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## The Role of Enticement in a Violation of a Protection Order

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# The Role of Enticement in a Violation of a Protection Order

Olivia M. Fritsche\*

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### I. Introduction

“You going to pay for this shit you’re doing. I don't give a fuck if you call the cops or not. Fuck them. Fuck the cops. Fuck the Judge. Fuck your God damn lawyer, period.”<sup>1</sup> This is one of the many threatening messages Eric Nolen left on his ex-girlfriend’s voicemail three hours before showing up at her house and attacking her.<sup>2</sup> After leaving this message, Nolen drove to his ex-girlfriend’s house and brutally attacked her; Nolen forced his ex-girlfriend to the ground, kicked her fifteen to twenty times in the chest and abdomen, and caused her to urinate on herself.<sup>3</sup> Throughout the attack the victim was screaming so loud that multiple neighbors came to the scene and witnessed the abuse.<sup>4</sup> As a result, the victim was left with a bloody lip, large bruises on her chest and abdomen, and bruises on her face in the shape of a shoeprint.<sup>5</sup> In the voicemail message, Nolen was referring to his disregard for the protection order that his ex-girlfriend of fourteen years had received approximately two weeks before the encounter.<sup>6</sup> Following the incident, Nolen was arrested and

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1. Brief for the Commonwealth at 2, *Nolen v. Commonwealth*, 673 S.E.2d 920 (Va. 2009) (No. 2422-07-1), 2008 WL 6913864, at \*1.

2. *Id.* at 3–5.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

convicted after a bench trial for felonious violation of a protection order.<sup>7</sup>

This is the typical situation where a protection order must be fully and rigorously enforced in order to protect a woman<sup>8</sup> who is the victim of an abusive relationship.<sup>9</sup> In contrast, consider Mark Hunt's arrest for his violation of a protection order.<sup>10</sup> On February 16, 2010, Stephanie Hunt obtained a protection order against her husband that prevented Mark from having any

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7. *Nolen v. Commonwealth*, 673 S.E.2d 920, 921 (Va. 2009).

8. For the purpose of uniformity, this Note refers to the petitioner as female and the respondent as male because this is the traditional situation in which reports of abuse arise, with the male as the batterer and the female as the victim. See Linda M. Peterman & Charlotte G. Dixon, *Assessment and Evaluation of Men Who Batter Women*, J. OF REHABILITATION, Oct. 1, 2001, at 38 (“[I]t has been reported . . . that the male is the abuser in 95% of domestic violence cases . . .”). There has been a trend in recent years that more men are becoming the victims of abuse. See Bert H. Hoff, *US National Survey: More Men Than Women Victims of Intimate Partner Violence*, 4 J. OF AGGRESSION, CONFLICT & PEACE RES. 155, 155 (2012), <http://dx.doi.org/10.1108/17596591211244166> (last visited Jan. 31, 2014) (finding more men than women had been abused in 2011, with “an estimated 5,365,000 men and 4,741,000 women [as] victims of intimate partner physical violence” in the last year) (on file with the Washington and Lee Law Review). Additionally, studies have shown “that domestic violence occurs in same-sex relationships at approximately the same rate as it does in heterosexual relationships,” meaning the petitioner and the respondent could be members of the same sex. Ronald F. Bobner, Amy J. Miller & John W. Zarski, *Sexual Identity Development: A Base for Work with Same-Sex Couple Partner Abuse*, 22 CONTEMP. FAM. THERAPY 189, 189 (2000).

9. Recent studies have shown that a higher number of women act as the primary perpetrator than previously thought. These studies illustrate the difficulty of implementing a one-sided protection order when there is mutual abuse within the relationship. See Irene Hanson Frieze & Maureen C. McHugh, *Intimate Partner Violence: New Directions*, 1087 ANNALS N.Y. ACAD. OF SCI. 121, 132 (2006) (examining a study of heterosexual couples in stable relationships and finding “[m]ore men than women reported being the targets of one-sided violence, and more women than men reported being the violent one in the couple”); Suzanne C. Swan et al., National Institute of Health, *A Review of Research on Women's Use of Violence with Male Intimate Partners*, 23 VIOLENCE & VICTIMS 301, 313 (2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2968709/pdf/nihms244725.pdf> (illustrating the prevalence of women abusers and the need for interventions to examine the circumstances of abuse rather than assuming typical patterned abuse).

10. *State v. Hunt*, No. 106,296, 2012 WL 3966535, at \*1 (Kan. Ct. App. Apr. 19, 2012).

contact with Stephanie.<sup>11</sup> A little over a month later, Stephanie began “ha[ving] trouble breathing and walking up the stairs, vomited, and may have had pneumonia.”<sup>12</sup> While it is not clear how the couple came into contact, the couple used the speakerphone function of Mark’s phone to contact the district court and request information on how to end the protection order so that Mark could help Stephanie.<sup>13</sup> Following this call, Mark drove Stephanie to the hospital, where she received prescription medicine to assist with her symptoms.<sup>14</sup> Stephanie acknowledged that she could have taken a taxi or bus to the hospital rather than relying on Mark,<sup>15</sup> but she wanted to get the protection order dropped because “she was afraid she would end up in the hospital . . . and there would be no one to take care of their children except for [Mark].”<sup>16</sup>

Following the visit to the hospital, Mark and Stephanie went to the district court to remove the protection order.<sup>17</sup> It became clear that Stephanie was not ready to have the order removed when she began crying in front of an administrative assistant in the courthouse.<sup>18</sup> The assistant then had Mark Hunt arrested,<sup>19</sup> charged with a violation of a protection order, and eventually convicted and sentenced to six months of probation.<sup>20</sup>

These two scenarios illustrate the stark difference in circumstances that can lead to a protection order violation. Eric Nolen’s actions are the perfect example of a situation where protection orders and the violations that result are the necessary and appropriate penalty for the abuser.<sup>21</sup> Nolen contacted his ex-

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Brief of Appellee at 1, *State v. Hunt*, No. 106,296, 2012 WL 3966535 (Kan. Ct. App. Apr. 19, 2012).

17. Brief of Appellant at 7–8, *Hunt*, 2012 WL 3966535.

18. *Id.*

19. Brief of Appellee at 2–3, *Hunt*, 2012 WL 3966535.

20. *Id.* at 4.

