

## Three Strikes and You're In: Why the States Need Domestic Violence Databases\*

*Domestic violence entered the public consciousness during the 1970s,<sup>1</sup> and activists' demands for attention and redress since then have brought about many changes in the law's response to abuse within the family.<sup>2</sup> This Note examines the beginning of what may become a new trend in legal responses to domestic violence: legislation establishing databases or registries of domestic abusers. Though no law has yet been passed to create such a database, several states have proposed variations of it. This Note examines Texas and New York, two states in which these databases were recently proposed, as model jurisdictions for analyzing the databases' possible pros and cons. It first discusses feminist goals in the reformation of legal responses to domestic violence and concludes that a statewide database is a necessary and effective way of continuing the reform effort. It then appraises the possible criticisms that such a database would face and proposes a solution based on a preexisting program that many states already implement. Finally, it delves into the question of cost and posits that the benefits derived from a domestic violence database would greatly outweigh any monetary burdens it might impose.*

In 2011, two states saw legislators propose a controversial new measure to be incorporated into the criminal justice system—a database or registry that would publish information about domestic abusers.<sup>3</sup> Both databases would have made public the abuser's name, address, and photograph, along with a description of the offenses of which the abuser was found guilty.<sup>4</sup> Access to the databases would have been available without cost to the general public via a searchable website<sup>5</sup> or special telephone number.<sup>6</sup> Although these proposals aimed to reduce domestic violence by warning past and potential victims, both proposals died in committee.<sup>7</sup>

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1. See Leah J. Dickstein & Carol C. Nadelson, *Introduction* to FAMILY VIOLENCE: EMERGING ISSUES OF A NATIONAL CRISIS, at xi, xii (Leah J. Dickstein & Carol C. Nadelson eds., 1989) (documenting the first active movement against the phenomenon in 1973).

2. See Martha Albertson Fineman, *Preface* to THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE, at xi, xii–xv (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (summarizing changes in the law as a result of feminist critiques of the legal system).

3. Amanda Gordon, *Domestic Violence Registries*, CONN. OFF. LEGIS. RES. (June 27, 2011), <http://www.cga.ct.gov/2011/rpt/2011-R-0196.htm>.

4. Tex. H.B. 100, 82d Leg., R.S., § 3 (2011); S. 3819, 2011 Leg., Reg. Sess., § 2 (N.Y. 2011).

5. Tex. H.B. 100, § 3.

6. N.Y. S. 3819, § 2.

7. Gordon, *supra* note 3.

Such proposals are relatively new, but the 2011 bills were not the first of their kind. One of the bills represents Texas's second attempt at creating a domestic violence database.<sup>8</sup> In the last three years, similar bills have been proposed in California<sup>9</sup> and Virginia,<sup>10</sup> and there is evidence of legislative interest in the idea in Nevada.<sup>11</sup> Despite the bills' admirable goal of protecting the public from batterers, none have passed.<sup>12</sup>

In this Note, I argue that despite the disheartening results of efforts thus far, state legislators should continue to advocate for domestic violence databases. I first examine the goals of domestic violence legal reform in light of the goals of the feminists who first brought the problem to public attention and find that a domestic violence database would be an appropriate and efficient tool to combat the problem of abuse in the family. I then compare the Texas and New York bills and conclude that the Texas bill provides a more cost-effective and reasonable means of establishing the database. Finally, I examine several arguments against the database, including concerns about its cost-effectiveness, and determine that the database can withstand such attacks.

### I. Why the Database Is Necessary and Appropriate

A domestic violence database is needed in order to protect victims of abuse.<sup>13</sup> The criminal justice system has faced significant problems in attempting to aid these victims, and a domestic violence database could resolve these problems. Domestic violence databases offer a preventative—rather than remedial—approach to combating this pervasive social problem while promoting feminist goals and supporting women's autonomy. Because the database presents a relatively unproblematic way for the state to reduce domestic violence and because domestic violence is still a major problem in

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8. Representative Joaquin Castro proposed a similar bill in the 81st Legislative Session. Tex. H.B. 2754, 81st Leg., R.S. (2009).

9. Assemb. B. 1771, 2008 Leg., Reg. Sess. (Cal. 2008); see also *No Refuge for Domestic-Violence Perpetrators*, S.F. CHRON., Oct. 12, 2010, available at [http://articles.sfgate.com/2010-10-12/opinion/24130205\\_1\\_domestic-violence-domestic-violence-statewide-registry](http://articles.sfgate.com/2010-10-12/opinion/24130205_1_domestic-violence-domestic-violence-statewide-registry) (discussing the possibility of implementing a domestic violence registry in California).

10. H.B. 1932, 2011 Gen. Assemb., Reg. Sess. (Va. 2011); see also Abby Rogers, *Financial Woes Doom Domestic Abuse Registry*, VA. STATEHOUSE NEWS (Mar. 14, 2011), <http://virginia.statehousenewsonline.com/3222/financial-woes-doom-domestic-abuse-registry/> (describing the funding issues that eventually caused the Virginia bill to lose support).

11. In Nevada, Assemblyman James Ohrenschall has discussed his plans to propose a bill creating a domestic violence registry. Henry Brean, *Domestic Violence Registry Proposed*, LAS VEGAS REV.-J. (Sept. 26, 2008), <http://www.lvrj.com/news/25958094.html>. However, no such bill has been proposed. *Id.*

12. Gordon, *supra* note 3.

13. Throughout this Note, gendered language is used to discuss domestic problems generally. This language is not intended to suggest that women are never batterers, or that men are never victims of domestic violence.

the United States, every jurisdiction should implement a database as quickly as possible.

A. *The Problems with the Law's Current Response to Domestic Violence*

These days, talk of “empowering” the victims of domestic violence focuses entirely on empowerment after abuse has already occurred—basically, empowerment in prosecuting the abuser, severing ties with him, and building a new life on one’s own.<sup>14</sup> The bills introduced in Texas and New York, conversely, propose an entirely new kind of empowerment by giving potential victims the chance to make informed decisions about their dating partners and thus to avoid abusive relationships entirely.

The need for a preventative resource on the front end of abusive relationships is all the more pressing because of the law’s inadequacies in dealing with domestic violence after it has occurred. The law’s failure to address domestic violence as a crime when it was first brought to public attention during the 1970s is common knowledge.<sup>15</sup> This is not to say that progress has not been made. A variety of measures have been implemented to ensure that the legal system is responsive and sensitive to victims and that domestic violence laws are vigorously enforced. These measures include retraining police officers to recognize the seriousness of the problem, enabling warrantless arrests of domestic violence offenders, passing mandatory arrest statutes, removing the marital exemption from rape statutes, instituting no-drop policies for prosecutions, and enacting anti-stalking laws.<sup>16</sup> Texas, for example, has an anti-stalking statute<sup>17</sup> and permits warrantless arrests for individuals suspected of domestic violence,<sup>18</sup> and at least one Texas county has instituted a no-drop policy.<sup>19</sup>

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14. See, e.g., Noël Bridget Busch & Deborah Valentine, *Empowerment Practice: A Focus on Battered Women*, 15 *AFFILIA* 82, 86 (2000) (applying empowerment theory to social work with victims of domestic violence to allow victims to “gain power and access to resources” after they have been abused); Christine O’Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 *B.C. L. REV.* 937, 938 (1999) (“[Pre-trial release hearings] provide[] an ideal setting in which to balance the State’s interest in addressing crimes of domestic violence and the private autonomy interests of the victim.”).

15. See, e.g., JULIE BLACKMAN, *INTIMATE VIOLENCE: A STUDY OF INJUSTICE* 12–13 (1989) (explaining the developing awareness of family violence during the 1970s and enforcement problems with the new domestic violence laws); NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY* 196 (2006) (“[H]istorically . . . police officers did not respond as rapidly to domestic violence calls or treat intimate violence situations as seriously as other violent crimes.”).

16. See *Developments in the Law—Legal Responses to Domestic Violence*, 106 *HARV. L. REV.* 1498, 1533–41 (1993) [hereinafter *Legal Responses*] (noting the relative success of those measures in improving the legal response to domestic violence).

17. *TEX. PENAL CODE ANN.* § 42.072 (West 2011).

18. *TEX. CODE CRIM. PROC. ANN.* art. 14.03(a)(4) (West Supp. 2010).

19. *Family Violence Unit*, TARRANT COUNTY CRIM. DISTRICT ATT’Y, <http://www.tarrantda.com/specialunits/familyviounit.htm>. For discussion of no-drop policies generally, see *infra* notes 29–31 and accompanying text.

