held liable for a violation of a suicidal individual's constitutional rights when it fails to provide any policy or training for law enforcement on how to interact with people in a mental health crisis.[86] In striking down a summary judgment motion, the *Kirby* court applied a "deliberate indifference" standard to the municipality, a "stringent" standard that requires the plaintiff to demonstrate that the municipal actor "disregarded a known or obvious consequence of his action."[87] A city's policy of inaction once notified that its program caused constitutional violations "is the functional equivalent of a decision by the city itself to violate the Constitution."[88]

B. The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) has statutory implications with parallels to *Kirby* that shed light on how law enforcement should have a duty to care for suicidal batterers who have been placed under an order of protection. In general, the ADA provides additional tools for examining law enforcement's conduct with the mentally ill, such as abrogation of state sovereignty. Under Title II of the ADA, federal courts have developed case law clarifying State obligations for accommodating individuals with mental illness and their access to public services and programs, including the interaction between the mentally ill and law enforcement.

In *Mohney v. Pennsylvania*, the Court reviewed the legislative history of the ADA and concluded that Congress intended for such encounters to be considered.[89] The legislative history included a report that identified "improper handling and communication with handicapped persons by law enforcement personnel" as an "area in which problems of discrimination occur."[90] When applying Title II to law enforcement and mentally disabled individuals, the Court found that police officers should be properly trained on how to handle mentally disabled persons, especially when making ar-

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[86] No. CV-12-190-JLQ, 2013 WL 1497343, at *1, *13 (E.D. Wash. Apr. 10, 2013) (holding that there were material issues of fact as to whether the city failed to provide training for law enforcement on excessive force against people with mental illness); *see also* Newman v. San Joaquin Delta Cmty. Coll. Dist., 814 F. Supp. 2d 967, 978 (E.D. Cal. 2011) (holding that the "failure to have any continuing education training on handling mentally ill people and the failure to address the issue at all in the police manual created at least triable issues") (emphasis omitted).

[87] *Kirby*, 2013 WL 1497343, at *12 (citing Board of Comm'rs v. Brown, 520 U.S. 397, 410 (1997)).

[88] Connick v. Thompson, 131 S. Ct. 1350, 1360 (2011) (quoting City of Canton v. Harris, 489 U.S. 378, 395 (1989) (O'Connor, J., concurring in part and dissenting in part)).

[89] 809 F. Supp. 2d 384, 396–98 (W.D. Pa. 2011).

[90] *Id.* at 397–98 (citing U.S. Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities 165 (1983)).

rests.[91] Such obligations conform to the Congressional Judiciary Committee's report, which noted, during the drafting of the ADA, "discriminatory treatment based on disability can be avoided by proper training."[92]

C. Applying the Mental Health Paradigm to Restraining Order Violations

The concepts of municipal liability under *Kirby* and *Mohney*'s applications of abrogation of sovereign immunity under the ADA can be used to circumvent the barriers the Supreme Court has created with regards to restraining order violations for domestic violence when there is a mental illness component related to suicide ideation.[93] Although the Court has ruled that law enforcement is not obligated to respond to restraining order violations,[94] an obligation should arise if there is a mental illness component to a case. To achieve such an obligation, this Note proposes shifting the focus from the victim to the batterer.

The duty to care, or mandated suicide intervention, should require law enforcement to be responsive to restraining order violations perpetrated by suicidal batterers. Such a duty, however, would only be applicable if a police officer is aware of the suicide ideation. An adequate response would likely entail some form of a civil commitment. This response, however, should not be viewed as sufficient, or as a replacement for the criminal justice system. Failure to respond can be construed as "reckless indifference" that could lead to the batterer violating the restraining order again with more lethal force that results in the death of the victim and the suicide of the batterer. The risk of municipal liability and abrogation of sovereign immunity can incentivize the creation of policies in which law enforcement is responsible for addressing restraining order violations.

