

110XDF

Print Request: LEXSEE

Time of Request: March 08, 2005 11:14 AM EST

Number of Lines: 910

Job Number: 1842:35068006

Client ID/Project Name: bjh-shahcase

Note:

Research Information:

Lexsee 5 Geo. J. Gender & L. 763

Send to: NISSANKA, SHANIA  
PENNSYLVANIA COALITION AGAINST DOMESTIC  
6400 FLANK DR STE 1300  
HARRISBURG, PA 17112-2669

Copyright (c) 2004 The Georgetown Journal of Gender and the Law  
The Georgetown University

Spring, 2004

5 *Geo. J. Gender & L.* 763

**LENGTH:** 17887 words

**ARTICLE:** An invitation to Liability?: Attempts at Holding Victims of Domestic Violence Liable as Accomplices When They Invite Violations of Their Own Protective Orders

**NAME:** MARYA KATHRYN LUCAS

**SUMMARY:**

... In one [domestic violence] case, a woman claimed her husband had held her prisoner. ... The court reasoned that because a domestic violence victim is not automatically protected by her victim status, as is a statutory rape victim protected by her age, and because a domestic violence victim must petition the court to bestow on her this protected status through the granting of a protective order, she cannot achieve the protected status necessary to provide her with immunity from the criminal accomplice laws. ... Like the appellate decision in *Lucas*, the Iowa Supreme Court, in *Henley v. Iowa District Court*, held the domestic violence victim, Sheral Henley, liable as an accomplice for reinitiating contact with her abuser after she obtained a protective order. ... Out of this backdrop emerged the instant decision in *State v. Lucas*. The Ohio Supreme Court relied principally on *Gebardi* to determine whether the subject of a protective order may be held liable as an accomplice for aiding and abetting her abuser in violating the order. ...

**TEXT:**

[\*763] INTRODUCTION

In one [domestic violence] case, a woman claimed her husband had held her prisoner. I issued a protective order and advised her not to see [\*764] him. But she kept going back to him, so I put both of them in jail. n1

This quote illustrates one Kentucky judge's solution to an apparently growing problem in adult abuse cases involving victims of domestic violence who reinitiate contact with their abusers after obtaining protective orders. n2 Protective orders are judge-issued papers that proscribe the abuser's behavior and order the abuser not to contact the victim. n3 This Kentucky judge held the victim in contempt of court. n4 Other courts have fined the victims. n5 In *State v. Lucas* n6 the Ohio Appellate Court held the victim, Betty Lucas, liable as an accomplice for violating her own protective order when she invited her husband over for their son's birthday celebration. n7 In holding Betty Lucas liable, the court inferred victim liability in the Ohio statute, despite the statute's silence on that subject. In addition to inferring victim liability, the appellate court held Betty Lucas liable for the misdemeanor/felony with which her abuser was charged. n8

Although measures are necessary to curtail the problem of victims and abusers reinitiating contact with one another, holding the victim liable fails to acknowledge the complex reality surrounding the domestic violence victim's psychological, social, economic and family situation. n9 Holding the victim liable also fails to acknowledge the reality that a victim, often a *pro se* petitioner, n10 may not fully understand the language in and meaning of a protective order.

The Ohio Supreme Court overruled the appellate court decision and thereby recognized the larger policy implications of holding domestic violence victims liable as accomplices for violating their own protective orders. n11 In addition to recognizing policy implications, the Ohio Supreme Court provided a thorough legal analysis of

accomplice liability exceptions and statutory interpretation to support its holding that Ohio law precludes charging the victim as an accomplice because of the victim's protected status. n12

This case note discussing *State v. Lucas* reviews historical and contemporary [\*765] legal responses to domestic violence, examines criminal accomplice law and its exceptions, and analyzes the instant decision.

## I. FACTS AND HOLDING

In *State v. Lucas*, the state of Ohio charged Betty S. Lucas with one count of domestic violence and one count of complicity to violate the order of protection she had obtained in 2000 against her ex-husband, Joseph Lucas. n13 The state alleged that Betty Lucas acted as an accomplice, in violation of her order of protection when she invited her ex-husband to her home on May 10, 2001 for their child's birthday celebration. n14 During the party, the Lucases consumed alcohol, argued and then entered into a physical altercation. n15 The state charged Joseph Lucas with violating the protective order, and after he pled no contest, fined him \$ 100. n16 Betty Lucas entered a plea of no contest to the complicity charge and a plea of guilty to the charge of domestic violence. n17 The trial court found her guilty of both offenses and sentenced her to 180 days in jail, ninety days to be served for each charge. n18 However, the trial court suspended Betty Lucas' sentence and subsequently placed her on probation for two years. n19

Betty Lucas appealed her complicity conviction to the Ohio Court of Appeals for the Fifth District. n20 On appeal, Betty Lucas argued that, based on public policy, the protected subject of a protective order cannot be liable as an accomplice if the abuser violates the order. n21 Instead, she argued that public policy demands that such victims be considered part of a protected class. n22 She further argued that it was against the intent of the Ohio General Assembly to prosecute the victim in such a case. n23 The appellate court rejected Betty Lucas' arguments on appeal and held that she had violated the Ohio criminal statute that prohibits any person from aiding or abetting another in committing an offense. n24

The Ohio Supreme Court granted certiorari to hear Betty Lucas' case n25 because the holding of the Ohio Court of Appeals for the Fifth District in *Lucas* conflicted with that of the Ohio Court of Appeals for the Eighth District, in *City of North Olmstead v. Bullington*. n26 Unlike the appellate court in *Lucas*, the appellate court in *Bullington* held that an individual who is the protected subject of an order of protection cannot be held liable for aiding and abetting the abuser in violation of the order. n27 The Ohio Supreme Court in *Lucas* agreed with *Bullington's* conclusion and based its decision on case law, statutory interpretation and public policy rationales. n28

## II. LEGAL BACKGROUND

Domestic violence remains a widespread problem in the United States. n29 According to one U.S. Department of Justice Department report, every year an estimated 1.3 million women suffer abuse from their husbands, former spouses or live-in partners. n30 Domestic violence occurs when an abuser uses threats and physical violence in an effort to control the victim. n31 The abuse may include one isolated incident, but more often, it includes a series of incidents aimed at controlling the victim. n32 Statutes, including the Ohio Revised Code, define potential victims as either "family or household member[s]," including "a spouse, a person living as a spouse, or a former spouse" of the abuser. n33

### A. BACKGROUND HISTORY OF DOMESTIC VIOLENCE

Historically, the western legal system condoned spousal abuse. British common law, out of which American common law developed, legalized the husband's right to physically abuse his wife. n34 American law continued this legal tradition until the late nineteenth century when the Alabama and Massachusetts supreme courts held the practice of spousal abuse illegal. n35 However, spousal [\*767] abuse, already entrenched as a cultural practice, continued despite legal condemnation. n36

During the feminist movement of the late 1960s and 1970s, studies on domestic violence and the lobbying efforts of victims' advocates led to the recognition of domestic violence as a social problem. n37 This recognition prompted state legislatures to begin enacting criminal and civil domestic violence laws in the 1970s. n38 By 1983, forty-three states and the District of Columbia had passed domestic violence legislation. n39 State legislatures also enacted procedural and organizational reforms that included mandatory arrest procedures, n40 the creation of domestic violence units within prosecutors' offices, the implementation of treatment programs for abusive spouses and relief programs such as counseling for victims, n41 as well as the creation of shelters for victims. n42 Legislatures and legal reformers also implemented reform by abolishing the marital rape exception and the spousal immunity privilege. n43

Finally, state reform efforts culminated with the passage of the federal [\*768] Violence Against Women's Act (VAWA) in 1994. This legislation, enacted pursuant to Congress' powers under the Commerce Clause and the Fourteenth Amendment, reflected the recognition of domestic violence as a national social problem. n44 The Act provided for the prevention of gender-motivated violence through federal funding to states, education, deterrence, remedies for victims, new federal domestic violence crimes and full faith and credit for protection orders. n45 Congress enacted the VAWA after more than four years of extensive hearings, debates, testimony and legislative findings, all demonstrating the deleterious effects of domestic violence on women and over society as a whole. n46 However, the United States Supreme Court in *United States v. Morrison* recently undermined the VAWA by ruling that a key provision, Title III, which established a federal, civil right cause of action for victims of gender-motivated violence, was in violation of the U.S. Constitution's Commerce Clause and Fourteenth Amendment. n47 By abolishing this key provision, the Supreme Court thus relegated the problem of domestic violence to the state courts -- historically the locale of victims' gender discrimination -- and deprived victims of the alternative federal venue. n48

## B. THE CIVIL PROTECTIVE ORDER

One of the first state civil remedies for domestic violence victims was the civil protective order. n49 A protective order is a "legally binding court order that prohibits an individual who has committed an act of domestic violence from further abusing the victim." n50 To date, protective orders remain firmly entrenched in all fifty states. n51