These reforms signal a positive change, at least in terms of the willingness of the criminal justice system to aid victims of domestic violence. However, they have given birth to a host of new problems in the domestic violence context. On the more innocuous side, some of these policies are simply ineffective. Anti-stalking statutes, for example, are often disregarded by the police and are difficult to enforce.<sup>20</sup> Mandatory-arrest policies do not necessarily increase enforcement against abusers because police officers often exercise discretion in determining whether probable cause of domestic violence exists.<sup>21</sup> Similarly, civil protective orders against abusers are ineffective when police officers can decline to enforce them,<sup>22</sup> a problem vividly and terrifyingly demonstrated by the facts of *Town of Castle Rock v. Gonzales*.<sup>23</sup> In addition, victims' lack of knowledge about the availability of protective orders, along with language barriers and unfamiliarity with the legalese used in the courtroom, seriously hamper the potential benefits of these orders.<sup>24</sup>

On the more damaging side of things, these measures can create additional problems for victims of domestic violence. Mandatory arrest statutes have increased the number of women arrested for incidents of domestic violence; the arrested women often inflict only defensive wounds and are "the primary perpetrators much less often than their male partners."<sup>25</sup> From a broader perspective, these arrest statutes have had a negative effect

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20. See Jennifer L. Bradfield, Note, *Anti-stalking Laws: Do They Adequately Protect Victims?*, 21 HARV. WOMEN'S L.J. 229, 260–65 (1998) (describing problems with the justice system's response to stalking, particularly in that police officers will often wait until the situation has "escalated to the point of violence or near-violence" before taking action under an anti-stalking statute).

21. LEVIT & VERCHICK, *supra* note 15, at 198; see also *Legal Responses*, *supra* note 16, at 1537 (arguing for mandatory arrest because the discretionary expanded arrest powers have been little-used and the laws prohibiting domestic violence are still under-enforced).

22. *Legal Responses*, *supra* note 16, at 1510 ("Protection orders . . . are frequently violated, rarely produce an arrest for violation, and often fail to prevent further violence.").

23. 545 U.S. 748 (2005). The respondent in the case was a woman who had obtained a protective order against her husband during divorce proceedings. *Id.* at 751. The protective order required her husband to maintain a certain distance from the family home. *Id.* One evening, her three children went missing from the home. *Id.* at 753. The respondent contacted local police multiple times with information about her husband's whereabouts, asking them to find and protect her children. *Id.* When her children did not return, she showed up at the police station after midnight, but the police took no action. *Id.* at 753–54. Three hours later, her husband showed up at the police station and opened fire; he was killed when the police officers shot back. *Id.* at 754. The bodies of the three children were found in his car; he had murdered them earlier in the night. *Id.* The Supreme Court ruled that the respondent's due process rights had not been violated by the city's failure to enforce the order, affirming dismissal of the suit. *Id.* at 768.

24. Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 169–71 (1993).

25. LEVIT & VERCHICK, *supra* note 15, at 199. Women have been arrested for inflicting harm on their husbands or intimate partners regardless of whether they were acting in self-defense. *Legal Responses*, *supra* note 16, at 1538–39.

because they have been used disproportionately to arrest racial minorities.<sup>26</sup> In addition, the prospect of mandatory arrest may deter victims from calling law enforcement in the first place.<sup>27</sup> Finally, some studies have shown that mandatory arrest may actually increase violence against the victim by angering the batterer further, leading to escalated violence when he returns home.<sup>28</sup>

No-drop policies, in which prosecutors are not allowed to drop charges, even at a victim's request,<sup>29</sup> have also had a harmful effect on some victims of domestic violence. These policies fundamentally interfere with a victim's autonomy by forcing her to continue with "a process over which she has no control."<sup>30</sup> In addition, they may subject the victim to further intimidation or violence from her batterer as a way of retaliating against her for participating in his prosecution.<sup>31</sup>

Finally, though the law has tried, it has not yet reached a point where it can successfully sever a battered woman from her abusive relationship. This is because the factors that cause a victim to stay with her batterer are multifaceted, and the law does not (and perhaps cannot or should not) address all of them. The reasons that a woman cannot leave her abusive husband go beyond the physical or mental abuse and extend into the economics of the family. The traditional family features "a sexual division of labor, and concomitant dependency and restricted opportunities for women."<sup>32</sup> Realistically, from the point at which a woman gets married and has children, she often no longer has a voice or an exit—at least not without incurring the disapproval of society.<sup>33</sup> Victims are often isolated due to their batterers' efforts to completely control their lives; as a result, they have nowhere to turn to if they leave their relationships.<sup>34</sup> Abusers frequently provide victims with the resources necessary for survival—a home, food, and clothing (for

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26. LEVIT & VERCHICK, *supra* note 15, at 198–99.

27. *Legal Responses*, *supra* note 16, at 1538.

28. *Id.* at 1539.

29. *Id.* at 1540.

30. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865 (1996).

31. *Legal Responses*, *supra* note 16, at 1541. No studies have shown that aggressive prosecution policies lead to increased violence by the batterer. Hanna, *supra* note 30, at 1866 n.73. However, the possibility that some victims may be subject to increased violence as a result of a process that they cannot control certainly raises questions about no-drop policies. This possibility should be considered when evaluating the wisdom of such policies.

32. June Carbone, *What Do Women Really Want? Economics, Justice, and the Market for Intimate Relationships*, in *FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, & SOCIETY* 405, 412 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

33. *Cf. id.* at 416 ("Unhappily married women remain married . . . because the younger the children, the more of them, and the less the mother earns, that is, the greater her 'specialization' within the family, the less the woman's ability to leave or credibly threaten to do so. Without the possibility of 'exit,' 'voice'—and the ability to share the burden of changing diapers or making school lunches—diminishes as well.").

34. LEVIT & VERCHICK, *supra* note 15, at 190.

the victims as well as their children)—and victims commonly have no job skills.<sup>35</sup> To some extent, the services provided by shelters for homeless women can remedy these problems.<sup>36</sup> However, out of necessity, shelters can only provide temporary relief, are not available to all victims,<sup>37</sup> and are often understaffed and underfunded.<sup>38</sup>

Therefore, something more is needed to solve the plight of battered women.<sup>39</sup> As demonstrated above, it is often too late by the time the law intervenes, so what is needed is a solution that arrives earlier in the relationship—before the relationship has reached the point where the victim cannot leave despite the law’s efforts. The domestic violence database proposes to intervene at the earliest possible moment—before the relationship has even begun.

June Carbone has noted women’s “systemic vulnerability” within the traditional model of marriage, which is primarily caused by their “domestic role in marriage, their premarital education and socialization, [and] their limited opportunities within the workplace.”<sup>40</sup> Feminists have argued that a more egalitarian model of marriage would redress this vulnerability, positing that “women’s greater independence gives them the ability to renegotiate the terms of an intrinsically oppressive relationship—or to leave if their concerns remain un[ad]dressed.”<sup>41</sup> However, it is difficult for any party to negotiate a better position for itself if not fully informed about the other party.<sup>42</sup> This is where the domestic violence database comes in. The database provides information crucial to a woman’s decision of whether to embark on a relationship with an individual. The information is particularly necessary because a woman making this decision will often have very little else to alert her to the fact that her potential partner is a batterer—many batterers are kind and charismatic during the beginning stages of the relationship.<sup>43</sup>

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35. *Id.*

36. *Legal Responses*, *supra* note 16, at 1506.

37. *See id.* at 1508 (noting that “lack of knowledge or other barriers to access” limit the availability of shelters).

38. *Id.* at 1506 (“Shelters are typically underfunded, understaffed, and unable to respond fully to the needs of battered women.”).

39. I am not attempting to assert that the reform efforts have been useless. On the contrary, it is clear that countless victims of domestic violence have benefited immensely from them, and certainly, the situation is better now than it was thirty years ago. *See infra* notes 15–19 and accompanying text. However, violence against intimate partners is a problem that sadly has not gone away despite the reforms.

40. Carbone, *supra* note 32, at 413.

41. *Id.* at 405.

42. *See* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 26 (2000) (“The more information that a party has, the more likely it is that he or she can see the context of a given situation clearly and respond accordingly.”).

43. Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 19, 22.

