



**Injustice Defined: Why Battered Women Cannot and Should Not Be Charged with Violating Civil Protection Orders that Were Issued at Their Request**

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## INTRODUCTION

Civil protection orders<sup>1</sup> can offer significant protection to battered women. The orders may require the abuser to vacate his home, stay away from the victim and refrain from contacting her in any way, among other remedies. Typically, abusers who violate the terms of a civil protection order face arrest and other criminal penalties. Civil protection orders can offer significant relief to victims. In a study completed in 1998, victims in three different jurisdictions were interviewed up to seven months after they obtained civil protection orders and asked if they felt safer, whether their lives had improved and whether they felt better about themselves. Strikingly, 85% of the women reported their lives had improved, 90% felt better about themselves and 80% felt safer.<sup>2</sup> In a more recent study, it was determined that permanent protective orders are associated with a significant decrease in police-reported violence against women by their male intimate partners.<sup>3</sup> Accordingly, civil protection orders are a key tool that battered women can use to try to minimize their exposure to the violence they are experiencing at the hands of their batterers. However, there are reported instances where this important tool has been used against the victim. In those cases, a woman who obtained a civil protection order has been criminally charged with violating that order because she initiated or acquiesced to contact with the abuser. This paper presents both public policy reasons and legal arguments why women cannot and should not be charged criminally for having contact with their abusers who are subject to civil protection orders.<sup>4</sup>

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<sup>1</sup> Orders that restrain a person from having contact with another person or residence are known by various terms. Depending on the issuing state, they may be known as civil protection orders, orders for protection, orders of protection, personal protection orders, protection from abuse orders, stay away orders, no contact orders, harassment or restraining orders. They will be referred to as civil protection orders hereinafter.

<sup>2</sup> See Susan Keilitz, et al., *Civil Protection Orders: Victims' Views on Effectiveness*, U.S. Dep't of Justice (1998).

<sup>3</sup> See V.L. Holt, M.A. Kernic, T. Lumley, M.E. Wolf, and F.P. Rivara, *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (JAMA) 589 (August 7, 2002).

<sup>4</sup> It is also possible that a woman could be charged with violating a *criminal* no contact order that was issued against her abuser who is now a defendant in a criminal case. The arguments, *infra*, would apply to that situation as well.

## BACKGROUND

Typically, when a woman files for a civil protection order, she is usually called the *petitioner* or the *plaintiff* while the abuser is called the *respondent*. The civil protection order will often order the respondent not to have any contact with the petitioner. In at least a few jurisdictions, petitioners have been charged criminally after the issuance of the civil protection order for intentionally making contact with the respondents. Petitioners have been variously charged with contempt of court for disobeying an order of the court; conspiracy to violate a civil protection order; aiding and abetting the violation of a civil protection order; or if the order was written sufficiently broadly, for violating the order itself.

At least one state explicitly prohibits petitioners from being charged for violating their own civil protection orders. Minnesota law provides “The admittance into petitioner's dwelling of an abusing party excluded from the dwelling under an order for protection is not a violation by the petitioner of the order for protection.”<sup>5</sup>

In states that do not explicitly prohibit petitioners from being charged with violating their own orders, petitioners can make the following arguments to prosecutors and judges to convince them to drop or dismiss any criminal charges. The first argument raises the public policy reasons why women should not be charged; the remaining arguments raise various legal theories that preclude charging women for violating their own orders.

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<sup>5</sup> MINN. STAT. § 518B.01, subd. 14(i) (2003).

## ARGUMENTS

### PUBLIC POLICY CONCERNS

*I. Charging women with violating their own civil protection orders significantly decreases their safety and shifts the responsibility for violence away from their batterers.*

Women obtain civil protection orders in an attempt to protect themselves from future harm. When they learn that if they call the police when their abuser has violated an order, that they may face the risk of being arrested themselves if they initiated or acquiesced to the contact in any way, they may decide not to call the police.

Battered women may contact their abusers for any number of reasons. They may need to discuss financial matters regarding jointly owned assets. They may be attempting to reconcile with their abusers. They may reunite with them because they fear physical harm from their batterers or loss of their children if they do not. Abusive relationships are complicated by the presence of children. The petitioner may need to contact the respondent to seek financial assistance or to address her children's issues or needs.