21. Brief for the Commonwealth at 2, *Nolen v. Commonwealth*, 673 S.E.2d 920, 921 (Va. 2009) (No. 2422-07-1), 2008 WL 6913864, at \*1.

girlfriend without being provoked and arrived at her house to severely beat her.<sup>22</sup> He chose to blatantly disregard the legal protection in order to abuse his former girlfriend.<sup>23</sup> There was no excuse or defense to his actions, and his punishment was appropriate.<sup>24</sup>

In contrast, Mark Hunt's actions question the enforcement mechanisms of the protection order system.<sup>25</sup> On paper, Hunt violated the protection order, but a full look at the circumstances of the violation and arrest highlights how blameless his actions truly were.<sup>26</sup> Although the court did the right thing in not removing the protection order, the conviction of Hunt was an improper penalty for his actions.<sup>27</sup> The couple was still married, and both parties likely still had feelings for each other, making it very difficult for Hunt not to volunteer to help his wife and mother of his son to the hospital.<sup>28</sup>

Civil protection orders<sup>29</sup> are the leading tool in preventing the maltreatment of women in abusive relationships, offering an effective and low-cost solution to the hardship of domestic violence.<sup>30</sup> These orders are designed to protect the victim of an

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22. *Id.*

23. *Id.*

24. *See* Nolen v. Commonwealth, 673 S.E.2d 920, 921 (Va. 2009) (affirming Nolen's conviction for felonious violation of a protection order).

25. *See* State v. Hunt, No. 106,296, 2012 WL 3966535, at \*2 (Kan. Ct. App. Sept. 7, 2012) (determining that Stephanie sought assistance from Mark in getting to the hospital when she was suffering from symptoms of pneumonia).

26. *Id.*

27. *See id.* at \*4 ("Stephanie had obtained the protection order without Mark's help, and she could have sought its modification or removal without his help.").

28. *See id.* at \*1 ("[T]hey were afraid that Mark wouldn't be allowed to care for the children if Stephanie were seriously ill, perhaps hospitalized . . .").

29. There are many names given to protection orders that are often used interchangeably. These include: no-contact order, stay-away order, restraining order, harassment order, and order for protection among others. VIOLENCE AGAINST WOMEN ONLINE RES., [http://www.vaw.umn.edu/documents/survivor\\_brochure/survivorbrochure.html#id56863](http://www.vaw.umn.edu/documents/survivor_brochure/survivorbrochure.html#id56863) (last visited Feb. 9, 2013) (on file with the Washington and Lee Law Review). Unless otherwise mentioned in the text, this Note will use the term "protection order" to encompass all of these possible terms.

30. *See* T.K. Logan & Robert Walker, *Civil Protection Orders Effective in Stopping or Reducing Partner Violence*, CARSEY INST. 1, 1 (2011),

abusive relationship, while also penalizing the perpetrator for his criminal actions.<sup>31</sup> The law of domestic violence has worked diligently to create safeguards from this violence, but as the law develops, there is a need to recognize the changing dynamics of society.

The problem with the current approach is that not all abusive relationships are one sided, and while one partner may be considered the victim, there is often a more complex story, sometimes involving mutual abuse.<sup>32</sup> A civil protection order is effective in the traditional model of abuse where there is one abuser and one victim; however, some abusive relationships involve mutual abuse and manipulation, which cannot be remedied in the same manner.<sup>33</sup> Although the actions of the protected party may only play a role in the violation in the small minority of cases, there is still a need to analyze this grey area where the protected party has played too egregious of a role to go unnoticed.<sup>34</sup> This Note highlights the discrepancies in the courts' approach to assessing and sanctioning protection order violations,

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<http://www.carseyinstitute.unh.edu/publications/IB-Logan-Civil-Protective-Order.pdf> ("Civil protective orders are effective in reducing partner violence for many women. For half the women in the sample, a protective order stopped the violence. For the other half, the orders significantly reduced violence and abuse."); Jeremy Travis, Department of Justice, *Civil Protection Orders: Victim's Views on Effectiveness*, NAT'L INST. OF JUST., Jan. 1998, at 2 (analyzing a study of women who had sought protection orders and finding that seventy-two percent of participants felt their life had improved, "more than 90 percent reported feeling better about themselves, and 80 percent felt safer").

31. See Tara L. Cornelius, Allison Kunde & Ryan C. Shorey, *Legal Consequences of Dating Violence: A Critical Review and Directions for Improved Behavioral Contingencies*, 14 *AGGRESSION & VIOLENT BEHAV.* 194, 199 (2009) (describing the advantages of civil protection orders "including increasing safety of the primary victim, potentially deterring future violence, and providing the victim with some degree of control over the aberrant situation").

32. See *id.* at 202 ("[T]he vast majority of dating violence involves mutual violence, such that an individual likely has experienced both victimization and perpetration . . .").

33. *Id.*

34. In a study conducted of 663 protection orders taken out in the Quinicy Court of Massachusetts in 1990, 48.4% of the abusers re-abused their victim within two years of the issuance of a protection order. Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 192 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

and advocates for a nuanced assessment of violations, rather than simply punishing the supposed abuser automatically.

To set the background for obtaining and enforcing a protection order, Part II of this Note provides information on how a petitioner obtains an order, the relief available from the court, the possible duration of orders, and the procedure for enforcing and processing a violation of a protection order.<sup>35</sup>

Part III explores the injustice of the current system, looking specifically at how the petitioner's role in the violation is considered when sanctioning the respondent.<sup>36</sup> Protection orders are structured so that one person is forbidden from making contact, while the other has no restrictions placed on communicating.<sup>37</sup> This structure leaves the victim free to contact the restrained party, while the restrained party can be arrested for even the slightest contact.<sup>38</sup> With this framework, the victim has been given a free pass to contact her abuser, and even invite him to come over, without being penalized.<sup>39</sup> This Part will examine the flaws of this system, advocating for a greater emphasis on the female petitioner's role in the violation, while also finding a balance between her fragile state and the possible abuse of the respondent.<sup>40</sup>

Part IV looks at the legal system's current approach to the problems of inducement.<sup>41</sup> Additionally, this Part will look at the

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35. See *infra* Part II (providing an overview of the system of obtaining and enforcing a protection order).

36. See *infra* Part III (analyzing the problems with the current enforcement of protection orders when a respondent was enticed into coming into contact).

37. See ALASKA STAT. § 18.66.100 (2012) (providing the restrictions that can be placed on the respondent to a protection order); FLA. STAT. § 741.30 (2012) (listing the restraints that can be placed on the respondent); NEB. REV. STAT. § 42-924.03 (2012) (stating that a respondent may not receive a protection order unless they file their own complaint or the court finds evidence supporting the issuance of a protection order against the petitioner).

38. See KEITH GUZIK, ARRESTING ABUSE 44 (2009) (recounting a case where the petitioner reached out to the respondent to remove his belongings from their shared home and upon arrival was arrested for violating the protection order).

39. See *id.* ("This happens all the time. Girls call a guy over when a no-contact order is in effect. He comes over and she calls the cops.").

40. See *infra* Part III (analyzing the rationale behind the protection of the woman and considering the role of battered women's syndrome in the process).