Prior to the implementation of protective order legislation in the 1970s, the only form of legal protection for domestic violence victims was a court-ordered injunction, granted in some states, but not all, pursuant to a divorce or legal separation. n52 Because issuance of an injunction required that the victim be married to her abuser and because the injunction expired shortly after it was obtained, injunctions had a very limited effect on stopping abuse. n53 Furthermore, if an abuser violated the injunction, he incurred no criminal penalty. n54 Although a [\*769] violation of the injunction gave the victim the option to file a separate petition against her abuser for contempt of court, the transactional costs and the potential courtroom prejudice to the victim likely outweighed the option's benefits. n55

In addition to prohibiting further abuse, protective orders may also enjoin the abuser's conduct (for example, enjoining the abuser from coming near the victim and contacting her) determine custody and visitation rights of the parties grant the victim possession of the residence or property and order child support. n56 The court first issues a temporary or ex parte order of protection to the victim and then serves the order on the abuser. n57 Within a two-week period a hearing is held during which both parties may present evidence against one another. n58 If the victim proves the abuse, she may receive a full order of protection. n59 Protective orders continue to serve as the primary source of protection for victims of domestic violence. n60

Despite the widespread use of protective orders, enforcement problems persist when abusers violate the orders. n61 The sanctions for violations vary from state to state. n62 Thirty-eight states, including Ohio and the District of Columbia, enforce protective orders through criminal contempt laws; all fifty states do so through statutes which criminalize protective order violations. n63

## C. THE OHIO STATE ADULT ABUSE STATUTE AND CRIMINAL ACCOMPLICE LAW

Ohio's adult abuse statute provides that a court may issue a protective order to a victim of domestic violence to restrain the abuser from physical abuse, attempts at physical abuse or threats of physical abuse that place the victim in fear of imminent harm. n64 However, according to Ohio statute, the court may not issue mutual protective orders. n65 That is, the same protective order cannot apply to both the victim petitioner and the abuser respondent. n66 Each party must file a petition separately and allege individual facts of abuse in the petition. n67

Ohio's statute proscribes protective order violations. For example, the statute says, "no person shall recklessly violate the terms of [a] protection order issued [\*770] or consent agreement approved pursuant to . . . 3113.31 of the Revised Code." n68 Absent any previous violations, violation of an Ohio protective order constitutes a misdemeanor in the first degree and leads to either criminal prosecution of the abuser or holding the abuser in civil contempt of court or both. n69

### 1. The General Rules of Accomplice Law and the Ohio Statute

Ohio law determines whether an abuser has "recklessly" violated an order within the meaning of the adult abuse statute by adopting the term as it is defined in Ohio's general provisions for criminal liability. n70 Under this criminal

provision, a person is reckless when he or she disregards a "known risk" that his/her conduct is likely to "cause a certain result," or his or her conduct is likely to be of a certain nature, or that "certain circumstances are likely to exist." n71

The Ohio statute not only holds an abuser liable for violating a protective order, but also holds liable any person who acts as an accomplice by aiding and abetting the abuser or the principal in violating the order. n72 The Ohio criminal accomplice statute is a general provision applicable to most substantive state offenses. n73 A principal is the primary actor; an accomplice is a person who "aids, counsels, commands, or encourages the principal either before or during the commission of the crime." n74 Ohio's criminal accomplice law states that, "no person, acting with the kind of culpability required for the commission of an offense shall . . . aid or abet another in committing the offense." n75

Complicity law has two requirements. n76 First, to be an accomplice one must *act*. n77 Under Ohio statute, aiding and abetting is one of a number of *acts* that are proscribed. n78 Second, in the performance of the act, an accomplice must exhibit a *mental state* of intent. n79 This mental state has two elements. n80 The first mental element requires the accomplice to act with the same mental culpability as the principal or "with the kind of culpability required for the commission of the [\*771] offense." n81 For example, one who aids and abets the principal in a murder n82 must possess the same purpose -- to cause death -- as the principal. n83 The second mental element requires that the accomplice *intend* to assist the principal by aiding or abetting or committing another such act. n84 Under Ohio law, an accomplice "shall be prosecuted and punished as if he were the principal offender." n85

## 2. Exceptions to Accomplice Liability

*a. The Victim Exception* There are some exceptions to accomplice liability. n86 At common law, a person could not be an accomplice if he/she was the victim that the law was intended to protect. n87 The first case to espouse this exception was England's *The Queen v. Tyrell*, in 1893. n88 In *The Queen*, the court held that a teenage girl could not be charged with a criminal offense of aiding and abetting a male to commit the "misdemeanor of having unlawful, carnal knowledge of her." n89 The court reasoned that the statute was intended to protect "women and girls" under age sixteen, who are so immature as to be unable to protect themselves. n90 Thus, the court indicated that the statute bestowed on this class of persons a protected status. n91 The court held that a statute passed for the purpose of protecting a certain class could not hold that class liable as aiders and abettors of the offense, especially given the statute's silence regarding aiding and abetting. n92 The court reasoned that holding a female accountable in such a manner would curtail her desire to report the offense, and thus the statute would be rendered "inoperative." n93

The Model Penal Code also adopted this victim defense. n94 Ohio statute has not explicitly adopted the victim defense, although it has been recognized by Ohio's [\*772] appellate court in *Bullington* and now the supreme court in *Lucas*. n95 The victim exception applies even where the victim's conduct assists the commission of the offense in a very significant way, and even where the victim-accomplice satisfies all the elements of the offense. n96 To hold a victim liable would otherwise contravene the legislative purpose in providing special protection for a defined class of persons. n97

*b. The Statutory Scope Exception* Another exception to criminal accomplice liability, and one emerging out of policy considerations for the victim, requires an examination of the actual scope of the statute defining the liability of the principal and that of the protected class member for whom the statute was enacted. n98 The exception applies when a statute defines the offense according to the actions of the principal alone and not according to those of the protected class member. n99 The statute, by declining to assign liability to the protected class member, indicates an affirmative legislative policy to exclude the protected class of persons from accomplice liability. n100 The United States Supreme Court first espoused this exception in *Gebardi v. United States*, addressing whether a woman who simply acquiesces to her transportation across state lines for prostitution purposes, without affirmative action, may be held liable for aiding and abetting in the commission of the crime under the Mann Act. n101 The Mann Act prohibited knowingly transporting females across state lines for the purposes of prostitution. n102 The Act also prohibited aiding or assisting in such transportation. n103 Because the statute addressed the liability of the transporter alone, not that of the female transported, and because the statute failed to specifically criminalize the female's acquiescence, the Supreme Court held that the female could not be held liable as an accomplice. n104 For the female to have aided or abetted the transporter [\*773] under the Mann Act, the court said she would have needed to commit actions more significant than mere acquiescence. n105 To be an accomplice, the Court held that a woman needed to be "the active or moving spirit in conceiving or carrying out the transportation." n106

The court interpreted the Mann Act's silence on the issue of acquiescence as an affirmative, legislative policy to leave such behavior unpunished. n107 The court concluded, "it would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers." n108

#### D. THE MODERN APPLICATION OF CRIMINAL ACCOMPLICE LAW EXCEPTIONS

*Gebardi* progeny emphasize that the statute at issue must have been enacted with the single purpose of protecting that class member in order for the accomplice liability exception to properly apply. n109 Cases further emphasize that if the statute at issue proscribes both the conduct of the principal and that of the protected class member, the protected class member may be held liable as an accomplice. n110

Cases have also clarified what "further acts" a victim must commit before the victim abandons his/her victim status and becomes the accomplice, the "active or moving spirit" to which *Gebardi* referred. n111

A modern application of the victim defense and *Gebardi* exception appears in the 1998, California case *In re Meagan*, decided by the California Court of [\*774] Appeals. n112 In that case, the juvenile court charged 14-year-old Meagan with burglary after finding that she entered another's residence at the behest of 22-year-old Oscar Rodriguez, engaged in consensual sex with Rodriguez, and stole items from the apartment. n113 Although the court did not find that Meagan had the intent to enter the residence for the purpose of burglary, it did find that her intent upon entry was to aid and abet in Rodriguez's commission of statutory rape, a felony under California law. n114 Based on the general rule of criminal law, the court then used the finding that Meagan had aided and abetted the statutory rape as the predicate felony to support the burglary finding. n115

The appellate court reversed the juvenile court's decision. n116 Although acknowledging the general rule of accomplice liability, the appellate court held that Meagan was immune from its application because of *The Queen* and *Gebardi*. n117 First, the court reasoned that the general rule of accomplice liability cannot be applied where the statute -- in the case at bar, the statutory rape statute -- addresses only the liability of the perpetrator of the act but not that of the victim. n118 The court reasoned that the statutory scope thus belied a legislative intent that "the conduct of one of the parties shall go unpunished." n119 Second, the court reasoned that when the intent of a statute is to protect a certain class, such as minor victims of rape, the legislature could not have intended to punish that special class as aiders/abettors. n120 Thus, the court concluded that because Meagan was a victim member of a protected class under the statutory rape laws, she could not commit the crime of her own statutory rape. n121