If a battered woman knows that she may be arrested when she calls to report that the respondent has violated the order or assaulted her again, she will very likely not call the police. This leaves the battered woman even more isolated and under the power of the abuser than before she had the order. Furthermore, the abuser can use the civil protection order against her; he may be able to get her arrested by making false claims that she invited him to the home. If she is actually convicted and placed on probation, then her abuser may gain even greater power over her by immobilizing her with threats to call her probation officer with damaging information about alleged probation violations, such as drinking or substance abuse.

If word spreads in a community that women can be arrested for violating the very orders that are designed to protect them, they may decide not to file for the order in the first place. One of the potential obstacles for a woman seeking a protective order can be fear of the judge and courtroom. The courtroom can be intimidating for battered

women as it is, without the additional threat that they could be arrested as a result of obtaining an order. Women may fear that their abusers will be present and that intimate details of their lives will be publicly discussed. In a recent study, battered women were asked to describe the feelings they experienced in the court: They said “I felt sick. I was shaking so bad and felt like passing out. I felt nervous.” “[Felt] like I was the criminal . . . It’s awful because you’re scared the defendant is there. You’re sad. You’re alone. You feel guilty.” “I found it embarrassing and humiliating to stand there with a bunch of strangers.”<sup>6</sup> In order to encourage battered women to seek legal protection, the court must try to make the courtroom experience more welcoming and less frightening, not more threatening by imposing potential future criminal liability on her.

Moreover, by focusing on the conduct of the petitioner, the court or prosecutor shifts the focus from the abuser, who is clearly violating the order by having contact with the victim. Regardless of whether she gave him permission or not, the respondent is knowingly violating the order. The Model State Code on Domestic and Family Violence § 308<sup>7</sup> keeps the focus on the abuser by providing that “[i]f a respondent is excluded from the residence of a petitioner or ordered to stay away from the petitioner, an invitation by the petitioner to do so does not waive or nullify an order for protection.” If the judge notifies the abuser that he cannot see the victim under any circumstances, the abuser gets the clear message that he is responsible for his own fate.

If instead the court focuses on the woman’s conduct, the abuser is not held fully accountable. He has little to risk by ignoring the civil protection order and much to gain in terms of showing the victim that he is not subject to the control of the criminal justice system, particularly if he can use the civil protection order to turn the force of the criminal justice system against her.

Therefore, in order to further the public policy of decreasing domestic violence by giving a victim the ability to exclude the abuser from her life and also hold the batterer accountable, orders for protection should not be enforced against the victim.

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<sup>6</sup> JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM* 148-49 (1999).

<sup>7</sup> This code was developed by the National Council of Juvenile and Family Court Judges in 1994 to serve as a model for states seeking to amend their laws to better protect victims of domestic violence.

## **PROHIBITION AGAINST MUTUAL ORDERS**

*II. Charging petitioners as co-conspirators or complicitors in the violation of civil protection orders issued against respondents violates the prohibition against issuing mutual orders.*

Many states prohibit the issuance of mutual civil protection orders, except in limited circumstances such as when the respondent also files a separate petition and the court determines that both parties did, in fact, commit domestic violence. For example, Arkansas law provides that a court shall not grant a mutual order of protection unless each party, “(1) Has properly filed and served a petition for a protection order; (2) Has committed domestic violence as defined in 9-15-103; (3) Poses a risk of violence to the other; and (4) Has otherwise satisfied all prerequisites for the type of order and remedies sought.”<sup>8</sup>

The Model State Code on Domestic and Family Violence § 310 provides that “A court shall not grant a mutual order for protection to opposing parties.” The drafters prohibited mutual orders because “Mutual orders create due process problems as they are issued without prior notice, written application, or finding of good cause. Mutual orders are difficult for law enforcement officers to enforce, and ineffective in preventing further abuse.” (Commentary to Section 310).

Under federal law, a mutual civil protection order is not entitled to full faith and credit in other states unless a cross petition seeking the order was filed and specific findings were made that each party was entitled to the order.<sup>9</sup>

Finally, the Justice Department, in issuing grants to reduce domestic violence, specifically requires states that receive certain Violence Against Women Act grants to certify that they are working to eliminate the issuance of mutual civil protection orders.

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<sup>8</sup> ARK. CODE § 9-15-216 (2002). *See also* CAL. FAMILY CODE § 6305, ALA. CODE § 30-5-5 (West 2003); MICH. COMP. LAWS § 600.2950 (2003).

