

THICK ENOUGH TO STOP A BULLET: CIVIL PROTECTION ORDERS, SOCIAL MEDIA, AND FREE SPEECH

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ABSTRACT

Domestic violence occurs in private and public spaces, including the virtual spaces social media platforms create. This Note examines the role domestic violence Civil Protection Orders can play in regulating social media behavior. Contrary to scholars who have argued that injunctions and criminal statutes should rarely, if ever, prohibit “speech about” an individual, this Note argues that Civil Protection Orders prohibiting an abuser from mentioning his victim over social media are appropriate in some circumstances. In examining what circumstances justify such orders, and how those orders should be issued and enforced, this Note considers constraints set by First Amendment free speech principles and a desire to combat mass incarceration.

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INTRODUCTION

Fold up your PFA and put it in your pocket
Is it thick enough to stop a bullet?
Try to enforce an order that was
improperly granted in the first place
Me thinks the Judge needs an education
On true threat jurisprudence.
—Tone Dougie¹

This Note grapples with a question that *United States v. Elonis* forces us to confront: how do victims of domestic violence stay safe when criminal statutory law is inadequate to protect them from abuse over social media? It posits that one solution—for some people, for some problems—is creatively drafting civil protection orders to prohibit respondents to such orders from speaking about the petitioner over social media. Orders regulating social media behavior raise free speech and due process concerns, and the purpose of this Note is to evaluate how seriously to take these concerns, to propose designs for orders that comply with constitutional requirements, and to provide the background necessary for judges and advocates to balance the competing interests at play.

This Note neither critiques nor attempts to relitigate *United States v. Elonis*, but *Elonis* provides the critical backdrop for understanding why criminal statutory law is insufficient for protecting victims of domestic violence against abusive social media behavior.

After Tara Elonis ended a relationship with her abusive ex-husband Anthony Elonis, Mr. Elonis posted “lyrics” on Facebook which, according to the jury in his criminal case, a reasonable person would regard as threats to harm his ex-wife, Tara Elonis.² In an opinion by Chief Justice Roberts and joined by six of his colleagues, the Court overturned Elonis’s conviction under the U.S. Criminal Code, which “makes it a federal crime to transmit in interstate commerce ‘any communication containing any threat . . . to injure the person of another,’” but does not state a culpability standard.³ The Supreme

1. *Elonis v. United States*, 135 S. Ct. 2001, 2006 (2015) (quoting from the lower court’s opinion containing the original post. PFA refers to a protection-from-abuse order). Depending on one’s perspective, “Tone Dougie” is either the nom de plume or nom de guerre of Anthony Elonis, the appellant in the case.

2. *Id.* at 2004, 2007.

3. *Id.* at 2008, 2013 (quoting 18 U.S.C. § 875(c) (2012)).

Court held that negligence was insufficient to support a conviction under the statute and therefore overturned Elonis's conviction.⁴

Justice Alito and Justice Thomas objected that the decision failed to clarify the meaning of an ambiguous statute⁵ and, consequently, improperly avoided the free speech concerns that animated Anthony Elonis's defense.⁶ Either Justice Alito's partial concurrence or Justice Thomas's dissent would have sustained the conviction. For Tara Elonis and advocates for victims of domestic violence, the case confirmed the law's inability to protect women from being terrorized by their former partners.⁷

The case leaves open the Constitutional question of whether a mechanism other than 18 U.S.C. § 875(c),⁸ the federal criminal statute

4. *Id.* at 2003.

5. *See id.* at 2014 (Alito, J., concurring in part and dissenting in part) (arguing that § 875(c) applied to someone who recklessly transmitted a threat); *id.* at 2018 (Thomas, J., dissenting) (arguing that conviction under the statute only requires general intent—that the defendant “knew he transmitted a communication, knew the words used in that communication, and understood the ordinary meaning of those words in the relevant context”).

6. *See id.* at 2016–2017 (Alito, J., concurring in part and dissenting in part) (arguing that such a conviction would not violate the First Amendment); *id.* at 2024–28 (Thomas, J., dissenting) (agreeing that a conviction under the threat statute would not violate the First Amendment).

7. *See, e.g.,* Alison J. Best, Note, *Elonis v. United States: The Need to Uphold Individual Rights to Free Speech While Protecting Victims of Online True Threats*, 75 MD. L. REV. 1127, 1128 (2016) (disputing *Elonis* and arguing that the Supreme Court should have adopted a “hybrid reasonable-speaker and reasonable-recipient standard, which would best balance the dual interests of maintaining individual free speech rights while also protecting the public from true threats”); Joseph Russomanno, *Facebook Threats: The Missed Opportunities of Elonis v. United States*, 21 COMM. L. & POL'Y 1, 3 (2016) (claiming that the Court was “negligent” in failing to address the issues raised by threats and, in particular, the role they play in domestic violence); Lino Graglia, *The New Law of Threats: But What if the Defendant Is Not a “Reasonable Person”?*, 52 WAKE FOREST L. REV. 61, 85 (2017) (describing the increased difficulty of threat prosecutions after *Elonis*, including subsequent interpretations of statutes other than § 875(c), and noting the particular burden that the new threat doctrine places on victims of domestic violence); Deborah M. Weissman, *Countering Neoliberalism and Aligning Solidarities: Rethinking Domestic Violence Advocacy*, 45 SW. L. REV. 915, 920 (2016) (placing the *Elonis* decision within the context of a First Amendment regime designed to “protect commercial interests and inhibit government regulations that interfere with an unfettered market”).

8. 18 U.S.C. § 875(c) (2012).

prohibiting threats using tools of interstate commerce, could have made Anthony Elonis's comments illegal.⁹

This Note addresses one alternative to the federal criminal statute by asking whether a domestic violence Civil Protection Order (CPO)¹⁰ could regulate abusive social media behavior. It argues that a Civil Protection Order could, constitutionally, prohibit the further discussion of a victim of domestic violence over social media under certain conditions.

In particular, this Note advocates for a pragmatic approach suggested by a Pennsylvania intermediate appellate court, which found an order barring further discussion of a domestic violence victim to be constitutional when it found as fact that any further reference to the victim over social media would constitute a continuation of the pattern of abuse.¹¹

The few courts that have addressed similar CPO convictions against First Amendment challenges have not yet described a consistent doctrine for sustaining them, nor one that engages fully with *Packingham v. North Carolina*, the Supreme Court's most relevant precedent and its clearest discussion of the First Amendment's protection of social media activity.¹² In *Packingham*, the Court invalidated a North Carolina statute making it a felony for registered sex offenders to access commercial social networking websites where a sex offender knew the site allowed minor children to become members

9. For an example demonstrating how much *Elonis* leaves open, see *People v. Murillo*, 190 Cal. Rptr. 3d 119, 124 (Cal. Dist. Ct. App. 2015) (upholding the conviction of a man who posted threatening lyrics over social media using the "reasonable listener" standard *Elonis* rejected for the federal statute, but applying the California state statute). In nearly identical circumstances, but applying California law, a California appellate court found that the California threat statute could support a criminal conviction for a threat issued over social media. Both parties agreed that *Elonis* did not govern because of its statutory basis. *Id.* Perhaps an unsung virtue of Justice Roberts's commanding majority is its implicit grant of authority to states to decide how to interpret state statutes without being commandeered by a Constitutional holding.

10. Civil injunctions against perpetrators of domestic violence go by various names, including Civil Protection Orders, Orders of Protection, Protective Orders, Protection from Abuse Orders, and Protection Orders. This Note will use "Civil Protection Order" or "CPO" to refer generally to the class.

11. *Commonwealth v. Lambert*, 147 A.3d 1221, 1229 (Pa. Super. Ct. 2016). This case, which involved a CPO completely banning references to the victim over social media, will be discussed in detail in Part II.A of this Note.

12. 137 S. Ct. 1730 (2017). See *infra* Part II.B for a fuller discussion of *Packingham*.

or maintain personal webpages.¹³ However, the Court also indicated that it would sustain more tailored restrictions on social media access and use, leaving advocates, legislatures, lower courts, and scholars ample room to test the loose borders *Packingham* established.¹⁴

Accordingly, this Note proposes two model orders and offers two justifications for upholding no-mention orders against First Amendment challenges. One justification argues that a no-mention order is a content-neutral time, place, and manner restriction and would survive intermediate scrutiny; the other assumes the order would be treated as content-based and argues that it should survive strict scrutiny.

Part I first offers an overview of CPOs and describes the role they play in addressing domestic violence, including domestic violence committed over social media. Where communication through social media is similar to earlier and more familiar forms of communication such as mail and telephones, courts and legislatures have been able to incorporate social media into existing CPO restrictions such as prohibitions of contact, threats, and stalking. However, courts are also confronting questions that require more creativity when victims seek protection from abusive social media behavior without clear analogues in the analog world. Part I will conclude by describing these gaps and the reasons why CPOs might be better equipped than general criminal statutes to bridge them.

Part II examines the existing law of CPO speech restrictions, which is still in an early phase of development. The state courts that have addressed First Amendment challenges to social media restrictions in CPOs have generally allowed the orders. However, these cases have not fully defended these orders against scholarly critiques and apparently contradictory rulings on analogous issues. Social media restrictions are also part of parole and probation conditions, non-domestic violence Civil Harassment Orders (CHOs),¹⁵ and sex-offender

13. *Id.* at 1731, 1738.

14. *Id.* at 1731. *See also* Mutter v. Ross, 811 S.E.2d 866, 872–73 (W. Va. 2018) (using *Packingham* to find a complete ban on a parolee’s internet use impermissible but noting that “[t]here are instances . . . where the West Virginia Parole Board has a legitimate interest in restricting a parolee’s access to the internet.”).

15. While the names of these injunctions vary, this Note will use “Civil Harassment Order” or “CHO” to refer to a range of orders available to victims of harassment who do not share the intimate relationships with their abusers necessary to obtain a CPO. *See generally* Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781 (2013) (describing the history of availability of CHOs, arguing against most speech restrictions in CHOs, and offering a compilation of statutes fitting his definition of CHOs).

registry conditions, and the cases before and since *Packingham* have not yet gelled into a coherent body of law. Part II introduces and analyzes the cases and scholarship that govern and guide this area of law.

Part III presents two alternative proposed orders, each of which would have rendered Anthony Elonis criminally liable for his damaging social media behavior toward Tara Elonis had it been in place at the time of his posting.

Proposed Order One: Respondent must refrain from posting on social media, or from recklessly causing another person to post on social media, any image of, reference to, or mention of petitioner.

Proposed Order Two: [following a prohibition of threatening the victim...] The “threats” prohibited by this order include social media posts by a respondent who consciously disregards the risk that a reasonable person would interpret it as a threat to harm the petitioner.

Part III explores the constitutional merits of each proposed order as well as their ability to prevent or punish the behavior this Note claims should be prohibited or punished, and it returns to the argument Part II begins: that domestic violence deserves a distinct analysis from other cases involving offensive social media behavior.

From the start, it is worth acknowledging a few constraints on this project. First, the Author is under no illusion that CPOs, no matter how cleverly and creatively drafted, provide The Solution to domestic violence. Domestic violence is among the oldest and most persistent forms of human cruelty, and limiting abusive social media behavior will not stop it. But the enormity of a problem is no excuse for ignoring it, and a remedy does not need to be comprehensive to be useful.

The second constraint on this project is concern for due process and equal protection. By now, “mass incarceration” is a familiar term to describe the large and unjust criminal justice system that polices, assaults, kills, and incarcerates African-Americans and other people of color in a disproportionate and destructive manner and that sweeps up countless others in the process.¹⁶ CPOs are themselves a form of

16. The literature on this subject is vast and vital. For a helpful collection of sources on this subject, see Dan Berger, Garrett Felber, Kali Gross, Elizabeth Hinton & Anyabwile Love, *Prison Abolition Syllabus*, BLACK PERSPECTIVES (Nov.

control, and their violation can result in incarceration. Expanding the reach of CPOs should therefore trouble those readers who, like the Author, aim to shorten the reach of criminal law. Therefore, this Note will consider the relationship between the CPOs it proposes and the larger criminal justice system, arguing that the overuse of these CPOs would be an unfortunate contribution to an already unfair system, while the appropriate use of these CPOs is compatible with, and could contribute toward, a world without prisons.

The third constraint is the First Amendment. The United States Constitution cherishes and protects the right to think and speak freely, and speech restrictions are appropriately difficult to execute in a fair and constitutional way. One of the paradoxes of regulating speech is that the more general the regulation, the more it risks overbreadth; and the more specific it is, the more it risks content or viewpoint discrimination. The push and pull of these values make it important and challenging to find means of regulation that punish all and only the forms of speech that should be punished. So the task this Note takes on is not an easy one, and it makes no more claim to solving this problem than to solving the problem of gender-based and sexual violence. But it is worth trying, for the sake of victims of domestic violence who might benefit from these orders, and even for the sake of perpetrators of domestic violence who might be more justly restrained by these orders than by other forms of control.

20, 2016), <https://www.aaihs.org/prison-abolition-syllabus/> [https://perma.cc/LRK7-HAXY]. For the works that most influenced the Author's thinking on the subject, *see generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing mass incarceration as a system of racial control); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN 5* (2017) (using the symbol of the Chokehold as "a way of understanding how American inequality is imposed," Butler offers a compelling analysis of the ways in which the criminal justice system attempts to control black men).

I. CIVIL PROTECTION ORDERS AND INTERNET-ENABLED DOMESTIC VIOLENCE

This Note proposes that Civil Protection Orders, already a common tool in combatting domestic violence, can combat abusive internet behavior. This Part introduces the reader to CPOs and discusses some of the issues courts and advocates face as petitioners try to use CPOs to prevent and punish abusive social media content.

A. Understanding Civil Protection Orders

Every state in the United States provides some sort of civil remedy that victims of domestic violence can use to enjoin their abusers from further abuse.¹⁷ These vary in name and nature, but the basic idea is that a court may, based on some history of abuse between people with a familial or intimate relationship, prohibit or mandate a specified set of behaviors by the perpetrator toward the

17. See e.g., Caplan, *supra* note 15; Sally Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1498 (2008). For a practical description of each state's laws, see *Legal Information*, WOMENSLAW.ORG, <https://www.womenslaw.org/laws> [<https://perma.cc/9FJ7-TCQ6>] [hereinafter *Womenslaw Legal Information*]. This Note will typically refer to generic abusers, respondents, and defendants with pronouns like "he," "his," and "him" and to generic victims, survivors, and petitioners with pronouns like "she," "her," and "hers." The Author is cognizant, both from experience working with survivors of domestic violence and from the cases reviewed for this Note, of the fact that domestic violence can occur in a variety of directions between people of all genders, including those who would use neither of these sets of pronouns. This usage seems to be standard in the field both among scholars and advocates, based primarily on the overwhelming rates of violence from men directed toward women. See, e.g., Goldfarb, *supra*, at 1488 n.2; *Pronouns*, CAGOLDBERGLAW, <http://www.cagoldberglaw.com/domestic-violence/> [<https://perma.cc/886T-Z68K>] (noting that "[h]ere on our web site we tend to use female pronouns when talking about victims of abuse, and masculine pronouns when talking about perpetrators. This is a deliberate choice based on a number of things, including the demographics of our clients. It is essential to note that men can be victims of abuse and women can be perpetrators of it. Abuse happens both in straight and same-sex relationships. Two in five gay or bisexual men will experience intimate-partner violence in their lifetimes. Half of all lesbian women will experience it. Transgender people are at the highest risk of intimate partner violence and are 2.6 times more likely to experience it than a straight person.").

victim.¹⁸ Although temporary restraining orders and preliminary injunctions¹⁹—orders that enjoin behavior during the course of

18. These orders vary significantly, and many states offer several orders that could help individuals experiencing domestic violence. Consider a few examples:

In the state of Washington, Womenslaw Legal Information lists six different types of restraining orders that domestic violence victims might use: Domestic Violence Orders of Protection (for victims of domestic violence at the hands of a spouse or former spouse; domestic partner or former domestic partner, including same-sex couples; someone with a child in common; someone related by blood or marriage; an adult person residing or formerly residing with the victim; someone with whom the victim has had a dating relationship; and someone who has a biological or legal parent-child relationship with the victim, including step-parents and step-children and grandparents and grandchildren); Stalking Protection Orders (for victims of “stalking conduct” who are ineligible for Domestic Violence Protection Orders); Civil Anti-Harassment Orders (for victims of harassment regardless of relationship); Sexual Assault Protection Orders (for victims of sexual assault who would not qualify for Domestic Violence Protection Orders); Vulnerable Adult Protection Orders (for vulnerable adults who have been abandoned, abused, personally exploited, neglected, financially exploited, or threatened by a family member, care provider, or other persons with a relationship with the vulnerable adult); and an Extreme Risk Protection Order (a civil court order prohibiting the respondent from controlling, purchasing, possessing or receiving firearms, where the petitioner can be a member of the respondent’s family or household or a law enforcement officer or agency). *Legal Information: Washington*, WOMENSLAW.ORG, <https://www.womenslaw.org/laws/wa/restraining-orders> [https://perma.cc/UNZ2-K3L8].

By contrast, Womenslaw Legal Information only lists one form of restraining order for Delaware, the Order of Protection from Abuse (for victims of abuse by a current or former spouse, a person who has lived as a couple or has a child in common with the victim, a custodian, a child, a person with whom the victim has had a “substantive” dating relationship, a relation by blood or marriage who lives in the same household, or is the victim’s mother, father, mother-in-law, father-in-law, brother, sister, brother-in-law, sister-in-law, grandparent, grandchild, stepparent, stepchild, child, daughter-in-law, or son-in-law). *Legal Information: Delaware*, WOMENSLAW.ORG, <https://www.womenslaw.org/laws/de/restraining-orders> [https://perma.cc/JK3U-LT2N].