#### E. THE INTERSECTION OF CRIMINAL ACCOMPLICE LAW EXCEPTIONS AND DOMESTIC VIOLENCE LAW

##### 1. Ohio Case Law History

The first Ohio court to recognize the victim defense was the *City of North [\*775] Olmsted v. Bullington*, in which the court addressed the intersection of criminal accomplice and adult abuse law. n122 This was a case of national first impression. n123 In *Bullington*, the City of North Olmsted filed a complaint against Laura Bullington, alleging that she "recklessly aided, abetted, and/or solicited" her husband to violate the no-contact terms of the protective order that she had obtained against him. n124 The police filed the complicity charge against Laura Bullington after discovering that she was a passenger in a car with her husband, during a routine traffic stop, despite her existing protective order against him. n125 The trial court dismissed the complaint and the City appealed the decision. n126

The Ohio Court of Appeals for the Eighth District focused its inquiry not on the "meaning and depth of the complicity laws but whether a victim in a protected class of a criminal law may be punished for its criminal violation." n127 The court held that a complainant or victim named in the protective order could not be charged with aiding and abetting her husband in its violation. n128 The appellate court relied on the Ohio Supreme Court case, *State v. Williams*, n129 which held that the Ohio General Assembly intended the domestic violence laws to be "special in nature." n130 The appellate court in *Bullington* reasoned that one of the unique features of the domestic violence laws, particularly those laws relating to protective orders, was their specificity to the offender and the offender's conduct. n131 The court also reasoned that the language of protective orders was nonwaivable and could not be altered by the parties except through court intervention, as articulated in *City of Reynoldsburg v. Eichenberger*. n132

In that case, the Ohio Court of Appeals for the Fifth District held that a wife could not consent to her husband's return to the house after such action had been prohibited by a protective order; only the court could sanction such an

action. n133 As in *Eichenberger*, the *Bullington* court concluded that the purpose of the nonwaivable language was to protect the victim not only from her abuser, but from her own actions, whether volitional or induced by duress. n134 The *Bullington* court acknowledged that "any number of reasons may exist for a victim's being in the offender's presence. Many of these reasons may not be volitional, even though they may appear on the surface to be so." n135 To punish anyone other than [\*776] the offender, the court reasoned, "would make Laura Bullington responsible for her husband's action," contrary to the order's purpose and contrary to the historical efforts of the General Assembly to formulate a statute primarily targeting the offender's behavior. n136 The court further reasoned that arresting the victim for complicity charges would violate notice requirements under procedural due process; although Ohio's protective orders specifically notify offenders of the consequences of violating the order, they do not provide the same such notice for victims. n137 Finally, the court characterized the female who obtains a protective order as a victim in a protected class and concluded that, as a result of this protected status, the victim is immune from liability for aiding and abetting the order's violation, similar to the reasoning in *In re Megan*. n138

From this backdrop, two years after *Bullington*, emerged Ohio's 2002 appellate court case in *Lucas*. Although the appellate court recognized the *Bullington* opinion, the *Lucas* court declined to follow its precedent. n139 While acknowledging *Bullington's* interpretation of the domestic violence statute, the *Lucas* court disagreed with *Bullington's* conclusion that because a domestic violence victim is a member of a protected class, she cannot be held liable for aiding and abetting the violation of a protective order to which she is not a party. n140 Rather than emulating the *Bullington* approach and focusing on statutory interpretation and public policy, the appellate court in *Lucas* focused on the complicity laws as they applied to the domestic violence laws. n141 The court relied on a provision from the statute prohibiting violations of protective orders, which said, "no person shall *recklessly* violate the terms of a protection order issued pursuant to . . . 3113.31." n142 The court concluded that Betty Lucas' mental state in violating the protective order went beyond that required by the statute and was not just reckless, n143 but intentional. n144 The court then distinguished the law governing the protected status of a domestic violence victim from that governing [\*777] a statutory rape victim. n145 The court reasoned that because a domestic violence victim is not automatically protected by her victim status, as is a statutory rape victim protected by her age, and because a domestic violence victim must petition the court to bestow on her this protected status through the granting of a protective order, she cannot achieve the protected status necessary to provide her with immunity from the criminal accomplice laws. n146 The court said, "we cannot agree with the *Bullington* court's public policy rationale, as it becomes overreaching when the victim, such as appellant herein, requested the protection order and then recklessly exposed herself to the offender from whom she had sought protection." n147

## 2. Other State Court Decisions and Practices

Other state courts have found domestic violence victims liable as accomplices. Like the appellate decision in *Lucas*, the Iowa Supreme Court, in *Henley v. Iowa District Court*, held the domestic violence victim, Sheral Henley, liable as an accomplice for reinitiating contact with her abuser after she obtained a protective order. n148 However, rather than holding her liable for the underlying substantive offense, the Iowa court held Henley in contempt of court. n149 The court acknowledged that Henley suffered "vicious abuse at the hands" of her abuser before she obtained a protective order against him. n150 However, even with the protective order, the court indicated that she failed to stay away from her abuser and was later found at his home during a police search. n151 Both were arrested and taken into custody. n152 Henley spent one night in jail, and was later held liable as an accomplice to the violation. n153 Henley argued that as a non-party to the protective order, she could not be held in contempt of court for its violation. n154 The trial court rejected this argument, and the Supreme Court affirmed the trial court. n155 The Iowa Supreme Court based its decision on an earlier case, *Hutcheson v. Iowa District Court*, in which the victim was held in contempt of court for violating a no-contact protective order. n156 *Hutcheson* held that courts may enforce contempt orders against nonparties who act with knowledge and in concert with the party to the order. n157 Following this line of logic, the Iowa Supreme Court in *Henley* wrote, "the statute makes no exception for victims [\*778] who, regrettably, choose to ignore their own best interest. The desires of those individuals must be subordinated to the interest of victims in general, and to the court's ability to demand accountability in this emotionally charged arena." n158

The decisions by the Ohio appellate court in *Lucas* and the Iowa Supreme Court in *Henley* are consistent with recent trends in which judges are reportedly holding domestic violence victims accountable by fining them or placing them in custody when they reestablish contact with their abusers. n159 For example, one Kentucky judge fines victims who reestablish contact with their abusers. n160 In 2002, this judge fined one woman \$ 100 and another \$ 200 when the women contacted their abusers after having obtained protective orders. n161 The judge commented, "when these

orders are entered, you don't just do whatever you damn well please and ignore them." n162 Like the Iowa judges in *Henley* and *Hutcheson*, another Kentucky judge holds domestic violence victims in contempt of court for contacting their abusers in spite of protective orders. n163 In an effort to codify the judges' treatment of domestic violence victims, Kentucky State Representative Johnnie Turner is lobbying for a bill that would provide sanctions for those victims who fail to comply with orders which they obtain against their abusers. n164

Similarly, judges are imposing sanctions against those victims of domestic violence who obtain and then drop their protective orders. n165 In Illinois, if a woman disavows her initial complaint against the abuser, some judges will hold her in contempt of court; if a woman does the same in North Carolina, some judges will charge her a \$ 65 fee. n166 Beginning in the 1980s and 1990s there was another trend holding the victim responsible for her abuser's actions -- the dual arrest of the victim and the abuser -- as a result of implementing mandatory arrest policies. n167

[\*779] Holding the victim liable for the abuser's conduct applies in other areas of the law as well. Many states punish domestic violence victims who fail to protect their children from abusive fathers or mates. n168 That is, states may charge the battered mother for failing to stop her abuser, not just from abusing the child, but from abusing the mother. n169 Courts have permitted the state to remove children from homes when the sole charge is abuse of the mother. n170 Courts reason that these abused mothers are neglectful because they allow their children to witness the abuse. n171 Where criminal liability is imposed, enacting legislation essentially holds the non-abusive mother liable as an accomplice for aiding and abetting in the abuse, despite the fact that she might not have committed all elements of the offense or have had the requisite *mens rea*. n172

### III. INSTANT DECISION

Out of this backdrop emerged the instant decision in *State v. Lucas*. The Ohio Supreme Court relied principally on *Gebardi* to determine whether the subject of a protective order may be held liable as an accomplice for aiding and abetting her abuser in violating the order. n173 The court noted that *Gebardi* had its roots in *The Queen*, a case that held that statutory rape victims were exempt from liability because of the nature of the statute defining the crime. Moreover, the court noted the more recent California case, *In re Meagan*, which like *The Queen*, held that charging the victim as an accomplice would contravene legislative policy because the legislature had imposed criminal penalties on the perpetrator of the statutory rape and *not* the victim.