<sup>9</sup> 18 U.S.C. § 2265.

If the petitioner can be charged with violating the order that restrains her abuser, then this has the same effect as issuing and enforcing a mutual order against her, without the respondent having to meet the statutory requirements for a mutual order.<sup>10</sup> Mutual orders are not favored by legislators because they send the wrong message to the abuser by focusing on the victim's behavior, not the abuser's behavior.

Moreover, mutual orders are difficult to enforce and prosecute. When called to a scene where there are mutual orders in place, police officers often either arrest both parties or neither party. The former result sends the message to the abuser that his conduct is no more serious than hers. The latter result sends the message to the abuser that he can violate the order and not face any consequences. Given the clear expression of disapproval of mutual orders in state and federal law and the Model State Code, prosecutors should not be permitted to circumvent this prohibition by charging the petitioner as a co-conspirator or aider and abettor.

## CONSTITUTIONAL CONCERNS

### *III. Charging petitioners with violating civil protection orders issued on their own behalf violates their due process rights.*

Both the Fifth and Fourteenth Amendments to the Constitution prohibit governmental actions that would deprive people of "life, liberty, or property, without due process of law."<sup>11</sup> In the context of domestic violence, a person charged with a criminal violation of a civil protection order faces the potential loss of liberty. The accused is entitled to the following procedural safeguards: (1) written notice of allegations made against her; (2) disclosure of the evidence used to support those allegations; (3) an opportunity to be heard by an impartial decision maker, usually a judicial officer; and (4) a written statement of findings on which any adverse decision is based.<sup>12</sup> Most state

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<sup>10</sup> *State v. Lucas*, 795 N.E. 642, 647 (Ohio 2003) available on the World Wide Web at <http://www.sconet.state.oh.us/Rod/Documents/0/2003/2003-Ohio-4778.doc>.

<sup>11</sup> U.S. CONST. amend. V; U.S. CONST. amend. 14.

<sup>12</sup> *See Application of Cochran*, 434 F. Supp. 1207, 1213 (D. Neb. 1977) (citing to *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); also available on the World Wide Web at <http://laws.findlaw.com/us/408/471.html> ).

statutes allow a civil protection order to be issued only after written notice to the batterer and a formal hearing where the court makes particularized findings of domestic violence.<sup>13</sup> Consequently, an abuser charged with violation of a properly issued civil protection order has obtained all the process that is due under the Constitution.<sup>14</sup>

A battered woman who is charged with violation of a civil protection order issued on her own behalf clearly faces a loss of liberty and is entitled to the above procedural safeguards, i.e. written notice and a chance for a meaningful hearing. With respect to the notice requirement, it is unlikely that a battered woman who has petitioned for and obtained a civil protection order against her abuser is on notice that she is subject to criminal penalties for violation of that civil protection order. Typically, the civil protection order itself is specific to the batterer and proscribes and prohibits the batterer's conduct. Unless it is a mutual order, the petitioner's otherwise perfectly legal act of contacting the respondent is not similarly constrained. The battered woman is, therefore, not on notice that her conduct is criminally punishable, and charging the battered woman for her conduct violates her procedural due process rights.<sup>15</sup>

In addition to the lack of notice, a battered woman who is charged with violation of a civil protection order issued on her behalf is deprived of the opportunity to be heard. Most courts have held that a civil protection order cannot be issued without specific findings of abuse by the respondent.<sup>16</sup> When a woman is charged with violation of a civil protection order issued on her own behalf, she is charged without any findings pertaining

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<sup>13</sup> *E.g.* KY. REV. STAT. ANN. § 403.745 (2002). If the court finds that there is a danger of immediate violence to the victim, it may issue a temporary ex parte protective order. This emergency order expires in 14 days, after which the respondent is entitled to notice and a full hearing before a permanent order is issued. *See also H.E.S. v. J.C.S.*, 815 A.2d 405, 408 (N.J. 2003) (holding that the right to procedural due process is only violated when the respondent has no notice of the domestic violence charge before the hearing and the allegation of domestic violence does not appear on the face of petitioner's complaint).

<sup>14</sup> *See United States v. Baker*, 197 F.3d 211, 217 (6th Cir. 1999) (construing 18 U.S.C. § 922(g)(8), which prohibits a person subject to a protective order issued *pursuant to actual notice and a hearing* from possessing a firearm) (emphasis added).