The District of Columbia has only one order, the Civil Protection Order, but petitioners become eligible by two sets of criteria. A petitioner may file for a CPO based on the commission or threat of any crime by a respondent who is or was married to the petitioner; is or was dating or in a domestic partnership with the petitioner; is related to the petitioner by blood, adoption, legal custody, or domestic partnership; has a child in common with the petitioner; shares or shared a home with the petitioner; or is or was in an intimate relationship with a person with whom the petitioner has also had an intimate relationship. Alternatively, a petitioner may file against *anyone* she accuses of stalking, sexually assaulting, or sexually abusing her. *Legal Information: District of Columbia*, WOMENSLAW.ORG, <https://www.womenslaw.org/laws/dc/restraining-orders> [https://perma.cc/8S5W-982Y].

adjudication—and criminal protection orders²⁰ also play a role in regulating domestic violence, this Note’s focus is on civil injunctions taking effect after adjudication. These injunctions may be permanent, although most jurisdictions limit them by time.²¹

The CPO can be divided into four component parts: relationship, abusive behavior, procedure, and injunction. First, with a few exceptions, the victim and perpetrator must exist in a domestic relationship, either familial or intimate.²² Second, the perpetrator must engage in some sort of abusive behavior.²³ Third, the victim must

This Note’s focus is on domestic and sexual violence, and the “CPO” it discusses is a composite, idealized CPO that is the restraining order available for all and only situations of sexual and domestic violence. Of course, no state’s framework captures all and only domestic and sexual violence within a single order’s purview because of the fuzzy lines of domesticity and sexuality. The D.C. CPO probably comes closest to the idealized order because it both captures *all* crimes between those with an intimate relationship and all sexual crimes between all persons. However, the D.C. CPO is also available to victims of stalking, which is not necessarily sexual or domestically violent in nature.

Although CHOs generally fall outside the purview of this idealized CPO, victims of domestic violence will occasionally seek CHOs even in jurisdictions where domestic violence CPOs are available. *See, e.g., Johnson v. Arlotta*, No. A11-630, 2011 WL 6141651 (Minn. Ct. App. Dec. 12, 2011) (upholding a non-domestic violence Harassment Restraining Order against an ex-boyfriend in Minnesota, a state that allows domestic violence Orders for Protection against a respondent who has had a significant romantic or sexual relationship with the petitioner). Because the justifications for the orders proposed in Part III rely on the nature of domestic and sexual violence, this Note only defends such orders in CHOs when the cases involve domestic and sexual violence.

19. *See Womenslaw Legal Information, supra* note 17 (describing the procedures across all U.S. jurisdictions, including temporary and preliminary orders).

20. Criminal protection orders are injunctions initiated by prosecutors as a condition of pretrial release after an arrest for criminal domestic violence, and they differ significantly from CPOs in that the state, not the victim, initiates and controls the case. *See JEANNIE SUK, AT HOME IN THE LAW 16* (2009) (“Whereas the civil protection order is sought voluntarily by the victim, the criminal protection order is sought and issued by the state in the public interest.”). Courts can also issue similar injunctions after conviction, including in cases where the victim would not want such orders in place. *Id.* at 48–49.

21. *See Womenslaw Legal Information, supra* note 17; *see also* Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015 (2014) (making the case for CPOs of indefinite duration).

22. *See supra* note 17, and accompanying text.

23. For example, the trigger under the Washington statute is “domestic violence,” which the statute defines as “(a) Physical harm, bodily injury, assault, or

petition a court, which may be a specialized or a general civil court.²⁴ Fourth, the court may order an injunction. CPO statutes generally list several actions the court may enjoin, but in many jurisdictions, the petitioner may request, and the court may order, virtually any behavior to be prohibited.²⁵

It might be fair to say that CPOs have a fifth component: the punishment for their violation, but it may also be possible to imagine the remedy as being distinct from the right. When a respondent violates a CPO, the violation can be charged either through contempt proceedings in the court that issued the CPO or as a misdemeanor or felony in a criminal court.²⁶ However, the purpose of the orders this Note proposes is not that they bring more activity into the realm of the criminal or that they lead to greater punishment,²⁷ but that they

the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.” WASH. REV. CODE § 26.50.010 (2018).

24. See, e.g., WASH. REV. CODE § 26.50.020(5) (2018) (describing jurisdictional issues and circumstances under which petitions can be brought in superior, district, and municipal courts). In New York, the Family Court, Criminal Court, and the Supreme Court can all issue orders of protection depending on the circumstances: family courts handle Family Offense petitions, criminal courts can issue orders of protection against individuals charged with crimes, and the Supreme Court can issue an order of protection as part of divorce proceedings. *Obtaining an Order of Protection*, NYCOURTS.GOV, <http://www.nycourts.gov/faq/orderofprotection.shtml> [<https://perma.cc/XH3S-3KVC>].

25. For example, in the District of Columbia, the statute lists ten specific remedies and then allows the judge to direct “the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter.” D.C. Code § 16-1005(c)(11) (2016). See generally Goldfarb, *supra* note 17 (describing the importance of the customization of protection orders, both in terms of the value that carefully-drafted orders provide for giving victims what they want, but also for adding to victims’ belief in the legitimacy of the process and the recognition that good process grants).

26. These vary by jurisdiction. See SUK, *supra* note 20, at 15.

27. *But see id.* (“Once envisioned as an alternative to criminal process, civil protection orders have now been subsumed by the criminalization strategy.”). However, as Suk acknowledges, the trend toward processes favoring criminalization was not inevitable. *Id.* at 15 and accompanying notes. By reexamining policies such as mandatory arrests and no-drop prosecution rules and increasing access to legal services, it may be possible to shift power away from prosecutors and toward domestic violence survivors. See David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1197 (1995) (arguing for the

prevent further harm from occurring.²⁸ This may be the purpose of any just criminal law, but CPOs feature at least three essential differences. First, injunctions offer notice and clarity that criminal codes do not. A respondent in a CPO proceeding is more likely to understand what it means when a judge tells him he cannot write anything about the petitioner on social media than the meaning of “threat” as set by 18 U.S.C. § 875 and constrained by the “true threat” doctrine. Second, the process is more flexible than criminal prosecutions. Petitioners either

use of victim-initiated criminal contempt sanctions over state-initiated criminal charges); *see also* Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 BYU L. REV. 515, 517 (2010) (arguing against inflexible “no-drop” prosecution rules and in favor of prosecution policies that consider specific violations in a broader context of relationships).

28. Empirical evidence offers little certainty in answering the question of whether CPOs are effective remedies. *See generally* Christopher T. Benitez et al., *Do Protection Orders Protect?*, 38 J. AM. ACAD. PSYCHOL. L. 376, 376 (2010) (surveying scientific studies of the rates of CPO violation and rates of re-abuse). Studies measuring the rates of protection order violation varied from 7.1% to 81.3%. *Id.* at 381. Few of the studies surveyed had control groups for women who sought, but did not receive, CPOs. Benitez et al., *supra* at 378–81. Even those surveys that did have control groups could not, for ethical reasons, have judges randomly grant or deny CPOs to create a control group; so presumably, the petitioners denied CPOs had different situations than those who were granted CPOs. *See* ANDREW R. KLEIN, NAT’L INST. OF JUSTICE, NCJ 225722, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS, AND JUDGES 58 (2009) (noting that “[t]he research has not been able to answer this question definitively, mainly because it is not ethically permissible to randomly grant or deny protective orders to compare results. Furthermore, these orders ‘work’ on different levels.”). Some of the studies surveyed also measured police-reported incidents, and it may be that those with protection orders are more likely to call the police when they know they have an order in place. Benitez et al., *supra* at 378–81. For these reasons and more, it is extremely difficult to measure the essential question of whether seeking and receiving a CPO leads to a significant reduction in incidents of domestic violence.

Some research has also found that CPOs reduce the severity of domestic violence, suggesting that asking whether violations occurred may be the wrong question entirely. T.K. LOGAN ET AL., THE KENTUCKY CIVIL PROTECTIVE ORDER STUDY: A RURAL AND URBAN MULTIPLE PERSPECTIVE STUDY OF PROTECTIVE ORDER VIOLATION CONSEQUENCES, RESPONSES, AND COSTS 98 (2009); *see also* Goldfarb, *supra* note 17, at 1510–14 (arguing that CPOs can succeed for a variety of different reasons, and arguing that the apparent disparity between high rates of satisfaction among women who receive CPOs and, depending on the study, high rates of violation and re-abuse can either be explained by the reduction in severity of the abuse or the empowerment and satisfaction that comes through the process of petitioning for and receiving a CPO).

request specific injunctions from judges in the presence of the respondent or negotiate the terms directly with the respondent, who can consent without admitting to a crime.²⁹ CPOs can therefore be more carefully tailored to balance harms than universally applicable statutes driven by legislative pressure and the need to govern all circumstances. Third, CPOs frequently occur in the context of ongoing relationships, so respondents are more likely to have interests other than physical liberty worth protecting.³⁰ There are therefore good reasons to hope, even with the controversial empirical data,³¹ that CPOs reduce the instances and severity of crime even though they make more acts criminal.

B. Abuse over Social Media

To understand why CPOs may have a new role to play in curbing abusive social media behavior, it is necessary to understand how abusers use social media to harass their victims and why criminal and tort law provide inadequate remedies. This section takes up that task.

Abusers use social media in ways familiar and unfamiliar to criminal and tort law. Even the most comprehensive criminal and tort frameworks cannot cover every form of domestic violence abuse occurring regularly over social media, leaving space for CPOs to fill gaps other areas of the law leave. This section's aim is to describe the problem of social media abuse and the need for solutions beyond criminal and tort law.

According to a recent survey, forty-five cyberstalking federal and state laws are currently in force.³² States have taken two approaches: extending the applications of existing law and creating

29. See, e.g., D.C. CODE § 16-1005 (2016) (demonstrating a protection order can be entered with the consent of a respondent without an admission of guilt).

30. For example, where there is a child in common, a respondent might be willing to comply with a CPO regulating his contact with the mother when he knows that the family court judge could modify the custody arrangement if he breaches the CPO.

31. Goldfarb, who places the quantitative data into context by using qualitative data such as interviews with attorneys, takes a more optimistic view of CPOs than some of the literature discussed *supra* note 28. Goldfarb, *supra* note 17, at 1503–04 (arguing that “[c]ivil protection orders have emerged as the most frequently used and, in the view of many experts, most effective legal remedy against domestic violence.”).

32. Resources: Laws, WORKING TO HALT ONLINE ABUSE, <http://www.haltabuse.org/resources/laws/> [https://perma.cc/54GG-AKJA].

new laws specifically for internet content.³³ However, advocates are currently fighting for more.³⁴ The adopted and proposed statutes respond to gaps left by previous and current legal regimes. These gaps include ambiguous threats, the infliction of emotional distress, harm to reputation and privacy, incitement, and the destruction of existing boundaries such as those created by Civil Protection Orders.

1. Threats

Although threats are prohibited by state and federal law and “true threats” are excluded from First Amendment protection, *Elonis* revealed how toothless these laws can sometimes be.³⁵ By reversing *Elonis*’s conviction, the Supreme Court tacitly recognized a category of speech acts that would not be crimes under the threat statute despite the fact that a reasonable person would foresee the statements being understood as threats.³⁶ As Aaron Caplan wrote prior to *Elonis*, the true threat standard is a demanding one, which means that “there may be some words that do not satisfy the true threat standard, yet may in context cause a reasonable victim to perceive threats of violence that

33. Aily Shimizu, Note, *Domestic Violence in the Digital Age: Towards the Creation of a Comprehensive Cyberstalking Statute*, 28 BERKELEY J. GENDER L. & JUST. 116, 119–20. (2013).

34. See generally *id.* (calling for cyberstalking statutes that (1) address the use of electronic communications; (2) do not have a physical threat requirement; (3) cover anonymous communications; (4) do not have a requirement that communications be directed at the victim; and (5) address third-party inducement by the perpetrator). See also Megan L. Bumb, Note, *Domestic Violence Law, Abusers’ Intent, and Social Media: How Transaction Bound Statutes Are the True Threats to Prosecuting Perpetrators of Gender-Based Violence*, 82 BROOK. L. REV. 917, 921 (2017) (identifying “transaction-bound criminal statutes” such as battery, harassment, and interstate communication as a barrier to effective prosecution because “they are temporally constrained and do not recognize the pattern of power and control central to this abuse or capture the true harm of the behavior.”). Bumb views *Elonis* as a prime example of the failure of transaction-bound statutes and calls on states to enact statutes criminalizing “coercive domestic violence,” as defined by Professor Alafair S. Burke. *Id.* (citing Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 601–02 (2007)); see also Emma Marshak, Note, *Online Harassment: A Legislative Solution*, 54 HARV. J. ON LEGIS. 503, 523–27 (2017) (proposing a two-tier online harassment statute focused on threats that attempts to “remain squarely in the ‘true threat’ exception to the First Amendment”).

35. 135 S. Ct. 2001, 2006 (2015).

36. Writing in dissent, Justice Thomas wrote that there was “no dispute” that the posts at issue met the objective standard that a reasonable observer would construe them as being true threats to another. *Id.* at 2019 (Thomas, J., dissenting).

do not appear on the surface.”³⁷ This becomes especially challenging in the age of social media, when ordinary people have an unprecedented ability to reach other people with ambiguous messages³⁸ and uncertain directionality.³⁹ By a similar token, threat statutes may not cover implicit or explicit threats to post information, images, or opinions about the victim online, whether they are made in-person or over another medium.⁴⁰ The mere possibility that an abuser might post harmful information to social media can be used as leverage to maintain an abusive relationship and perpetuate any form of domestic violence.⁴¹ If the revelation of this information is lawful, the threat of

37. Caplan, *supra* note 15, at 830.

38. See, e.g., *Commonwealth v. Walters*, 37 N.E.3d 980, 994–96 (Mass. 2015) (overturning a jury verdict that interpreted as a threat a Facebook profile page in which the defendant sat with a large gun across his lap and listed, “make no mistake of my will to succeed in bringing you two idiots to justice,” as a favorite quote). The victim interpreted the “quote” as a threat to her and her new partner. *Id.* While the Facebook profile page, viewed in isolation, was too ambiguous to satisfy Massachusetts’s statute criminalizing threats, the case points to the added difficulty of deciding cases in media that use photographs, videos, and memes extensively. A picture may be worth a thousand words, but it is not clear *which* thousand. The court also notes that there “is no question that new technology has created increasing opportunities for stalkers to monitor, harass, and instill fear in their victims, including through use of Web sites” and that defendants cannot “launder” harassment or threats through the internet to escape liability. *Id.* at 696–97.

39. See *infra* note 67 for one attempt to address this problem. To an extent, this problem predates social media. For example, in a 1998, 5-4 decision with two fascinating dissents, the Pennsylvania Superior Court sitting en banc overturned a conviction for a violation of a PFA when the man restrained from making threats said “I’m going to kill this bitch” in front of prison guards at the York County Prison where he was incarcerated. *Commonwealth v. Baker*, 722 A.2d 718, 720 (Pa. Super. Ct. 1998), *aff’d* 766 A.2d 328 (Pa. 2001). The Superior Court decision and the Pennsylvania Supreme Court decision affirming it did not categorically rule out the possibility that a statement made outside the presence of the victim could constitute a threat, but rather decided the case on vagueness and notice grounds, reasoning that that the respondent was not on notice that his statement—made while incarcerated and far from the victim—would constitute a threat. *Id.* However, social media exacerbates this problem by spreading communication faster and more cheaply than ever before.

40. For example, 18 U.S.C. § 875(c) only prohibits communications threatening to kidnap or injure the person of another. See Shimizu, *supra* note 33, at 124 (discussing the limits of § 875(c) in preventing online abuse, even before *Elonis*).

41. This problem predates social media. See Laurie S. Kohn, *Why Doesn’t She Leave? The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence*, 29 HASTINGS CONST. L.Q. 1, 2–11 (2001) (proposing

such action may not be illegal under extortion law.⁴² Thus, some threats that may be worth prohibiting are not covered by current law, leaving a role for CPOs to play.

2. Incitement

Social media also gives perpetrators a platform for inciting physical violence or, probably more commonly, encouraging and facilitating online harassment.⁴³ Prosecution for criminal incitement is

CPOs that prohibit the respondents from divulging certain confidential information such as HIV status, sexual orientation, and immigration status). Again, social media only makes this problem worse as abusers can be sure to find a sizable audience quickly and cheaply.

42. See Samuel W. Buell, *Culpability and Modern Crime*, GEO. L.J. 547, 561–62 (2015) (asserting that for a threat to be extortionate, federal courts have required the threat of some wrongful action or a threat of some action to achieve a wrongful purpose, and that these decisions have “at least implied that one determines whether the threatened action or claim to property is wrongful by asking whether the action would be permitted or the claim recognized under a relevant body of law.”) So, assuming the dissemination of information is neither criminal nor actionable under relevant tort law, the court would have to determine if the purpose behind the threat is wrongful. Courts *might* frame the issue as maintaining an abusive relationship—ostensibly a wrongful purpose—but they might also frame it as maintaining a marital relationship. More significantly, many blackmail statutes prohibit attempts to gain property or money, making the maintenance of an abusive relationship an awkward fit. For example, the federal prohibition on using interstate communication for the purpose of extortion requires the “intent to extort...any money or thing of value.” 18 U.S.C. § 875(d) (2012). Thus, although Kohn sees the constitutionality of extortion laws as a useful precedent for upholding CPOs that prohibit dissemination of private or reputation-harming truthful information, the extortion laws themselves do not provide a remedy. Kohn, *supra* note 41, at 25–32.