The *Lucas* court then drew analogies to the *Gebardi* decision. The court said that just as the Mann Act failed to criminalize the woman's acquiescence in prostitution across state lines, so too the Ohio domestic violence statute failed to criminalize the protected subject of a protective order for inviting or acquiescing in the order's violation. The court first noted that the Ohio statute anticipates that a victim might invite a violation of the protective order. As a result, the Ohio statute requires that a protective order contain certain language expressing its non-waivability:

[\*780] The order or agreement shall state clearly that *the order or agreement cannot be waived or nullified by an invitation to the respondent from the petitioner ... to enter the residence, school, business, or place of employment or by the respondent's entry into one of those places otherwise upon the consent of the petitioner or other family or household member.* n174

The court reasoned that the legislature, in enacting this provision, recognized the volatile nature of abusive relations and thus wished to insulate protective orders from "shifting emotions" and the excuse, or claimed excuse, of an invitation. n175 The court went on to reason that the statute's silence as to victim-petitioner liability for such an invitation demonstrates a legislative intent to leave this behavior unpunished, just as the Mann Act's silence as to a woman's acquiescence demonstrated a legislative intent to leave her behavior unpunished.

The court further reasoned that holding a victim-petitioner liable as an accomplice for violating her own protective order would be tantamount to enforcing a mutual protective order against the victim, a result that the Ohio statute explicitly prohibits. Enforcing victim liability is inconsistent with the mandated process that requires each complainant to file his/her own petition and allege individual facts of abuse.

The court further noted that its enforcing rules, the "Rules of Superintendence," require protective orders to provide a different warning to abusers than to victim-petitioners. The victim-petitioner rule merely warns the victim that if she wants to re-contact her abuser, she must petition the court to modify or dismiss the protective order. In contrast, the abuser rules threaten criminal charges front and center for violating the protective order, stating, "if you go near the Petitioner/Alleged Victim, even with the Petitioner's/Alleged Victim's consent, you may be arrested." n176 The court reasoned that this was evidence of the Ohio legislature's intent to proscribe only the conduct of the abuser, not that of

the victim. Drawing an analogy to *Gebardi*, the court construed Ohio's domestic violence statute as providing no punishment for the protected party's activity, even while recognizing the protected party's participation in violating the very statute affording her protection.

The court reasoned that to hold otherwise would discourage the reporting of abuse and allow the abuser to contravene the statute by threatening to claim that "an illegal visit was the result of an illegal invitation." n177 The court said that allowing abused women to be charged with complicity "is a prospect neither intended by the General Assembly nor acceptable as a matter of public policy." n178 [\*781] Thus, relying on case law precedent, namely *Gebardi*, statutory construction and policy the *Lucas* court found that under Ohio's domestic violence statute, a victim petitioner is immune from punishment for her abuser's violation of a protective order.

#### IV. COMMENT

The Ohio Supreme Court's decision in *Lucas* represents one of those celebrated times in jurisprudence when the court gets it right in its cogent legal analysis and in its human wisdom. The *Lucas* court's legal analysis made clear that neither accomplice law nor the Ohio statute at issue supports assigning accomplice liability to victims who re-contact their abusers after obtaining protective orders. The court, however, went beyond pure legal analysis to embrace the intersection of law and policy by analyzing the practical effects of holding domestic violence victims liable as accomplices. The court recognized that the practical effect of holding victims liable would be to disregard the extensive research demonstrating the psychological and socio-economic factors that make severing ties with an abuser extremely complex and make the potential for re-contact likely. Furthermore, the court recognized that the practical effect of holding victims liable would be to shift the blame for abuse away from the abuser to the victim. Thus, the *Lucas* decision resonates not only with domestic violence victims and advocates but also with the legal community and serves as an important precedent for other states. n179

##### A. THE IMPORTANCE OF *GEBARDI* TO THE OHIO SUPREME COURT'S DECISION

In relying on the U.S. Supreme Court's decision in *Gebardi*, the Ohio Supreme Court effectively resolved the conflict between the Ohio appellate courts in *Lucas* and *Bullington*. The conflict between the two cases concerned whether criminal accomplice law or public policy was the proper framework by which to interpret whether a victim of domestic violence may be charged as an accomplice when she aids or abets her abuser in violating a protective order. n180 Although both appellate opinions utilized precedent emerging from *Gebardi*, neither one explicitly analyzed the issue under the framework of the U.S. Supreme Court decision. As a result, neither appellate court case provided a comprehensive, solid and ultimately binding interpretation of criminal accomplice law as applied to [\*782] Ohio's domestic violence laws. In contrast, by relying heavily on *Gebardi*, the Ohio Supreme Court did provide a binding interpretation of the law at issue.

##### B. THE INSTANT DECISION AND STATUTORY INTERPRETATION ACCORDING TO *GEBARDI*

Using the *Gebardi* court's interpretation of the Mann Act as guidance, the Ohio Supreme Court correctly addressed the scope of Ohio's domestic violence statutes and the actors whom the statute addresses. Just as the Mann Act identified two actors -- the man transporting and the woman being transported -- so too the Ohio statute identifies two actors -- the person abusing and the victim being abused. n181 Just as the Mann Act was directed primarily at proscribing the transporter from further transporting, so too the Ohio statute is directed primarily at proscribing the abuser from further abusing his victim. n182 For example, the Ohio statute expressly grants relief on the petitioner's own behalf after she alleges, within her petition, acts of abuse committed by the respondent against the petitioner. n183 On the basis of these allegations, the court will then grant the protective order for the sole protection of the petitioner, not the protection of the respondent. n184 Once granted, the order may proscribe the abuser's conduct, such as prohibiting the abuser from contacting the petitioner, or require certain conduct of the abuser, such as payment of child support. n185 Furthermore, the statute prohibits mutual orders of protection, whereby the court grants two orders, one for each party based on only one party's petition. n186 By prohibiting mutual orders of protection the statute indicates that the protective order inures to the victim petitioner's benefit alone.

Similarly, just as the Mann Act assigned liability to the transporter, so too, the Ohio statute assigns liability to the abuser. n187 Just as the Mann Act anticipated that the protected party -- the prostitute -- would participate in violating that statute, so too the Ohio statute anticipates that the victim might participate in violating the protective order. n188 Just as the Mann Act failed to punish the prostitute's acquiescence to the criminal act, so too, the Ohio statute fails to punish the victim's participation in the form of inviting a violation of the [\*783] protective order. n189 In fact, the Ohio statute expressly prevents an invitation of the victim from nullifying the effect of the statute on holding liable the

abuser who chooses to disregard the warning language. n190 The protective order further provides the abuser with an explicit warning that violation of the order, even at the behest of the victim, will lead to criminal penalties. n191 No such warning appears on the victim's order of protection. n192 Thus, the statute contemplates that victims, in aiding and abetting violations of the protective orders, may do more than merely acquiesce to a violation of a protective order and may actually invite a violation themselves, yet the statute still fails to explicitly hold the victim liable for such activity.

In analyzing the liability of the victim in light of the entire statutory scheme, and under *Gebardi's* framework, the Ohio Supreme Court imbued *Bullington's* public policy analysis with authority and derailed *Lucas's* conspiracy law analysis. One basis for the appellate court's holding in *Lucas* was that the statutory language, which holds violators of the protective orders liable, is neutral and not specifically directed at the respondent-abuser. n193 However, as the Ohio Supreme Court indicated, this point is not dispositive. n194 The particular provision of the statute to which the appellate court referred indicates that, "No person shall recklessly violate the terms of . . . a protection order issued . . . pursuant to . . . 3113.31 of the Revised Code." n195 By reading this provision apart from the rest of the adult abuse statute, a court could interpret "person" as encompassing both the victim and the abuser. However, statutes are intended to be read as part of their larger scheme. n196 Furthermore, this specific provision actually requires that "person" be interpreted "under section 3113.31." As discussed above, this section of the domestic violence laws clearly places liability for violating a protective order on the abuser and not on the victim. n197 Under section 2912.27, "person" must refer to the abuser. In addressing the abuser and not the victim, the Ohio statute declines to punish the victim for violating the order. Thus, under the statutory analysis provided by *Gebardi*, the Ohio domestic violence laws exhibit [\*784] an affirmative legislative policy to leave the victim of domestic violence unpunished for her abuser's conduct. n198

#### C. THE INSTANT DECISION AND THE VICTIM EXCEPTION TO ACCOMPLICE LIABILITY

Although the opinion is silent on this point, the common law victim exception, as applied in *In re Meagan* and Ohio case law precedent, supports the Ohio Supreme Court's statutory interpretation. As *In re Meagan* demonstrates, the victim exception applies where the legislature displays an intent to protect a certain class. n199 Holding a member of this same protected class liable under the statute would contravene its very purpose of providing protection. n200 Based on Ohio case law, which recognizes that domestic violence laws are special in nature n201 and that the language of the protective orders is non-waivable, n202 and based on the overall statutory scheme addressing adult abuse, the Ohio legislature undoubtedly intended to protect domestic violence victims as a class. n203 The Ohio legislature intended this protection when it recognized that abuse may be so serious as to require court intervention in the form of a protective order for up to five years. n204 The Ohio legislature intended this protection by recognizing that abuse may be so serious that the victim's right to be free from abuse overrides the abuser's right to contact or go near the victim or reenter their dwelling, acts which might otherwise be constitutionally protected. n205 The Ohio legislature intended this protection when it recognized that abuse may be so serious that no invitation by the victim to violate the order's provisions could nullify its effectiveness. n206

Ohio is not the only state to recognize the protected status of domestic violence victims through its legislation. Forty-nine other states maintain this legislation as well. n207 Even the federal government, in enacting the Violence Against Women Act, recognized the special status of domestic violence victims. n208 Because of the special status of domestic violence victims, the common law victim defense [\*785] should apply where courts attempt to hold the victim liable as an accomplice to the violation of her own protective order.