41. See *infra* Part IV (examining different state court's approaches to the



possibility of mutual protection orders as a solution to this problem.<sup>42</sup> This Note recognizes the flaws of mutual protection orders—including the risk of nonenforcement, the possible violation of due process, and the psychological effects that a mutual protection order might have on both the respondent and the petitioner—and rejects this option as a solution to the problem of inducement.<sup>43</sup>

Part V suggests more constructive solutions to the injustice, seeking a balance between a woman's enticement of the respondent into a violation, and the respondent's possible abuse of the system.<sup>44</sup> This Part looks at how the implementation of a new judicial mechanism, that comes into play *after* a violation has occurred, can help to remedy the issue of unjust enforcement.<sup>45</sup>

## II. Background

Protection orders are civil remedies that provide protection to a victim of domestic violence by requiring the respondent to stay away from the petitioner.<sup>46</sup> This protection is offered by statute in all fifty states, with most states having the option of issuing temporary or emergency protection orders, as well as permanent

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victim's role in the violation and the backlash that some of these decisions have created).

42. A mutual protection order prevents both parties from contacting each other, sometimes without requiring a mutual showing of abuse. See Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 266 (1996) ("A mutual protection order is an order entered against both parties, requiring both to abide by the restraints and other forms of relief in the civil protection order.").

43. See *infra* Part IV.D.2 (looking at how courts and scholars have approached the problem currently and seeking to find a trend in what is the appropriate remedy for the injustice).

44. See *infra* Part V (exploring possible solutions to the inequity that results when a respondent comes into contact with his victim after being repeatedly provoked).

45. *Infra* Part V.

46. See DIANE KIESEL, DOMESTIC VIOLENCE: LAW, POLICY, AND PRACTICE 1077 (2007) (explaining the purpose and process of attaining a protection order).

protection orders.<sup>47</sup> To receive protection, the victim petitions the court for a formal order that will prohibit the abuser from contacting the victim for a certain period of time.<sup>48</sup> This provides the woman with the independence to decide whether she needs protection, as well as providing protection “whether or not [her] abuser[] face[s] criminal charges.”<sup>49</sup> Each state has its own procedure and requirements for obtaining a protection order, as well as variations in the relief, duration, and sanctions available.<sup>50</sup>

#### *A. Requirements for Obtaining an Order of Protection*

To obtain a protection order, the victim must file a petition in court, typically in the family division of a civil court.<sup>51</sup> Most states require that the victim have a specific relationship with her abuser to qualify for the order.<sup>52</sup> This relationship includes current and former spouses, family members related by blood, current or former household members, persons in intimate relationships, and individuals who have a child in common.<sup>53</sup> In

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47. Catherine F. Klein & Leslie E. Orloff, *Protective Orders and Other Injunctive Relief: Civil Protection Orders*, in DOMESTIC VIOLENCE: LAW, POLICY, AND PRACTICE 1078, 1078 (2007) (explaining the differences between temporary and permanent protection orders).

48. See KIESEL, *supra* note 46, at 1079 (describing the process of obtaining a protection order).

49. *Id.*

50. See Protective Orders, 0080 SURVEYS 19 (Westlaw) (citing the statutes for obtaining a protection order for all fifty states).

51. See KIESEL, *supra* note 46, at 1078 (noting that most orders of protection are petitioned for in the “family divisions of civil court”).

52. See ALASKA STAT. § 18.66.100 (2012) (requiring the respondent in a petition for an order of protection to be a household member); CONN. GEN. STAT. § 46b-15 (2012) (requiring the abuse to have been committed “by another family or household member”); OHIO REV. CODE ANN. § 3113.31 (West 2010) (requiring the domestic violence to occur between household members); VT. STAT. ANN. tit. 15, § 1101(a) (2012) (requiring the abuse to occur between family or household members).

53. See Klein & Orloff, *supra* note 47, at 1079 (listing the relationships normally required to attain a protection order). One of the difficulties of defining these relationships is determining what a statute means by “intimate relationship.” See Devon M. Largio, *Refining the Meaning and Application of “Dating Relationship” Language in Domestic Violence Statutes*, 60 VAND. L. REV.

order to make this process easier, many court systems provide form pleading and court mediators prior to appearing before a judge.<sup>54</sup>

Following the initial petition, most jurisdictions will issue an ex parte temporary<sup>55</sup> protection order. Because this is an ex parte petition, the respondent does not need to be present for the order to be issued.<sup>56</sup> Following this issuance, the respondent will be served with the temporary order and notified of the court date when the permanent order will be issued.<sup>57</sup> A temporary order normally lasts ten to twenty-one days, or until the permanent protection order is issued; if an emergency order is issued, it typically lasts seventy-two hours, but sometimes it can be as short as the court's next business day.<sup>58</sup>

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939, 958–60 (2007) (explaining some of the difficulties of interpreting what a statute means by intimate relationship). Statutes that allow dating as one of the qualifying relationships often include factors that are considered when determining if a dating relationship exists. *See id.* (describing various requirements that states have created to help define what qualifies as an intimate relationship). For example, in the Vermont statute that defines a dating relationship, the factors include, “(A) the nature of the relationship; (B) the length of time the relationship has existed; (C) the frequency of interaction between the parties; [and] (D) the length of time since the relationship was terminated, if applicable.” VT. STAT. ANN. tit. 15, § 1101(a) (2012).

54. *See* Klein & Orloff, *supra* note 47, at 1080 (“Most jurisdictions provide form pleading to facilitate the process of petitioning for a protection order.”).

55. Each state has its own statute containing the requirements for obtaining a temporary protection order. *See, e.g.*, COLO. REV. STAT. § 13-14-102(4)(a) (2012) (“A temporary civil protection order may be issued if the issuing judge or magistrate finds that an imminent danger exists to the person or persons seeking protection under the civil protection order.”); KAN. STAT. ANN. § 60-3106(b) (2012) (“Prior to the hearing on the petition and upon a finding of good cause shown, the court on motion of a party may enter such temporary relief orders . . . .”); N.M. STAT. ANN. § 40-13-4(A)(1) (2012) (“Upon the filing of a petition for order of protection, the court shall: immediately grant an ex parte temporary order of protection without bond if there is probable cause . . . that an act of domestic abuse has occurred. . . .”).

56. *See* Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 54 (2000) (describing the process of obtaining a civil protection order).

57. *See id.* (providing the steps of obtaining a civil protection order).

58. *See* NAT'L CTR. ON PROTECTION ORDERS & FULL FAITH & CREDIT, PROTECTION ORDER DURATIONS MATRIX (2012), <http://www.fullfaithandcredit.org/files/bwjp/files/State%20Protection%20Order%20Duration%20Matrix%20%287-2012%29.pdf> [hereinafter PROTECTION ORDER DURATIONS MATRIX] (listing the

Once the initial order is issued, the petitioner needs to appear in court again to receive her final protection order.<sup>59</sup> At this hearing, the respondent has the opportunity to refute any of the claims and present evidence demonstrating that the order is inappropriate.<sup>60</sup> For a final order, most states only require the petitioner to show by a preponderance of the evidence that the respondent abused the petitioner in some way and the abuse is likely to occur again.<sup>61</sup> If the respondent does not appear at the hearing, the temporary order can be extended for a specified amount of time, or a final order can be put in place without the respondent's presence.<sup>62</sup> This final order can last from one to five years,<sup>63</sup> with some states offering permanent orders, meaning the respondent is indefinitely prohibited from any contact with the petitioner.<sup>64</sup>

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duration of the various types of protection orders that can be issued in each state).