<sup>15</sup> *See Doe v. Poritz*, 661 A.2d 1335, 1352 (N.J. Super. 1995) (holding that risk assessment of sex offender that occurs without a formal judicial proceeding violates the offender's procedural due process rights). Although *Doe* is not exactly on point, charging a battered woman without the appropriate process is analogous to commitment of a sex offender who is labeled 'high risk' without the appropriate procedure.

<sup>16</sup> *See Pearson v. Pearson*, 488 S.E.2d 414, 417 (W.Va. 1997) (construing W.Va. Code § 48-2-15(b) (9) (1996)); *Kobey v. Morton*, 278 Cal. Rptr. 530, 532 (Cal. App. 1991); FLA. STAT. ANN. § 741.30 (2002), prohibiting issuance of mutual orders for protection without independent findings.

to her own conduct or any opportunity to contest the order, in violation of her procedural due process rights.<sup>17</sup> She has no opportunity to explain to the court why she should not be subject to an order.

The lack of notice and opportunity to be heard “are so fundamental to the concept of due process that their absence is almost certainly a fatal defect when physical liberty is at stake.”<sup>18</sup>

In *City of North Olmsted v. Bullington*,<sup>19</sup> an Ohio court found that due process was violated in just such a situation. The court had issued a temporary protection order for the battered woman’s protection in connection with a criminal case, prohibiting her husband from having any contact with her. The police stopped a vehicle driven by her husband and learned that she was in the passenger seat. Her husband was charged and convicted of violating the temporary protection order. The city charged her with aiding and abetting her husband to violate the temporary protection order.

The Ohio Court of Appeals found that the battered woman could not be charged as an aider and abettor because she was not afforded the due process that an offender must receive before a temporary protection order can be issued against him or her.<sup>20</sup>

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<sup>17</sup> *City of North Olmsted v. Bullington*, 744 N.E.2d 1225, 1228 (Ohio App. 2000) (stating that because an OFP is specifically issued against the offender, neither the city nor law enforcement officials can hold the victim liable under that OFP).

<sup>18</sup> *Cochran*, 434 F. Supp. at 1213.

<sup>19</sup> 744 N.E. at 1228.

<sup>20</sup> *Id.* See also *Bays v. Bays*, 779 So. Rep. 2d 754, 758 (La. 2001) (protective order issued against petitioner was invalid where respondent had not filed a counter petition seeking an order; petitioner was not given reasonable notice that he might be subjected to a protective order), available on the World Wide Web at <http://www.lasc.org/opinions/2001/00c1727.opn.pdf>; *Deacon v. Landers*, 587 N.E.2d 395, 398 (Ohio App. 1990) (Violation of due process to issue protection order against petitioner where petitioner was not afforded an opportunity to be heard or defend herself).

## BATTERED WOMEN AS MEMBERS OF A PROTECTED CLASS

*IV. Petitioners are members of the protected class sought to be protected by civil protection orders and therefore can not be charged as aiders and abettors for violating their own civil protection orders.*

Domestic protective orders are designed to protect victims of domestic violence from their abusers. States have criminalized violations of protective orders in order to hold abusers accountable when they defy the court's edict. As noted in *United States v. Annunziato*, "when the legislature has imposed criminal penalties to protect a class of persons, it can hardly have meant that a member of that very class should be punishable as an aider or abettor or as a co-conspirator."<sup>21</sup> This logic has been applied to a woman charged as a co-conspirator for violating the Mann Act. The Mann Act made it illegal to transport a woman across state lines for the purpose of engaging in sexual intercourse. In *Gebardi v. United States*,<sup>22</sup> the court found that the woman who consented to cross state lines to commit adultery could not be charged as a co-conspirator. The court reasoned that since the original legislation did not condemn the woman's participation in the original offense, this was evidence of an affirmative legislative policy to leave her participation unpunished. Accordingly, she could not be charged as a co-conspirator.<sup>23</sup>

Likewise, in *People v. Meagan R.*,<sup>24</sup> the court found that a juvenile girl could not be charged as an aider and abettor to burglary because the predicate or underlying offense for the burglary was statutory rape. In that case, the defendant was a 14 year old girl who accompanied a 22 year old man, Oscar Rodriguez, to his ex-girlfriend's apartment. He broke into the apartment and he and the defendant had sex on his ex-girlfriend's bed. Testimony conflicted as to whether the defendant or Rodriguez then vandalized his ex-girlfriend's apartment. In reversing the girl's conviction for burglary, the court reasoned that she was the protected victim in a case of statutory rape so she could not be charged with aiding and abetting her own rape. The court noted the intent of the legislation was

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<sup>21</sup> 293 F.2d 373, 379 (2d. Cir. 1961).