#### D. THE INSTANT DECISION AND POLICY CONSIDERATIONS

Policy reasons also support the decision in *Lucas*. As the Ohio Supreme Court noted, applying accomplice liability in this case would extend accomplice liability to other abused women who, unlike Betty Lucas, did not in fact invite their abuser's contact. n209 Such an extension of liability would likely "create a real chill on the reporting of the violation" because the abuser could simply threaten "that an illegal visit was the result of an illegal invitation." n210

In relying on this policy argument, the Ohio Supreme Court recognized domestic violence as a larger societal problem, not simply a problem confined to isolated instances of abuse. n211 This recognition of policy considerations in the domestic violence arena by a state supreme court is precedent setting. In considering larger policy issues, the court heeded the voluminous literature written within the past thirty years calling for the legal system to acknowledge the richer and deeper context of abusive situations. n212 This context recognizes that abuse is not the result of an abuser's involuntary loss of control due to the victim's behavior. n213 Rather, research indicates that an abuser makes a conscious choice to commit violent acts in order to exert control over the victim. n214 This context also recognizes the

various social, economic and psychological components that constitute an abusive situation. n215 Courts that address the issue of punishing women who re-contact their abusers should consider these components.

An understanding of the victim's psychology may explain her difficulty in cutting off ties to the abuser or possibly re-contacting him in spite of a protective order. Studies show that women who experience repeated abuse may develop pathological responses. n216 These responses may include a temporary suspension of decision-making capabilities and a disabling of the victim's cost/benefit analytical skills. n217 One theory of response is "learned helplessness," a component of the Battered Woman's Syndrome, n218 where the abused woman becomes [\*786] psychologically and emotionally passive. n219 As a result, she is unable to leave the relationship in spite of the abuse. n220 The fact that Battered Woman's Syndrome is admissible evidence in courts in all fifty states n221 demonstrates the relevance of such a psychological consideration when courts rule on domestic violence issues.

Another psychological theory is that of "traumatic bonding" that suggests that rather than passively remaining in the relationship, the abused woman develops a positive emotional attachment or bond to her abuser which makes leave-taking incredibly difficult. The bonding results when the abuser asserts himself over the victim through physical abuse and leaves the victim feeling powerless. n222 The victim develops an attachment to her abuser in order to improve her sense of power. n223

Other studies demonstrate that a victim's choice to remain with her abuser is based on reason rather than a feeling of psychological entrapment. n224 In choosing to remain with an abuser, the woman may be avoiding, among other factors, an escalation of abuse. n225 Indeed, the reason why so many women fail to leave is based on an internal understanding, confirmed through studies, that violence against abused women is most acute at the point of separation. n226 "Many of the women killed by their husbands are killed after they have separated." n227 As a result, court-ordered protective orders often intensify the likelihood that an abuser will commit violence against the victim. n228 Although leave-taking can be successful, it is usually a long and arduous process. n229 Understanding the challenges women face when leaving their abusers should affect legal inquiries. n230

Social dynamics may also influence a woman's decision to stay with or re-contact her abuser. For example, many abused women cite their children as the [\*787] primary reason for staying with the abuser. n231 These women may believe that "to succeed as women they must succeed in their conjugal relationships, and that they have an obligation to try their utmost to make these relationships work, thus preserving their families." n232 Some women may simply want to raise their children with a father or may believe they are incapable of raising their children alone. n233

Economics may also influence the woman's decision to stay with or re-contact her abuser. Studies show that if an abused woman possesses greater access to economic resources, she is more likely to sever ties with her abuser. n234 However, if the woman is socialized in the role of wife and mother, she may find it difficult to reenter the workforce. n235 Furthermore, general employment discrimination against women may be an impediment to the abused woman's ability to gain financial independence from her abuser. n236

As a result of the complex interaction between social, economic, and psychological factors, an abused woman can be left feeling disempowered. n237 Consequently, the legal system may provide a victim with a sense of empowerment through the issuance of a protective order, a symbol of her formal severance from her abuser. n238 Studies about victim interaction with the legal system show that women who obtain protective orders report overall improvements in their lives. n239 For example, one study by Susan Keilitz and her colleagues, discussing women who had obtained protective orders, found that seventy-two percent of women observed reported life improvements within one month of obtaining the order, eighty-five percent reported life improvements after six months and ninety percent reported an increased emotional well-being. n240 In a follow-up interview, eighty-percent reported feeling more secure than before the protective order. n241 Another study by Mary Fischer and Karla Rose found that ninety-one percent of the women felt positive about their decision to obtain a protective order. n242 Eighty-nine percent felt greater control over their relationships and ninety-eight percent felt greater control over their lives. n243 In another study by Anne Horton [\*788] and her colleagues, ninety-four percent of the victims felt positive about their decision to obtain a protective order. n244 In yet another study by Adele Harrell and Barbara E. Smith, seventy-nine percent reported a belief that protective orders communicated the message to the abuser that abuse was wrong. n245 Thus, these studies demonstrate that a victim obtaining a protective order represents a turning point in the abusive relationship. n246 Legal intervention disrupts the abuser's pattern of control and domination and enables the victim to restructure the relationship. n247

Had the Ohio Supreme Court found Betty Lucas complicit, such a legal characterization would have negated the beneficial psychological effects protective orders provide victims and would, in essence, characterize the abuser and victim as one actor. Such a legal characterization would place the responsibility of stopping the abuse on the victim

rather than on the abuser and also would validate the abuser's control dynamic, reinforcing the common claim that domestic violence is merely a "marital squabble," an issue unfit for police, social worker and court intervention. n248 Such a policy would further create a situation where the abuser could fabricate the victim's invitation, using it as a ruse to violate the protective order, which would in turn lead to underreporting of the crime. n249

Not only would such a policy suppress reports of protective order violations, but such a policy would likely discourage victims from initially seeking court intervention. n250 Many victims would likely perceive these charges of accomplice liability as unfair treatment under the legal system and an attempt by the system to silence the victim's voice. n251 Studies supporting this assertion show that the more a victim feels properly heard and properly treated by the justice system, the more likely she is to seek aid. n252

#### E. THE INSTANT DECISION AND ALTERNATIVES/SUGGESTIONS

As the Ohio Supreme Court demonstrated, legal and policy reasons do not support the court practice of assigning accomplice liability to victims who invite protective order violations. However, the issue of re-contact appears to be a [\*789] significant problem for judges and a burden for the judicial system, and is admittedly frustrating. Therefore, the judicial, social and government systems should seek alternatives to accomplice liability to promote victim compliance with protective orders. For example, in one jurisdiction, after the court issues protective orders, law enforcement officials will mail letters and provide follow-up visits to victims. n253 This method maintains the legal focus on the abuser, helps determine who is violating the order and reaffirms the victim. n254

Legislatures should also consider rewriting the warning language that appears in an order so that the language is easily comprehensible for the layperson. To further maximize comprehension, legislatures should include, in clear and simple language, specific examples of what constitutes a violation of the order. Pictorial representations might even be appropriate in order to clarify meaning. Additionally, judges should provide explicit, standardized, comprehensible verbal instructions to both the victim and the abuser as to what a violation of the protective order means.