59. See Waul, *supra* note 56, at 54 (“The petitioner then must return to court to obtain the permanent order . . . and participate in a hearing where the respondent has the opportunity to challenge the CPO [civil protection order] request.”).

60. See *id.* (describing the options available to the defendant in refuting an order for protection).

61. See *id.* (describing the process of obtaining a civil protection order); A.B.A. COMM’N ON DOMESTIC VIOLENCE, STANDARDS OF PROOF FOR DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) BY STATE (2007), [http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/Standards\\_of\\_Proof\\_by\\_State.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/Standards_of_Proof_by_State.authcheckdam.pdf) [hereinafter STANDARDS OF PROOF] (providing the standards of proof for each state and the corresponding statute).

62. See Klein & Orloff, *supra* note 47, at 1079 (“Courts also issue protection orders after full hearing, by consent, or by default.”).

63. See MASS. GEN. LAWS ANN. ch. 209A, § 3 (2012) (“Any relief granted by the court shall be for a fixed period of time not to exceed one year.”); MINN. STAT. § 518B.01, subd. 6(b) (2012) (“Any relief granted by the order for protection shall be for a period not to exceed two years, except when the court determines a longer period is appropriate.”); N.Y. FAM. CT. ACT § 842 (McKinney 2012) (“A[n] . . . order of protection may be effective for a maximum period of two years or, when aggravating circumstances are found, may be effective for a maximum period of five years.”).

64. See ALA. CODE § 50-5-7(d)(2) (2012) (“Any final protection order is of permanent duration unless otherwise specified or modified by a subsequent court order.”); CAL. FAM. CODE § 6345(a) (West 2012) (“These orders may be renewed . . . either for five years or permanently.”); DEL. CODE ANN. tit. 10, § 1045(f) (“[T]he Court may grant no contact relief . . . for as long as reasonably necessary . . . up to and including the entry of a permanent order of the Court.”).

### *B. Relief Available*

Once a petitioner meets her burden of showing abuse, the court has broad authority to issue various forms of relief that it determines necessary.<sup>65</sup> Depending on the state, relief can either be issued through the temporary order, or the petitioner may have to wait until the final protection order is issued to receive the full relief available.<sup>66</sup>

This Note focuses on the relief offered by a no-contact provision, which forbids the respondent from making any contact with the petitioner, whether or not the contact involves abuse.<sup>67</sup>

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65. See KIESEL, *supra* note 46, at 1100 (“The scope of the relief that may be ordered . . . is very broad. The court has the power to do what is necessary to stop the family violence and keep the victims safe.”); NAT’L CTR. ON PROTECTION ORDERS & FULL FAITH & CREDIT, PROTECTION ORDER RELIEF MATRIX (2012), [http://www.bwjp.org/files/bwjp/files/Protection\\_Order\\_Relief\\_Matrix\\_2012.pdf](http://www.bwjp.org/files/bwjp/files/Protection_Order_Relief_Matrix_2012.pdf) (listing the duration of the various types of protection orders that can be issued in each state). The respondent may be required to surrender his firearms to police; continue paying utility bills; move out of the shared home; refrain from using a shared vehicle; stay away from the school or day care center of a shared child; refrain from disposing of shared personal property; or comply with one of the many other injunctions that are available depending on the state statute. See *id.* (listing some of the nonobvious types of injunctions that a court can issue).

66. See PROTECTION ORDER DURATIONS MATRIX, *supra* note 58 (listing the duration of the various types of protection orders that can be issued in each state). Once a no-contact order is issued the court may provide law enforcement officers to assist the petitioner in removing the petitioner’s or respondent’s possessions from a shared household to avoid any further abuse or a violation of the order. See MONT. CODE ANN. § 40-15-201 (2011) (providing that the court may “direct[] an appropriate law enforcement officer to accompany the petitioner to the residence to ensure that the petitioner safely obtains possession of the residence, automobile, or other essential personal property or to supervise the petitioner’s or respondent’s removal of essential personal property”); N.J. STAT. ANN. § 2C:25-29 (West 2012) (stating that the court may issue “an order requiring that a law enforcement officer accompany either party to the residence or any shared business premises to supervise the removal of personal belongings in order to ensure the personal safety of the plaintiff when a restraining order has been issued”).

67. See ARK. CODE ANN. § 9-15-205 (2012) (providing that one form of relief the court can issue is an order “prohibit[ing] the abusing party directly or through an agent from contacting the petitioner or victim except under specific conditions named in the order”); IDAHO CODE ANN. § 39-6306 (2012) (listing one form of relief as preventing the respondent “from . . . telephoning, contacting, or otherwise communicating, directly or indirectly, with the petitioner and any designated family member or specifically designated person of the respondent’s

Judges see this as the most effective form of preventing further abuse because it does not merely prevent abuse of the victim, but instead prevents any contact whatsoever.<sup>68</sup> The no-contact provision is considered a crucial advantage of a protection order because it prevents the abuser from luring the victim back into the relationship by sending flowers or notes that will make the victim believe the abuser is going to change his behavior.<sup>69</sup> These provisions are especially relevant because the abuser's slightest communication can result in a violation of the no-contact order, even in situations where the victim initiates the contact.<sup>70</sup>

### *C. Duration of the Order*

Once an order is issued, the order lasts for a set duration.<sup>71</sup> Following this time period, the petitioner can renew the order by offering sufficient evidence that the order is still necessary to prevent abuse.<sup>72</sup> If the petitioner decides the order is no longer

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household"); D.C. CODE § 16-1005(c)(4) (2012) (stating that the order can include a provision that "[r]equires the respondent to stay away from or have no contact with the petitioner and any other protected persons or locations").

68. See *A Roundtable Discussion on Domestic Violence*, HOUS. LAW., Sept./Oct. 2004, at 24, 27 (quoting Judge Davies of the of the 177th Criminal District Court of Harris, Texas, as stating, "I will make a condition of that bail that they have no contact. . . . I don't care if it's a love note—you know you're not going to send flowers[, y]ou're not going to have any contact or communication whatsoever").

69. See *id.* ("The 'no contact' order has a huge advantage because it means he can't call her and tell her he loves her, and beg her to come back and do the honeymoon thing.").

70. See *State v. Lucas*, 795 N.E.2d 642, 643 (Ohio 2003) (finding a respondent in violation of a protection order even though the petitioner invited the respondent over to her home to celebrate their child's birthday).