Given the connection between suicidal batterers and mental illness, the case law developed with regards to municipal liability should be applicable to restraining order violations. As recognized in *Kirby*, the failure to train law enforcement to adequately respond to individuals with mental illnesses may sometimes give rise to claims invoking municipal liability.[95] Applying such obligations to suicidal batterers under restraining orders, law enforcement should be adequately trained to handle these cases because they involve individuals who are potentially mentally ill. When examining suicidal batterers and restraining orders within this context, it is clear that municipal liability could arise if law enforcement is not adequately trained to intervene whenever a violation occurs. Furthermore, the threat of municipal liability

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[91] *Id.* at 398.
[92] *Id.* (quoting H.R. REP. No. 101-485, pt. 3, at 50 (1990)).
[93] *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 755 (2005).
[94] *Id.*
[95] *See* Kirby v. City of E. Wenatchee, No. CV-12-190-JLQ, 2013 WL 1497343, at *13 (E.D. Wash. Apr. 10, 2013).

could lead to self-regulation within municipalities; after receiving adequate training on responding to domestic violence cases with suicidal batterers, police officers could face penalties for failing to adhere to such policies.

The need for adequate law enforcement responses to cases involving suicidal batterers is further reinforced by the relationship between the ADA and abrogation of sovereign immunity. Because of the relationship between suicidal ideation and mental illness, it is arguable that a suicidal domestic batterer is entitled to protection under the ADA. In light of this argument, Title II of the ADA obligates state and local governments to have certain modifications that accommodate the mentally ill and their access to services and programs.[96] Cases recognizing that Title II requirements should be extended to law enforcement training, such as *Mohney*,[97] support the claim that Title II compels adequate training of law enforcement with respect to mentally ill batterers. Such training of cases involving the mentally ill would presumably address domestic violence and order of protection violations. These trainings should require law enforcement to respond to restraining order violations by providing the perpetrator access to mental health care (through a civil commitment). When implementing these trainings as policies, state and local governments should recognize that the failure to intervene in restraining order violations involving suicidal batterers denies these batterers access to mental health care. Because of their arguable mental illness, these batterers should not be expected to have a complete and uncompromised motivation to obtain such assistance themselves. As a result, law enforcement should have a duty to care because non-action can lead to the suicide of the perpetrator in subsequent restraining order violations.

IV. Challenges

While this Note has explored various ways in which the mental health paradigm can be used for more robust domestic violence intervention, certain challenges could compromise the application of this paradigm.

One challenge is the need for more comprehensive empirical support. Generally, the proposal in this Note would benefit from a closer empirical examination of the problem. Future research on the nationwide extent of domestic homicide-suicides is crucial for ascertaining the scope of the problem and the resources available for reducing the prevalence of these tragedies. The argument for utilizing mental health seizures and the concepts of municipal liability and the abrogation of sovereign immunity in the context of domestic violence would benefit immensely from more in-depth research on the relationship between domestic violence and mental illness, especially when batterers have threatened suicide. In the context of mental health

[96] *See* Tennessee v. Lane, 541 U.S. 509, 511 (2004).
[97] Mohney v. Pennsylvania, 809 F. Supp. 2d 384, 396–98 (W.D. Pa. 2011).

seizures, more research will be beneficial for satisfying the burden-of-proof standards that arise from the Fourth and Fourteenth Amendments. For municipal liability and the abrogation of sovereign immunity, in-depth research can solidify the view that suicidal batterers suffer a mental illness that warrants a certain type of training for law enforcement that will lead to more intervention.

While more empirical support would significantly strengthen the argument for using a mental health paradigm to respond to domestic homicide-suicide, other significant challenges remain to be addressed. The following sections explore some possible concerns with the proposal outlined in this Note—namely, that it may minimize the seriousness of domestic violence crimes, prioritizes the batterer's needs over the victim's, still largely places the burden to take action on the victim, and ignores the limitations of the current mental health system.