#### CONCLUSION

The Ohio Supreme Court, in declining to assign accomplice liability to the victim, rightly maintained the focus of the statute and its penalties on the abuser. As the Ohio Supreme Court said, "protection orders are about the behavior of the respondent and nothing else. How or why a respondent finds himself at the petitioner's doorstep is irrelevant. To find appellant guilty of complicity would be to criminalize an irrelevancy." n255 The court's ruling thus allows victims to identify themselves as just that -- victims, not accomplices in their own abuse. n256

#### FOOTNOTES:

n1 Michael T. Morley, Richard Albert, Jennie L. Kneedler, & Chrystiane Pereira, *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 219 (2003).

n2 *See id.* at 218-19.

n3 David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1170 (1995).

n4 Morley et al., *supra* note 1, at 219.

n5 *Id.*

n6 770 N.E.2d 114 (Ohio Ct. App. 2002).

n7 *Id.* at 298, 301.

n8 *See Lucas*, 770 N.E.2d at 116-17; OHIO REV. CODE ANN. §§ 3113.31(L)(1), 2919.27(A)-(B) (West, WESTLAW through Aug. 14, 2003).

n9 *See Amy R. Melner, Rights of Abused Mothers v. Best Interest of Abused Children: Courts' Termination of Battered Women's Parental Rights Due to Failure to Protect Their Children from Abuse*, 7 S. CAL. REV. L. & WOMEN'S STUD. 299, 301 (1998).

n10 *See Carolyn N. Ko, Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDIS. L.J. 361, 365 (2002).

n11 *State v. Lucas*, 795 N.E.2d 642, 647-48 (Ohio 2003).

n12 *Id.* at 644-48.

n13 *Id.* at 643.

n14 *Id.*

n15 *Id.* Joseph Lucas received a fractured and dislocated elbow, head injuries, and was subsequently treated in the hospital. *Id.* Betty Lucas received a bruised nose. *Id.*

n16 Adam Liptak, *Ohio Case Considers Whether Abuse Victim Can Violate Own Protective Order*, N.Y. TIMES, May 30, 2003, at A1.

n17 *Lucas*, 795 N.E.2d at 643.

n18 *Id.*

n19 *Id.*

n20 *Id.*

n21 *Id.*

n22 *Id.*

n23 *Id.*

n24 *Id.* at 644.

n25 *Id.* at 644.

n26 744 N.E.2d 1225, 1226 (Ohio Ct. App. 2000).

n27 *Id.* at 1229.

n28 795 N.E. 2d at 647-48.

n29 Ko, *supra* note 10, at 361-62.

n30 *Id.* at 361 (citing PATRICIA TJADEN & NANCY THOENNES, U.S. DEPT' OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 26 (2000)).

n31 Joan Erskine, *If It Quacks Like a Duck: Recharacterizing Domestic Violence as Criminal Coercion*, 65 BROOK. L. REV. 1207, 1216 (1999).

n32 Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 981 (1995).

n33 OHIO REV. CODE ANN. § 3113.31(A)(1), (3)(a)(i) (West, WESTLAW through Aug. 14, 2003.)

n34 Shelby A. D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 304-05 (1995). William Blackstone, an English legal commentator, expressed that it was appropriate for a husband to give his wife moderate correction since she was his responsibility. *Id.* at 304. The British Common Law said that a husband could use an instrument "not thicker than his thumb" to punish his wife. *Id.*

n35 *Id.* In 1824, the Mississippi Supreme Court was the first American Court to officially condone spousal abuse. *Id.* at 305 (citing *Bradley v. State*, 1 Miss. 156 (1824)). Fifty years later, the North Carolina Supreme Court held that spousal abuse was illegal, but was essentially beyond the reach of the court's jurisprudence because of its status as a private matter. *State v. Oliver*, 70 N.C. 60 (1874). The Alabama Supreme Court, in holding spousal abuse illegal, stated that, "the wife is entitled to the same protection of the law that the husband can invoke for himself. She is a citizen of the State and is entitled, in person and in property, to the fullest protection of its laws." *Fulgham v. State*, 46 Ala. 143 (1871). *See also Commonwealth v. McAfee*, 108 Mass. 458 (1871).

n36 *See Moore, supra* note 34, at 306.

n37 Ko, *supra* note 10, at 362. For example, one 1970s study on 109 abused women demonstrated that for every 32,000 assault incidents, only 517 (less than two percent of the total) were reported by the victim. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 50 (1992). Other studies revealed that police were failing to respond to domestic violence calls. *Id.* at 47. Even when police did respond to domestic violence calls, they failed to arrest the abuser and often undermined the victim's plea for help by laughing in her face. *Id.* at 48. Some police departments, such as the Oakland Police Department, even had explicit non-arrest policies, as stated in their manuals. *Id.*

n38 Zorza, *supra* note 37, at 62; Ko, *supra* note 10, at 362.

n39 Zorza, *supra* note 37, at 62.

n40 Ko, *supra* note 10, at 362. Mandatory arrest laws require the police officer to arrest an abuser in a domestic violence case when the officer has probable cause to believe the offender committed an assault or placed a victim with a protective order in fear of imminent physical injury. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1854 (2002). To give effect to the mandatory arrest scheme, state legislatures relaxed the normal standard which required the officer to obtain a warrant before arresting an individual (the exceptions to this rule included where the officer had probable cause to believe a felony had been committed or where a misdemeanor was committed in the officer's presence). *Id.* at 1853. Mandatory arrest became an established policy in the mid-1980s, largely as a result of Lawrence Sherman and Richard Berk's study, conducted in Minneapolis, on the relationship between arrest and recidivism in domestic violence cases. Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 558-59 (1999). The study was one of six which found that arrest of the abuser was the most effective way to decrease the likelihood of new violent incidents. *Id.*

n41 Ko, *supra* note 10, at 362.

n42 Zlotnick, *supra* note 3, at 1169.

n43 *Id.* The marital rape exception made it legal for husbands to rape their wives simply based on their marital status. Deborah H. Bell, *Family Law at the Turn of the Century*, 71 MISS. L.J. 781, 828 (2002). The spousal immunity privilege barred spouses from testifying against one another in court when one spouse was charged with a crime against the other. Malinda L. Seymore, *Against the Peace and Dignity of the State: Spousal Violence and Spousal Privilege*, 2 TEX. WESLEYAN L. REV. 239, 246 (1995). This bar to testimony essentially prevented the victim, usually the sole witness to the abuse, from testifying against her abuser and thus provided the abuser with immunity from prosecution. *Id.* at 241, 257.

n44 Jennifer R. Hagan, *Can We lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 926 (2001); see *United States v. Morrison*, 529 U.S. 528, 614 (2000).

n45 *Id.* at 927.

n46 *Id.* at 926-27.

n47 *Id.* at 929-30 (citing *Morrison*, 527 U.S. 1068).

n48 *Id.* at 954-55, 979-80.

n49 Zlotnick, *supra* note 3, at 1170.

n50 *Id.* By 1976, two states had adopted civil protective order legislation. Ko, *supra* note 10, at 362. By 1994, all fifty states had adopted protective order legislation. *Id.*

n51 Zlotnick, *supra* note 3, at 1190.

n52 Zorza, *supra* note 37, at 52-53.

n53 *Id.* at 52-53.

n54 *Id.* at 53.

n55 *Id.*

n56 Zlotnick, *supra* note 3, at 1191.

n57 *Id.*

n58 *Id.* at 1192.

n59 *Id.*

n60 Ko, *supra* note 10, at 362. In 2000, courts issued 11,623 restraining orders in Los Angeles County. *Id.* In 1996, victims filed more than 10,000 restraining orders in Philadelphia. *Id.* at 362-63. In 1992, courts issued 46,515 restraining orders in Massachusetts. *Id.* at 363.

n61 Zlotnick, *supra* note 3, at 1194.

n62 *Id.*

n63 Epstein, *supra* note 40, at 1860.

n64 OHIO REV. CODE ANN. § 3113.31(1)(a)(b) (West, WESTLAW through Aug. 14, 2003).

n65 *Id.* § 2919.26(I)(2).

n66 *Id.*

n67 *Id.*

n68 *Id.* § 2919.27(A)(1).

n69 *Id.* § 2919.27(B)(1)-(2); § 3113.31 (I)(2)(b), (L)(1)(a)-(b), (L)(2).

n70 OHIO REV. CODE ANN. § 2901.22(c) (West, WESTLAW through Aug. 14, 2003).

n71 *Id.*

n72 *See Id.* § 2923.03(A)(2).

n73 LEWIS R. KATZ ET AL., 3 BALDWIN'S OH. PRAC. CRIM. L. § 92: 1 (2003). In Ohio, complicity is also an "independent" crime so that aiders and abettors may be prosecuted and convicted as principals even if the principle offender is not. *See id.* at § 92: 1 n. 4 (citing *State v. Graven*, 369 N.E.2d 1205, 1208 (Ohio 1977)).

n74 *Id.* § 92: 2.

n75 OHIO REV. CODE ANN. § 2923.03(A)(2) (West, WESTLAW through Aug. 14, 2003).

n76 KATZ, *supra* note 73, § 92: 3.

n77 *Id.*

n78 *Id.* The other proscribed complicit acts include, "soliciting another person to commit a crime . . . conspiring with another to commit a crime and causing an innocent or irresponsible person to commit a crime." *Id.*

n79 *Id.*

n80 *Id.*

n81 *Id.* n.3 (citing *In re Washington*, 691 N.E.2d 285, 286 (1998)).

n82 *Id.* § 92: 3.

n83 *Id.* Wayne LaFave explained accomplice liability theory well when he said, "while the applicable statutes state that these crimes may be committed only by certain persons or classes of persons, it must be remembered that an individual within the scope of the definition *did* commit the crime as a principal in the first degree. The evil or harm with which the legislature was concerned has thus occurred, and the purposes of criminal law are well served by also holding accountable those persons not covered by the statute who assisted in bringing about the proscribed result." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.3, \*\*5-6 (2d ed. 2003) (emphasis in original).