71. See *supra* note 63 and accompanying text (listing the average length of a protection order).

72. See DEL. CODE ANN. tit. 10, § 1045 (2012) ("Orders may be extended only after the Court finds by a preponderance of the evidence that domestic violence has occurred since the entry of the order, a violation of the order has occurred, if the respondent consents to the extension of the order or for good cause shown."); IOWA CODE ANN. § 236.5(2) (2012) ("The court may extend the order if the court, after hearing at which the defendant has the opportunity to be heard, finds that the defendant continues to pose a threat to the safety of the victim, persons residing with the victim, or members of the victim's immediate

necessary before the expiration of the order, she needs to formally have the court rescind the order.<sup>73</sup>

Sometimes petitioners will decide to reinitiate their relationship with their abuser without going through the necessary steps to officially remove the order. This places the respondent at immediate risk of being held in violation of the order because most states do not consider reconciliation or the petitioner's invitation as a defense to a violation.<sup>74</sup> There are some courts that have found reconciliation and a couple's return to their pre-protection order relationship renders the protection order null, removing the risk of penalty from both parties.<sup>75</sup>

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family."); ME. REV. STAT. tit. 19-A, § 4007(2) (2012) ("[T]he court may extend an order, upon motion of the plaintiff, for such additional time as it determines necessary to protect the plaintiff or minor child from abuse.").

73. See D.C. CODE § 16-1005 (2012) (stating that a judicial officer "may, upon motion of any party to the original proceeding, extend, rescind, or modify the order for good cause shown"); N.M. STAT. ANN. § 40-13-6 (2012) ("Injunctive orders shall continue until modified or rescinded upon motion by either party or until the court approves a subsequent consent agreement entered into by the parties."); OKLA. STAT. ANN. tit. 22, § 60.4 (2012) (stating that a protection order will last five years "unless extended, modified, vacated or rescinded upon motion by either party or if the court approves any consent agreement entered into by the plaintiff and defendant").

74. See *Dixon v. State*, 869 N.E.2d 516, 520 (Ind. Ct. App. 2007) (determining that an invitation by the petitioner is not a defense in respondent's violation of a protection order); *City of N. Olmsted v. Bullington*, 744 N.E.2d 1225, 1227 (Ohio Ct. App. 2000) ("When the General Assembly enacted this law, it clearly intended that the victim could not by his or her action alter the effect of the law. The General Assembly intended that no victim could waive the effects of the [protection order]."); *State v. Dejarlais*, 969 P.2d 90, 92 (Wash. 1998) (finding that "consent should not be a defense to violating a domestic violence protection order").

75. See *Mohamed v. Mohamed*, 557 A.2d 696, 698 (N.J. App. Div. 1989) (finding a protection order void because "the domestic violence action [was] resolved by the parties, [and] the reconciliation should end the matter [because t]he reconciliation of the parties destroys the viability of a domestic violence order").

*D. Violation of the Order**1. The Violation*

Once the protection order is put in place, a violation occurs when the respondent disregards the provisions of the order, typically through contact with the petitioner.<sup>76</sup> The key requirement for a violation to result in a penalty is that the forbidden contact must be reported to the police.<sup>77</sup> Without reporting, the abuser will not bear any penalty because a protection order is not a self-enforcing mechanism.<sup>78</sup> For a violation to occur, the victim must report the contact or abuse, and a formal arrest must occur.<sup>79</sup>

Until recently, police officers have been criticized for their inadequate response to calls of domestic abuse and protection order violations.<sup>80</sup> This lack of officer response largely relied on “an unspoken assumption that internal family disputes largely fell outside of their area of responsibility.”<sup>81</sup> In recent years there

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76. See Catherine F. Klein & Leslie E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1095 (1993) (“Offenders may routinely violate orders, if they believe there is no real risk of being arrested . . . . For enforcement to work, the courts need to monitor compliance, victims must report violations, and, most of all, police, prosecutors, and judges should respond sternly to violations . . . .”).

77. See *id.* (noting that without a report of a violation there is no way for a violation to occur).

78. See *id.* (explaining that there is no method for verifying whether an abuser has come into contact with the protected party).

79. See *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 767 (2005) (finding that an individual does not “have a property interest in police enforcement of [a] restraining order” and therefore it is up to the discretion of the police to enforce the order).

80. See JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM* 46 (1999) (detailing the failed responses of police officers in making arrests, specifically noting police training materials which recommended avoiding arrest if possible); Eve S. Buzawa & David Hirschel, *Evolution of the Police Response to Domestic Violence*, in *VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS* 69, 69–70 (Evan Stark & Eve S. Buzawa eds., 2009) (describing the lack of police enforcement of domestic abuse situations up until the past 30 years); Damon Phillips, *Civil Protection Orders: Issues in Obtainment, Enforcement and Effectiveness*, 61 J. MO. B. 29, 33 (2005) (providing examples of where a police officer’s failure to act resulted in drastic consequences).

81. Buzawa & Hirschel, *supra* note 80, at 69.



has been a shift to better police enforcement, with many states now having mandatory-arrest policies for any incident that involves domestic abuse.<sup>82</sup> Additionally, many officers are now better equipped for dealing with a violation of a protection order because of increased training and education on enforcing orders.<sup>83</sup> In furtherance of this mission, many states now require the police officer to inform the victim of the legal rights and services that are available to victims of abuse in their jurisdiction.<sup>84</sup>

## 2. Processing the Violation

Once a violation has been reported and the abuser has been arrested, the violation can result in both civil and criminal penalties.<sup>85</sup> Civilly, the respondent may be held in contempt of court; criminally, the respondent may face criminal penalties depending on the state statute.<sup>86</sup> In the majority of states, the criminal penalty is the primary method for truly penalizing a defendant, with “the overwhelming majority treat[ing] the

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82. See A.B.A. COMM’N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE ARREST POLICIES BY STATE (2007), [http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Domestic\\_Violence\\_Arrest\\_Policies\\_by\\_State\\_11\\_07.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.auth_checkdam.pdf) (listing each state’s arrest policy, typically having a mandatory arrest or pro-arrest policy).

83. See NAT’L CTR. ON PROTECTION ORDERS & FULL FAITH & CREDIT, PROTECTING VICTIMS OF DOMESTIC VIOLENCE: A LAW ENFORCEMENT OFFICER’S GUIDE TO ENFORCING PROTECTION ORDERS NATIONWIDE 1–20 (2006), [http://www.bwjp.org/files/bwjp/files/LawEnforcement\\_031411\\_Web.pdf](http://www.bwjp.org/files/bwjp/files/LawEnforcement_031411_Web.pdf) (providing law enforcement officers with a pamphlet on the proper process for enforcing a protection order).

84. See, e.g., MO. ANN. STAT. § 455.080 (2012) (“The officer at the scene of an alleged incident of abuse shall inform the abused party of available judicial remedies for relief from adult abuse and of available shelters for victims of domestic violence.”).

85. See Robin R. Runge, *ABA Standards Safeguard Domestic Violence, Sexual Assault, and Stalking Victims*, 26 CHILD. L. PRAC. 142, 142 (2007) (“The court may order civil remedies including temporary custody, child support, and restitution, as well as require the respondent to refrain from further criminal contact. Moreover, violations of the order may be criminally or civilly enforced.”).