<sup>22</sup> 287 U.S. 112, 123 (1932); available on the Word Wide Web at <http://laws.findlaw.com/us/287/112.html> .

<sup>23</sup> *Id.*

<sup>24</sup> 49 Cal. Rptr. 325, 332 (1996).

<sup>26</sup> *Id.* at 330 (citation omitted).

to criminalize the exploitation of children rather than to penalize the children. “Above and beyond the protection afforded to all victims of sexual assault, the Legislature has determined that children are uniquely susceptible to ‘outrage’ and exploitation. Hence, special laws on the subject of sex with children have been enacted. They expand the kinds of acts which may be deemed criminal sexual misconduct, and they generally operate without regard to force, fear, or consent.”<sup>26</sup>

Similarly, battered women are also particularly vulnerable to exploitation due to the often overwhelming power and control their abusers exercise over them. In recognition of this risk, state legislatures have enacted domestic violence protective order provisions in an effort to give battered women the power to escape their abusive relationships. Battered women are the special class sought to be protected. Accordingly, they cannot be legally charged as co-conspirators.

The Ohio State Supreme Court agreed with this analysis in *State v. Lucas*.<sup>27</sup> The facts in *Lucas* are nearly identical to those in *Bullington*. The court had previously issued a temporary protection order against the woman’s ex-husband, prohibiting him from having any contact with her. Lucas then invited him to her home for their child’s birthday party. The two of them engaged in a physical altercation. She was charged with complicity to violate a temporary protection order as well as domestic violence.<sup>28</sup>

The court reversed the lower court’s failure to dismiss the complicity charge. Relying on the analysis enumerated in *Gebardi* and *In re Meagan R.*, it found that Ohio’s protection statutes fail to criminalize the protected party’s activities in inviting or acquiescing in a violation of the statutes.<sup>29</sup> It looked to the fact that the provisions of a civil protection order are nonwaivable. For example, Ohio Rev. Code § 3113.31(E)(7)(a) provides that any protective order must state on it that “the order or agreement cannot be waived or nullified by an invitation to the respondent from the petitioner or other family or household member to enter the residence. . .” The court noted that although the statute

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<sup>27</sup> 795 N.E. 2d 642 (Ohio 2003).

<sup>28</sup> *Id.* at 643.

<sup>29</sup> *Id.* at 647.

recognizes that petitioners may invite the violation of a protective order, it provides no penalty for such petitioners. Accordingly, the court held that “an individual who is the protected subject of a temporary protection order cannot be prosecuted for aiding and abetting the restrained under the protection order in violating said order.”<sup>30</sup>

## CONCLUSION

A civil protection order is an important legal tool that may provide increased safety to a victim of domestic abuse. However, if it is turned against the victim so that she faces criminal charges for initiating contact with her abuser, it then becomes a weapon for the abuser to use against her. Charging a victim for violating the order may also increase her risk of harm by taking away her option of calling on law enforcement when she is in imminent danger. As previously explained, charging victims is also bad public policy because it shifts the focus of the law away from the abuser and on to the victim.

In addition to the negative consequences to her safety, charging the victim also creates other serious legal problems. In states where mutual orders are prohibited, charging the victim constitutes an illegal attempt to impose a mutual order. Furthermore, charging her is illegal because it violates her constitutional rights to due process. Finally, this practice contravenes the intent of the legislature in enacting domestic violence protective orders by punishing the battered woman instead of protecting her. Accordingly, a petitioner cannot and should not be charged with violating her own order for protection.

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<sup>30</sup> *Id.* at 648. *Contra Henley v. Iowa District Court*, 533 N.W.2d 199, 203 (Iowa 1995) (Victim could be charged with contempt for aiding and abetting her abuser in violating a no-contact order as long as victim knew of the existence of the order and acted in concert with the person to whom the order was directed).