43. Two relatively famous examples are the so-called “Gamergate” incident and a more recent case in which White Nationalist Andrew Anglin organized a “troll storm” against a Jewish Montana resident. See Caitlin Dewey, *The Only Guide to Gamergate You Will Ever Need to Read*, WASH. POST (Oct. 14, 2014), https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/?utm_term=.7a4b7eedb3e5 [<https://perma.cc/5CXL-VKXJ>]; Kirk Siegler, *Descending on Montana Town, Neo-Nazi Trolls Test Where Free Speech Ends*, NAT’L PUB. RADIO (Jan. 23, 2018) (audio and written story), <https://www.npr.org/2018/01/23/579884628/victims-of-neo-nazi-troll-storm-find-difficulties-doing-something-about-it> [<https://perma.cc/JQ68-5DCW>]. Given its high profile, an *amicus* brief by Eugene Volokh, and an abuse prevention order that prohibited the abuser from posting “any further information about [petitioner Zoë Quinn]” or encouraging hate mobs, the Gamergate case could have become the most prominent case on point for this Note. *Quinn v. Gjoni*, 50 N.E.3d 448, 448–49 (Mass. App. Ct. 2016), *appeal denied*, 56 N.E.3d 829 (Mass.

highly limited by *Brandenburg v. Ohio*,⁴⁴ although at least some courts allow exhortations to followers to commit violent acts against individuals to be charged as threats.⁴⁵ In *U.S. v. Wheeler*, a case involving a Facebook post urging the defendant's "religious followers" to "kill all the children of a [police officer's] blood line," the court observed that "the line between threats and incitement, especially in cyberspace," is not as clear as one who seeks *Brandenburg's* protection would desire.⁴⁶ However, *Elonis's* requirement that the speaker have a subjective intent to communicate a threat still applies, so convictions are still challenging.⁴⁷ The ease with which a savvy social media user can mobilize a troll army, or even a lone gunman,⁴⁸ endangers domestic violence victims and reveals a significant gap in the law.

2016). However, no court reached the First Amendment questions on the merits. The Boston Municipal Court Department judge told the defendant's counsel to raise the First Amendment challenge on appeal, 50 N.E.3d at 449, and the question was moot when raised on appeal because, while the appeal was pending, the trial court granted Ms. Quinn's motion to vacate the order in its entirety because Mr. Gjoni was using the order to draw attention to himself and to her. *Id.* at 450.

44. 395 U.S. 444, 447 (1969) (holding that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

45. See *U.S. v. Wheeler*, 776 F.3d 736, 744–45 (10th Cir. 2015); accord *U.S. v. Turner*, 720 F.3d 411 (2d. Cir. 2013).

46. 776 F.3d at 745. The court explained that "[s]everal attributes of the Internet substantially amplify the fear an individual can instill via threats or incitement," noting, in particular, the threats' ability to reach a large audience, and the fact that anonymity allows authors to make threatening statements they would never consider making in person. *Id.* at 745 n.4. "And, given the prevalence and diversity of Internet fora and discussion boards, such exhortations may often find a receptive audience of like-minded individuals—perhaps audiences more willing to do the bidding of one urging violent action." *Id.*

47. *Wheeler*, decided while *Elonis* was still pending Supreme Court review, applied the 10th Circuit's subjective intent standard and reversed the conviction for a new trial with a jury instruction consistent with the rule. *Id.* at 740. The Ninth and Tenth Circuits were the only circuits prior to *Elonis* that had interpreted § 875(c) as requiring the subjective intent of the defendant to commit a threat. *Elonis v. United States*, 135 S. Ct. 2001, 2018 (2015) (Thomas, J., dissenting).

48. The so-called "Pizzagate" conspiracy theory is a useful example. Convinced by internet conspiracy theorists that a pizza restaurant ran a secret pedophilia dungeon in its basement, a lone gunman drove to Washington, D.C. intent on releasing the alleged imprisoned children. He only surrendered himself to police after learning there were no such prisoners. See Andrew Breiner, *Pizzagate, Explained: Everything You Want to Know About the Comet Ping Pong Conspiracy Theory but Are Too Afraid to Search for on Reddit*, SALON (Dec. 10,

3. Reputational harm and infliction of emotional distress

Beyond threatening or inciting physical violence, abusers use social media to damage their victims' reputation by disclosing defamatory or private information to third parties,⁴⁹ inflict emotional distress,⁵⁰ monitor their victims,⁵¹ impersonate their victims,⁵² and otherwise exact revenge on those who supposedly spurned them.⁵³ Some of these harms fall within the framework of existing torts such as defamation, intentional infliction of emotional distress, and invasion

2016), <https://www.salon.com/2016/12/10/pizzagate-explained-everything-you-want-to-know-about-the-comet-ping-pong-pizzeria-conspiracy-theory-but-are-too-afraid-to-search-for-on-reddit/> [<https://perma.cc/Q4RT-QNYK>].

49. See, e.g., *Johnson v. Arlotta*, No. A11-630, 2011 WL 6141651, at *1 (Minn. Ct. App. Dec. 12, 2011) (describing how respondent created and directed petitioner's friends, family, and co-workers to a blog describing the victim's mental health history, involvement with criminals, and history in abusive relationships).

50. See, e.g., *Purifoy v. Mafa*, 556 S.W.3d 170, 175–76 (Tenn. Ct. App. 2017) (posting, "For you as a black woman, you should know better. You should have your mind checked out. You should know that you don't do that. . . . [Y]ou are a shame. Shayla Nicole, you are a shame. You should be ashamed of yourself.>").

51. See, e.g., Natalie Nanasi, *The Trump Administration Quietly Changed the Definition of Domestic Violence and We Have No Idea What for*, SLATE (Jan. 21, 2019), <https://slate.com/news-and-politics/2019/01/trump-domestic-violence-definition-change.html> [<https://perma.cc/C6XE-EQ7L>] (describing "insidious" abusive behaviors, including "monitoring communication and social media"); see also JENNIFER PERRY, WOMEN'S AID AND NETWORK FOR SURVIVING STALKING, DIGITAL STALKING: A GUIDE TO TECHNOLOGY RISKS FOR VICTIMS 15–35 (2012), https://1q7dqy2unor827bjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2015/11/Digital_Stalking_Guide_V2_Nov_2012.pdf [<https://perma.cc/4CPP-4X7Q>] (discussing various monitoring techniques stalkers use to surveil victims, such as 'social engineering,' geolocation, and social networking).

52. See, e.g., Andy Greenberg, *Spoofed Grindr Accounts Turned One Man's Life Into a 'Living Hell,'* WIRED (Jan. 31, 2017), <https://www.wired.com/2017/01/grinder-lawsuit-spoofed-accounts/> [<https://perma.cc/2J2X-VL42>] (describing how a man received dozens of visits a day from strangers demanding sex after seeing a fake profile with all of his information on the app Grindr).

53. See Bumb, *supra* note 34, at 927–29 for an extensive list of ways abusers use social media as part of abuse and *see id.* at 931–36 for her analysis of the gaps current statutes leave.

of privacy,⁵⁴ but the ex-post remedies tort law provides are frequently insufficient.⁵⁵

First, as with many torts, financial compensation is an imperfect remedy. This is especially true when the tortfeasors are poor and likely to be judgment proof, where the harm to reputation is difficult to calculate, where the potential plaintiffs would have a difficult time obtaining legal representation for a low-value claim, where the tortfeasor and victim may wish or be required (for example, by shared property or a child in common) to maintain an ongoing relationship, or where the tortfeasor already owes the victim money through child support or alimony obligations and therefore does not have additional money available to satisfy a tort judgment. Moreover, even if a tort judgment could be satisfied, the availability of a money judgment would not make every victim whole after the loss she faces when an abusive partner discloses confidential information such as HIV status, sexual orientation, or immigration status.⁵⁶ Second, these torts are not comprehensive. For example, defamation does not protect against true statements, opinions, or statements about public figures made without actual malice.⁵⁷ Consider posts made by one abuser about his victim:

How can someone say they love someone and within a few days be with someone else is that a slut or what[?]⁵⁸

Opining that his partner is a “slut” probably falls outside of any defamation category, but it might nonetheless affect his victim’s ability to meet new partners, embarrass her in front of co-workers thereby damaging her career, or damage her reputation generally. The jurisprudence around these torts developed in cases involving matters of political or public importance.⁵⁹ and even where courts have

54. See generally RESTATEMENT (SECOND) OF TORTS (AM. LAW INST. 1979). Division 5 covers defamation, Division 6 covers injurious falsehoods, and Division 6a addresses the invasion of privacy, including false light and intrusion upon seclusion. *Id.*

55. See generally Kohn, *supra* note 41 (examining the constitutionality of CPOs designed to aid victims who do not leave abusive partners because of fear that the batterer will publicize truthful confidential information about her).

56. These are the three examples Kohn offers in her article. *Id.* at 4–11.

57. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

58. *Commonwealth v. Lambert*, 147 A.3d 1221, 1224 (Pa. Super. Ct. 2016).

59. *E.g. Sullivan*, 376 U.S. at 270–80 (holding that a public official may not recover damages for a defamatory falsehood relating to his official conduct unless

distinguished between cases involving public and private figures,⁶⁰ the canonical cases have not always addressed the *deeply* private sphere of the home or the intimate relationship. Third, torts provide an inadequate remedy because they provide relief after the damage is done. One of the jobs of the law is to predict and prevent harms before the fact when it can do so without unduly invading protected interests.⁶¹

One collateral consequence of the pain and suffering caused by offensive social media posts is that their victims may be less likely to participate in social media in the future.⁶² While this may not strike everyone as a tragic harm worthy of upending other constitutional principles, under *Packingham's* view of the importance of social media to political and social participation, it is a harm worthy of attention and protection.⁶³ In addition to the right all people have to entertainment and social connection, the ability to participate in

he proves the statement was made with actual malice); *Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (overturning a jury award for intentional infliction of emotional distress at least in part because the pain-inflicting speech addressed matters of public concern).

60. *E.g.* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974) (allowing states to enforce remedies for defamation of private individuals, on the grounds that unlike public officials, private individuals have not “voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them”).

61. *See* *Johnson v. Arlotta*, No. A11-630, 2011 WL 6141651 at *6 (Minn. Ct. App. Dec. 12, 2011). Defendant Arlotta argued that a Harassment Restraining Order enjoining him from sending emails or other electronic messages concerning his victim that affect or intend to adversely affect her safety, security, or privacy was inappropriate because a tort action would be the proper vehicle of redress. The Court was not persuaded because “[t]he legislature enacted the HRO statute to protect people from harassing words and actions, and [the petitioner] is entitled to seek that protection.”

62. *See* Anita Bernstein, *Abuse and Harassment Diminish Free Speech*, 35 PACE L. REV. 1, 29 (2014) (explaining how cyber abuse and harassment lead to the silencing of its victims).

63. *See* *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (describing social media websites as “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard”). Presumably, this mechanism is just as powerful and important for the beneficiaries of speech regulation as for those being regulated. *Packingham* does not set up this discussion particularly well because the state interest was in “keeping convicted sex offenders away from vulnerable [child] victims,” *id.*, but a case focused on the competing interests of adults might raise a distinct line of questions.

campaigns like #blacklivesmatter and #MeToo deserve some attention and potentially protection.

4. Maintaining boundaries

Another problem social media posts pose is that they can threaten existing boundaries. For example, no-contact orders frequently work in both directions, and speech *about* party B by party A can induce party B to violate a no-contact order to tell party A to refrain from further speech about her. While the potential for this dynamic predates social media, internet tools make it more likely that people will see material written about them. When CPOs succeed, they work because they establish boundaries between two people who are safer and better off with some sort of barrier.⁶⁴ Social media, at its best, fosters connection between people and breaks down boundaries and barriers between people who are not in the same physical space. However, some barriers should not be broken.

These are just some of the problems associated with domestic violence in the social media era. Some of these are old problems with new twists, while others may be truly novel.⁶⁵ For much of American history, domestic violence was either legal or a problem the law only barely comprehended and addressed,⁶⁶ and criminal and tort law have never been adept at addressing the legal needs of victims of domestic violence. Just as CPOs emerged from that reality, so too must CPOs adapt for present realities. The next section describes the role CPOs are playing in addressing social media abuse.

C. CPOs and Social Media: An Old Tool for a New Task

Civil Protection Orders already prohibit some forms of abuse over social media, but courts and legislature are still determining how

64. *But see* Goldfarb, *supra* note 17, at 1510 (examining alternative definitions of success for CPOs).

65. *But see* Caplan, *supra* note 15, at 849 (arguing that “[n]o special rules are needed to analyze alleged harassment involving the Internet. . . . [S]o-called cyber-harassment or cyber-bullying statutes . . . in most cases will not alter how a court rules on a civil harassment petition [and] do little more than ensure that previously existing harassment laws extend to online interactions . . .”).

66. *See* SUK, *supra* note 20, at 13 (“For much of our history, [domestic violence] was generally outside the reach of the criminal law. . . . Although wife beating was formally illegal in all U.S. states by 1920, it was not until the 1970s that efforts by the women’s movement to recast DV as a public concern began to succeed.”).

to address new forms of abusive communication social media enables. The advent of social media has presented courts with both easy and hard questions with respect to CPOs.

1. The No-Contact Order

For examples of the variety of questions presented to the courts with respect to CPOs, consider one of the most common CPO orders: the prohibition of further contact. Courts have had no trouble finding that a respondent can violate an order enjoining further contact by directly messaging the petitioner through social media.⁶⁷ But determining just how far to extend the meaning of “contact” raises a more serious problem. More controversial activities include “tagging,” which one court recently construed as probably fitting within the meaning of “contact” because the victim was notified of the tagging of the post,⁶⁸ and writing about a petitioner in a forum she is likely to view.⁶⁹ A recent article suggested a definition of “communication” over

67. See Caplan, *supra* note 15, at 826–27 (describing the direction of messages through phone, mail, messenger, or electronic communications as the meaning “contact” takes in the typical no-contact order); see also Andrews v. Ivie, 956 N.E.3d 720, 725–26 (Ind. Ct. App. 2011) (construing Facebook messages as unwanted contact as part of a decision affirming a lower court’s issuance of a CPO); People v. Horton, 21 N.E. 3d 207, 209 (N.Y. 2014) (stating, in the context of witness tampering, that Facebook messages essentially act as emails on the website and therefore qualify as contact); see, e.g., SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL PROTECTION ORDER, DOMESTIC VIOLENCE, <https://www.dccourts.gov/sites/default/files/pdf-forms/Sample-Order-of-Protection.pdf> [<https://perma.cc/VE6K-QLCC>], which explicitly and severally provides the option of banning communication through social media. See also GENERAL FORM 5A, NEW YORK FAMILY COURT, <https://www.nycourts.gov/forms/familycourt/pdfs/gf-5a.pdf> [<https://perma.cc/4EFH-EA8Q>] (providing the option of banning electronic communication).

68. See Andrew Denney, *Judge: Facebook Post Could Violate Protection Order*, N.Y. L.J. (July 14, 2016), <https://www.law.com/newyorklawjournal/almID/1202747032520/> (on file with the Columbia Human Rights Law Review).

69. See, e.g., State v. Craig, 112 A.3d 559, 570–71 (N.H. 2015) (construing the meaning of “contact” to include a Facebook post about his victim when the defendant had, prior to the no-contact order, drawn the victim’s attention to his Facebook page by way of a letter). However, *Craig* explicitly avoided the question of whether the post would constitute “contact” in absence of the letter. *Id.* at 571. See also Best v. Marino, 404 P.3d 450, 463 (N.M. Ct. App. 2017) (upholding the conviction of a respondent who violated an Order of Protection prohibiting the further infliction of severe emotional distress when the respondent posted disparaging comments about the victim). The defendant in *Best* objected that she was not on notice that a comment about her victim on a blog was prohibited because it was not intended to reach him, but the court ruled that the pair’s existence in the

the internet as including speech “by an individual who recklessly disregarded a reasonable likelihood that the target would discover it.”⁷⁰ If courts adopted this definition of “contact,” most CPOs would be converted into “no-mention” orders, and this Note’s remaining pages would be unnecessary. Orders prohibiting contact have generally been upheld as constitutional,⁷¹ and even those commentators most likely to argue against the orders this Note proposes do not argue for the wholesale constitutional rejection of direct communication restrictions in CHOs and CPOs.⁷²

same social and political spheres put the respondent on notice that a disparaging post by her would cause the victim severe emotional distress. *Id.* at 461–62. Although the pair maintained a platonic friendship, *id.* at 455, stalking or sexual assault, whether or not committed by a household member, fall within the definition of “domestic abuse” for the New Mexico statute despite the availability of a separate Civil Restraining Order for harassment or other harm. *Restraining Orders*, WOMENSLAW.ORG: LEGAL INFORMATION: NEW MEXICO (Jan. 25, 2018, 9:57PM), <https://www.womenslaw.org/laws/nm/restraining-orders/protection-orders-domestic-violence/who-can-get-protection-order> [https://perma.cc/ZJ25-5S8L]. In a case involving a probationary condition prohibiting a convicted stalker from contacting his ex-wife, a Georgia Court of Appeals found that a blog post the ex-wife discovered only after running a Google search of her own name did not constitute “contact” because “no evidence was presented suggesting that [the defendant] authored the web postings in order to get in touch with or communicate with his ex-wife.” *Marks v. State*, 703 S.E.2d 379, 380–81 (Ga. Ct. App. 2010).