Furthermore, the database could be helpful to women who are already victims of domestic violence. An additional barrier to leaving the abuser is love. A woman may not leave her abuser because she does not want to lose the relationship she has cultivated with him, despite the violence.<sup>44</sup> Batterers often follow violent incidents with “honeymoon phases” in which the batterer shows remorse for his actions, promises to change, and temporarily becomes a loving partner.<sup>45</sup> Though this is a recurring cycle,<sup>46</sup> many victims believe their batterers when they say that each episode of violence is the last and that the abuse will cease from then on.<sup>47</sup> It is possible that a woman stuck in this cycle would turn to the database (or receive information about it from a friend or family member), learn that her intimate partner has behaved in the same way in the past, and realize that he is not going to change. This realization may be enough to push the woman to get help and to take the steps she needs to extricate herself from the abusive relationship.

Although reforms to the criminal law have made great leaps in improving law enforcement’s response to domestic violence, domestic violence nevertheless remains a major issue for too many women. Domestic violence is the most frequent cause of injury for women between the ages of fifteen and forty-four.<sup>48</sup> The law’s efforts thus far have concentrated mainly on how to resolve the problem once domestic violence has already occurred; no preventative measures have been implemented. This is particularly unfortunate because domestic violence is a recurring crime from which victims are often unable to extract themselves. Furthermore, the law’s post-violence efforts have raised problems of their own. Against this backdrop, the creation of a domestic violence offender database is essential. The database could prevent women from entering into abusive relationships so that the problems with post-violence enforcement are never encountered. In addition, the database may be helpful to victims who are trapped in relationships because they believe that their abusers will change.

### *B. The Database and the Public–Private Dichotomy*

The criminal law reforms addressing domestic violence have reflected a consistent pattern of moving the problem from the private sphere to the

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44. *See id.* (“A victim may say she still loves the perpetrator, although she definitely wants the violence to stop. . . . [M]ost [people in an abusive relationship] do not immediately leave . . . when treated badly; they tend to try harder to please the abuser.”).

45. *See* Hope Toffel, Note, *Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People Who Kill Their Abusers, and the Argument for Extending Battering Syndrome Self-Defenses to All Victims of Domestic Violence*, 70 S. CAL. L. REV. 337, 349 (1996) (explaining the “cycle of violence,” which consists of three stages: the tension-building phase, the acute-battering phase, and the phase of loving contrition).

46. *Id.*

47. Buel, *supra* note 43, at 22.

48. Judith A. Smith, *Battered Non-wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 94 (2005).

public sphere.<sup>49</sup> For the most part, this move has been viewed as progress because the original conception of domestic violence as a private issue was largely the reason behind the failure of the state to protect women from harm.<sup>50</sup> In this part, I examine the consequences of this shift, particularly its impact on the autonomy of domestic violence victims. Most of the changes have done damage to the autonomy of victims while claiming to help them. The domestic violence database, conversely, both preserves and enhances a potential victim's autonomy.

Much feminist theory in recent years has been devoted to the idea of autonomy, particularly with regard to reproductive rights<sup>51</sup> and sexuality.<sup>52</sup> Not much has been said on the topic of autonomy relating to domestic violence, however. This is perhaps not surprising, as the problem of domestic violence is rooted in one intimate partner's need to control the other. This does not mean, however, that autonomy is a concept ill-fitted to the issue of domestic violence.

The word *autonomy* has its origin in politics,<sup>53</sup> but it has been imported from the public sphere into the personal to stand for the idea of self-

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49. See BLACKMAN, *supra* note 15, at 1 ("In the last two decades, intimate violence has gone from the taboo to the talked about.")

50. Hanna, *supra* note 30, at 1869.

51. See generally Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (arguing that the Court in *Roe v. Wade*, 410 U.S. 113 (1973), should have used sex-equality considerations in finding a constitutional right to abortion, as reproductive autonomy is necessary for women to participate in society as equals to men); Maura A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, HASTINGS CENTER REP., July–Aug. 1990, at 6 (criticizing the unlimited reproductive liberty stemming from women's autonomy that is typically advocated by feminists and suggesting that this approach devalues children and ignores moral concerns about reproduction); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) (outlining an approach to reproductive rights that the author terms the "sex equality approach," which posits that a woman's control over her reproductive capacity is necessary to achieve equality between the sexes); Angela Thachuk, *Midwifery, Informed Choice, and Reproductive Autonomy: A Relational Approach*, 17 FEMINISM & PSYCH. 39 (2007) (discussing Canadian midwifery and its capacity to maximize women's reproductive autonomy).

52. See generally YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER & A WORLD WITHOUT RAPE (Jaclyn Friedman & Jessica Valenti eds., 2008) (presenting a series of essays advocating for increased female sexual power and autonomy); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (arguing that feminist scholars have focused too much on the danger inherent in sexual activity and not enough on the pleasure possible for a woman with both negative and positive sexual liberty); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993) (discussing the possibility of reforming the criminal-rape law so that it protects female sexual autonomy); Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35 (1992) (arguing that the law of rape, despite its many reforms, still fails to protect women's autonomy); Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321 (2005) (arguing for the adoption of a standard of affirmative consent in rape law and positing that only such an affirmative-consent standard will allow women to regain control over their sexual encounters).

53. Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 446 (1983).

government.<sup>54</sup> Pared down to its most basic form, the right to autonomy is “the right to decide how one is to live one’s life, in particular how to make . . . critical life-decisions.”<sup>55</sup> According to John Stuart Mill, this right to autonomy extends to all decisions in the personal domain—decisions that do not directly affect other persons.<sup>56</sup> Furthering this argument, Mill asserts that legal paternalism is at odds with the right to autonomy when the law tries to invade this personal domain.<sup>57</sup> Even if the law claims to be acting for the best interest of the individual, this invasion is not justified because the right to autonomy supersedes the law’s interest in that individual’s personal good.<sup>58</sup> On the other hand, the law is fully justified in intervening when a person’s decision extends outside of the personal sphere and harms another individual.<sup>59</sup>

As domestic violence became criminalized, the state moved deeper and deeper into what was once conceived as the personal sphere. Domestic violence prosecutions occupy an uncomfortable position with regard to the idea of autonomy.<sup>60</sup> On the one hand, the state is clearly justified in interfering with the batterer’s autonomy because his actions and decisions are hurting another individual—his autonomy has extended beyond the personal domain. On the other hand, prosecuting a batterer against the victim’s will conflicts with many decisions that are solely within the victim’s personal domain—whether to stay in an intimate relationship, how to raise her children, etc.<sup>61</sup>

Although Carol Hanisch famously announced that “the personal is political,”<sup>62</sup> there are nonetheless benefits to maintaining a private domain free from government intervention, even for women and even from a

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54. *See id.* (“Indeed it is plausible to suppose that . . . ‘personal autonomy’ is a political metaphor.”).

55. *Id.* at 454.

56. *Id.* at 455; JOHN STUART MILL, ON LIBERTY 15 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859).

57. *See* MILL, *supra* note 56, at 16 (“The only freedom which deserves the name, is that of pursuing our own good in our own way . . . . Though this doctrine is anything but new, and, to some persons, may have the air of a truism, there is no doctrine which stands more directly opposed to the general tendency of existing opinion and [the] practice [of regulating private conduct].”).

58. *See id.* (“Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.”).

59. *Id.* at 14.

60. *See, e.g.,* Kimberly D. Bailey, *Lost in Translation: Domestic Violence, “The Personal Is Political,” and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1256 (2010) (acknowledging the tension between the aims of criminal law and the concept of victim autonomy).

61. *See, e.g., id.* at 1274–75 (characterizing women who refuse to participate in the prosecution of their abuser as “quite rational individuals who are making the best choices they can under constrained circumstances”).

62. Carol Hanisch, *The Personal is Political*, WRITINGS BY CAROL HANISCH, <http://www.carolhanisch.org/CHwritings/PIP.html>.

feminist perspective.<sup>63</sup> For example, it is the concept of privacy that allows women the freedom to use birth control<sup>64</sup> and to maintain a right (albeit a limited one) to abortion.<sup>65</sup> Conversely, the idea that all victims benefit from public intervention and state-mandated participation in the prosecution process is disturbingly paternalistic.<sup>66</sup>

The dilemma posed by the collision between domestic violence in the public sphere and the victim's personal autonomy is not one that can be resolved in this Note. However, the domestic violence database is a way for the state to respond to the problem of domestic violence without running into that dilemma. The database simultaneously strengthens and preserves the woman's autonomy. As discussed above, the fundamental concept underlying autonomy is the right to choose.<sup>67</sup> A woman's decision of with whom to pursue a romantic relationship is a highly personal one that cannot be invaded without hampering her autonomy. At the same time, that decision is the turning point in determining whether the woman will become a victim of domestic violence. A domestic violence database enhances her decisional strength by equipping her with information that she could use to avoid making a choice that might eventually lead to her victimization. On the other hand, the database does not interfere with the woman's autonomy. No one is required to use the database, and no state-sponsored consequences result from refusing to heed its information. Despite the public nature of the database, each person's choice of whether and how to use it is a private decision.