86. See *id.* (explaining possible civil and criminal penalties that may arise from the violation of an order).

violation as a misdemeanor.”<sup>87</sup> For some states, the violation of the order is even more serious, resulting in a felony in Minnesota, Missouri, North Dakota, Ohio, Texas, and Washington.<sup>88</sup>

The victim has two paths she can take to penalize the abuser: (1) personally file a form for civil contempt;<sup>89</sup> or (2) alert local law enforcement of the violation and have the district attorney prosecute the violation.<sup>90</sup> If the victim chooses the civil path, she is responsible for filing the form for civil contempt, where she recounts the violation of the order and attaches any police report of the violation if available.<sup>91</sup> Criminally, a violation will be prosecuted if the respondent disobeys the order, and the petitioner alerts law enforcement, resulting in the respondent’s arrest.<sup>92</sup> If a violation occurs without an arrest, the victim can

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87. See CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* 541 (Robert C. Clark et al., eds., 2001) (explaining the process for enforcing a protection order).

88. *Id.*

89. See OR. JUD. DEP’T, *WHAT YOU CAN DO WHEN YOUR MULTNOMAH COUNTY FAMILY ABUSE PREVENTION ACT (FAPA) RESTRAINING ORDER HAS BEEN VIOLATED* 2–5 (rev. ed. 2010), <http://courts.oregon.gov/multnomah/docs/FamilyCourt/WhatYouCanDoIfYourRestrainingOrderIsViolated.pdf> [hereinafter *WHAT YOU CAN DO*] (providing a step by step instruction of the process for punishing a violation of an order for protection in Oregon); *A Guide to Protection Orders, The Court and Community Resources*, COLUMBUS CITY ATTORNEY, <http://www.columbuscityattorney.org/prosecution-guidetoprotection.aspx> (last visited Jan. 31, 2014) (listing the steps that will occur in assessing a violation of a protection order) (on file with the Washington and Lee Law Review).

90. See *WHAT YOU CAN DO*, *supra* note 89 (explaining the process of alerting law enforcement of a violation and working with them to have the abuser penalized).

91. Many organizations that protect abused women offer services or online instructions to assist these women in filling out the civil contempt form. See *END VIOLENT ENCOUNTERS, HOW TO FILE A MOTION TO SHOW CAUSE FOR A PERSONAL PROTECTION ORDER VIOLATION*, <http://www.eveinc.org/main/images/ppo/motiontoshowcause.pdf> (providing detailed instructions on how to fill out a civil contempt form in Michigan). The form is fairly basic, requiring that the victim show cause that there was a violation and providing the respondent an opportunity to appear in court to demonstrate why they should not be held in contempt. See *Contempt Citation and Order to Show Cause*, STATE OF COLO., JUD. BRANCH, <http://www.courts.state.co.us/Forms/renderForm.cfm?Form=228> (last visited Jan. 31, 2014) (providing an example of Colorado’s show cause form for contempt of court) (on file with the Washington and Lee Law Review).

92. See sources cited *supra* note 89 (offering instructions on how to report a violation of a protection order and receive civil and criminal remedies from the

reach out to local enforcement or the district attorney to report the violation and start the process for prosecution.<sup>93</sup>

### *III. The Injustice of the Current System*

#### *A. Disparity in Enforcement*

While a protection order is traditionally obtained by one party against another, the violation of the order does not always occur in a simple manner where there is only one-sided contact and abuse. Currently, a violation of a protection order places all of the emphasis on the abuser's role in a violation and essentially ignores the role of the protected party.<sup>94</sup> The majority of courts have found that a protected party's role in the violation of a protection order will not be considered, even in cases of mutual abuse, placing all the blame on the respondent who violated the order.<sup>95</sup> This ignorance of the protected party's role allows the victim to use the structure of the order for enticement, rather than protection, creating an unintended negative penalty for a respondent who is lured into a violation.

In analyzing mandatory arrest policies, Keith Guzik has recognized a trend of women intentionally calling their abusers to

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court).

93. See sources cited *supra* note 91 (providing guides on reporting a violation of a protection order).

94. Many scholars argue that this should always be the case because of the fragile situation that women are already in by obtaining a protection order. One author, Sally Goldfarb, specifically looked at situations where a victim was penalized for her actions in "enticing" her abuser, and characterized this penalty as inappropriate because of the difficulties the protected party faces. See Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1528–29 (2008) (noting the many penalties that a victim might bear because of her role in the violation of the protection order).

95. See *State v. Lucas*, 795 N.E.2d 642, 643 (Ohio 2003) (illustrating a situation where there was mutual abuse, sending the male to the hospital with a fractured elbow, and the female with a bruised nose). There is the possibility that the woman inflicted these more severe injuries in self-defense, but the facts are not clear on that issue. *Id.*; see also *City of N. Olmsted v. Bullington*, 744 N.E.2d 1225, 1229 (Ohio Ct. App. 2000) ("[T]he victim may not be charged as an aider and abetter in the violation of a TPO by an offender.").

lure them into violating the order.<sup>96</sup> Guzik quoted one prison guard stating: “That happens all the time. Girls call a guy over when a no-contact order is in effect. He comes over and she calls the cops.”<sup>97</sup> The circumstances of this type of violation are distinctly different from a scenario where the respondent shows up uninvited and beats the protected party.<sup>98</sup> The law needs to provide a mechanism for handling these violations where the woman’s role in the violation cannot and should not go unnoticed.

This problem of disparate treatment also arises where the parties have reconciled, no abuse has occurred, the parties have not sought legal assistance, and yet, the respondent is still charged with a violation. For example, in May of 1998, Frank and Laura Bullington were pulled over for a routine traffic violation and upon identification of the passengers the police realized that Laura had a protection order against her husband.<sup>99</sup> Not knowing the rules and procedures for protection orders, the police arrested both passengers for violation of the order.<sup>100</sup> Eventually, the court convicted Frank for violating the protection order, but found the wife could not be charged with violating the protection order as an aider and abetter.<sup>101</sup> Here, a violation resulted without a report of abuse, and without either party complaining, but only the respondent was penalized for the reconciliation of the parties.<sup>102</sup> Without a legal option to assess these types of violations, the court system is neglecting to understand the circumstances that lead to the violation and the culpability of the parties involved.

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96. See GUZIK, *supra* note 38, at 44 (exploring the consequences of mandatory arrest policies and their reliance on gender stereotypes).

97. *Id.* (internal quotation marks omitted).

98. The illustrations at the beginning of this Note provide another example of a situation where enforcing the violation would conflict with the purpose of the order. *Supra* notes 1–20 and accompanying text.

99. *Bullington*, 744 N.E.2d at 1225.

100. *Id.* at 1226.

101. See *id.* at 1229 (“Here, the victim of a TPO is a member of the protected class designated for protection from violent abusers. Consequently, the victim may not be charged as an aider and abetter in the violation of a TPO by an offender.”).