70. Nancy Leong & Joanne Morando, *Communication in Cyberspace*, 94 N.C. L. REV. 104, 109 (2015). The authors then offer a taxonomy of internet activity that might be considered communication: direct communication (e.g. Facebook message, personal message on LinkedIn, direct tweets), tagging, mutual forum communication (communication over a social networking site that can make posts visible to another user based on their status as friends, members of the same group, or as common posters in a particular discussion thread), likely discovery (posting that will likely be discovered based on overlapping social circles), and discovery in fact (activity outside those four categories that the target nonetheless discovered). *Id.* at 119–23. The authors consider all categories other than discovery in fact to be communication. *Id.* at 123.

71. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 907, 907–08 (1993) (listing cases across several jurisdictions upholding these orders against free speech challenges). See also Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and Cyberstalking*, 107 NW. U. L. REV. 731, 741 (2013) (surveying a wide range of state and federal cases and concluding that some laws prohibiting unwanted contact “have been struck down in some states, but on balance they have generally been upheld by lower courts; and the Supreme Court has upheld the federal ban on repeated unwanted mailings.”).

72. See Caplan, *supra* note 15; see also Volokh, *supra* note 71. To be clear, Caplan and Volokh unequivocally oppose a redefinition of “contact” or

However, an attempt to re-define “contact” or “communication” to include any reference to the victim over social media would be mistaken. First, laws and injunctions that criminalize behavior must be clear about the behavior they prohibit; prohibiting contact does not straightforwardly or clearly prohibit all communication about the victim over social media.⁷³ Second, the primary goal of CPOs should be to prevent, not punish, abusive behavior. CPOs that do not clearly state the behavior they prohibit lack the sort of clear guidance a respondent needs to alter their behavior. Third, construing the meaning of “contact” to include speech about the victim that is likely to reach her creates some tension with the pre-social media constitutional justification for no-contact orders—namely, prohibiting direct, one-to-one contact with the victim.⁷⁴

“communication” along the lines of the proposal of Leong & Morando, *supra* note 70. Quite to the contrary, Caplan’s primary suggestion to avoid First Amendment deficiencies in CHOs is “replacing content with contacts” by issuing speech injunctions in CHOs that go no further than ending unconsented contact. Caplan, *supra* note 15, at 826–45. Similarly, Volokh argues that speech injunctions in harassment statutes and CHOs should be limited, as he claims they traditionally have been, to “unwanted one-to-one speech.” Volokh, *supra* note 71, at 742–44.

73. Some courts have already rejected the proposition that communication about a person who could reasonably be expected to discover it constitutes “contact.” *See, e.g.*, *Chan v. Ellis*, 770 S.E.2d 851, 854–55 (Ga. 2012), a case in which Professor Volokh submitted an *amicus* brief. Likewise, a Florida court interpreting the state’s cyberstalking statute determined that Facebook posts sent out to a general audience were not “directed at a specific person” as the statute requires. *See Scott v. Blum*, 191 So. 3d 502, 504 (Fla. Dist. Ct. App. 2016).

74. *See, e.g.*, *Gilbert v. State*, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988) (noting that “[w]e first reject any notion that the First Amendment to the United States Constitution or [articles] of the Oklahoma Constitution ever covered threatening or abusive communications to persons who have demonstrated a need for protection from . . . domestic abuse.”) (emphasis added); *People v. Blackwood*, 476 N.E.2d 742, 746 (Ill. App. Ct. 1985) (holding that “[t]he only speech for which defendant could be reasonably punished under the Act is that form of expression which would not be subject to constitutional protection under any circumstances.”); *Schramek v. Bohren*, 429 N.W.2d 501, 506 (Wisc. Ct. App. 1988) (finding that “[e]ven if the sanctions of the [Wisconsin statute authorizing CPOs] indirectly prohibit speech, the state can ban speech directed primarily at those who are unwilling to receive it.”) (emphasis added); *see also Klein & Orloff, supra* note 71, at 907–08 (discussing constitutional challenges to CPOs and domestic violence statutes in terms of the First Amendment and other constitutional amendments); Volokh, *supra* note 71, at 742 (emphasizing that “[t]he laws are aimed at restricting speech to a person, not speech about a person. And that is the context in which they have been generally upheld against First Amendment challenge.”).

The novel harms posed by social media, described in the following section require somewhat novel solutions. This does not mean reinventing the wheel, but it does require some innovation.

2. Beyond Contact

CPOs including “no-contact” orders will not fully protect victims from the full range of harmful social media activity, so the question remains whether CPOs can cover abusive communication that falls outside the ordinary meaning of “contact.” That is, if courts escape the vagueness problem described above are clear about what they are doing, can they prohibit speech about the victim?

CPOs have restricted speech by prohibiting contact for nearly four decades,⁷⁵ but restrictions on speech *about* the victim appear to be a newer phenomenon.⁷⁶ While some petitioners likely requested⁷⁷ and

75. In 1976, Pennsylvania became the first state to pass a statute authorizing a CPO-type order, which was called the “Protection from Abuse Act” (PFA). SUK, *supra* note 20, at 14. Although Pennsylvania’s statute did not explicitly authorize “no-contact” orders until a 1988 amendment, a Pennsylvania court implicitly sanctioned such orders while deciding another matter regarding PFAs where it described as valid an order that “prohibited any contact with [the victim’s] residence.” *Vanderhurst v. Rice*, 17 Pa. D. & C.3d 225, 227 (Pa. D. & C. 1980). See Margaret Klaw & Mary Scherf, *Feminist Advocacy: The Evolution of Pennsylvania’s Protection from Abuse Act*, 1 U. PA. J.L. & SOC. CHANGE 21, 21–22 (1993) (describing the origins of the Protection from Abuse Act).

76. A 2001 article advocated for the constitutionality of CPOs banning respondents from revealing specific confidential information about the petitioner concluded that “a court facing a constitutional challenge to a domestic violence speech restriction *would have no direct precedent to which to turn*. Although at least one court has granted such a restriction, none has resulted in an appellate decision.” Kohn, *supra* note 41, at 21–22 (emphasis added). Not long after Kohn published the article, the Georgia Court of Appeals held that a permanent protective order prohibiting an alleged stalker from publishing or discussing his former girlfriend’s private medical information exceeded the Georgia statute. *Collins v. Bazan*, 568 S.E.2d 72, 73 (Ga. Ct. App. 2002). According to *Bazan*, protection orders barring communication other than contact with the victim could only do so if the speech “place[d] the victim in reasonable fear for her safety or the safety of her immediate family.” *Id.* at 74; see also *Baskin v. Hale*, 787 S.E.2d 785, 791–92 (Ga. Ct. App. 2016) (discussing the limits of pre-social media precedents in an analogous custody order).

77. A recent study of non-domestic violence Temporary Protection Orders in the Las Vegas Justice Court lists some of the requested remedies petitioners have sought that are outside the court’s power, such as “[t]hat there be no middle of the night odd behavior.” JOE TOMMASINO, PROTECTION ORDER OR CHAOS? THE TPO PROCESSING EXPERIENCE IN THE LAS VEGAS JUSTICE COURT AND ITS LARGER IMPLICATIONS FOR NEVADA LAW 98–100 (2010). Many of these relate to speech

received orders prohibiting speech about them in the 1980s or 1990s,⁷⁸ such orders appear to have largely evaded appellate and scholarly review with respect to First Amendment concerns.⁷⁹ In one case that predates social media, an appellate court in Washington found that a domestic violence protection order prohibiting an abuser from contacting any agency about his victim's immigration status was unconstitutional because (1) it prohibited both protected and unprotected speech, and (2) it was an unconstitutional prior restraint on his First Amendment right to petition the government for a redress of grievances.⁸⁰ Although it is unclear if this case represents the status quo before social media, the doctrine seems to be swinging in the other direction. Whether because of larger legal trends,⁸¹ the particular

about the petitioner: "Refrain from badmouthing me and my family," "[s]tay away from any online groups or websites that I may be a part of," "[s]top talking about me," "[n]ever use my name, verbally or written," and "I want the Court to prohibit the Adverse Party from all internet access." *Id.* at 98–101. Tommasino links the increase in requests for orders that restrain the public disclosure of private facts to social media, but it seems likely that some requests along the lines of "[r]efrain from badmouthing me and my family" predated the internet era. *Id.* at 98.

78. Because orders can be handwritten, are rarely appealed, and are not always publicly available, a comprehensive search would be challenging. This Note's focus is on First Amendment issues, so the primary focus of research has been on appellate cases addressing First Amendment challenges. Conversations with former colleagues who represent petitioners seeking CPOs have led this Author to believe that orders prohibiting speech to third parties have historically been rare.

79. See Kohn, *supra* note 41, at 41; Volokh, *supra* note 71, at 738, 740–45 (framing harassment orders and statutes prohibiting speech about a person as a recent development diverging from trends from "a few decades ago" and citing examples of this new trend primarily from the last ten years); Klein & Orloff, *supra* note 71 (offering a comprehensive overview of Civil Protection Orders as of 1993, including a review of First Amendment challenges, and failing to discuss orders restraining speech about the victim to third parties); PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 43–47 (1990) (discussing remedies available under Civil Protection Orders and failing to mention any such order).

80. *In re Marriage of Meredith*, 201 P.3d 1056, 1062 (Wash. Ct. App. 2009). *But cf.* *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–19 (1973) (denying standing to a woman attempting to invoke a criminal law against her child's father for failure to pay child support because "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."). Although there are clear formal distinctions between these cases—*Linda R.S.* certainly did not prohibit the woman from asking the government to prosecute the case—it is worth considering when courts are and are not comfortable telling people to mind their own business.

81. This seems to be Volokh's position. See Volokh, *supra* note 71, at 755–62.

harms social media enables, or more ambitious petitioners and advocates,⁸² courts seem to have been granting social media restrictions that are broader than those granted earlier. The next Part surveys emerging law discussing the free speech implications of CPOs governing social media activity.

II. SOCIAL MEDIA RESTRICTIONS AND THE FIRST AMENDMENT

Against this backdrop, domestic violence victims, their advocates, and judges have attempted to craft Civil Protection Orders that prohibit some of the abusive behavior. Because these orders restrain speech, respondents and scholars have raised First Amendment concerns.

The first section of this Part examines a few of these orders and the constitutional justifications courts upholding them have offered. The second section discusses the broader landscape of social media law with respect to sexual and domestic violence, especially the Supreme Court's recent decision in *Packingham*.

A. The Cases So Far

State courts addressing First Amendment challenges to broad social media bans in CPOs have upheld such bans in a few cases, but the law is not yet settled. This section examines some of the broadest social media restrictions and how courts have treated them.

In *Commonwealth v. Lambert*,⁸³ the Superior Court of Pennsylvania affirmed a criminal conviction for indirect criminal contempt of a Protection from Abuse (PFA) order. The PFA directed

82. For an example of one such advocate, see Margaret Talbot, *The Attorney Fighting Revenge Porn*, NEW YORKER (Dec. 5, 2016), <https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn> [<https://perma.cc/S4TQ-JVDJ>] (discussing Carrie Goldberg, a highly creative and entrepreneurial lawyer using and creating a variety of legal tools to combat “revenge porn,” the practice of uploading or sharing revealing or sexually explicit images or videos of another person without that person’s consent). Although Goldberg’s firm appears to represent individuals in CPO hearings, her website gives the impression that they are not one of her primary remedies against revenge porn. *Domestic Violence*, CAGOLDBERGLAW, <http://www.cagoldberglaw.com/domestic-violence/> [<https://perma.cc/886T-Z68K>] (explaining that “[t]he family court orders of protection are boilerplate and, in most places, they will not have specific language barring the offender from aggressing against the victim on social media or posting nude pictures online. Some judges may be willing to add the language.”).

83. 147 A.3d 1221, 1223 (Pa. Super. Ct. 2016).

that defendant Jack Lambert not have any contact with the plaintiff, directly or indirectly, at any location.⁸⁴ The order further directed that Lambert “may not post any remark(s) and/or images regarding Plaintiff, on any social network(s), including, but [not] limited to, Facebook, Myspace, Twitter, or any other electronic networks.”⁸⁵ The appellate court describes what ensued:

The day following entry of the final PFA order, Appellant authored a series of posts on Facebook alluding to a nameless, former paramour, his disapproval of how she ended their relationship, and the emotions he was experiencing because of the unfair treatment he believed he received from both her and the justice system. The following posts represent a sample of the Facebook comments at issue:

- I’ve lost my love and trust in people. I don’t think I’ll ever trust again. I gave her my full trust just for her to use it against me and then has somebody else within days. She never loved me but I loved her and still do. But things are different now. So, it is time to let go of her and let her be happy and hopefully she someday realizes that she needs help and turn back into the wonderful woman I love. She has three years now without me taking care of her and doing everything for her. So, maybe she will finally see things differently and see I’m willing to wait for her. I have to. She’s my soulmate.
- I’m just so fucking depressed. I am so sorry, Facebook, but I lost my best friend, my love, my soul. My heart is crushed. God only knows what I will do next. I am so lost right now. God, help me through this. Please give me my love back. I have been trying to do everything right but I screw up sometimes. I can’t deal with the pain.
- Wondering how you can go from lovin [sic] someone who takes excellent care of you to absolutely hating them people have arguments but that doesn’t mean you stop loving them unless you never really loved them at all and was just using them.
- How can someone say they love someone and within a few days be with someone else is that a slut or what[?]

84. *Id.*

85. *Id.*

- [Appellant updated his profile picture, which depicts his nautical star tattoo, one of a set of matching tattoos that both he and Plaintiff got on their lower legs while they were a couple.]
- Justice system sucks and too many women abuse it.⁸⁶

After the plaintiff contacted the authorities, Lambert was charged with criminal contempt for violating the PFA.⁸⁷ On appeal of the conviction, the court reviewed two questions: first, whether the trial court abused its discretion by convicting the defendant when there was “no wrongful intent and [Lambert’s] social media posts did not threaten, stalk, harass, or contact” the plaintiff, and second, whether the PFA’s restriction on the posting of any remarks or images regarding the plaintiff on any social media violated the free speech protections the Pennsylvania and United States constitutions provided.⁸⁸ On the first question, the appellate court found “ample evidentiary support” for the lower court’s determination that Lambert possessed the wrongful intent required by the contempt statute.⁸⁹

On the second question, the court considered whether to apply the strict scrutiny standard Lambert urged.⁹⁰ Instead, the court applied the test for content-neutral speech regulation to expressive conduct first announced in *United States v. O’Brien*.⁹¹ The court found the PFA valid, “for the proscription in question is not content-based, clearly advances an important governmental interest unrelated to speech, and is narrowly-tailored to advance this interest.”⁹²

Lambert claimed that he thought he had blocked the plaintiff’s access to his Facebook posting,⁹³ meaning he did not violate the no-contact order, so the court directly confronted the question of whether he could be punished for violating the PFA’s prohibition of all posting about the victim. Rather than trying to fit the communication within the well-established framework for prohibiting unwanted contact,

86. *Id.* at 1223–24.

87. *Id.*

88. *Id.* at 1226.

89. *Id.* at 1227.

90. *Id.* at 1227–28.

91. *Id.* at 1228 (citing *United States v. O’Brien*, 391 U.S. 376 (1968)).

92. *Id.* at 1229.

93. *Id.* at 1225.

including contact through third parties,⁹⁴ the court appears to have created a novel form of proscribable online communication: targeting.⁹⁵ The court continued, “the proscription is not concerned with the *content* of Appellant’s speech but with, instead, the *target* of his speech, namely, Plaintiff, whom the court has already deemed the victim of his abusive conduct.”⁹⁶ By analogizing targeting to contacting, the court built on a precedent under which the proscription would be constitutional, but the Court still had to justify its position that the restriction was content-neutral. It did so by finding that Lambert’s Facebook posting would violate the PFA whether his remark was “patently innocuous or offensive, informational or nonsensical.”⁹⁷ The PFA was not regulating the content of his speech, and the restriction could be judged under the *O’Brien* intermediate scrutiny standard.⁹⁸

However, *Lambert* did not consider the possibility that the name or likeness of the victim might be considered content. In three instances, the opinion stated or implied that the Facebook posts violated the PFA because the plaintiff was the “subject” of the posts,⁹⁹

94. See, e.g., *Commonwealth v. Walsh*, 36 A.3d 613, 619 (Pa. Super. Ct. 2012) (discussing a PFA order that clearly prohibited appellant from contacting the victim through a third party).

95. *Lambert*, 147 A.3d at 1229. The court considered targeting to be “tantamount to making impermissible contact with the victim,” but did not hold that the post was itself an attempt to contact the victim. *Id.* (emphasis added). This use of targeting appears to be novel. After discussing the *O’Brien* standard and explaining that the somewhat broader free speech protections offered by the Pennsylvania Constitution do not help Lambert, the court’s opinion continued for the final three substantive paragraphs without citation. *Id.* at 1229. *Lambert* has not yet been cited in subsequent opinions for this use of “target” or for its free speech analysis and holding. The term “target” also appears with a completely different meaning in CPO cases involving personal jurisdiction questions raised when, for example, an abuser “targets” his victim in another state by posting a YouTube video intended to reach her. See Jessica Miles, *We Are Never Ever Getting Back Together: Domestic Violence Victims, Defendants, and Due Process*, 35 CARDOZO L. REV. 142, 143 (2013).

96. *Lambert*, 147 A.3d at 1229.