The move of domestic violence from the private to the public realm, while an important and necessary change, has not been entirely smooth. Some reform efforts have encroached upon the victim's autonomy while trying to mete justice on her batterer. While the domestic violence offender database does not solve these problems, it does provide a way for the state to get involved without infringing on a woman's autonomy. As such, it ought to be a welcome addition to the tools that law enforcement currently wields against domestic violence.

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63. See Laura W. Stein, *Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 MINN. L. REV. 1153, 1177–78 (1993) (arguing that privacy can increase autonomy for women and help to achieve feminist goals).

64. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that a law forbidding the use of contraceptives unconstitutionally invaded the right to privacy).

65. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding in part that the right to privacy covers a woman's choice of whether or not to terminate her pregnancy); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46 (1992) (“[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”).

66. See Hanna, *supra* note 30, at 1872 (“Some feminists argue that allowing the state to decide for women in a male-dominated system is paternalistic . . .”).

67. See *supra* notes 53–59 and accompanying text.

## II. Crafting the Ideal Bill: Lessons from HB 100 and S3819

Though the Texas and New York bills are similar in spirit, they have important differences that could prove crucial to each bill's success. This part discusses the two most important differences: the prerequisite number of offenses required and the difference between a database and a registry. In both respects, the Texas bill should serve as a model for other states looking to pass a domestic violence database measure because it contains safeguards superior to New York's proposed legislation while leaving out extraneous and potentially harmful measures. The best version of the bill would create a database of offenders who have at least three domestic violence convictions on their records.<sup>68</sup> Although the database would be accessible to the general public, offenders would not be required to update their information or to notify friends, neighbors, or partners. The database would be most effective in jurisdictions like Texas that have Batterer Intervention Programs (BIPs) that work to reintegrate offenders into society;<sup>69</sup> any jurisdictions that lack such programs should pass them prior to, or in conjunction with, database laws.

To maximize effectiveness and minimize overbreadth, databases should compile lists of offenders who have three or more domestic violence convictions. The Texas bill (HB 100) and the New York bill (S3819) both preface listings on the database/registry with the requirement of at least one conviction of family or domestic violence.<sup>70</sup> The Texas and New York definitions of domestic violence are similar.<sup>71</sup> However, HB 100 and S3819 differ in the number of offenses that one must be found guilty of before being subjected to a listing on the database. HB 100 requires three or more findings of family violence before an offender will be listed.<sup>72</sup> S3819, on the other hand, requires any individual who is convicted of any domestic violence offense to be listed.<sup>73</sup> The HB 100 approach appears to be the more

68. This is the approach of the proposed Texas bill. Tex. H.B. 100, 82d Leg., R.S., § 3 (2011).

69. See *infra* notes 122–27 and accompanying text.

70. Tex. H.B. 100, § 3; S. 3819, 2011 Leg., Reg. Sess., § 3 (N.Y. 2011).

71. The Texas Family Code defines *family violence* as follows:

(1) [A]n act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

(2) abuse . . . by a member of a family or household toward a child of the family or household; or

(3) dating violence . . . .

TEX. FAM. CODE ANN. § 71.004 (West 2008). S3819 defines *domestic violence offense* as “the conviction of any felony offense defined in the penal law when the victim of such crime or offense is a family or household member.” N.Y. S. 3819, § 3.

72. Tex. H.B. 100, § 3.

73. See N.Y. S. 3819, § 2 (defining *domestic violence offender* for purposes of the registration act as a person convicted of any domestic violence offense).

prudent one, as a commonly voiced concern in the debate over these registries is the chance that a wrongful accusation could land an innocent person on the list. Another concern is that a one-time domestic spat could land a normally peaceful person on a list of supposedly violent individuals, damaging that individual's reputation as well as future employment and relationship prospects. These worries can be resolved by HB 100's three-strike requirement, which ensures that only those who are actually guilty, and repeatedly so, suffer the consequences of being listed on the database.

Creating a database rather than a registry is crucial to maintaining victims' privacy while minimizing the costs of administering the program. Texas's HB 100 is structured to create a database, whereas New York's S3819 is written to create a registry. The difference lies in the additional requirements imposed by the S3819 registry. S3819 compels every abuser to affirmatively register and update his information in the registry.<sup>74</sup> In addition, S3819 has a notification component that requires local law enforcement to be alerted when a registered abuser moves into the neighborhood.<sup>75</sup> Though this notification requirement is not as expansive as the community-notification components of sex offender statutes,<sup>76</sup> it could still be harmful to victims of domestic violence. Many victim-support groups worry that a listing on the registry would "out" the abuser's partner as a victim of domestic violence, which could cause pain, shame, and suffering.<sup>77</sup> As such, less notification is more when it comes to protecting victims. Because the database is primarily meant to be used by potential victims of domestic violence in researching their prospective partners, there is no need for widespread notification, and indeed, widespread notification could be damaging to individuals already harmed by domestic violence. In addition, leaving out registration and notification requirements means spending less, as discussed in subpart III(B). In this respect, the sparser requirements of HB 100 make it a more ideal proposal than S3819.

HB 100 is a better model for states that are interested in crafting domestic violence databases. HB 100 contains more safeguards for individuals accused of and prosecuted for domestic violence, while simultaneously providing increased confidentiality for victims of domestic violence.

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74. *Id.*

75. *Id.*

76. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3825 (Supp. 2010) (requiring notification of local authorities within seventy-two hours of the offender's release from prison and community notification within forty-five days); N.J. STAT. ANN. § 2C:7-6 (West 2005) (requiring community notification within forty-five days of release); WASH. REV. CODE ANN. § 4.24.550(1), (5) (West Supp. 2011) (requiring authorities to create and maintain a statewide publicly available sex offender website); *see also* Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49 (2005) (discussing the impact of and responses to community-notification laws).

77. *N.Y. Domestic Violence Registry Proposal Met with Big Concerns*, CBS N.Y. (April 18, 2011), <http://newyork.cbslocal.com/2011/04/18/n-y-domestic-violence-registry-proposal-met-with-big-concerns/>.

Because it is the better archetype, the following discussion assumes a database structured in the same way as HB 100: a publicly searchable database that compiles information about repeat domestic violence offenders, without the cumbersome registration and notification requirements of S3819.

### III. Possible Criticisms of the Database

#### A. *Ineffectiveness at Reducing Crime and Recidivism*

Thus far, no state has implemented a domestic violence database. As such, there is no empirical evidence on the effects of such a bill that can be analyzed. Therefore, my examination of critiques leveled against the bill takes place in the hypothetical realm, drawing largely on the most similar legal scheme in our current system: the system of state-run sex offender registries mandated by Megan's Law. The similarities between the two are so apparent that nearly every news source reporting on the Texas bill has made a reference to the sex offender registry.<sup>78</sup>

By federal mandate, every state has implemented a registry that publicly lists the name and information of individuals who have committed sex-related crimes.<sup>79</sup> The details and administration of these registries vary from state to state, but all require sex offenders to inform local authorities of their addresses and update them each time they move.<sup>80</sup> The sex offender laws have been hugely controversial. They have been attacked as ineffective,<sup>81</sup> as products of public misconceptions about sex offenders,<sup>82</sup> and as unconstitutional.<sup>83</sup>

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78. See, e.g., Jay Gormley, *Proposed Bill Would Create Domestic Violence Registry*, CBS DFW (Jan. 21, 2011), <http://dfw.cbslocal.com/2011/01/21/proposed-bill-would-create-domestic-violence-registry> (remarking that the proposed database would be "much like the one used to track sex offenders"); Chase Thomason, *Legislator Pushes Domestic Violence Registry*, FOX 34 NEWS (Jan. 18, 2011), <http://www.myfoxlubbock.com/news/local/story/domestic-violence-house-bill-100-texas/WG6OLMD8gEKsTAgVyITP6w.csp> (calling the domestic violence registry "similar to the current sex offender registry"); Mark Whittington, *Texas Domestic Violence Registry Proposed*, YAHOO! NEWS (Jan. 21, 2011), [http://news.yahoo.com/s/ac/20110121/tr\\_ac/7667862\\_texas\\_domestic\\_violence\\_registry\\_proposed](http://news.yahoo.com/s/ac/20110121/tr_ac/7667862_texas_domestic_violence_registry_proposed) (noting that the Texas bill would create a domestic violence registry "similar" to sex offender registries).