102. *Id.*

A violation of a protection order is a serious offense that can result in severe penalties for the respondent.<sup>103</sup> While the penalty is justified in the majority of cases, there is the small minority of cases where courts place the blame on the respondent for procedural reasons, rather than the culpability of the individuals.

### *B. The Rationale Behind the Protection*

The primary reason for refusing to consider the role of the woman in violating a protection order is rooted in the woman's vulnerable mental state in an abusive relationship.<sup>104</sup> Lenore Walker's theory on the cycle of abuse highlights the fragile state of an abused woman, which divides an abusive relationship into three stages: "the tension building phase; the explosive or acute battering incident; and the calm loving respite."<sup>105</sup> This cycle illustrates the battered woman's belief that her abuser is going to get better, giving her motivation to remain in the abusive relationship because of the periods of the cycle where he acts affectionately.<sup>106</sup> This cycle argues that once a man beats his wife, it will almost always happen again, resulting in continued abuse and manipulation of the battered woman.<sup>107</sup>

In the case of *Stevenson v. Stevenson*,<sup>108</sup> the court relied on this pattern of abuse as the reason for denying a victim's request

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103. See *supra* notes 87–88 and accompanying text (noting that the typical criminal penalty for a violation is a misdemeanor, with some states considering the violation a felony).

104. See LENORE E. WALKER, *THE BATTERED WOMAN* 55–70 (1979) (explaining the cycle of violence and the fragile physical and psychological state that women are in).

105. *Id.* at 55.

106. See *id.* at 69 (describing a woman's tendency to want to continue the relationship based on the one phase of the cycle where her abuser treats her with love and respect).

107. See *id.* ("Most women report that before they know it, the calm, loving behavior gives away to little battering incidents again."); see also *Stevenson v. Stevenson*, 714 A.2d 986, 994–95 (N.J. Ch. 1998) ("A period of relative calm may last as long as several months, but in a battering relationship the affection and contrition of the batterer will eventually fade, and phases one and two, the 'tension-building' phase and the 'acute battering incident' phase, will start anew.").

108. 714 A.2d 986, 994–95 (N.J. Ch. 1998) (finding that reconciliation of the

to remove an order she had received against her abuser.<sup>109</sup> The court announced that “[a] period of relative calm may last as long as several months, but in a battering relationship the affection and contrition of the batterer will eventually fade, and phases one and two, the ‘tension-building’ phase and the ‘acute battering incident’ phase, will start anew.”<sup>110</sup> The court then rejected the petitioner’s request because the court found that the likelihood of further abuse was too great to allow the petitioner to re-enter the relationship.<sup>111</sup>

Due to the vulnerable relationship that abusive couples face, it is not uncommon that both parties will want to reconcile.<sup>112</sup> If the parties choose to do so, they must receive a formal order from the court to remove the preexisting protection order before they should take too many steps in continuing their relationship.<sup>113</sup> If the court decides to remove the protection order, the parties can legally reunite; however, if the court decides not to remove the order, the parties will be prevented from reconciling.<sup>114</sup> For

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couple is not sufficient to merit the removal of an order for protection).

109. *See id.*

When considering a victim’s application to dissolve, and whether there is good cause to do so, a court must determine whether objective fear can be said to continue to exist, and also whether there is a real danger of domestic violence recurring, in the event the restraining order is dissolved.

110. *Id.* at 993.

111. *See id.* (finding that a protection order could not be removed because of “the uncontroverted evidence of defendant’s brutality against his wife, his history of violence both within and without the domestic arena, [and] his alcohol abuse and uncontrolled assaultive behavior when under the influence . . .”).

112. *See* Laurie S. Kohn, *What’s So Funny About Peace, Love, and Understanding? Restorative Justice As a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 552–61 (2010) (looking at how reconciliation of a couple can be used to the advantage of the domestic violence prevention system).

113. *See* Robert F. Friedman, *Protecting Victims from Themselves, but Not Necessarily from Abusers: Issuing a No-Contact Order over the Objection of the Victim Spouse*, 19 WM. & MARY BILL RTS. J. 235, 245 (2010) (“Prior to the expiration of the order . . . the party protected by the order may petition the court to vacate the order.”).

114. *See* *Stevenson v. Stevenson*, 714 A.2d 986, 994–95 (N.J. Ch. 1998) (finding that the dissolution of an order of protection is up to the discretion of the judge and refusing to remove the order even after the petitioner requested dissolution); Tamara L. Kuennen, “No-Drop” Civil Protection Orders: Exploring

example, in the case of *Stevenson*, the court refused a victim's petition to remove an order of protection in order for the court to protect the victim from further abuse, even though she was the one who petitioned for the removal of the order.<sup>115</sup>

Even without reconciliation, the precarious state of an abusive relationship makes it difficult for an abuser to resist the persistent contact that a victim might initiate; the abuser may reconnect with the victim and fully intend to cease abusing her, but the abusive behavior may still recommence.<sup>116</sup> The abusers in these situations do not deserve to go unpenalized, but they do deserve a proper hearing that places some emphasis on the role that the victim played in provoking a violation.<sup>117</sup>

#### IV. *The Legal System's Approach to the Problem*

The woman's role in violating a protection order has not gone unnoticed in the legal community, but there is no consensus on exactly what type of judicial weight should be given to her

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*the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 44 (2007) ("The quasi-criminal nature of CPOs, as compared with traditional civil injunctions, may cause a judge to take a more interventionist, rather than deferential, approach.").

115. See *Stevenson*, 714 A.2d at 995 ("This court will not be an accomplice to further violence by this defendant, by wholly dissolving at this point the restraints that have been entered against him. Accordingly, and for lack of good cause shown, plaintiff's application to dissolve the Final Restraining Order is denied.").

116. See WALKER, *supra* note 104, at 55–70 (describing the cycle of abuse where a loving relationship turns violent without provocation).

117. See Goldfarb, *supra* note 94, at 1528–29 (describing some court's decisions to consider the woman's role in the violation, resulting in women being "charged as accessories for 'enticing' the abuser to violate the order; [and] . . . such contact [being] considered . . . a mitigating factor when sentencing the abuser on a criminal charge"). Much of the discretion in how to enforce a protection order is still left to the judge, and some judges have decided to take it into their own hands when they feel that a woman deserves to be penalized for her actions in communicating with her abuser. See Francis X. Clines, *Judge's Domestic Violence Ruling Creates an Outcry in Kentucky*, N.Y. TIMES, Jan. 8, 2002, at A14, available at <http://www.nytimes.com/2002/01/08/us/judge-s-domestic-violence-ruling-creates-an-outcry-in-kentucky.html> (recounting a judge's decision to fine two victims of domestic abuse for ignoring the protection orders they had received against their abusers).

continued contact with her abuser. In Diane Kiesel's casebook entitled *Domestic Violence: Law, Policy, and Practice*, she recognizes the problem in weighing the woman's role in the violation, but does not provide a solution.<sup>118</sup> Kiesel asks the question: "[S]hould a judicial sanction be imposed where a victim invites her abuser to ignore the protective order and is subsequently injured or abused at his hands?"<sup>119</sup> Both law enforcement and the court system have asked this same question, but there is no single answer to how the victim's role in the violation should be treated.