n84 *Id.*

n85 OHIO REV. CODE ANN. § 2923.03(F).

n86 LAFAVE, *supra* note 83, at \*\*1.

n87 KATZ, *supra* note 73, § 92: 13.

n88 *See* LAFAVE, *supra* note 83, at \*\*7, 16 n.100. LaFave cites *The Queen* as one of the earliest examples of case law espousing the victim exception to accomplice law. *Id.*

n89 1 Q.B. 710 (1894).

n90 *Id.* at 711.

n91 *Id.*

n92 *Id.*

n93 *Id.* at 712.

n94 LAFAVE, *supra* note 83, at \*\*7.

n95 KATZ, *supra* note 73, § 92: 13.

n96 Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 208-09 (1982).

n97 LAFAVE, *supra* note 83, at \*\*7, 16 (citing Model Penal Code § 2.06, Comment (1985)). Policy says that, "the businessman who yields to the extortion of a racketeer, the parent who pays ransom to the kidnapper, may be unwise or even may be thought immoral; to view them as involved in the commission of the crime confounds the policy embodied in the prohibition." *Id.*

n98 Peter J. Henning, *Individual Liability for Conduct By Criminal Organizations in the United States*, 44 WAYNE L. REV. 1305, 1322-23 (1998); LaFave, *supra* note 83, at \*\*7, 16 n. 102; *See In re Meagan*, 42 Cal. App. 4th 17, 23 (Ct. App. 1998).

n99 *See Henning, supra* note 98, at 1323.

n100 *See Gebardi v. United States*, 287 U.S. 112 (1932); *United States v. Southard*, 700 F.2d 1 (1st Cir. 1983).

n101 287 U.S. at 123.

n102 *Id.* at 118.

n103 *Id.*

n104 *Id.* at 123. The court wrote, "this acquiescence, though an incident of a type of transportation specifically dealt with by the statute, was not made a crime under the Mann Act itself." *Id.* at 121. The court declined to analyze this case under the other common law exception to aiding and abetting liability, which states that where a crime is so defined that participation by another is necessary for its commission, the participant will not be held liable as an accomplice. *Id.* at 122.

n105 *Id.* at 117-18.

n106 *Id.*

n107 *Id.* at 123. The court said that it could not "infer that the mere acquiescence of the woman transported was intended to be condemned by the general language punishing those who aid and assist the transporter." *Id.* at 119.

n108 *Id.* at 123.

n109 *See United States v. Southard*, 700 F. 2d 1, 20(1st Cir. 1983). For example, in *Southard*, Southard was unable to claim immunity from accomplice liability under 18 U.S.C.A. Section 1084(a), which prosecutes those who are "engaged in the business of betting or wagering." *Id.* at 20. Southard claimed that as a mere bettor, he was the same as the woman crossing state lines in *Gebardi* and could not be charged as an accomplice. *Id.* The

court rejected his argument, stating, "section 1084(a) was not passed to protect bettors from their gambling proclivities. Its stated purpose was to assist the states in enforcing their own laws against gambling." *Id.*

n110 *See* United States v. Annunziato, 293 F. 2d 373, 380 (2d Cir. 1961).

n111 *See* United States v. Spitler, 800 F. 2d 1267, 1278 (4th Cir. 1986). In *Spitler*, for example, the court held that Spitler had committed acts that went beyond mere acquiescence as a victim and that affirmatively aided and abetted in the substantive offense of extortion. *Id.* at 1278. Spitler, a state official for the highway, entered into a fraudulent billing scheme with Carpenter, also a state official for the highway, whereby Spitler overcharged the state for a construction project, only with Carpenter's approval. *Id.* at 1270, 1278. In exchange, Carpenter extorted a number of items from Spitler and his department. *Id.* at 1278. While the court said that normally Congress did not intend to criminalize the extortion victim's acquiescence, the court found that Spitler had gone beyond mere acquiescence by setting up the billing scheme with Carpenter. *Id.* at 1278-79. As a result, the court found that he could be held liable as an accomplice for aiding and abetting extortion. *Id.* at 1279.

n112 42 Cal. App. 4th at 20-21.

n113 *Id.* The house that they entered was that of Oscar's ex-girlfriend, Joani. The court indicates that Meagan later related to one of her schoolmates that she and Oscar had broken into the house in order to pay Joani back for cheating on Oscar. *Id.* at 20.

n114 *Id.* at 20, 22.

n115 *Id.* at 20, 27. The general rule of criminal law is that a defendant may be liable in the commission of the offense as an aider and abettor even if the defendant does not have the specific intent to bring about the crime. *Id.* at 22. As applied to the present case, even though Meagan did not have the specific intent to commit the crime of burglary, she did have the intent to commit statutory rape, and the intent allegedly transferred to the other criminal act of burglary. *Id.* at 20, 27. The appellate court acknowledging this general rule noted, "it is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . ." *Id.* at 22.

n116 *Id.* at 20.

n117 *Id.* at 23, 26.

n118 *Id.* at 24.

n119 *Id.*

n120 *Id.*

n121 *Id.* at 27. Because the court held that Meagan could not be charged as an accomplice in her own statutory rape, it ruled, accordingly, that she could not retain the culpable mental state for burglary.

n122 744 N.E.2d at 1226.

n123 *Id.* at 1228.

n124 *Id.* at 1226.

n125 *Id.* at 1226-27.

n126 *Id.* at 1227.

n127 *Id.*

n128 *Id.* at 1229.

n129 683 N.E.2d 1126 (Ohio 1997).

n130 744 N.E.2d at 1227.

n131 *Id.*

n132 *Id.* 1990 WL 52467 (Ohio App. 5 Dist.).

n133 1990 WL 52467, \*2 (Ohio App. 5 Dist.).

n134 744 N.E.2d at 1227.

n135 *Id.* at 1229.

n136 *Id.* at 1228-29.

n137 *Id.* at 1228. The order in this case prohibited Laura Bullington's husband from entering her residence or place of employment and included the following notice in bold-faced type to the husband: "if this order requires you to refrain from entering the residence, school, business or place of employment of the complainant or the family or household member(s) named in this order, this order cannot be waived or nullified by an invitation to you to enter their residence, school, business or place of employment or your entry into one of those places otherwise with their consent." *Id.* at 1226-27.

n138 *Id.* at 1226-27.

n139 770 N.E.2d at 116.

n140 *Id.* at 115-17.

n141 *Id.* at 115, 117.

n142 *Id.* (emphasis in original).

n143 *Id.* at 117. Again, under the Ohio code, "[a] person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." OHIO REV. CODE ANN. § 2901.22(C) (West, WESTLAW through Aug. 14, 2003).

n144 *Id.* at 117.

n145 *Id.*

n146 *Id.*

n147 *Id.*

n148 533 N.W.2d 199 (Iowa 1995).

n149 *Id.* at 200.

n150 *Id.*

n151 *Id.* at 201.

n152 *Id.*

n153 *Id.*

n154 *Id.*

n155 *Id.* at 202.

n156 *Id.*

n157 *Id.*

n158 *Id.*

n159 Morley et al., *supra* note 1, at 218-19.

n160 *Id.* at 218-19, 220 n.359.

n161 *Id.* at 218-19, 220 n.359 (citing Francis X. Climes, *Judge's Domestic Violence Ruling Creates Outcry in Kentucky*, N.Y. TIMES, Jan. 8, 2002, at A14).

n162 *Id.*

n163 *Id.* at 219. He said, "number one, I want to protect the woman. In one case, a woman claimed her husband had held her prisoner. I issued a protective order and advised her not to see him. But she kept going back to him, so I put both of them in jail. I kept them there for about ten days. Now they're divorced and live in separate states -- but if I hadn't been that forceful, the situation would have gone on and on." *Id.*

n164 *Id.*

n165 *Id.* at 220 n.360 (citing *Should Women Be Punished for Returning to the Men Who Abuse Them?*, GLAMOUR, July 2002 at 134; Stephanie Simon, *Judges Push for Abused to Follow the Law*, L.A. TIMES, Jan. 22, 2002, at A1).

n166 *Id.*

n167 Mills, *supra* note 40, at 588. Mills argues that because mandatory arrest laws require the police to arrest the primary aggressor and because it is difficult to discern who the primary aggressor is, police officers have arrested both the victim and the abuser. *Id.* She writes that Los Angeles statistics could indicate a national trend towards dual arrest. *Id.* In 1987, the police arrested 340 women and 4,540 men for domestic violence, while in 1995 the police arrested 1,262 women and 7,513 men. *Id.* at 588-89. She said, "as mandatory arrest policies became the practice of choice, three times as many women were arrested, compared to less than twice as many men." *Id.* at 589.

n168 Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, \*2 (1999).

n169 *Id.*

n170 *Id.*

n171 *Id.*

n172 Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 613 (1998). Jacobs notes that in the absence of such legislation, the state's other option would be to hold the non-abusive mother liable as an accomplice, provided that such liability could be proven. *Id.*

n173 795 N.E.2d at 645.