A. Recognizing the Seriousness of Domestic Violence

Some might argue that, even if it has practical benefits, addressing domestic violence through a mental health framework could minimize the seriousness of domestic violence. First, by providing the batterer with treatment rather than criminal punishment, it may imply a lesser culpability. Further, by dealing with domestic violence as a private medical issue—rather than a systemic social problem—the mental health model may "individualize" this type of gender-based violence: it may treat domestic violence as a product of isolated batterers' psychiatric concerns rather than pervasive cultural norms, and perpetuate the stereotype that batterers have unusually high levels of mental illness and are therefore rare and outside the norm.[98]

While these concerns are well founded, this Note argues that applying the mental health paradigm does not imply that domestic violence is any less serious than other crimes. First, it is important to emphasize that mental health intervention in domestic violence cases is not intended as a substitute for the criminal justice process or as a means for diminishing a batterer's culpability. While its focus is on treatment rather than punishment, it is intended as a complementary framework to criminal justice, providing an alternative mechanism to the frequently blunt tools of criminal law. Thus, while its immediate focus is on the individual, applying a mental health paradigm is not meant to displace systemic approaches to either eradicating gender-based violence or treating mental illness.

Rather, by adding an additional tool to domestic violence intervention efforts, a mental health paradigm allows for a more nuanced case-by-case approach that can integrate criminal penalties with mental health treatment. Mental health treatment could often be an effective remedy in domestic violence cases—indeed, a more appropriate remedy than criminal punishment.

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[98] *See* Adams, *supra* note 20, at 86.

In many cases where victims seek intervention, their goal is not necessarily to have the batterer be put through the criminal justice system and convicted.[99] For example, they may want temporary assistance to put an end to the violence and reconcile the family, something that psychiatric care for the batterer may facilitate better than criminal convictions. Criminal sanctions may also be particularly burdensome for the victim when she is dependent on the batterer for financial support. Confining the batterer in prison may cut her off from her only source of income, and stamping his permanent record with a domestic violence conviction may reduce his earning power in the future. Mental health treatment, on the other hand, provides a form of intervention without financially burdening the victim in the long term.

B. Prioritizing Batterers' Care?

Another concern the mental health paradigm may raise is that it seems to prioritize the batterer's access to mental health service over the victim's right to protection, in particular because intervention is triggered by indicators of the batterer's mental health concerns—such as suicidal ideation—rather than the level of risk to the victim. It also may put the batterer's need for mental health care over the victim's. While the mental health impact of domestic violence on the victim is widely recognized,[100] many victims do not or cannot access mental health services for a broad array of reasons.[101] Given the scarcity of available mental health resources and the need to invest in active outreach to survivors, it may be problematic to focus our efforts on recognizing a special duty to care for the batterer while victims are not receiving the care they need.

Recognizing the batterer's right to care and recognizing the victim's, however, are not mutually exclusive. Increased intervention in domestic violence via the batterer's psychiatric needs can open the door to more effective mental health outreach to victims and provide a launching point for expanding their access to mental health care along with the batterer's. Furthermore, the argument that focusing on the batterer presupposes that batterers' mental health care conflicts with the victim's wellbeing. Mental health treatment could often be an effective remedy in domestic violence cases—indeed, often a more appropriate remedy than criminal punishment. This is especially the case when victims seek intervention without necessarily having the batterer be put through the criminal justice system and convicted. For example, mental health treatment provides a form of intervention without

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[99] *See, e.g.*, Liza Mundy, *Fault Line*, WASH. POST MAG., Oct. 26, 1997, at W8.

[100] *See, e.g.*, People v. Humphrey, 921 P.2d 1, 3–4 (Cal. 1996).

[101] *See* Michael Rodríguez et al., Intimate Partner Violence and Barriers to Mental Health Care for Ethnically Diverse Populations of Women 2 (2009), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2761218/pdf/nihms143722.pdf, *archived at* http://perma.cc/A4QX-SXN6.

financially burdening the victim in the long term, in contrast to a batterer's imprisonment, which can limit the victim's financial resources.