97. *Id.*

98. *Id.*

99. *Id.* at 1224 (explaining that “[t]hrough the posts never identify her by name, Plaintiff was certain she was the subject of Appellant’s commentary.”); *id.* at 1227 (holding that “the insinuation that Plaintiff and the recent PFA order at issue were the subjects of Appellant’s Facebook activity was obvious and unmistakable.”); *id.* at 1227 n.4 (clarifying that “[a]ppellant argues ‘[t]he imprecise wording of the Order’s social media restriction was not clear or specific enough to indicate Appellant would be in violation for posting about himself, his feelings, or his

which exposes the PFA to the argument that it prohibited particular subject matter.¹⁰⁰ Adding an additional challenge to the argument that the restriction was content-neutral, Lambert did not mention his victim's names in any of the offending posts, so the court had to determine that certain posts referred to her because Lambert used pet names, posted pictures of a tattoo he had that matched one of his victim's, and referred to the duration of their relationship.¹⁰¹ The question of whether the restriction could yet be considered content-neutral is the subject of Part III.A.ii., which aims to put *Lambert* on more solid ground.

In *Polinsky v. Bolton*, a case involving a somewhat less restrictive injunction, an appellate court affirmed an order that prohibited a wide range of online speech.¹⁰² The district court issued the following order:

Writings or other communications by [Bolton] which are made available for public hearing or viewing and which contain addresses, telephone numbers, photographs or any other form of information by which a reader may contact, identify or locate [Polinsky] are acts of harassment and are prohibited by this order. Any communications made by [Bolton] under an identity or auspices other than his true name and which refer to [Polinsky] are acts of harassment and are prohibited regardless of the truth or falsity of any statement made about [Polinsky].¹⁰³

tattoos.' . . . [T]he record belies his claim of being the sole subject of his public postings.”)

100. In an analogous case citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the North Carolina Supreme Court struck down a cyberbullying statute that prohibited anyone from posting or encouraging others to post “private, personal, or sexual information pertaining to a minor.” *State v. Bishop*, 787 S.E.2d 814, 819 (2016). The court determined the statute to be content-based on its face because it criminalized some messages but not others and could not be adjudicated without examining the content of the communication. *Id.* According to the court's interpretation of *Reed*, this meant that North Carolina's “justification for the cyberbullying statute ‘cannot transform [this] facially content based law into one that is content neutral.’” *Id.* (quoting *Reed*, 135 S. Ct. at 2228).

101. *Lambert*, 147 A.3d at 1224.

102. *Polinsky v. Bolton*, No. A16-1544, 2017 Minn. App. Unpub. LEXIS 471 (Minn. Ct. App. May 22, 2017).

103. *Id.* at *5.

Against challenges of prior restraint, overbreadth, and the right to speak anonymously, the court found that the order was narrowly tailored to serve the state interest of protecting the victim.¹⁰⁴ The court did not provide nearly as detailed a First Amendment analysis as *Lambert*, and it did not engage with the question of content-neutrality at all.

Similarly, a California appellate court in *Phillips v. Campbell* allowed an order prohibiting the abuser from posting photographs, videos, or information about the victim to any internet site against a First Amendment challenge, although the First Amendment issue was not properly before the court because it was raised for the first time on appeal.¹⁰⁵ However, the court nevertheless said that it would reject the First Amendment argument because continued engagement in activity that has been determined after a hearing to constitute abuse is not speech protected by the First Amendment.¹⁰⁶ As in *Lambert*, the California court in *Phillips* focused on the big picture of the pattern of abuse rather than focusing on a single transaction.¹⁰⁷

Some CPOs have taken another course, which is to fold abusive social media posting into prohibitions present in nearly all CPOs: restrictions on harassment and stalking. These orders have fared differently in different states' contexts, with some courts upholding

104. *Id.* at *11–17. The court did not announce the level of scrutiny it applied in rejecting the respondent's prior restraint argument, although in a brief footnote dismissing the respondent's argument that the order violated his First Amendment rights, the court referred to the government's "compelling state interest in protecting potential victims" as justifying the use of the least restrictive way to pursue that interest, which seems to imply it was applying strict scrutiny. *Id.* at *17 n.5.

105. *Phillips v. Campbell*, 206 Cal. Rptr. 3d 492, 500 (Cal. Ct. App. 2016).

106. *Id.* (citing *In re Marriage of Evilsizor & Sweeney*, 189 Cal. Rptr. 3d 1 (Cal. Ct. App. 2015)).

107. This is the sort of framework shift Bumb advocates for in domestic violence law more broadly. See Bumb, *supra* note 34, at 921 (criticizing transaction-bound criminal statutes as a poor fit for domestic violence, which tends to occur over a period of time rather than a single criminal moment).

them,¹⁰⁸ some courts invalidating them on First Amendment grounds,¹⁰⁹ and some courts invalidating them on statutory grounds.¹¹⁰

B. The Imprint of *Packingham* and Other Analogous Law

A few cases and legal issues outside the context of CPOs and CHOs may provide some insight on the constitutionality of social media restrictions in CPOs. The Supreme Court's most recent and certain foray into the intersection of sexual violence, social media, and the First Amendment came last June, when the Court decided *Packingham v. North Carolina*.¹¹¹ In *Packingham*, the court invalidated a North Carolina law making it a felony for a registered sex offender to "access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages."¹¹² Justice Kennedy's majority opinion assumed, without actually holding, that the statute was content-neutral and therefore subject to intermediate

108. See, e.g., *Johnson v. Arlotta*, No. A11-630, 2011 WL 6141651, at *1 (Minn. Ct. App. Dec. 12, 2011) (upholding a Harassment Restraining Order barring harassing online speech not aimed directly at the victim because, under Minnesota precedent, the Constitution does not protect harassing speech); *Best v. Marino*, 404 P.3d 450, 463 (N.M. Ct. App. 2017) (upholding, against First Amendment and vagueness challenges, a conviction under an order that restrained speech that would cause the petitioner severe emotional distress); *A.S.R. v. A.K.A.*, 84 N.E.3d 1276, 1278 (Mass. App. Ct. 2017) (affirming a harassment prevention order against a challenge that the order penalized constitutionally protected speech).

109. See, e.g., *Best*, 404 P.3d at 463 (invalidating a district court order prohibiting almost any internet access by the defendant after she violated the valid internet-use restriction described *supra* note 108).

110. See, e.g., *Scott v. Blum*, 191 So. 3d 502, 505 (Fla. Dist. Ct. App. 2016) (holding, in a case not involving domestic violence, that a reasonable person would not experience the substantial emotional distress petitioner claimed he experienced based on a series of emails, articles, blog posts, and videos the respondent sent or posted about him); *Collins v. Bazan*, 568 S.E.2d 72, 74 (Ga. Ct. App. 2002) (holding that the disclosure of confidential medical information did not cause proscribable harassment or intimidation because it did not place the victim in reasonable fear for her safety or the safety of her immediate family). *Bazan* pre-dates social media and was previously cited for its separate holding regarding the meaning of "contact." See *supra* note 76.

111. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1743 (2017).

112. *Id.* at 1731 (quoting N.C. GEN. STAT. §§14-202.5(a), (e)).

scrutiny.¹¹³ The opinion held the statute was not narrowly tailored.¹¹⁴ By banning all access to sites like Facebook, LinkedIn, and Twitter:¹¹⁵

North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to “become a town crier with a voice that resonates farther than it could from any soapbox.”¹¹⁶

The court’s opinion explicitly left open the possibility that states could enact more specific law to prevent sexual crimes,¹¹⁷ although the decision’s sweeping grandiosity nonetheless motivated Justice Alito to concur because he thought the Kennedy opinion’s “undisciplined dicta” might make the enactment of such laws too difficult.¹¹⁸ A ban on referencing a particular person on social media falls safely into the area that *Packingham* leaves undecided: how states should go about “enacting more specific laws” than the North Carolina law, which would properly serve as “the state’s first resort to ward off the serious harm that sexual crimes inflict.”¹¹⁹

A few other state court cases outside of the domestic violence CPO context shed some light on how courts might treat bans on mentioning people on social media. In a custody and divorce case involving domestic violence, a court rejected a broad social media ban a petitioner requested, but the court nevertheless imposed its *own*

113. *Id.* at 1736. This is one of many ways the opinion allows states and circuit courts to resolve issues locally.

114. *Id.* at 1732.

115. *Id.* at 1737. The Court was also uneasy with the possibility that the statute may have been broad enough to ban access to Amazon.com, Webmd.com, and Washingtonpost.com. *Id.* at 1736–37.

116. *Id.* at 1737 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997)).

117. *Id.* at 1737.

118. *Id.* at 1738 (Alito, J., concurring).

119. *Id.* at 1737 (majority opinion).

broad social media ban.¹²⁰ The court acknowledged a separate civil restraining order prohibiting the father from having any contact with his children and agreed that custody was out of the question.¹²¹ However, the court refused the injunction the petitioner requested, which would bar the defendant from “posting pictures, letters, notes, cards, recordings, or likenesses of or information related to the children on any social media website.”¹²² The court analyzed the request under strict scrutiny and wrote that protecting the best interest of the child was a compelling state interest that would justify a narrowly tailored speech restraint.¹²³ However, the court concluded “that a broad order limiting the defendant’s speech online is an impermissible prior restraint on speech, but speech narrowly tailored to prevent disparaging comments between the parents in front of the children, or as needed to protect the interests of the children, is permissible.”¹²⁴ The court then issued the following order:

Neither party shall injure the children’s opinion of the other parent by their words or their actions. Neither parent shall permit any third party to injure the children’s opinion of the other parent by their words or their actions. Neither party shall discuss any adult matters with the children, including but not limited to this trial or any other court-related matter. Neither party shall disseminate information intended to or which is likely to result in the children being exposed to information about this trial or any other court-related matter or which portrays the other parent in a negative light.¹²⁵

While certainly narrower than the order the wife requested, this order discriminates sharply between different categories of content, and it may raise vagueness issues as parties and courts try to determine the meaning of “adult matters” and “negative light.”¹²⁶ Along

120. *Wutzl-Frez v. Frez*, No. HH DFA144072788S, 2015 Conn. Super. LEXIS 2555 (Conn. Super. Ct. Sept. 29, 2015), *aff’d mem.* Adele F. v. Roger F., 155 A.3d 831 (Conn. App. Ct. 2017).

121. *Id.* at *23–24.

122. *Id.* at *17–18.

123. *Id.* at *18–21.

124. *Id.* at *22–23.

125. *Id.* at *30–31.

126. *Id.* at *30–31. As an aside, the court also seemed to think its order was so fair and reasonable that it might as well apply to the mother as well as the father

those lines, in another custody case, a court held that restrictions placed on the mother's communications were overbroad and vague when they barred her from making any reference to the father over social media and prohibited her from discussing any "adult-only issues" in front of the children.¹²⁷

Courts evaluating probation conditions have also wrestled with questions about social media restrictions. A New Jersey Appellate Division upheld a special condition of probation prohibiting a woman from blogging on the internet about her ex-husband and children.¹²⁸ Similarly, in an Illinois case involving a juvenile, an appellate court upheld a probation condition that required a young person to remove any references to gangs, guns, or drugs on his social media account.¹²⁹ However, at least some courts since *Packingham* have acknowledged the limits of internet-use bans as part of probation.¹³⁰ The doctrine for deciding these cases is still emerging.¹³¹ This Note does not intend to

and restrain her from portraying her abusive ex-husband to the children in a negative light. This is exactly the sort of capricious decision-making that adds credence to Volokh and Caplan's position, *see infra* Part III.C, and that motivates this Note's attempt to formulate better alternatives.

127. *Gider v. Hubbell*, No. M2016-00032-COA-R3-JV, 2017 Tenn. App. LEXIS 211 (Tenn. Ct. App. Mar. 29, 2017).

128. *State v. H.L.M.*, No. A-1257-12T3, 2014 N.J. Super. Unpub. LEXIS 1079, at *17 (N.J. Super. Ct. App. Div. May 13, 2014).

129. *In re R.H.*, 99 N.E.3d 29, 38 (Ill. App. Ct. 2017). This case is particularly interesting because it cuts against the intuition that contact-based restrictions are more likely to pass constitutional muster than contact-based restrictions. In an Illinois case cited by *R.H.*, the court invalidated a restriction on contacting gang members because of the possibility that the restriction could prohibit innocuous contact with friends and family who happened to be in gangs or that the prohibition would be too easy to violate accidentally. *See id.* at 38–39 (citing *Omar F.*, 89 N.E.3d 1023, 1038–39 (Ill. App. Ct. 2017)). However, because *R.H.* "controls his own social media accounts and can simply avoid posting about the prohibited topics," the risk of accidental violation is lower. *In re R.H.*, 99 N.E.3d at 38. The state's ability to invoke the *parens patriae* power was essential, and the case would carry limited authority in other contexts.

130. *See, e.g., United States v. Avila*, No. 17-10065, 2017 U.S. App. LEXIS 26263, at *4–5 (9th Cir. Dec. 21, 2017) (striking down a ban on using internet-enabled devices because the ban bore no relationship to the defendant's crime or previous probation violation).

131. For example, in *Gider v. Hubbell*, a case in which a no-mention order was invalidated on First Amendment grounds, the court claimed it had no in-state precedents where a party involved in a custody proceeding sought to enjoin the other party's speech. No. M2016-00032-COA-R3-JV, 2017 Tenn. App. Lexis 211, at *31 (Tenn. Ct. App. Mar. 29, 2017). *Gider* cited to and relied on a 2013 Georgia case where the court found no authority specifically addressing the issue of restricting

make complete sense of the current doctrine, but it hopes to forge a path through it. The next Part proposes model orders, an argument for how courts should treat them, and some constraints on how these orders could be used.

III. MODEL ORDERS AND THEIR DEFENSES

This Part offers two model orders and their justifications, along with assessments of their strengths and weaknesses. Had either of these orders been in place at the time of Anthony Elonis's posts, he likely would have been found in violation of his PFA. Under either of these orders, the respondent would have a clear opportunity to understand and challenge¹³² the restriction upon him before violating it.

A. Proposed Order One: Respondent must refrain from posting on social media, or from recklessly causing another person to post on social media, any image of, reference to, or mention of petitioner.

This proposed order is the quintessential “no-mention” order. It is broad, but nonetheless clear, in the activity that it prohibits: any mention of or reference to the petitioner. This section proposes two justifications for upholding the no-mention order against First Amendment challenges.

First, it should survive strict scrutiny because it is narrowly tailored to serve the government's compelling interest in protecting victims of domestic violence from suffering further abuse.

parents' social networking websites. *Lacy v. Lacy*, 740 S.E.2d 695, 706 (Ga. Ct. App. 2013) (citing *Baskin v. Hale*, 787 S.E.2d 785 (Ga. Ct. App. 2016)). Though the court in *Lacy* upheld an all-out ban on either party mentioning each other over social media, the authorities relied upon seem inapposite, as those cases involved restrictions on parents making derogatory remarks about the other parent in front of the children, contacting one another, or calling each other's place of work. *Lacy*, 740 S.E.2d at 707–08 (citing *Maloof v. Maloof*, 204 S.E.2d 162, 163–64 (Ga. 1974) (involving restrictions on parents making derogatory remarks); *Roberts v. Roberts*, 173 S.E.2d 675, 678–79 (Ga. 1970) (restricting communication between parents)). None of these restrictions involves an all-out mention ban, or a situation of “one-to-many” speech, to use Volokh's terminology. See Volokh, *supra* note 71, *passim*.

132. The possibility of pre-enforcement review in individual cases provides an interesting procedural safeguard, although the value to individual respondents would be limited by the fact that few respondents have representation in the CPO hearing, much less access to representation for an appeal.

Second, it only needs to survive intermediate scrutiny because it is either content-neutral or so close to being content-neutral that the justifications for applying strict scrutiny do not apply. Once deemed content-neutral and subject only to intermediate scrutiny, it survives the test because it is a time, place, and manner restriction narrowly tailored to serve the government's significant interest in protecting victims of domestic violence that leaves ample alternative channels for communication.

Under either justification, the first step in making this type of restriction work is treating it as an extraordinary remedy rather than as a routine prohibition such as harassing, assaulting, stalking, threatening, or contacting¹³³ the victim. These orders would only be appropriate where the petitioner has proposed,¹³⁴ and the court has agreed, that the respondent is practically incapable of discussing the petitioner on social media without causing proscribable harm. The *Lambert* court comprehends this situation and writes eloquently about it: "For an adjudged abuser to refer to a victim in publicly trafficked electronic forums, for whatever reason, is to exercise control over the victim in public, thus perpetuating the abuse of the victim."¹³⁵ No-

133. While harassment, assault, stalking, and threatening are prohibited in almost every CPO, and are frequently banned by criminal law anyway, "contact" is the outlier on this list in that not all CPOs contain no-contact orders and not all petitioners want them. To the dismay of some commentators, these orders are nonetheless common enough to be labeled "routine." See Goldfarb, *supra* note 17, at 1489-90 (describing orders prohibiting contact as "the overwhelming majority" of CPOs, but arguing that CPOs permitting ongoing contact and the maintenance of relationships should be more widely allowed and utilized); see also SUK, *supra* note 20, at 35, 38, 41-50 (noting that "the routine practice" of obtaining orders restricting contact can yield "de-facto" divorce).