79. 42 U.S.C. §§ 16902, 16912 (2006).

80. *Id.* § 16914(a)(3).

81. Adrienne Lu, *Megan's Law Ineffective, Study Says*, PHILA. INQUIRER, Feb. 7, 2009, available at <http://www.correctionsone.com/news/1843686-Megans-Law-ineffective-study-says>.

82. See Eric Lotke, *Politics and Irrelevance: Community Notification Statutes*, 10 FED. SENT'G REP. 64, 64-65 (1997) ("The belief that sex offenders reoffend repeatedly fuels the rush toward community notification. . . . Scholarly research does not support these claims.").

83. See Catherine A. Trinkle, Note, *Federal Standards for Sex Offender Registration: Public Disclosure Confronts the Right to Privacy*, 37 WM. & MARY L. REV. 299, 333 (1995) (arguing that the Federal Registration Act violates the right to privacy and is unconstitutional because it "fails to meet the narrow tailoring requirement of the strict scrutiny test"). This Note will not discuss the constitutionality of sex offender registries, or the related constitutionality of the HB 100 database because sex offender registries have withstood virtually every constitutional challenge that has been raised against them. See, e.g., *Smith v. Doe*, 538 U.S. 84, 105 (2003) (rejecting an *ex post facto*

To some extent, the comparisons made by news reports make sense. The proposed domestic violence database and the various mutations of the sex offender registry across the United States have several characteristics in common.<sup>84</sup> Both keep a public record of individuals who have committed a certain morally distasteful crime. Both (ideally, at least) perform the public service of informing the members of a community about the danger among them.

Because of their similarities, it is likely that the domestic violence database will be susceptible to the arguments against the sex offender registries—namely, that these programs fall short of their deterrent and reintegrative goals and are excessively expensive. However, the database is in many respects a milder measure than the various Megan’s Law registries, and this allows it to steer clear of some of the registries’ faults. Furthermore, the nature of the crime at issue and the framework of state law in which the database falls make a stronger case for the domestic violence database than for the sex offender registry.

Although sex offender registries have been criticized for their inability to deter further crime, these arguments are less persuasive in the context of domestic violence. A primary argument against the sex offender registries is that they are ineffective at deterring sex crimes and, therefore, that their growing costs are not justified.<sup>85</sup> Some commentators claim that the registries make convicted individuals *more* likely to reoffend because being listed on a public registry isolates the offenders and cuts them off from the social support that they need to reintegrate into the community.<sup>86</sup> Related to the claim of ineffectiveness is the claim of public misunderstanding. Opponents claim that individuals convicted of sex offenses in fact rarely reoffend and that the popularity of the registries is based on the public’s

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challenge to the Alaska registry); *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 7–8 (2003) (rejecting a due process challenge to the Connecticut registry); *In re Alva*, 92 P.3d 311, 313 (Cal. 2004) (rejecting a claim that the California registry constituted cruel and unusual punishment); *Commonwealth v. Becker*, 879 N.E.2d 691, 702 (Mass. App. Ct. 2008) (rejecting a claim that the Massachusetts registry constituted cruel and unusual punishment); *Coronado v. State*, 148 S.W.3d 607, 610–11 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (rejecting due process and ex post facto challenges to the Texas registry); *Dean v. State*, 60 S.W.3d 217, 225 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d) (rejecting an ex post facto challenge to the Texas registry); *In re M.A.H.*, 20 S.W.3d 860, 865–67 (Tex. App.—Fort Worth 2000, no pet.) (rejecting due process and equal protection challenges to the Texas registry).

84. Compare Tex. H.B. 100, 82d Leg., R.S., § 3 (2011), with TEX. CODE CRIM. PROC. ANN. art. 62.005 (West Supp. 2010).

85. KRISTEN ZGOBA ET AL., N.J. DEP’T CORR., MEGAN’S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 2 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf>.

86. See Levenson & Cotter, *supra* note 76, at 52 (reporting that notification laws created despair and hopelessness in some sex offenders, blocking their efforts to change); see also ERIC A. POSNER, LAW AND SOCIAL NORMS 100–03 (2000) (asserting that shaming punishments create “deviant and hostile subcommunities” of shamed individuals where undesirable behavior is encouraged).

misconception of all sex offenders as repeat offenders.<sup>87</sup> Opponents of the databases have analogized these arguments to the domestic violence context.

There are several ways of addressing these arguments. First, some arguments, such as the argument that the registries actually increase recidivism, are simply unsupported by empirical evidence.<sup>88</sup> In other cases, the crimes are too different for arguments against sex offender registries to be applied equally to domestic violence databases. The argument about low rates of recidivism cannot be made with regard to domestic violence.<sup>89</sup> Others are somewhat more complicated.

The assertion that the registries are ineffective is interesting because, in theory, shaming punishments as a category are effective<sup>90</sup> (though this statement is not without its own controversy).<sup>91</sup> Punishment in the criminal justice world is thought to be useful not just because it incapacitates offenders but also because it expresses moral condemnation.<sup>92</sup> Individuals are influenced by the beliefs and values of their fellow human beings, and people are reluctant to engage in activities that others refrain from and denounce.<sup>93</sup> Shaming punishments publicly showcase the moral disapproval of the community through a highly visible “stamp” of the offender’s guilt.<sup>94</sup> Furthermore, shaming fulfills both retributivist and deterrence goals. A public demonstration of an individual’s wrongdoing satisfies the viewer’s sense of justice by reaffirming her values and humiliating the one who has disregarded them.<sup>95</sup> At the same time, the viewer feels a sense of aversion to the

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87. See Lotke, *supra* note 82, at 64 (citing multiple studies that place the rate of recidivism for sex offenders between 10% and 19%).

88. See Levenson & Cotter, *supra* note 76, at 53 (asserting that no research has looked into how different notification strategies affect offenders and that the more general effects of such programs on offenders and communities are largely unknown).

89. A multistate study showed that 32% of men reassaulted within a fifteen-month period and 70% of men committed acts of “verbal abuse.” Edward W. Gondolf, *Patterns of Reassault in Batterer Programs*, 12 VIOLENCE & VICTIMS 373, 379 tbl.2 (1997). In any event, HB 100 intrinsically cabins its effect to recidivist offenders with its three-conviction prerequisite. See *supra* note 72 and accompanying text.

90. See Aaron S. Book, Note, *Shame on You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653, 675 (1999) (“[T]here is evidence that shaming is an effective and creative means of keeping some offenders out of the prison system while simultaneously giving them a chance at rehabilitation.”).

91. See, e.g., Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2164 (2001) (arguing that shaming punishments do not serve the criminal justice goal of retribution); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1922 (1991) (arguing that shaming sanctions would be useless in the United States because of the way American society is structured).

92. Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996).

93. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997).

94. See *id.* at 384 (“Shaming penalties . . . convey condemnation in dramatic and unequivocal terms.”).

95. Kahan, *supra* note 92, at 602.

wrongdoing committed by the individual because she wishes to avoid that kind of humiliation.<sup>96</sup> Finally, shame is psychologically more effective at rehabilitating offenders than incarceration, the traditional form of punishment.<sup>97</sup> Shame connotes a sense of disappointment in the offender by the community, and with it comes a concomitant expectation that the offender can, in some way, make up for his wrongdoing.<sup>98</sup>

Nevertheless, the evidence indicates that the sex offender registries do not have an effect on recidivism. One study on rearrest rates for sex offenders in Washington found no significant differences between offenders subject to the community notification statutes often contained in sex offender registries and offenders who were not.<sup>99</sup> A similar study conducted in New Jersey similarly showed that the registry had no effect on reducing recidivism.<sup>100</sup> The research suggesting the ineffectiveness of the registries is by no means thorough, but it is persuasive, especially considering the complete lack of studies indicating that the registries are effective.<sup>101</sup>

Empirical studies on the reasons behind the registries' ineffectiveness are lacking, but the detractors of shaming punishments offer many theories. A major critique of shaming punishments is that they can prevent the offender from becoming a productive member of his community, thus driving him out of mainstream society into miscreant subcultures.<sup>102</sup> Opponents posit that shaming punishments do not work in our society because they do not provide a way for the shamed individual to become reintegrated into the community.<sup>103</sup> Failing to give the offender an opportunity to redeem himself renders the shaming, at best, meaningless, and, at worst, a gateway into more crime.