C. Burden on the Victim

Another concern with this Note's proposal is that it would primarily rely on victims reporting a batterer's suicidal ideation, which can create an added and often unreasonable burden on the victim. More often than not, the victim is one of the few people aware of the batterer's suicidal threats or ideation, as well as of the abuse they face at home. Much like in the current paradigm, where law enforcement heavily relies on victims to report domestic violence, the mental health paradigm would largely rely on the victim to report a batterer's suicidality. This approach may reinforce the assumption that domestic violence is a private matter in which intervention is inappropriate unless one of the parties seeks assistance. Putting the burden on the victim to protect herself may also perpetuate popular attitudes that implicitly fault victims who do not act. In the mental health paradigm, the common victim-blaming questions of "Why doesn't she leave?" or "Why doesn't she report him?" may get extended to "Why doesn't she seek psychiatric intervention for him?" Such assumptions trivialize significant reasons that many victims have for declining to seek intervention, such as fear of retaliation, emotional distress, concern for privacy, and distrust of law enforcement.[102]

This challenge is a significant one. It is, however, important to consider ways that the mental health paradigm can in fact reduce some of the burden that is currently placed on the victim. The current system puts the onus for safety on victims, requiring them to leave their homes and uproot their lives, often to seek protection in battered women's shelters.[103] It creates an expectation that victims confine themselves to limited spaces while the batterer enjoys full liberty. The mental health paradigm, by contrast, provides a mechanism to limit the batterer's liberty rather than place that burden on the victim. By shifting the burden to what the victim needs to do for her own protection and treatment to what the batterer needs to do, it may ultimately reduce the onus on the victim.

D. Practical Limitations of Mental Health Care

This Note also recognizes that the realities of the mental health care system, with its limited resources and capacities, may make it difficult to implement aspects of this proposal. Merely expanding the batterer's access to mental health care does not guarantee that he will actually receive adequate treatment or take the steps necessary to effectively participate in his treatment. Furthermore, even if a batterer is civilly committed—the primary

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[102] Rosenfeld, *supra* note 9, at 258.
[103] Rosenfeld, *supra* note 28, at 536.

form of intervention proposed throughout this Note—this form of confinement only lasts initially up to seventy-two hours, at which point a health care professional can decide to release him or her.[104] In some situations, the professional may have had insufficient information, time, or resources to adequately assess the batterer's level of dangerousness. In the context of restraining orders for suicidal batterers, the facts of the Third Circuit case *Burella v. City of Philadelphia* illustrate the limitations of mental health care.[105] The plaintiff, Jill Burella, obtained an order of protection against her ex-husband, George Burella, who was undergoing mental health treatment.[106] George repeatedly violated the order by making threatening phone calls to Jill.[107] Although the police were notified of these violations, they refused to take action because George was not physically present at Jill's house.[108] Shortly after, following an appointment with a psychiatrist, George went to Jill's house and shot her in the chest, causing severe injuries.[109] Immediately after shooting Jill, George shot and killed himself.[110]

Before this tragedy, George had a history of various mental health problems. Roughly one month after George began abusing Jill, he attempted suicide and was admitted to a psychiatric hospital where he was diagnosed with depression.[111] After George was released from the hospital, George's employer, the Philadelphia Police Department, placed him on restricted duty and referred him for psychological treatment.[112] Eventually the doctors cleared him to return to full active duty on the condition that he be evaluated every four months for a period of one year. Over a year later, Jill reported abuse to the Philadelphia Police Department's Internal Affairs Division and George was assigned a peer counselor.[113] After numerous incidents of abuse, a captain from the police department ordered George to submit to a psychiatric evaluation.[114] Later that month, George admitted himself to a psychiatric hospital but left after four days.[115] A few days afterwards, psychologists examined George and concluded that he should be monitored for the next two years.[116] After one follow-up appointment, George did not return for treatment. Four months later, just after leaving his psychiatrist's office, George attempted to kill Jill and killed himself.[117]

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[104] Stettin et al., *supra* note 72, at 14.
[105] 501 F.3d 134 (3d Cir. 2007).
[106] *Id.* at 138.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 136.
[112] *Id.*
[113] *Id.* at 137.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 138–39.