134. The requirement that the petitioner actually requests such an order is easy to overlook, but it is a crucial requirement to avoid the excesses of no-contact regimes in criminal court protection. See SUK, *supra* note 20, at 41-50 (describing the "de facto divorce" as a consequence of criminal protection orders prohibiting contact between married couples or partners, including cases where the victim did not want to end the relationship); see also *State v. Ross*, No. 35448-5-I, 1996 WL 524116, at *3, *4 (Wash. Ct. App. Sept. 16, 1996) (upholding a no-contact order issued as part of the appellant's criminal sentence over his challenge that it interfered with his constitutional right to marry by noting the state's "compelling interest in preventing future crimes"); *People v. Jungers*, 25 Cal. Rptr. 3d 873, 879 (Cal. Ct. App. 2005) (holding that the state's "compelling interest in protecting victims of domestic violence" justified curtailment of the defendant's rights of association and marital privacy).

135. *Commonwealth v. Lambert*, 147 A.3d 1221, 1229-30 (Pa. Super. Ct. 2016).

mention orders would only be permissible under factual conditions that could justify a court in saying such a thing about the particular abuser with respect to his victim.

1. This order survives strict scrutiny because the protection of victims of domestic violence is a compelling state interest and because the restriction is narrowly tailored to serve that purpose.

A court disagreeing with *Lambert* could find that the name or likeness of an individual is content and therefore apply strict scrutiny. If the court applies strict scrutiny, the domestic violence advocate would have to show that the order's restriction on social media use is narrowly tailored to advance a compelling state interest.¹³⁶ Just as three of the *Packingham* Justices found the protection of children from abuse to be a compelling state interest,¹³⁷ a court examining one of these orders could rely on ample state and federal precedent stating the state has a compelling interest in protecting victims of domestic violence from further abuse.¹³⁸ The narrow tailoring seems like the

136. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (holding that “[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

137. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1740 (2017) (Alito, J., concurring).

138. See, e.g., *Polinsky v. Bolton*, No. A16-1544, 2017 Minn. App. Unpub. LEXIS 471, at *16 n.5 (Minn. Ct. App. May 22, 2017) (upholding a speech restriction based on a “compelling state interest in protecting potential victims”); *State v. Doyle*, 787 N.W.2d 254, 259 (Neb. Ct. App. 2010) (holding that “the State has a compelling interest in protecting victims of domestic violence from continuing harassment and abuse” which justified a no-contact order); *Altafulla v. Ervin*, 189 Cal. Rptr. 3d 316, 323–24 (Cal. Ct. App. 2015) (using the state’s compelling interest in protecting a domestic violence victim from fear, abuse, or annoyance to uphold a domestic violence protection order based largely on the dissemination of embarrassing, but true, information about the victim). Courts have also announced similar compelling interests in other cases involving interference with other fundamental constitutional rights. Several appellate courts have come close to announcing the protection of victims of domestic violence as a compelling state interest in Second Amendment cases. See, e.g., *Stimmel v. Sessions*, 879 F.3d 198, 201 (6th Cir. 2018) (upholding the disarming of domestic violence misdemeanants against a Second Amendment challenge because it was substantially related to the “government’s compelling interest of preventing gun violence and, particularly, domestic gun violence.”); see also *State v. Ross*, No. 35448-5-I, 1996 WL 524116, at

more difficult hurdle because of the likelihood of an overly broad injunction.¹³⁹ By restricting any mention of the petitioner over social media, the injunction will undoubtedly prohibit some speech that would not be regulable by tort or generally-applicable criminal law. That, along with providing a more definite prohibition against speech that might be criminal or tortious anyway, is the point. The question is whether the orders are narrowly tailored to serve the interest it advances.

R.A.V. v. St. Paul stated that the prohibition against content discrimination is not absolute, suggesting that exceptions are most likely when the government is not trying to drive certain ideas or viewpoints out of the marketplace.¹⁴⁰ This order would not constitute viewpoint discrimination, because it would equally prohibit positive, negative, and neutral speech about the victim. These injunctions would not require police or judges to make difficult decisions that would require them to delve deep into the minds of perpetrators, victims, or reasonable Facebook users. Enforcement would be cut and dry, and the government would not express animus toward any viewpoint. The purpose is not to drive an idea out the marketplace, but to prevent abuse.

A court upholding this order would have to find that (1) the order is not over-inclusive by prohibiting the respondent from making statements that are not abusive,¹⁴¹ (2) that the same purpose could not

*3 (Wash. Ct. App. Sept. 16, 1996) (upholding a no-contact order issued as part of a criminal sentence against a challenge that it interfered with his constitutional right to marry because of the state's "compelling interest in preventing future crimes"); *People v. Jungers*, 25 Cal. Rptr. 3d 873, 879 (Cal. Ct. App. 2005) (holding that the state's "compelling interest in protecting victims of domestic violence" justified a curtailment of a defendant's rights of association of marital privacy); *Gourley v. Gourley*, 145 P.3d 1185, 1192 (Wash. 2005) (noting that "[t]he state[s] . . . compelling interest in protecting the victims of domestic violence and abuse" factors into a *Mathews v. Eldridge* balancing test in determining the due process requirements of a CPO hearing); *accord Nollet v. Justices of the Trial Court*, 83 F. Supp. 2d 204, 213 (D. Mass. 2000).

139. *Packingham*, 137 S. Ct. at 1736–37.

140. 505 U.S. 377, 387–88 (1992).

141. *Cf. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991) (finding a statute requiring that accused or convicted criminals' income from works describing their crime be deposited in escrow account was not narrowly tailored since it would encompass too large a number of works, like Malcolm X's autobiography).

be achieved by a less restrictive means,¹⁴² and (3) that it does not distinguish improperly between different types of speech that could be considered abusive under the same framework.¹⁴³ As far as the over-inclusiveness, the premise of this theory is that a court has made the judgment that any comment on social media would be abusive. Again, the *Lambert* court articulates this point effectively.¹⁴⁴ Statements not about the victim would not be prohibited. Crucially, a post like Lambert's "Justice system sucks and too many women abuse it," referring to women generally and voicing a public policy opinion, would not violate the order,¹⁴⁵ and the respondent would be welcome to express it over social media. This order would almost certainly allow the postings in *Commonwealth v. Walters* because they did not clearly refer to the victim.¹⁴⁶ Moreover, the central concern in *Packingham*, the permanent banishment of returning citizens from the public square, is not an issue here.¹⁴⁷ *Packingham* was not about protecting a registered sex offender's right to engage in conduct that sits in some gray area between child abuse and innocent communication with an underaged person; it was about reining in a legislature that far overreached its stated purpose of protecting children.¹⁴⁸ A restrained party could still participate in almost the full range of online activity, and he could participate in a discussion about the CPO process or describe his hatred of women generally. This order would only restrain him from

142. *Cf. Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989) (finding that "[t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

143. *R.A.V.*, 505 U.S. at 387.

144. *Commonwealth v. Lambert*, 147 A.3d 1221, 1229 (Pa. Super. Ct. 2016) (holding that "[f]or an adjudged abuser to refer to a victim in publicly trafficked electronic forums, for whatever reason, is to exercise control over the victim in public, thus perpetuating the abuse of the victim.").

145. *Lambert*, 147 A.3d at 1224; *cf. Polinsky v. Bolton*, No. A16-1544, 2017 Minn. App. Unpub. LEXIS, at *14 (Minn. Ct. App. May 22, 2017) (clarifying that "[w]e recognize that Bolton has a First Amendment right to comment on matters that relate to public issues [such as criticism of the court system] and that his blog may be an appropriate forum for exercising that right. . . . [T]he HRO does not prohibit this discussion."). Admittedly, the order in *Polinsky* restricts less speech than Proposed Order One or the *Lambert* order, but all three of these orders leave ample opportunity to criticize the court system without discussing the victims.

146. *Commonwealth v. Walters*, 37 N.E.3d 980, 994–96 (Mass. 2015). *See supra* note 38 and surrounding text.

147. *Packingham*, 137 S. Ct. at 1737.

148. *Id.* at 1737 (finding that "[t]he State has not, however, met its burden to show that this sweeping law is necessary or legitimate to serve that purpose.").

harming someone he has already harmed and could harm further through his online activity.

On the question of least restrictive means, one could reasonably argue that a no-mention order across social media is not specific enough. In *Polinsky*, the order may have survived strict scrutiny precisely because it was even more narrowly tailored than this proposed order.¹⁴⁹ In that “carefully crafted” order, Bolton was only restrained from publishing his victim’s contact information and from posting any reference to the victim anonymously.¹⁵⁰ While courts would still be free to issue orders with greater specificity than this proposed order, it is not clear that additional specificity would increase the likelihood that the order would be constitutional. The *Polinsky* order was arguably more content-discriminatory than this proposed order in that it barred the respondent from posting specific information about the victim, and it arguably compelled speech by requiring Bolton to publish under his own name when referring to his victim.¹⁵¹ Furthermore, highly specific bans will inevitably provoke narrowly tailored abusive content that toys with the boundaries courts attempt to set.¹⁵² While there may be some less restrictive alternatives in certain cases, it is not at all obvious that those restrictions would be equally effective at serving the state’s purpose or that they would be constitutionally preferable.

On the third point, an objector might say that the limitation is under-inclusive because it only prohibits certain abuse over one group of media. With regards to the media-specificity, the Supreme Court has allowed such prohibitions in the past,¹⁵³ and it seems appropriate

149. *Polinsky*, 2017 Minn. App. Unpub. LEXIS 471, at *15 (noting that “[the order] narrowly prohibits blog postings that identify Polinsky’s current contact information, which does not implicate political speech or matters of public concern.”).

150. *Id.*

151. *Id.* (holding that “[t]hus, the order appropriately required, among other provisions, that Bolton use his real identity when posting about her. Bolton’s use of his real name in future blog postings will allow Polinsky to locate him and identify him as the potential source of any additional harassing conduct.”) (internal citation omitted).

152. For example, in Anthony Elonis’s adaptation of a satirical sketch called “It’s Illegal to say . . .” and other posts, he built his humor and purported legal defense on the limits he perceived in the “true threat doctrine.” See *Elonis v. United States*, 135 S. Ct. 2001, 2005–06 (2015).

153. See *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992) (clarifying that “[t]here is no problem whatever, for example, with a State’s prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although

considering the specific harms enabled by social media. As far as limiting the prohibition to one relationship, *R.A.V.* held that such discrimination was possible “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.”¹⁵⁴ The speech that these orders proscribe does not fall completely within one of the traditional classes of unprotected speech, but the reasoning still applies because the basis of discrimination within the class of speech perpetuating domestic violence is attempting to end the perpetuation of domestic violence.¹⁵⁵ Thus, Proposed Order One could survive strict scrutiny.

2. This order survives intermediate scrutiny because it is a content-neutral time, place, and manner restriction that is narrowly tailored to serve a significant government interest.

Alternatively, Proposed Order One could be sustained as a regulation of the time, place, and manner of expression, which is lawful as long as it is content-neutral, narrowly tailored to serve a significant government interest, and leaves ample alternative channels of communication.¹⁵⁶ The *Lambert* court articulated most of the argument for a theory along these lines,¹⁵⁷ but it did not fully articulate a response to the argument that the target’s name or identity is content.¹⁵⁸ As the Supreme Court increasingly narrows what can be considered content-neutral,¹⁵⁹ some scholars have hypothesized that the ultimate effect of classifying more speech as content-discriminatory will be that courts will be more open to upholding content-discriminatory laws.¹⁶⁰ It may be that the best course is simply to

that prohibition would be ‘underinclusive,’ it would not discriminate on the basis of content.”); see, e.g., *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 124–26 (1989) (upholding 47 U.S.C. § 223(b)(1), which prohibits “obscene telephone messages”).

154. *R.A.V.*, 505 U.S. at 388.

155. *Commonwealth v. Lambert*, 147 A.3d 1221, 1230 (Pa. Super. Ct. 2016).

156. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 488 (1988).

157. *Lambert* analyzed the case under the *O’Brien* framework, but this section pursues a time, place, and manner framework instead.

158. *Lambert*, 147 A.3d at 1229.

159. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579–80 (2011); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231–32 (2015).

160. See Note, *Free Speech After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 2002 (2016) (explaining that “*Reed* may have the perverse effect of diminishing the centrality of the content distinction. It may instead enhance the fact sensitivity of courts considering First Amendment challenges. By making clear

defend the argument on strict scrutiny grounds. However, this section will make the case for Proposed Order One's content-neutrality for two reasons. First, it seems like a plausible argument, and *Lambert* should be salvaged if possible. Second, if that hypothesis is correct, it may be because courts integrate considerations into their strict scrutiny analysis that, before *Gilbert*, were part of the analysis to determine whether a regulation was content-neutral or content discriminatory. No matter how the courts frame these issues, advocates for speech regulations should present their best arguments.

Lambert found content-neutrality by saying that "the proscription is not concerned with the *content* of Appellant's speech, but with, instead, the *target* of his speech."¹⁶¹ In other words, the purpose of proscription has nothing to do with any content that might be proscribed, and even though reference to the content is necessary for adjudication, the possibility that the speaker might *say* the victim's name is not the reason for the ban. The reason for the ban is to prevent further abuse. This theory is consistent with *Hill v. Colorado's* formulation of content-neutrality, which asks whether the legislature adopted the restriction "because of disagreement with the message it conveys."¹⁶² As with the statute at issue in *Hill*, it is a regulation of the place or manner "where some speech may occur;" namely, it only prohibits some speech over social media.¹⁶³ Second, courts would not issue these orders because the government disagrees with the message the abuser conveys; in this case, the government prohibits *all* messages about the victim spoken over social media by the abuser, including those with which it could not possibly disagree (e.g. "Jessica got a CPO

the folly of elevating the content distinction over legitimate concerns about government suppression of speech for which it is meant to be a proxy, *Reed* may have sown the seeds of its own demise."); see also Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. REV. 65, 86 (2017) (discussing criminal laws regarding cyberbullying and child pornography: "Despite the protestations of *Reed's* critics, the case has not altered the First Amendment calculus in a way that severely restricts governments from passing such laws. It does ensure, however, that the government's power to criminalize speech should be earned, not assumed.").

161. 147 A.3d at 1229 (emphasis in original).

162. 530 U.S. 703, 719 (2000). For a brief but helpful primer on the Supreme Court's different approaches to finding content neutrality, see Eugene Volokh, *Content Discrimination and the First Amendment (Including the "Secondary Effects" Doctrine)*, VOLOKH CONSPIRACY (June 21, 2010), <http://volokh.com/2010/06/21/content-discrimination-and-the-first-amendment-including-the-secondary-effects-doctrine/> [https://perma.cc/UKM6-S2FQ].

163. *Hill*, 530 U.S. at 719.

against me today”).¹⁶⁴ Third, the order can be justified without reference to the content of the speech;¹⁶⁵ namely, by reference to the role that any speech over social media plays in perpetuating abuse. The respondent might respond by saying that adjudication is not possible without reference to the content of the speech, but according to *Hill*, the Supreme Court has “never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.”¹⁶⁶ In this case, the court would inevitably have to examine the content of the statement to determine whether the defendant violated the order, but that content nevertheless was not the basis of the order.

Alternatively, the victim’s name might be considered content-neutral as a secondary effect.¹⁶⁷ Under *Renton v. Playtime Theatres*,¹⁶⁸ laws targeting the proscribable secondary effects of speech are considered content-neutral even when the regulations apply to a particular category of speech.¹⁶⁹ *Boos v. Barry* articulated an important limit to this type of regulation when it held that listeners’ reactions to speech are not secondary effects.¹⁷⁰ This limits the usefulness of *Renton* in prohibiting hate speech,¹⁷¹ but it presents a more intriguing option in the case of a CPO. Assuming a CPO banning all mentions of the victim over social media also contains a no-contact order, the victim cannot possibly be considered the *audience* of the speech. To the extent that she is the intended audience, either the petitioner has violated the no-contact order, or the constitutional justifications for allowing a no-contact order¹⁷² apply directly to the no-mention order. The

164. *Id.*

165. *Id.* at 720.

166. *Id.* at 721.

167. See Volokh, *supra* note 162 (describing the Secondary Effects Doctrine as one approach to finding content neutrality). In this analysis, the Court asks “[w]hether the legislature’s ‘predominate concerns’ are ‘with the content of the speech as opposed to ‘with the secondary effects of the speech.’” *Id.* (citing *City of Renton v. Playtimes Theatres, Inc.*, 475 U.S. 41, 47 (1986)).

168. 475 U.S. 41, 47 (1986).

169. *Boos v. Barry*, 485 U.S. 312, 320 (1988).

170. *Id.* at 321 (holding that “[t]he emotive impact of speech on its audience is not a ‘secondary effect.’”).

171. See *R.A.V. v. St. Paul*, 505 U.S. 377, 384 (1992) (finding that “it is clear that the St. Paul ordinance is not directed to secondary effects within the meaning of *Renton*. As we said in [*Boos v. Barry*], ‘[l]isteners’ reactions to speech are not the type of “secondary effects” we referred to in *Renton*.’”).

172. See *supra* note 71 and surrounding discussion. No-contact orders frequently prohibit communication through third parties, which has been held

respondent's justification for speech about his victim lies not in his right to reach his victim, but in his right to reach an audience willing or interested in hearing what he has to say.¹⁷³ By prohibiting mentions of the victim, the court is neither protecting the victim nor the other audience from the emotive impact of the speech. The court is protecting the victim from what happens next, when the intended audience hears the speech: the troll storm, the harm to their reputation, or even the re-posted, re-tweeted, or forwarded message that cause the victim to perceive a threat or feel upset¹⁷⁴—what *Lambert* summarized as the abuser's ability “to exercise control over the victim in public, thus perpetuating the abuse of the victim.”¹⁷⁵ Those activities, which include but are not limited to speech acts, could properly be considered secondary effects that the no-mention order targets, which is one route to rendering the no-mention order content-neutral.¹⁷⁶

There may be a simpler way of getting around the fact that no-mention orders are arguably content based: ignoring a problem that just barely exists. At some level, a court could consider any speech

constitutional against First Amendment challenges. *See, e.g.*, *State v. Doyle*, 787 N.W.2d 254, 259 (Neb. Ct. App. 2010) (upholding a conviction when the defendant breached a no-contact order by contacting his victim through a nurse). Recall that this Note's objections to expanding the meaning of “contact” to include all online communication likely to reach the victim are that such orders would be vague and that not all circumstances warranting no-contact orders warrant no-mention orders.