There exists some research that tangentially supports this theory, finding that registered sex offenders experienced isolation and loss of relationships,

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96. *Id.* at 603; *see also* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 81 (1989) (“Shame not only specifically deters the shamed offender, it also generally deters many others who also wish to avoid shame and who participate in or become aware of the incident of shaming.”).

97. *See* Book, *supra* note 90, at 677 (citing BRAITHWAITE, *supra* note 96, at 72) (noting that shame punishment has the most potential to rehabilitate because it reminds offenders of their own morality).

98. *Id.* (citing BRAITHWAITE, *supra* note 96, at 72–73).

99. DONNA D. SCHRAM & CHERYL DARLING MILLOY, WASH. STATE INST. FOR PUB. POLICY, COMMUNITY NOTIFICATION: A STUDY OF OFFENDER CHARACTERISTICS AND RECIDIVISM 3 (1995).

100. ZGOBA ET AL., *supra* note 85, at 41.

101. *See* Levenson & Cotter, *supra* note 76, at 52 (“Little empirical evidence exists to support conclusions that Megan’s Law leads to the above-mentioned benefits [namely, increased safety and community awareness] . . .”).

102. *See* POSNER, *supra* note 86, at 102 (“Having lost legitimate opportunities for gain, the offender must turn to a life of crime . . .”).

103. *See* Massaro, *supra* note 91, at 1917, 1922 (arguing that a crucial element of an effective shaming system is a means “for reclaiming the shamed one, should she prove herself worthy” and that criminal justice systems in the United States lack this element because the cultural foundations of the shaming tradition “have eroded”).

jobs, and homes<sup>104</sup>—all signs that the offenders had lost their place in their communities. Though no study has been conducted on the subject, it is possible that rehabilitative treatment, coupled with the shaming punishment of a database or registry, could redeem the offender's bad behavior<sup>105</sup> and thus restore the offender's sense of belonging to his community. Having experienced the negative consequences of his behavior through shaming, the offender would value his recovered place in society more than he did before the shaming and have greater incentive not to repeat the condemned behavior.<sup>106</sup> Indeed, Dan Kahan, one of the major proponents of shaming punishments in the debate over alternative sanctions, has supported restorative justice programs, which focus on reintegrating the offender into the community, as a response to the criticisms of shaming.<sup>107</sup>

Notwithstanding concerns about the effect of shaming punishments on sexual criminals, this type of remedy can nevertheless have positive effects on the domestic violence problems our society faces. If the domestic violence offender registry is susceptible to the same criticisms as the sex offender registry, and if the problem with the sex offender registry is that it lacks reintegrative processes, then the solution to the argument that these registries are ineffective is a rehabilitative scheme that reintegrates offenders into society. Nearly every state already has such a scheme in place: the Batterer Intervention Program (BIP).<sup>108</sup>

The essence of the reintegrative program is redemption. Shaming and redemption are mutually strengthening concepts. As Toni Massaro concluded after a study on shaming techniques in various time periods and cultures, shaming is effective when it is based on "optimism" toward the offender's responsiveness to reintegrative programs.<sup>109</sup> Some commentators have even described shaming punishments as inherently redemptive.<sup>110</sup> Furthermore, redemption is most effective when one is being given the

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104. Levenson & Cotter, *supra* note 76, at 52.

105. See Lotke, *supra* note 82, at 65 (summarizing the results of several studies that cautiously concluded that sex offender therapy could have a positive effect).

106. See Massaro, *supra* note 91, at 1910, 1917 (concluding that shaming punishments are most effective when the offender has an opportunity to be "reintegrated into the social fabric").

107. Dan Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEXAS L. REV. 2075, 2090–95 (2006).

108. See *State Standards Listings by State*, BATTERER INTERVENTION SERVS. COALITION MICH., [http://www.biscmi.org/other\\_resources/state\\_standards.html](http://www.biscmi.org/other_resources/state_standards.html) (stating that, as of 2008, forty-three states had BIPs in place and listing sources for each state's standards). For further discussion of the BIP of one state—Texas—see *infra* notes 122–27 and accompanying text.

109. Massaro, *supra* note 91, at 1924.

110. See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 742 (1998) (proposing an educating model for shaming, which does more than "convey moral disapprobation and disapproval" by attempting to show the offender "why what he has done was wrong in the hope of getting him to repent"); Book, *supra* note 90, at 677 (explaining that shaming punishes at the same time as it reaffirms the morality of the offender by conveying that the offender's wrongdoing is out of character).

chance to win back his position in society.<sup>111</sup> Shaming is a particularly forceful condemnation, and the redeeming effect of a reintegration program is therefore likely to be particularly salient in the shaming context. The two are flip sides of the same coin—the shame is necessary to teach the offender that his conduct was wrong, and the reintegration is necessary to show the offender why it was wrong, to influence him to experience guilt, and ultimately to convince him to repent and seek amends.<sup>112</sup> While “restorative justice” is a major component of many reintegration programs, strong educational components—of the type offered by the various states’ BIPs—will offer domestic violence offenders better prospects for batterer reintegration.

Restorative justice is a process by which the individuals affected by the wrongdoing participate and communicate about the consequences of the wrong and how it can be corrected.<sup>113</sup> However, it is not the most effective way of reintegrating domestic violence offenders because the victim-offender relationship is unique in the domestic violence context. For one, restorative justice techniques are typically used for crimes in which no prior relationship existed between victim and offender and where the crime consisted of a single act.<sup>114</sup> In contrast, domestic violence by definition occurs between two individuals who have a preexisting, often serious, relationship. Furthermore, domestic violence usually occurs as a series of repeated and manipulative events over time<sup>115</sup> and can cause damaging psychological issues for its victims.<sup>116</sup> As a result, victims who have broken free of the abusive cycle generally value their own safety and the safety of their children much more than they value punishing the offender or obtaining an apology.<sup>117</sup> Therefore, restorative justice may not be the best model of reintegration for domestic violence offenders.

Instead, an education program would be an effective way of reintegrating domestic violence offenders. Domestic violence is a social problem that is rooted in the way individuals are taught to conceptualize gender and power.<sup>118</sup> For batterers, “violence is a resource for constructing

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111. See, e.g., Massaro, *supra* note 91, at 1910 (noting that because stakes are high when one risks a shaming punishment, subsequent “ceremonies of repentance and reacceptance” are particularly effective).

112. See Garvey, *supra* note 110, at 765 (describing how the sequence of punishment and moral education is an effective model for preventing future wrongdoing).

113. John Braithwaite & Heather Strang, *Restorative Justice and Family Violence*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE* 1, 4 (Heather Strang & John Braithwaite eds., 2002).

114. Julie Stubbs, *Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE*, *supra* note 113, at 42, 43.

115. *Id.*

116. See BLACKMAN, *supra* note 15, at 49 (discussing the psychology of battered women, including the phenomenon of “learned helplessness”).

117. Stubbs, *supra* note 114, at 51.

118. See Kristin L. Anderson, *Gender, Status, and Domestic Violence: An Integration of Feminist and Family Violence Approaches*, 59 J. MARRIAGE & FAM. 655, 658 (1997) (“[M]en and

masculinity.”<sup>119</sup> Most commentators agree<sup>120</sup> that violence in intimate relationships is a form of controlling the victim and that a need to maintain power informs the thinking that causes a batterer to batter.<sup>121</sup> What is needed is a way for batterers to reform their beliefs about male dominance and their need to control their partners. This education strategy is already being implemented through BIPs in forty-three of the fifty states.<sup>122</sup> Take, for example, Texas. The Texas Batterer Intervention and Prevention Program Accreditation Guidelines recommend training that teaches that battering is intentional behavior with the aim of maintaining dominance in a relationship.<sup>123</sup> Recommended staff training also includes instruction that battering is a form of oppression, as well as education on male privilege and the gendered nature of domestic violence.<sup>124</sup> The Texas Council on Family Violence (TCFV)—the nonprofit organization that assists the Texas Department of Criminal Justice’s Community Justice Assistance Division (TDCJ-CJAD) in accrediting BIPs<sup>125</sup>—has also set forth goals for BIPs that try to address the problem of domestic violence at its social roots. In a brochure published for partners of batterers going through a program, TCFV states that one of the goals of such a program is correcting harmful beliefs, such as, “men are superior, women are possessions of men, and aggression is an acceptable way to resolve conflicts.”<sup>126</sup> TCFV also emphasizes the reintegrative aspect of BIPs by characterizing the offense of domestic violence as a “crime against the community” for which the batterer should

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women actively construct gender through social practices designed to differentiate men from women . . . . These social practices construct and maintain the notion that men and women are different and reinforce men’s dominance in both a real (e.g., greater economic resources) and a symbolic fashion.”).