As demonstrated by *Burella*, situations exist where batterers who receive mental health treatment commit acts of violence that cause serious injury, or even death. *Burella* also suggests the possibility that batterers who are released following a temporary civil commitment could commit or attempt a domestic homicide-suicide. Given than some batterers may be motivated to retaliate against their victims—especially where the victim was the one who reported their suicidal ideation to authorities—the risk of harm could be even greater than prior to the batterer's commitment. Additionally, mental healthcare professionals may fail to recognize that a batter's risk of homicide-suicide is immediate and requires emergency intervention.

While there is no quick fix for practical challenges that mental health services face, it is important to note that expanding care for batterers—even if imperfectly—can reduce the risk of homicide-suicide in at least some domestic violence cases. Medical professionals should also be trained in recognizing common patterns of domestic violence and identifying characteristics in suicidal batterers that may be particularly relevant to those patterns. Furthermore, in order to make post-commitment follow-ups more effective, medical treatment should be combined with existing domestic violence intervention mechanisms. For example, in jurisdictions that use GPS monitoring for convicted domestic batterers, GPS monitoring should be extended to suicidal batterers who have a particularly high risk of committing domestic violence, as determined by Dr. Campbell's dangerousness assessment. It is important for jurisdictions to use dangerousness assessments with caution, focusing on the likely risk to domestic violence victims rather than singling out suicidal batterers merely for their mental health status. In areas without GPS legislation, an integrated collaboration between law enforcement, mental health care professionals, and victims' advocates is necessary to monitor the batterer and ensure that he receives adequate health care.

Conclusion

In comparison to most other types of homicides, domestic homicides tend to follow a predictable pattern, creating unique possibilities for prevention.[118] Mechanisms for domestic violence intervention, however, have been largely ineffective, often leading to tragic results.[119] Their ineffectiveness stems, in part, from cultural attitudes that treat domestic violence as a private matter outside the scope of police intervention. These attitudes are manifest in discretionary arrest laws that have resulted in widespread under-enforce-

[118] Rosenfeld, *supra* note 9, at 260.
[119] *Id.* at 258.

ment,[120] and case law that has denied victims a constitutional guarantee of the enforcement of protection orders.[121]

This Note argues that mental health law provides intervention mechanisms that can make domestic violence prevention more robust, particularly in cases where the perpetrator is suffering from suicidal ideation. By approaching such domestic violence cases as partially a mental health issue, law enforcement can intervene through mental health seizures of suicidal batterers at a high risk of harming themselves or others. In contrast to intervention through criminal law—where the Supreme Court has refused to find a protected entitlement to enforcement[122]—mental health law provides a framework for arguing that intervention is mandatory in certain cases. The recognized duty to care for certain suicidal individuals can be extended to suicidal batterers who have been placed under protection orders, thus making the police and municipalities potentially liable for failing to intervene.

The mental health paradigm can be used as a valuable tool for promoting more effective domestic violence intervention. It cannot, however, be used to eliminate domestic violence accountability, nor can it replace punishment in the criminal justice system. Moreover, the mental health paradigm may not be appropriate for certain types of domestic violence cases, especially those without a suicidal perpetrator. The mental health paradigm, however, can help create a culture in which domestic violence is taken more seriously. An emerging reformed culture can pave the way for more substantial legal reform that encompasses all types of domestic violence.

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[120] Cheryl Hanna, *Because Breaking Up Is Hard to Do*, 116 YALE L.J. POCKET PART 92, 93–94 (2006).

[121] Town of Castle Rock v. Gonzales, 545 U.S. 748, 748 (2005).

[122] *Id.*