173. *See Volokh, supra* note 71, at 743 (noting that “one-to-many speech critical of a particular person will very likely be seen by that person or offend that person. . . . [T]hough the subject will likely be offended by the speech, other readers may find the speech valuable. Suppressing one-to-many speech would thus unacceptably restrict communication to potentially willing listeners.”). Volokh ties this proposition to a First Amendment theory in which the value of speech stems either from the speech's ability to persuade, inform, or entertain listeners or from the value of speech as a means for self-expression, when both the speaker and listener consent to such self-expression. *Id.*

174. Again, the crucial difference between the CPO case and cases like *R.A.V.* and *Boos* is that the respondent to a CPO containing a no-contact order is already enjoined from contacting the victim, including through a third party, so the victim's emotive response could be considered a secondary effect in the CPO case.

175. *Commonwealth v. Lambert*, 147 A.3d 1221, 1229 (Pa. Super. Ct. 2016).

176. In terms of how to frame the secondary effects, *City of Erie v. Pap's A.M.* provides a precedent for regulating expressive acts when those acts produce “an atmosphere conducive to violence, sexual harassment . . . and other deleterious effects.” 529 U.S. 277, 290 (2000).

restriction as part of a CPO to be content-based.¹⁷⁷ Consider this paragraph from Caplan's article, expressing concern that even his solution of replacing bans on speech about CHO petitioners with no-contact orders could be considered content-based:

The proposal to replace content with contact may leave behind a nagging worry: Is it really possible? The identity of the speaker is part of a message's content, and governmental control over who speaks is often treated as a control over content. The pattern of repeated contact still communicates something—namely, that the respondent wants to be involved with (or control aspects of) petitioner's life. Ultimately, these concerns are not fatal because, if accepted, they would also leave us powerless to proscribe nonverbal stalking because it communicates the same message. Losing that message is an acceptable incidental cost of conduct regulation, assuming that regulation is otherwise valid.¹⁷⁸

Caplan's solution to saving the no-contact order from charges of content and speaker discrimination seems right, and the question is whether it can be taken one step further. If the nature of the speaker's identity as content can be considered *de minimis*, then shouldn't the victim's identity also be treated as such? By the same token, consider a CPO like the one in *Polinsky*, which prohibited the respondent from disseminating the petitioner's contact information. If a court can enjoin a respondent from dialing a phone number or giving that phone number to a friend to dial, why would the phone number gain status as content simply because the abuser chose to send it out over Facebook or Twitter? No-contact orders and, as Caplan observes, prohibitions on

177. As Caplan notes, "[t]he only genuinely content neutral injunction that could stop undesired speech about petitioner would be this: 'Respondent may not communicate with anyone about anything.'" Caplan, *supra* note 15, at 824–25.

178. *Id.* at 840 (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995), and *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) as examples of cases treating the identity of the speaker as content; and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), *Carey v. Brown*, 447 U.S. 455 (1980), and *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) as examples of cases in which government control over who speaks is treated as control over content). For a more in-depth discussion of speaker discrimination, see Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. L. REV. 765 (2015).

stalking, inevitably involve some minimal content. But they are saved from treatment as such because the purpose of prohibiting the prohibition has nothing to do with the content of the speech. Furthermore, even if the name or phone number were considered “content” or “subject-matter,” the government could not be accused of attempting to ban discussion of that subject matter, because the government only bans that discussion over certain fora *by the petitioner*. This elevates the concern over speaker discrimination,¹⁷⁹ but an abuser’s history of domestic violence and abusive or erratic social media behavior may justify discriminating against him with respect to his right to use certain media in certain ways.¹⁸⁰

If a court accepted this theory of content-neutrality, the order would likely meet the requirement that time, place, and manner restrictions must “leave open ample alternative channels for communication of the information.”¹⁸¹ The medium-specificity of this order would leave the respondent the opportunity to speak about his victims in ways that do not violate the order and do not perpetuate the abuse that social media enables. He would also be able to speak on social media about domestic violence, the CPO process, or any subject other than the victim. Otherwise, the argument for sustaining an order under intermediate scrutiny would look much the same as the argument under strict scrutiny, only protecting a victim of domestic violence from further abuse would only have to be considered a substantial state interest, and the order would be more likely to survive constitutional examination.

179. See *supra* note 178.

180. Cf. *U.S. v. Pedelahore*, No. 1:15cr24-LG-RWH, 2017 U.S. Dist. LEXIS 173095, at *2 (S.D. Miss. Oct. 19, 2017) (distinguishing *Packingham* and upholding a probationary condition prohibiting the use of internet-enabled devices for a limited period of time for a man previously convicted of using the internet to coerce a minor to engage in sexual activities). As opposed to the North Carolina statute at issue in *Packingham*, the probationary condition (1) only applied to a person with a history of internet misuse and (2) only applied during Pedelahore’s time on supervised release—meaning he was still serving his criminal sentence. *Id.* at *3–4. Accord *U.S. v. Rock*, 863 F.3d 827 (D.C. Cir. 2017). Along with *United States v. Avila*, No. 17-10065, 2017 U.S. App. LEXIS 26263 (9th Cir. Dec. 21, 2017), which invalidated a similar probationary condition when it bore no rational relation to the prisoner’s sentence, these post-*Packingham* cases are creating a workable rule for discriminating fairly between speakers convicted of internet-related crimes.

181. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

B. Proposed Order Two: [following a prohibition of threatening the victim . . .] The “threats” prohibited by this order include social media posts by a respondent who consciously disregards the risk that a reasonable person would interpret it as a threat to harm the petitioner.¹⁸²

This proposed order is a direct attempt to shore up the *Elonis* gap by articulating the culpability standard that the Supreme Court refused to read into the federal threat statute. While *Elonis* argued against his conviction on First Amendment grounds, the District Court, Circuit Court, and the Justices of the Supreme Court who engaged with the questions, Justices Alito and Thomas, all rejected *Elonis*’s claim.¹⁸³ This order adopts Justice Alito’s recklessness standard, rather than Justice Thomas’s general intent standard, because of its likelihood of carrying a majority on the Court.¹⁸⁴ A criminal conviction under a California statute using the same standard has been upheld, with both parties agreeing that *Elonis* did not prevent it.¹⁸⁵ In the circumstance of a CPO, Justice Thomas’s view regarding general intent¹⁸⁶ might gain traction because the additional notice, process, and specificity of CPOs leaves defendants ill-positioned to claim that they did not intend to break the law.

Along the lines of this model order, the creative drafter in the CPO could specifically target any of the harms described in Part II by temporarily modifying or explicating the meaning of terms like “harassment” or “stalking” or by writing custom orders. If these orders are clear and otherwise constitutional, they remain viable options for

182. This order borrows elements from a model statute proposed by Marshak, *supra* note 34, at 523–35.

183. *Elonis v. United States*, 135 S. Ct. 2001, 2007 (2015).

184. The majority opinion did not articulate a position on the question of whether recklessness would suffice to convict under § 875(c) given its silence on a culpability standard, *id.* at 2013, but “recklessness” is common enough as a culpability standard that a statute or CPO naming recklessness as the culpability standard would be unlikely to raise controversy. For example, in New York, a person is guilty of aggravated harassment in the second degree when, with intent to harass another person, the actor communicates a threat and “the actor knows or reasonably should know that such communication will cause such person to reasonably fear harm.” N.Y. CRIM. LAW § 240.30 (McKinney 2014).

185. *People v. Murillo*, 190 Cal. Rptr. 3d 119, 124–25 (Cal. Ct. App. 2015) (upholding the conviction of a man who posted threatening lyrics over social media using the exact same standard *Elonis* rejected for the federal statute, but applying the California state statute).

186. *See supra* note 5.

the creative drafter. This Note proposes a solution that may, as Justice Kennedy put it, be obsolete tomorrow,¹⁸⁷ and it encourages future drafting in the same spirit.

C. First Amendment Constraints

The previous sections proposed and defended two model orders under the First Amendment. This section examines the First Amendment concerns in a little more depth by considering the relevance of articles by Aaron Caplan¹⁸⁸ and Eugene Volokh¹⁸⁹ that argue against broad speech restrictions in Civil Harassment Orders, harassment statutes, and other laws. Volokh writes primarily about criminal harassment laws, some of which authorize civil injunctions,¹⁹⁰ and Caplan focuses on CHOs.¹⁹¹ Nevertheless, the free speech concerns they raise are valid, and the question this section asks is whether domestic violence CPOs are different.

For Caplan, CHOs restraining speech present vagueness, overbreadth, and prior restraint concerns.¹⁹² This Note proposes orders that address the vagueness problem by design. Proposed Order One, barring any reference to the victim over social media, tells the respondent exactly what he cannot do over social media.¹⁹³ No-mention orders will provide straightforward avenues to enforcement. If such

187. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

188. Caplan, *supra* note 15.

189. Volokh, *supra* note 71, at 732–33.

190. Some of these cases involve domestic violence and some do not. *See supra* note 18.

191. Their respective articles do not explicitly or definitively take positions on the types of orders this Note proposes for CPOs, and I do not want to give the impression that they are or would be unsympathetic to the particular needs of domestic violence victims and survivors. In fact, quite to the contrary, Caplan discloses that he served as counsel for a woman who was restrained by a CHO from “knowingly and willfully making invalid and unsubstantiated allegations or complaints [about her ex-husband] to third parties” after she wrote a letter to the editor of the local newspaper on the topic of domestic violence, which the ex-husband believed contained references to him. Caplan, *supra* note 15, at 784, 784 n.10. Similarly, Volokh discusses the need to listen to those involved in domestic violence disputes rather than forming opinions solely from what appears in the newspaper. Volokh, *supra* note 71, at 792.

192. *See* Caplan, *supra* note 15, at 808–26.

193. Compare with the vagueness issues at play when courts interpret words like “harassment,” “contact,” or “threaten” in a criminal statute, CPO, or CHO. *See* Caplan, *supra* note 15, at 810–15 (describing courts’ struggle to define “harassment”).

orders are widely available but not requested or granted in a given case, courts can presume that innocuous posting is allowed and handle marginal cases more leniently. The clarity of the order also provides clear instructions and boundaries to the respondent, which would, one hopes, reduce instances of abusive posting in the first place.¹⁹⁴ Proposed Order Two provides a specific, technical meaning to “threat” that operates if the order is in force. Both of these orders say what they mean. Caplan’s other constraints, prior restraint and overbreadth, are the primary concerns of the First Amendment analysis in Parts III.A and III.B and have been addressed above.

Volokh’s article expresses concern over a larger drift he perceives: a return to criminal liability for true statements said with bad motives.¹⁹⁵ Under the guise of criminal harassment laws, CHOs, and other violations, courts have been returning to an era where people can “be legally barred from saying derogatory things (even opinions or true statements) about other people unless they have a good reason to do so.”¹⁹⁶ His response is sweeping: “such an approach is unconstitutional when applied to speech said about the target rather than just to the target, at least when the speech is outside the traditional First Amendment exceptions (chiefly threats and ‘fighting words,’ plus perhaps libel and other knowing falsehoods).”¹⁹⁷ He draws a sharp line between one-to-one and one-to-many speech, acknowledging that the government “has considerable power to protect unwilling listeners against unwanted speech *to* them, at least when that speech is one-to-one—when it is said directly to them rather than to the public at large, so that restricting such one-to-one speech will leave speakers free to communicate to willing listeners.”¹⁹⁸ He further acknowledges that the government has some ability to restrict speech about people, including threats, knowing falsehoods, and solicitation of crime, and he recognizes that the government has “some power” to restrict “speech that is almost never relevant to any discussion on

194. Whether this is a delusional hope is a serious issue. *See supra* note 28 for a discussion of the efficacy of CPOs in general. Even if the primary effect of these orders is to inculcate wrongdoers and not to prevent primary behavior, it is worthwhile to be clear about what is legal and what is illegal.

195. Volokh, *supra* note 71, at 738.

196. *Id.*

197. *Id.*

198. *Id.* at 793.

either public or private topics,” with nude photographs, sex videos, and social security numbers as primary examples.¹⁹⁹

Applying Volokh’s analysis to the domestic violence context raises some concerns. First, the distinction between one-to-one and one-to-many speech should not be the dividing line when social media blurs the barrier between private and public conversations.²⁰⁰ Restrictions against unwanted mailing, phone calls, and emails mean much less when an abuser can ensure that his victim sees his offensive or abusive posting because a common friend reposts or retweets the comment or because the victim has a Google alert on her own name. Volokh appears to acknowledge this concern, but he says the fact that one probable viewer is offended should not outweigh the possibility that others may find it persuading, informing, or entertaining, or that the speech may be valuable as a means for self-expression (provided that some person listening to the self-expression consents to hear it).²⁰¹ But the circumstances of CPOs is not a matter of offense: it is a matter of safety, and it should be treated as such. Volokh proposes something of a balancing test, and it seems possible that the domestic violence situation would come out differently under this balancing test than the political and public cases most prominently in his mind.²⁰² Accordingly, one court adopting a position close to Volokh’s in a CHO included dicta that suggest a domestic violence CPO might be capable of prohibiting

199. *Id.* at 793–94.

200. *See generally* Leong & Morando, *supra* note 70 (attempting to define “communication” in the internet age and presenting some truly vexing examples).

201. Volokh, *supra* note 71, at 743.

202. When Volokh argues against one-to-many speech restrictions in CHOs and harassment statutes, he leads with four stories involving matters of public or political concern. *Id.* at 732–36. He mentions the existence of these orders in governing domestic relations, but he does not present those cases as needing different treatment, seemingly because of a belief that matters of daily life deserve strong constitutional protections. *Id.* at 791–92 (explaining “[t]hat ‘the personal is political’ may sometimes be an overstatement, but sometimes it’s quite right: consider how our understanding of domestic violence, the justice or injustice of divorce law, and more can be influenced by learning what has happened with our own friends . . .”). But Volokh, in this Note’s analysis, focuses too much on content, and not enough on context or perspective. It is important for anyone involved in a domestic violence matter to be able to voice their opinions and express their feelings, but that does not mean doing so in contexts where the speech has a significant likelihood of reaching and terrorizing the victim.

speech that a non-domestic violence harassment statute or order could not.²⁰³

Even if Caplan and Volokh's arguments are not fatal to no-mention orders in CPOs, they provide compelling arguments against their overuse. Their arguments also show the dangers of trying to prevent or punish all the harms described in Part I.B of this Note with the re-writing of statutes or pro-forma CPOs, or with judicial re-interpretation of words like "harassment" or "contact."

D. Non-First Amendment Constraints

Having explored the constitutionality of no-mention orders against First Amendment challenges, this Part concludes by noting a few concerns. The first is that these orders should not be issued in every case. It may be appropriate to list the "no-mention" order as one of the options that a petitioner can choose from the menu of available orders, but it would not be good for courts to grant requests without some basic scrutiny. At a minimum, a court should not generally grant a no-mention order unless there is some history of abusive or erratic social media behavior in addition to, or as, the abuse otherwise

203. See *State v. Burkert*, 174 A.3d 987, 1000–01 (N.J. 2017). The case, involving insulting online comments and lewd flyers distributed during a dispute between two corrections officers who served as officials for unions representing distinct classes of officers, *id.* at 989–90, held that New Jersey's harassment statute was too vague and broadly worded to put a reasonable person on notice that the defendant's speech would violate the statute. *Id.* at 999–1000. However, the court was clear that neither the First Amendment nor the New Jersey Constitution prohibited the state from criminalizing "speech that physically threatens or terrorizes another" or that punishes "expressive activity when 'substantial privacy interests are being invaded in an essentially intolerable manner.'" *Id.* at 1000–01. As *Commonwealth v. Lambert*, 147 A.3d 1221, 1223 (Pa. Super. Ct. 2016), demonstrates, courts might be more hesitant to tell victims of domestic violence that their partners' online speech should not terrorize them than they are to tell CHO petitioners that a "reasonable person" would not experience the substantial emotional distress from a social media post, *Scott v. Blum*, 191 So. 3d 502, 504 (Fla. Dist. Ct. App. 2016), or that emotional distress inflicted by the statement was not "so severe that no reasonable man could be expected to endure it." *Snyder v. Phelps*, 562 U.S. 443, 464 (2011) (Alito, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 46, comment *j* (AM. LAW INST. 1963–1964)). For whatever it is worth, the Restatement's still-quoted, gendered formulation of the reasonable man's capacity for emotional endurance predates the first statute criminalizing domestic violence as such by more than a decade. See *Klaw & Scherf*, *supra* note 75, at 21–22 (discussing states' legislative response to the needs of domestic violence victims in the 1970s and noting 1978 amendments to Pennsylvania's statute that added criminal provisions for contempt violations).

justifying the CPO,²⁰⁴ although it may sometimes be appropriate to issue a no-mention order based primarily on abuse carried out through communications to third parties.²⁰⁵ In general, though, most no-mention orders will probably arise through a combination of abusive social media behavior and other forms of abuse.