119. *Id.*

120. See Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 963 (2004) (characterizing the understanding as “remarkably uncontroversial”).

121. See, e.g., Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 567 (2007) (“Qualitatively, the intention of the [batterer] is not solely to engage in the violent conduct with which he is charged. Rather, his intention is to exercise power over and restrict the autonomy of his victim.”); Natalie Loder Clark, *Crime Begins at Home: Let’s Stop Punishing Victims and Perpetrating Violence*, 28 WM. & MARY L. REV. 263, 280 (1987) (“The most common ‘fruit’ of domestic violence appears to be power—the power to control the persons and lives of one’s fellow family members.”); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5 (1991) (“Recent feminist work on battering points to the struggle for power and control—the batterer’s quest for control of the woman—as the heart of the battering process.”).

122. See *supra* note 108 and accompanying text.

123. CMTY. JUSTICE ASSISTANCE DIV., TEX. DEP’T OF CRIMINAL JUSTICE, BATTERING INTERVENTION AND PREVENTION PROGRAM ACCREDITATION GUIDELINES 9 (2009).

124. *Id.* at 11.

125. *BIPP Accreditation*, TEX. COUNCIL ON FAM. VIOLENCE, <http://www.tcfv.org/our-work/information-for-batterers/bipp-accred>.

126. TEX. COUNCIL ON FAMILY VIOLENCE, IS HE REALLY GOING TO CHANGE THIS TIME?, available at [http://www.tcfv.org/pdf/Is he Really Going To Change.pdf](http://www.tcfv.org/pdf/Is%20he%20Really%20Going%20To%20Change.pdf).

seek to redeem himself by communicating with others in his community and by participating in community programs.<sup>127</sup>

Studies have been conducted on the effectiveness of BIPs in reducing domestic violence recidivism. A study in 1989 found that batterers who actually completed abuser-treatment programs were less likely to recidivate.<sup>128</sup> A more recent study found that batterer programs have a significant effect on reducing recidivism but concluded that a program on its own was not enough.<sup>129</sup> The data indicated that a major problem with batterer programs was attrition and suggested that a stronger community response to noncompletion was required.<sup>130</sup> The domestic violence offender database could be the solution to this problem. A listing on the database could serve as the community shaming response that is needed to encourage batterers to stay in their programs, rewarding a successful completion and subsequent demonstrations of reform with a removal of the listing. A study has shown that being on the sex offender registry motivated offenders to seek help for their problems.<sup>131</sup> The similarities between those registries and the domestic violence database suggest that the database could also have a correspondingly motivating effect on batterers to follow through with BIPs.

No proposed bill for a domestic violence database makes any mention of reintegration programs or BIPs. However, given the doubts about the effectiveness of sex offender registries, it would be wise to have both a shaming component and a redemptive education component to the domestic violence database. Having a method for reintegrating domestic violence offenders back into society could increase the database's effectiveness while serving the important sociocultural goal of reeducating batterers from their patriarchal and dominance-centered beliefs and values. Additionally, using the database in conjunction with the states' currently existing BIPs could increase the success that BIPs have achieved so far.

#### *B. Cost-Effectiveness of the Database*

As many states are facing budget shortfalls in a sluggish economy,<sup>132</sup> any new piece of legislation will be critically evaluated for the costs it may

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127. *Id.*

128. Huey-tsyh Chen et al., *Evaluating the Effectiveness of a Court Sponsored Abuser Treatment Program*, 4 J. FAM. VIOLENCE 309, 320 (1989).

129. Larry Bennett & Oliver Williams, *Controversies and Recent Studies of Batterer Intervention Program Effectiveness*, NAT'L ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN 8–9 (Aug. 2001), [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_bip.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/AR_bip.pdf).

130. *Id.* at 2.

131. See Levenson & Cotter, *supra* note 76, at 59 tbl.4 (reporting that two-thirds of the offenders surveyed agreed or strongly agreed with the statement, "I am more motivated to prevent reoffense so that I can prove to others that I am not a bad person").

132. See, e.g., ELIZABETH MCNICHOL ET AL., CTR. ON BUDGET & POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT 1, 9–11 tbls.3–5 (2011) (documenting budget shortfalls on a state-by-state basis for fiscal years 2009, 2010, and 2011); Peter Applebome, *Budget Shortfalls Put States in Same Gloomy Straits*, N.Y. TIMES, Jan. 8, 2009, at A25 (discussing the economic

impose. In this respect, the ground beneath the domestic violence database initially appears to be shaky. The creation of a new database will certainly impose costs—though the costs will be relatively low in relation to the benefit added. In addition, the database's counterpart, the sex offender registry, has come under fire in recent years for being costly and ineffective. Despite the current economic climate, domestic violence databases would be worth implementing despite their cost, as those costs will be greatly outweighed by their benefits. Thus, they are an overall cost-effective solution to the domestic violence problem. First, the cost of the database, if it is structured correctly, should be drastically lower than the price tag of the sex offender registries. Moreover, the cost of implementing the database is extremely low compared to the costs imposed on the national economy by domestic violence. In addition, the costs associated with the database are low compared to the overall expenditures of state governments. Finally, the database could be a cost-effective alternative to repeated incarceration of offenders.

Domestic violence imposes an immense cost on the national economy. A study by the Centers for Disease Control and Prevention estimated the costs of intimate-partner rape, physical assault, and stalking to be \$5.8 billion annually,<sup>133</sup> and the report's authors caution that this figure is probably conservative.<sup>134</sup> These costs include the medical and mental health care services required by victims of domestic violence, lost productivity in paid work and household tasks, and lost lifetime earnings for victims killed by an intimate partner.<sup>135</sup> Importantly, the report's authors stress that in order to reduce the toll that domestic violence takes on the nation, efforts should shift in focus from post-violence rehabilitation to pre-violence prevention.<sup>136</sup>

Unfortunately, because no state has implemented a domestic violence database, no quantitative figures are available for a cost-benefit analysis of such a database. However, there are some available data that can be used as a starting point. The most obvious cost comparison would be to the sex offender registries. If this were an apples-to-apples comparison, the prospects for the domestic violence database would be quite dim. One DOJ-funded study based out of New Jersey concluded that the growing costs of the sex offender registry were unjustified.<sup>137</sup> Many states are questioning the

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decline and the resulting budget shortfalls in New York, Connecticut, and New Jersey); Sara Murray, *States Face Budget Shortfalls of \$26.7 Billion*, WALL ST. J., Dec. 8, 2010, available at <http://online.wsj.com/article/SB10001424052748704250704576005683169980902.html> (arguing that states' fiscal woes are likely to continue for several years).

133. CTRS. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (2003), <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>.

134. *Id.*

135. *Id.*

136. *Id.*

137. ZGOBA ET AL., *supra* note 85, at 2.

amount of money that is directed toward the registries as state budgets get tighter.<sup>138</sup>

However, if HB 100 is to be the model for the many states' databases, and I believe that it should be, the implementation of a domestic violence database should be considerably cheaper than the costs of the sex offender registry. Because the tool proposed by HB 100 is a *database* rather than a *registry*, a host of costly measures that accompany registries can be avoided in creating the database. A registry imposes an affirmative burden on the offender to input and update the information about himself that is maintained in the registry. In Texas, for example, a registered offender is required to report changes to his registration authority whenever he changes his address or status and to report employment or enrollment at an institution of higher education.<sup>139</sup> In addition, the offender may be required to verify the accuracy of his information as frequently as every thirty days.<sup>140</sup> These requirements mean that registration authorities have to pay for personnel to staff the locations to which the offenders report and to input changes into the registries. Another common feature of the registries is the community-notification requirement.<sup>141</sup> Each of the fifty states has enacted statutes to require governmental bodies to act in some way to notify the community of a sex offender living among its citizens.<sup>142</sup> Methods of notification include press releases, flyers, phone calls, door-to-door visits, and neighborhood meetings.<sup>143</sup> Obviously, all of these measures cost money.