n174 *Id.* at 646.

n175 *Id.*

n176 *Id.*

n177 *Id.* at 647.

n178 *Id.*

n179 See Liptak, *supra* note 16.

n180 See *Lucas*, 770 N.E.2d at 115-17. The *Bullington* court based its public policy analysis of the statute principally on the California case. *In re Meagan*, which relied on *Gebardi* and *The Queen* for its legal conclusions. 744 N.E.2d at 1228; 42 Cal. App. 4th at 23, 26. The *Bullington* court acknowledged that *In re Meagan* was merely instructive. 744 N.E.2d at 1228. In failing to cite binding case law authority, such as the Supreme Court's *Gebardi* decision, in relationship to statutory interpretation, *Bullington* essentially provided *Lucas* the liberty to disagree with the decision. *Id.* However, the appellate court in *Lucas*, too, failed to interpret the statute under binding case law authority, choosing rather to focus on the breadth of Ohio's complicity laws as applied to the domestic violence statute. 770 N.E.2d at 115-17.

n181 See *Gebardi*, 287 U.S. at 118-19; OHIO REV. CODE ANN. § 3113.31 (West, WESTLAW through Aug. 14, 2003).

n182 See *Gebardi*, 287 U.S. at 118-19; OHIO REV. CODE ANN. § 3113.31(E)(1) (West, WESTLAW through Aug. 14, 2003).

n183 OHIO REV. CODE ANN. § 3113.31(C) (West, WESTLAW through Aug. 14, 2003).

n184 *Id.*

n185 *Id.* at (E)(1).

n186 *Id.* at (E)(4).

n187 *See Gebardi*, 287 U.S. 112, 119-20 (1932); OHIO REV. CODE ANN. § 3113.31 (West, WESTLAW through Aug. 14, 2003).

n188 *See Gebardi* 287 U.S. at 121; OHIO REV. CODE ANN. § 3113.31(E)(7)(a) (West, WESTLAW through Aug. 14, 2003).

n189 *See Gebardi* 287 U.S. at 123; OHIO REV. CODE ANN. § 3113.31(E)(7)(a), (L)(1) (West, WESTLAW through Aug. 14, 2003).

n190 OHIO REV. CODE ANN. § 3113.31(E)(2)(7)(a) (West, WESTLAW through Aug. 14, 2003).

n191 Sup.R. §§ 10.01(D), 10.02(G); Form 10.01-G.

n192 *Id.*

n193 *See State v. Lucas*, 770 N.E.2d 114, 117 (Ohio Ct. App. 2002).

n194 *State v. Lucas*, 795 N.E.2d 642, 644 (Ohio 2003). The Ohio Supreme Court wrote, "the inclusion of the mental state of 'recklessly' in R.C. 2919.27(A)(1) ensures that if there is a chance meeting between the subjects of a protection order, the result is not a crime. There is a crime, however, if, in visiting a certain place, the restraineed 'perversely disregards a known risk.'" *Id.* (quoting OHIO REV. CODE ANN. § 2901.22(C)) (West, WESTLAW through Aug. 14, 2003).

n195 OHIO REV. CODE ANN. § 2919.27(A)(1) (West, WESTLAW through Aug. 14, 2003).

n196 *Tyler v. Cain*, 533 U.S. 656, 662 (2001). The court said, "we do not, however, construe the meaning of statutory terms in a vacuum. Rather, we interpret the words in 'their context and with a view to their place in the overall statutory scheme.'" *Id.* (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809(1989)).

n197 *See supra* text accompanying notes 177-87.

n198 *See Gebardi*, 287 U.S. at 123; *supra* text accompanying notes 177-87.

n199 See *In re Meagan*, 42 Cal. App. 4th 17, 24 (Ct. App. 1998).

n200 *Id.*

n201 See *Williams*, 683 N.E.2d at 1229.

n202 See *Reynolds*, 1990 WL 52467 at \*2.

n203 See *Lucas*, 795 N.E.2d at 647-48; *Bullington*, 744 N.E.2d at 1229 ("To allow the city to focus on the victim's behavior abrogates the General Assembly's historical efforts to require police officers to turn their attention from the victim's actions and place their attention squarely where it belongs, on the offender's behavior."); OHIO REV. CODE ANN. § 3113.31.

n204 See OHIO REV. CODE ANN. § 3113.31(E)(3)(a) (West, WESTLAW through Aug. 14, 2003).

n205 See OHIO REV. CODE ANN. § 3113.31(E)(3), (7)(a) (West, WESTLAW through Aug. 14, 2003); see generally Laurie S. Kohn, *Why Doesn't She Leave? The Collusion of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence*, 29 HASTINGS CONST. L.Q. 1, 10-24 (2001).

n206 See *supra* citations accompanying notes 183-85.

n207 Ko, *supra* note 10, at 362.

n208 See Hagan, *supra* note 44, at 926.

n209 See 795 N.E.2d at 647.

n210 *Id.*

n211 See Stark, *supra* note 32, at 981.

n212 See Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, \*4 (1996).

n213 *Id.* at \*3.

n214 *Id.*

n215 See Melner, *supra* note 9, at 301.

n216 *Id.* at 303.

n217 *Id.*

n218 Battered Woman's Syndrome (BWS), first espoused by Lenore Walker in the 1970s, is a form of post-traumatic stress disorder that women develop after entering into intimate relationships with men who repeatedly physically or psychologically abuse them. James C. Stuchell, *Tradition, Distortion, and Creation: Three Approaches to "Battered Woman's Syndrome" in Tort*, 8 REGENT U.L. REV. 83, 86 (1997). BWS classifies abuse as occurring in three stages: (1) attention building -- in which the abuser expresses hostility towards the victim, who attempts to prevent its escalation into violence; (2) acute battering -- in which the abuser batters the victim; and (3) loving contrition -- in which the abuser expresses remorse over his abusive actions, promises to refrain from them, and convinces the victim to remain in the relationship. *Id.* at 87. This cycle must occur at least twice before a woman may be characterized with BWS. *Id.* The cyclical nature of abuse, as described by BWS, explains why so many women have difficulty leaving their abusers. *Id.*

n219 Melner, *supra* note 9, at 304.

n220 *Id.*

n221 Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141, 174 (1995).

n222 Melner, *supra* note 9, at 307.

n223 *Id.*

n224 *Id.* at 309.

n225 *Id.*

n226 *Id.* at 311.

n227 *Id.* (citing Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 71-72 (1991)).

n228 Melner, *supra* note 9, at 327.

n229 Enos, *supra* note 212, at \*245.

n230 See Mahoney, *supra* note 227, at 4.

n231 Melner, *supra* note 9, at 310 (internal citations omitted).

n232 *Id.* (citing LEWIS OKUN, WOMAN ABUSE 94 (1986)).

n233 *Id.*

n234 *Id.* at 312 (citing LEWIS OKUN, WOMAN ABUSE 94 (1986)).

n235 *Id.* (citing LEWIS OKUN, WOMAN ABUSE 94 (1986)).

n236 *Id.*

n237 See Ko, *supra* note 10, at 369.

n238 See *id.* at 369.

n239 *Id.* (internal citations omitted).

n240 *Id.* (internal citations omitted).

n241 *Id.* (internal citations omitted).

n242 *Id.* at 369-70 (citing Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 414 (1995) (referring to a sample narrative of a battered woman)).

n243 *Id.* at 370 (citing Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 414 (1995) (referring to a sample narrative of a battered woman)).

n244 *Id.* (citing Anne Horton, Kyriacos M. Simonidis, & Lucy Simonidis, *Legal Remedies for Spousal Abuse: Victim Characteristics, Expectations, and Satisfaction*, 2 J. FAM. VIOLENCE 265, 274 (1987). The study involved giving sixty-eight individuals an initial questionnaire and a follow-up questionnaire within six months of the TRO issuance. *Id.* at 268.

n245 *Id.* (citing Harrell & Smith, *supra* note 40, at 218).

n246 *Id.*

n247 *Id.*

n248 See Enos, *supra* note 212, at \*3.

n249 795 N.E.2d at 647.

n250 Morley et al., *supra* note 1, at 219.

n251 See Deborah Epstein, Margaret E. Bell, & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 469, 482 (2003).

n252 *Id.* at 469.

n253 Morley et al., *supra* note 1, at 219 (citing Connie Piloto, *Police Target Domestic Abusers*, DALLAS MORNING NEWS, Aug. 18, 2001, at 25A).

n254 *Id.*

n255 795 N.E.2d at 648.

n256 See *id.*

110XDF

\*\*\*\*\* Print Completed \*\*\*\*\*

Time of Request: March 08, 2005 11:14 AM EST

Print Number: 1842:35068006

Number of Lines: 910

Number of Pages:

Send To: NISSANKA, SHANIA  
PENNSYLVANIA COALITION AGAINST DOMESTIC  
6400 FLANK DR STE 1300  
HARRISBURG, PA 17112-2669