The second concern is a more general concern that the vast majority of parties—petitioners and defendants—are unrepresented in these cases,²⁰⁶ and the burden these orders could impose will disproportionately impact the poor. This is not the appropriate forum to re-litigate *Lassiter v. Department of Social Services*²⁰⁷ or to argue for the adequate funding of civil legal services, but it is worth considering whether it is fair to burden free speech rights and risk respondents' exposure to the criminal justice system in a proceeding with such minimal due process protection. However, though some might disagree, the inability to speak on social media about one's victim seems no worse than the burdens CPOs place on other rights—the right to contact one's children, live in one's home, and walk wherever one pleases. While the lack of a right to counsel casts some doubt on the legitimacy of the CPO in general, it casts no special doubt with respect to the orders this Note suggests.

The third concern has been discussed earlier in this Note but nonetheless persists as a worry: as with almost anything related to the criminal justice system, burdens will likely fall disproportionately on African-American men and communities of color more generally.²⁰⁸ As

204. This would help ensure compliance with *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). See *supra* Part II.B for a discussion of *Packingham* and *supra* note 180 for a discussion of some cases interpreting *Packingham*.

205. At least one court has found such abuse to be facially sufficient for the purposes of an application for a restraining order. See *In re Marriage of Nadkarni*, 93 Cal. Rptr. 3d 723, 732 (Cal. Ct. App. 2009).

206. Beverley Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & C.R. L. REV. 557, 567–68 (2006).

207. 452 U.S. 18, 27 (1981) (holding that an indigent's right to appointed counsel is only presumed to exist in litigation "when, if he loses, he may be deprived of his physical liberty").

208. See generally BUTLER, *supra* note 16 and ALEXANDER, *supra* note 16 (discussing impact of mass incarceration on communities of color). The hypothesis that any new burden on CPO respondents and criminal defendants will fall on African-American men has everything to do with the structural forces criminalizing African-American men and nothing to do with assumptions about who violates CPOs once they are issued. One study shows that the race of the *defendant* was not

things stand, the harms of domestic violence disproportionately fall on African-American women, women of color more generally, and the communities of which those women are a part.²⁰⁹ The purpose of the orders this Note proposes is not to shift some burden from one oppressed group to another, nor to create additional burdens, but to offer one small contribution to the discussion of how, simultaneously,²¹⁰ the United States might reduce its many forms of violence. This Note hopes to analyze the potential for CPOs within a framework that critiques both mass incarceration and theories of prison reform or abolition that do not adequately incorporate the perspectives of women—especially women of color and other particularly marginalized women—and the needs of victims of domestic and sexual violence.²¹¹ The goal of prison abolition²¹² may seem at odds with expanding the

found to be a factor related to violation of Protection orders. Benitez et al., *supra* note 28, at 382.

209. See Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 741, 741 (2017) (finding that “[n]on-Hispanic black and American Indian/Alaska Native women experienced the highest rates of homicide Over half of all homicides (55.3%) were [intimate partner violence]-related . . . and argument and jealousy were common precipitating circumstances.”). The same study that found that the race of the defendant was not a factor related to violation of CPOs found that race of the victim has been “identified as a significant factor in renewed abuse. Black women are at elevated risk of renewed abuse after legal intervention.” Benitez et al., *supra* note 28, at 383.

210. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1258 (1993) (explaining that “while understanding links between racism and domestic violence is an important component of any effective intervention strategy, it is also clear that women of color need not await the ultimate triumph over racism before they can expect to live violence-free lives.”).

211. See generally INCITE! WOMEN OF COLOR AGAINST DOMESTIC VIOLENCE & CRITICAL RESISTANCE, STATEMENT ON GENDER VIOLENCE AND THE PRISON INDUSTRIAL COMPLEX (2001), <https://incite-national.org/incite-critical-resistance-statement/> [<https://perma.cc/4BZU-4T73>] (calling on social justice movements to address both state violence and domestic violence in response to marginalization of women of color).

212. “Prison abolition” has a variety of meanings, and this Note draws the meaning of that term from the context of legal analysis from scholars such as Allegra McLeod and Paul Butler. See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1172 (2015) (noting that “[p]rison abolition seeks to end the use of punitive policing and imprisonment as the primary means of addressing what are essentially social, economic, and political problems. Abolition aims at dramatically reducing reliance on incarceration and building the social institutions and conceptual frameworks that would render incarceration unnecessary.”); BUTLER, *supra* note 16, at 232–36 (citing McLeod and offering three

reach of a criminal justice system that already has too much power in the domestic realm.²¹³ However, there are at least two ways that CPOs can fit into this movement. First, prison abolitionists call for “an array of alternative nonpenal regulatory frameworks.”²¹⁴ CPOs arguably already fit that definition, as they offer a response to violence that protects victims and incapacitates perpetrators without locking anyone in a cage. Second, while incarceration currently serves as the backstop for CPOs when they are violated, violations could also be enforced through any of the alternative remedies that prison abolitionists propose.²¹⁵

The fourth concern arises from reading the cases discussed in the Note and noticing the prevalence of mental health and substance abuse disorders among CPO respondents. This is not to make any general claim that individuals with mental illness are more likely to commit violent acts than anyone else. It is also not an attempt to make excuses for men or other individuals who are culpable for their crimes. Rather, the hope is to observe that systemic factors such as barriers to treatment, poverty, social stigma, and overexposure to the criminal

concrete actions toward abolition: reducing maximum sentences to twenty-one years, reducing the number of offenses for which a person can be sent to prison, and shifting spending from policing to community health care).

213. See generally SUK, *supra* note 20 (expressing concern about the expansion of criminal law into domestic space). See also Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race and Social Control*, 54 UCLA L. REV. 1418, 1453 (2012) (critiquing an understanding of domestic abuse as a criminal justice issue that “allowed some advocates to join forces with national and local governments to receive support for certain draconian reforms” such as mandatory arrest policies and other pro-policing remedies despite “the serious reservations of many women of color and other advocates”).

214. McLeod, *supra* note 212, at 1172 (explaining how abolition calls for nonpenal regulatory frameworks that recognize the dehumanization in controlling human beings by penal force including “those few people who may pose a severe, demonstrated danger to others and so, as the lesser of two evils, must be convicted and the threat they pose contained”).

215. For example, abolitionists frequently point to restorative justice as an alternative to incarceration. McLeod repeatedly offers the example of Brooklyn-based Sistas Liberated Ground (SLG), a group that both facilitates restorative justice and mediation and creates safe harbors for individuals vulnerable to domestic violence. *Id.* at 1217, 1227. One of Butler’s alternative remedies is income-based fines. BUTLER, *supra* note 16, at 234. While fines might not be the appropriate remedy for more violent violations of CPOs, they offer an intriguing potential to deter and penalize abusive uses of social media.

justice system appear to contribute to situations like Jack Lambert's.²¹⁶ Consider again one of Mr. Lambert's posts:

I'm just so fucking depressed. I am so sorry, Facebook, but I lost my best friend, my love, my soul. My heart is crushed. God only knows what I will do next. I am so lost right now. God, help me through this. Please give me my love back. I have been trying to do everything right but I screw up sometimes. I can't deal with the pain.²¹⁷

Consider also the testimony of the petitioner:

Q: When you read things like this saying, ["God only knows what I will do next,[" how do you feel?

A: What he says is true. God only knows what he will do next.

...

Q: [After establishing that plaintiff saved all Appellant's posts to her clipboard before he decided to remove them] So, at some point last night, the posts that we just talked about were removed?

A: Correct, except for the one that's there today that says this war is not over.

Q: When was that posted?

A: I believe last night or Wednesday. I'm sorry. I believe Wednesday. I could be wrong on the date.

Q: Was it at some point after these posts?

A: Yes.

Q: That's something that you actually viewed?

A: Yes.

Q: Were you concerned about that?

A: Yes.

216. See Marie E. Rueve & Randon S. Welton, *Violence & Mental Illness*, 5 PSYCHIATRY MMC 34, 36 (2008) (finding that "[m]ost patients with stable mental illness do not present an increased risk of violence." Rather, "mentally ill patients frequently encounter barriers to treatment, and . . . this inadequate treatment of their disorders results in patients being arrested for both violent and nonviolent crimes"); see also Benitez, *supra* note 28 at 383 (listing perpetrator characteristics, which "may predict renewed abuse after initiation of a protection order [including] . . . a history of violence or criminal acts, being male, youthful age, less than full-time employment, substance abuse, and other mental health contact").

217. *Lambert*, 147 A.3d at 1224.

Q: Why?

A: I don't know what Jack is capable of. Jack has been in and out of many mental hospitals throughout our relationship. I have personally had to 302 Jack.²¹⁸ He has involuntary (sic) [in original] put himself in mental institutions many times for homicidal thoughts — is one of the main things that really scare[s] me.²¹⁹

The petitioner's fear is obvious and well-justified, and as this Note has consistently argued, she deserves the law's protection. But Jack Lambert deserves some love and sympathy as well. He likely has his own story of suffering and abuse, both unique and connected to larger issues. It is a disgrace that "Facebook" is his therapist. However, the victim of his violence should not bear the consequences of his suffering, of the failure of the larger world to find a place for him. Solutions to his problems are unlikely to be found in the criminal justice system as it currently exists and are more likely to occur through the prioritization of housing, healthcare, public health, and education over incarceration. Perhaps the orders this Note proposes are a step in that direction, or perhaps their connection to the criminal justice system as it exists makes them irredeemable. But this Author submits that petitioners and their advocates, subject to some constraints by the First Amendment and other doctrines, are in the best position to evaluate these concerns, and that neither a lack of imagination about what a CPO can accomplish or an unyielding concept of the First Amendment should provide the limit.

CONCLUSION

This project began with an honest question the Author asked about *Elonis* in first-year Criminal Law during Spring 2017. Since then, we have learned that Russian agents influenced, and likely changed the outcome of the 2016 election by using Facebook and other social media.²²⁰ The #MeToo movement took off, and while the

218. The number "302," when used as a transitive verb, apparently refers to 50 PA. CONS. STAT. § 7302 (2017), Pennsylvania's statute for involuntary emergency commitment for a mental health examination.

219. *Lambert*, 147 A.3d at 1224–25.

220. See KATHLEEN HALL JAMIESON, CYBERWAR: HOW RUSSIAN HACKERS AND TROLLS HELPED ELECT A PRESIDENT (2018). Kara Swisher has persuasively argued against characterizing these attacks as "hacking" because "[p]urveyors of propaganda used these powerful platforms *exactly* as they were designed to be

importance of block and tackle reporting cannot be overstated, the movement received its name from a social media sensation. Social media enabled the movement to trickle down from the elite reporters using elite sources to take down elite men to women across the country and world sharing their stories with friends, families, and anyone who would listen. Facebook's stock and reputation shook in light of revelations that its products were enabling genocide, political sabotage, and mob behavior.²²¹ Anthony Kennedy, *Packingham's* author, retired from the bench. During the confirmation process for his replacement, Christine Blasey Ford accused Brett Kavanaugh of attempting to rape her when the two were in high school, sparking debates about sexual violence, evidence, and the length of time perpetrators should be held responsible for their misdeeds.²²² Death threats, doxing, and other forms of online harassment have disrupted Christine Blasey Ford's life; a life she built with great

used." Kara Swisher, Opinion, *How You Can Help Fight the Information Wars*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/opinion/russia-disinformation-facebook.html> (on file with the Columbia Human Rights Law Review).

221. See, e.g., Paul Mozur, *A Genocide Incited on Facebook, with Posts from Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> (on file with the Columbia Human Rights Law Review) (explaining how Myanmar's military personnel used Facebook as "a tool for ethnic cleansing" by posting incendiary comments on their hundreds of troll accounts, news pages, and celebrity pages); Aimee Picchi, *Facebook Stock Suffers Largest One-Day Drop in History, Shedding \$119 Billion*, CBS NEWS (July 26, 2018), <https://www.cbsnews.com/news/facebook-stock-price-plummets-largest-stock-market-drop-in-history/> [<https://perma.cc/93CX-WWWH>] (describing Facebook's \$119 billion loss in value in its first full quarter following the Cambridge Analytica scandal).

222. The debate in the Senate was highly limited because Justice Kavanaugh rested his defense on his claim that the incident never happened. However, more vigorous debate on the powers of apology and forgiveness took place beyond the Senate Judiciary Committee. See, e.g., Deborah Copaken, *My Rapist Apologized*, THE ATLANTIC (Sept. 21, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/copaken-kavanaugh/571042/> [<https://perma.cc/YZ3H-BF3T>] (recounting the story of Copaken's survival of rape and her subsequent conversation and relationship with her rapist); *The Daily: A Mother Talks to Her Sons About Brett Kavanaugh*, N.Y. TIMES (Dec. 28, 2018) <https://www.nytimes.com/2018/12/28/podcasts/the-daily/kavanaugh-assault-men-boys-respond.html> (on file with the Columbia Human Rights Law Review) (featuring a conversation with young men about the Kavanaugh hearings, and featuring, among other memorable comments, one young man saying that because victims will live with the consequences of sexual assault, perpetrators should as well).

difficulty after surviving an attempted rape.²²³ “Disrupted” may be an understatement, but it would insult her to say “destroyed.”

The legal academy has brimmed with new ideas about internet regulation and the First Amendment,²²⁴ and social media became a central focus of the *Columbia Law Review*'s symposium about the First Amendment.²²⁵ Litigation by the Knight Institute led to a holding that Donald Trump's Twitter account is a public forum and its followers have First Amendment rights.²²⁶

So where does all of this development leave the subject this Note addresses? At the very least, there seems to be growing recognition that United States law is not fully equipped to handle wrongdoing over the internet. Comprehensive regulation may be the solution; the First Amendment may or may not prove to be a barrier.

With respect to domestic violence, creative and ambitious legislation is necessary. But in the meantime, courts should respect creative and ambitious efforts by survivors and their advocates to use the tools already at their disposal. In combating domestic violence over social media, the Civil Protection Order should be recognized as one of those tools. While Volokh and Caplan have voiced important constraints on Civil Harassment Orders and civil and criminal harassment laws, this Note argues that the specific nature of domestic violence necessitates distinct treatment. Orders prohibiting CPO respondents from mentioning their victims over social media should be upheld, at least when the court has evidence that the respondent is practically incapable of discussing the respondent without

223. Anna North, *Christine Blasey Ford Has a Security Detail Because She Still Receives Threats*, VOX (Nov. 8, 2018), <https://www.vox.com/2018/11/8/18076154/christine-blasey-ford-threats-kavanaugh-gofundme> [https://perma.cc/RZS4-2QP6].

224. See, e.g., Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 547 (2018) (describing problems arising from the disconnect between today's speech environment and the assumptions about speech at play during the First Amendment's development in the twentieth century, and arguing that “protection of free speech may now depend on law enforcement recognizing its role in the protection of the American speech environment.”); Kate Klonick, *The New Governors: The People, Rules, and the Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1603 (2018) (analyzing the role of online platforms in moderating content and arguing that “[t]hese New Governors are part of a new triadic model of speech that sits between the state and speakers-publishers.”).

225. Symposium, *A First Amendment for All? Free Expression in an Age of Inequality*, 118 COLUM. L. REV. 7 (2018).

226. Knight First Amendment Institute at Columbia University v. Trump, 302 F. Supp. 3d. 541, 574, 580 (S.D.N.Y. 2018).

perpetuating the pattern of abuse. Courts in cases such as *Lambert* have found ways to uphold such orders, and this Note argues that they are on solid legal ground.²²⁷ These orders may help prevent harmful and unproductive behaviors, reducing the likelihood of further harm to the victim and punishment to the abuser. In that sense, these orders may contribute to a world that combats violence with tools other than prison and death. However, as long as CPOs are prison-backed remedies, they run the risk of contributing to the United States' corrupt and racist criminal justice system.

Creatively drafted CPOs may prove a useful tool in combatting some forms of domestic violence, and courts should respect the effort.

227. For the time being, these cases seem likely to remain at the state court level, as federal courts tend not to exercise jurisdiction over family court matters. If the Supreme Court were called upon to vindicate the First Amendment right of respondents, the outcome is far from certain. Justices Alito and Thomas are particularly interesting players to watch. Each wrote an opinion in *Elonis* that would have upheld the conviction against a First Amendment challenge. See *supra* note 6 and surrounding text. Justice Alito's concurrence in *Packingham*, in which Justice Thomas and Chief Justice Roberts joined, criticized the majority opinion because it did not pay enough attention to the "important differences between cyberspace and the physical world." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1743 (2017) (Alito, J. concurring). Justice Alito paves a path for upholding restrictions on online behaviors that would be impermissible in governing offline behaviors, which would be critical for upholding a CPO that restrains the respondent from speaking about the victim on social media even when a CPO could not prohibit a respondent from speaking offline about the victim with his lawyer, therapist, or friends. If the Alito-Thomas wing of the court proves ascendant in the wake of Justice Kennedy's retirement, that wing could find common cause with the Court's liberal wing, whose sensitivity to gender justice may prove important. See, e.g., *Voisine v. United States*, 136 S. Ct. 2272 (2016) (holding 6-2 that reckless domestic assault qualifies as a 'misdemeanor crime of domestic violence' under a statute prohibiting persons convicted of such an offense to possess a firearm). Justice Alito's jurisprudence in particular casts doubt on the erroneously fatalist assumption the Author initially had, which is that the Court's increasing use of the First Amendment to strike down progressive legislation—à la *Citizens United*, *Hobby Lobby*, and *Janus*—would prove a major obstacle to upholding this order. See *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).