The model database proposed by HB 100 requires neither continual updates and verifications nor community notification. Nor should it require such measures. Community notification might actually be harmful to victims of domestic violence.<sup>144</sup> Neither registration nor periodic reports of a domestic abuser's status are necessary to the goal of the domestic violence database, which is to allow individual people to equip themselves with information about their prospective partners before becoming involved in potentially dangerous and inescapable relationships. To this end, users of the

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138. Alan Greenblatt, *States Struggle to Control Sex Offender Costs*, NAT'L PUB. RADIO (May 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=127220896>.

139. See TEX. CODE CRIM. PROC. ANN. art. 62.055(a) (West Supp. 2010) (requiring registered offenders to notify their designated primary registration authorities when intending to change addresses); *Id.* art. 62.057(b) (requiring registered offenders to notify their designated primary registration authorities of any changes in name, physical health, or job or educational status); TEX. CODE CRIM. PROC. ANN. art. 62.153(a) (West 2006) (requiring registered offenders who work or attend school at a higher education institution to report to the campus-security authority or local law enforcement authority).

140. See TEX. CODE CRIM. PROC. ANN. art. 62.202(a) (West 2006) (requiring registered offenders civilly committed as sexual predators to report to their designated primary registration authorities not less than once every 30-day period to verify information contained in their individual registrations).

141. Levenson & Cotter, *supra* note 76, at 50.

142. *Id.*

143. *Id.*

144. See *supra* notes 76–77 and accompanying text.

database need only to be able to type their prospective partners' names and birthdays into a search form to put it to effective use. Since the domestic violence database's protective purpose is different from the sex offender registry's purpose of putting an entire community on alert to a possible danger, it need not implement costly aspects such as registration, periodic verification, and community notification. As such, the database is likely to be much cheaper than the average sex offender registry.

Pared down to the basics, then, some data can be found that might reflect the potential cost of a state's domestic violence database. In evaluating the viability of utilizing a database as part of its sex offender registration program, Ohio estimated a cost of \$475,000 in the first year to install and implement the database software, along with \$85,000 in each subsequent year to maintain it.<sup>145</sup> Virginia projected an initial cost of \$986,000 to design and develop a proposed domestic violence registry, with an additional \$126,411 each year for maintenance.<sup>146</sup> The cost for each state will obviously vary depending on the size of its population and the frequency with which domestic violence is reported and successfully prosecuted. However, even using the higher estimate of initial implementation by Virginia, passing a domestic violence database in each of the fifty states and two territories would only amount to about one percent of the annual cost of domestic violence nationwide.<sup>147</sup>

One million dollars to implement a database may seem expensive at first glance. However, when compared to other costs in state expenditures, this amount begins to look very small. For example, Texas appropriated \$10.8 billion to public safety and criminal justice in the 2010–2011 biennium.<sup>148</sup> Similarly, New York budgeted \$4.5 billion for public safety in the 2011–2012 fiscal year, with nearly \$3 billion of that total allotted to its Department of Corrections and Community Supervision.<sup>149</sup> The cost of initiating a domestic violence database would only be a tiny fraction of each

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145. *What Will It Cost States to Comply with the Sex Offender Registration and Notification Act?*, JUST. POL'Y INST., [http://www.justicepolicy.org/images/upload/08-08\\_FAC\\_SORNACosts\\_JJ.pdf](http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf). I note that this is an extremely loose and informal analysis, as the states' evaluations of how much they expect a database to cost are wildly disparate—ranging from under \$1 million in Wyoming to nearly \$60 million in California. *Id.*

146. VA. DEP'T OF PLANNING & BUDGET, 2011 FISCAL IMPACT STATEMENT (2011), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?111+oth+HB1932F122+PDF>.

147. If all fifty states and two territories each spent \$986,000, the total cost nationwide would be \$51,272,000. Taking the Centers for Disease Control's figure of \$5.8 billion seriously, *see supra* note 133 and accompanying text, the cost of all the states implementing the database would be about 0.9% of the cost of domestic violence nationwide.

148. LEGISLATIVE BUDGET BD., 81ST TEX. LEGISLATURE, FISCAL SIZE-UP: 2010–11 BIENNIUM 305 fig.256 (2009), available at [http://www.lbb.state.tx.us/Fiscal\\_Size-up/Fiscal%20Size-up%202010-11.pdf](http://www.lbb.state.tx.us/Fiscal_Size-up/Fiscal%20Size-up%202010-11.pdf).

149. GOVERNOR ANDREW CUOMO, STATE OF NEW YORK 2011–12 EXECUTIVE BUDGET BRIEFING BOOK 65 (2011).

state's general allocations for public safety, and the yearly maintenance cost thereafter would be even lower.

In addition, the database and its concomitant BIP present a cost-effective alternative to the expensive and wasteful process of cycling repeat offenders in and out of state prisons.<sup>150</sup> Robert Perkinson posits that though prisons exist for retributive and rehabilitative reasons, they are most successful at “manufactur[ing] convicts.”<sup>151</sup> The characteristics of prisons make them intrinsically self-defeating in terms of rehabilitation. Confining society's least favored individuals and allowing them to interact solely with each other ultimately leads to “more criminogenesis than moral regeneration, more debasement than redemption, more scandal than success.”<sup>152</sup> Considering that most prisons also suffer from poor oversight and unqualified and underpaid staff,<sup>153</sup> it seems only logical that those who go to prison will not be rehabilitated but will instead end up reincarcerated, thus increasing state expenditures. It is a system that continually imposes more costs on itself. The domestic violence database, in tandem with a BIP, provides a solution to this ineffective cycle. One of the benefits touted by proponents of shaming punishments is their cost-effectiveness—it is much cheaper to embarrass someone than it is to lock them up.<sup>154</sup> Furthermore, if the goal is to prevent prisoners from going back to prison, shaming provides a form of punishment that is much more likely to allow offenders to return to normal, functioning roles in society.<sup>155</sup> The powerful combination of a listing on the database and participation in a BIP is especially likely to prevent individuals from reoffending and imposing costs on the criminal justice system. While the creation and maintenance of the database will not be cost-free, it is unlikely to cost \$42 per offender per day, which is the price the state would pay to hold reoffenders in custody.<sup>156</sup>

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150. A 2002 study indicated that 21.8% of offenders serving time in local jails for violent crimes had victimized members of their families. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 61 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs.pdf>.

151. ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE 368 (2010).

152. *Id.* at 369.

153. *Id.* at 367.

154. *See, e.g.*, Kahan, *supra* note 92, at 641 (“[A]dding shame to the conventional punishments allows society to reduce its total reliance on imprisonment and thereby realize substantial savings in resources.”); Book, *supra* note 90, at 657 (“[S]haming constitutes an efficient, fiscally sound . . . form of sentencing . . .”).

155. *Cf.* Book, *supra* note 90, at 656–57 (noting that released prisoners are “disenfranchised, [and] deemed inferior citizens by their peers and potential employers,” making it difficult for them to lead normal, law-abiding lives).

156. *See* JJ Hensley, *Ariz. Aims to Cut Prison Costs; In Texas, a New Approach*, ARIZ. REPUBLIC, Apr. 18, 2010, available at <http://www.azcentral.com/news/articles/2010/04/18/20100418arizona-prison-costs.html> (“Texas spent about \$3 billion in 2009 on its criminal-justice system, which included about \$42 per day to house the 172,000 prisoners in state custody.”).

#### IV. Conclusion

The law of domestic violence has been troubled by the unique, recurring nature of the crime and by conflicts with victims' autonomy. The database is a state-provided solution that does not arrive at too late a point in the relationship and does not interfere with the would-be victim's right to make personal choices. The database is one answer to the law's struggles with crafting an appropriate response to domestic violence, and states that have an interest in battling this costly and demeaning phenomenon should take steps to create a database like the one proposed in Texas's HB 100.

The database is also a cost-effective way of reducing domestic violence. The combination of the domestic violence database with already existing BIPs would constitute a powerful tool to combat domestic violence recidivism. In addition, the database could prevent domestic violence from occurring in the first instance by equipping potential victims with information that would allow them to avoid violent relationships. Though the database would not come without a price tag, its cost would only be a fraction of the economic toll that domestic violence takes on the nation. Furthermore, in light of the budget shortfalls that many states are currently facing, the database presents an efficient alternative to repeatedly imprisoning abusers. States interested in saving money should incorporate a domestic violence database into their public safety programs.

—*Joyce Y. Young*