Some states have attempted to answer this question by recognizing and penalizing the woman for her role in the respondent's violation of a protection order in four ways: (1) charging the woman as an aider and abetter in the violation;<sup>120</sup> (2) rendering the order null because of reconciliation;<sup>121</sup> (3) fining the woman for her continued contact with the abuser;<sup>122</sup> and (4) issuing mutual protection orders.<sup>123</sup> The next subparts will look at the application of these methods, and some of the criticism surrounding them.

#### A. *The Protected Party as an Aider and Abetter*

Only a few state courts have addressed the issue of whether a petitioner can be charged as an aider and abetter in the violation of an order protecting her. In *Henley v. Iowa District Court for Emmet County*,<sup>124</sup> the court determined that the petitioner's decision to hide her abuser in her bedroom was too

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118. See KIESEL, *supra* note 46, at 172 (examining some of the issues that are raised by protection orders in the criminal context of the law).

119. *Id.*

120. *Infra* Part IV.A.

121. *Infra* Part IV.B.

122. *Infra* Part IV.C.

123. *Infra* Part IV.D.

124. 533 N.W.2d 199 (Iowa 1995). In *Henley*, the court found that a petitioner in a protection order can be held in contempt of court for assisting her abuser in violating a no-contact order. *Id.* at 199. Henley was then arrested and held in contempt for violating the order, and later was put on probation for six months. *Id.*



egregious for her to go unpenalized.<sup>125</sup> The violation of the order occurred after police officers noticed the abuser's car outside of Henley's house, and went to her door to ensure that everything was okay.<sup>126</sup> The police officers then conducted a search of the home and found Henley's abuser "under some blankets in the bedroom."<sup>127</sup> This Iowa court determined that Henley was an accomplice to the violation, and found her in contempt of court for her actions.<sup>128</sup> Here, the court recognized the need to protect the victim of domestic abuse, but also recognized that this victim's actions could not go ignored simply because she was previously the victim.<sup>129</sup> The court stated, "[a]lthough we are sympathetic to Henley's plight as a victim, her willful disregard for her own safety cannot deter us from upholding an enforceable order for her protection."<sup>130</sup> This statement highlights the Judiciary's refusal to ignore the actions of the victim in causing a violation of an order.<sup>131</sup>

Other state courts have taken the opposite approach, explicitly rejecting the idea of penalizing the petitioner.<sup>132</sup> In *State v. Lucas*,<sup>133</sup> an Ohio court decided that the protected party is immune from prosecution for complicity.<sup>134</sup> The court looked at the legislative intent of the statute, and determined that "[t]he General Assembly has made an invitation by the petitioner for the respondent to violate the terms of a protection order irrelevant to a respondent's guilt."<sup>135</sup> The court recognized that the protected party actually inflicted more damage on her

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125. *Id.*

126. *Id.* at 201.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 203.

131. *Id.*

132. *See State v. Lucas*, 795 N.E.2d 642, 648 (Ohio 2003) (finding that a petitioner can never be convicted of aiding and abetting in the violation of her own order).

133. 795 N.E.2d 642 (Ohio 2003).

134. *Id.*

135. *Id.*

husband than she herself was subject to,<sup>136</sup> but determined that this fact was irrelevant because of the need to protect the more typical situations, where the victim suffers more harm.<sup>137</sup> Moreover, Ohio's state statute goes even further by explicitly stating that "the [protection order] cannot be waived or nullified by an invitation to the respondent from the petitioner or other family or household member to enter the residence."<sup>138</sup>

Ohio is not alone in its refusal to penalize the victim as an aider and abetter in a protection order violation. Indiana courts have also determined that an individual cannot be found to have aided and abetted in the violation of an order that was established for her own protection.<sup>139</sup> Because protection orders are independently governed by each state's legislature, these differences in state penalties can create problems when the protected party crosses state lines.<sup>140</sup> Additionally, charging the victim as an aider and abetter is one of the most controversial aspects of protection orders because of the possible chilling effect it could have on the victim reporting the abuse, creating the risk of the protection order being deemed useless.<sup>141</sup>

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136. See *id.* at 647–48 (“[T]his case is different from most. Had Betty Lucas not gotten the better of her husband, this case would probably not be here.”).

137. See *id.* at 647 (finding that in a typical protection order violation, the “protected party receives the brunt of the injuries”).

138. OHIO REV. CODE ANN. § 3113.31(E)(7)(a) (West 2012).

139. See *Patterson v. State*, No. 34A02–1203–CR–235, 2012 WL 6478364, at \*3 (Ind. Ct. App. Dec. 14, 2012) (finding that the general assembly did not intend for the petitioner to be held in violation of the order, even if she invited the respondent to come into contact); *Dixon v. State*, 869 N.E.2d 516, 520 (Ind. Ct. App. 2007) (“[W]e do not consider whether the victim knowingly ignored the protective order but, rather, whether the defendant knowingly violated the protective order. The protective order is between [the abuser] and the State, not [the abuser] and [the victim].”).

140. See *infra* Part V.D (explaining how protection orders are enforced when a protected party crosses state lines).

141. See Adam Liptak, *Ohio Case Considers Whether Abuse Victim Can Violate Own Protective Order*, N.Y. TIMES, May 30, 2003, at A18 (quoting Cleveland lawyer Alexandria M. Ruden as stating, “[t]his would have an absolute chilling effect on domestic violence victims going to the police and going to prosecutors” when asked about the effect of a victim being charged with aiding and abetting her abuser in violating the order).

### B. Reconciliation of the Parties

Some courts looked to remedy the problem by considering the reconciliation of the parties as grounds to nullify an existing order. In *Mohamed v. Mohamed*,<sup>142</sup> a New Jersey appellate court found that, “[t]he reconciliation of the parties destroys the viability of a domestic violence order” because the parties have settled the matter themselves outside the boundaries of the law.<sup>143</sup>

Although this decision occurred before the passage of New Jersey’s Prevention of Domestic Violence Act of 1991,<sup>144</sup> which enhanced the power of law enforcement and the judiciary,<sup>145</sup> New Jersey has continued to use reconciliation as a consideration in determining whether a protection order violation has occurred.<sup>146</sup> In the later New Jersey case, *Carfagno v. Carfagno*,<sup>147</sup> the court created eleven factors that can be considered in determining whether a respondent’s request for dissolution of a protection order should be granted.<sup>148</sup> The factors are:

- (1) whether the victim consented to lift the restraining order;
- (2) whether the victim fears the defendant; (3) the nature of

142. 555 A.2d 696 (N.J. App. Div. 1989). In *Mohamed*, the court determined that a protection order was void because “the domestic violence action [was] resolved by the parties, [and] the reconciliation should end the matter[, because t]he reconciliation of the parties destroys the viability of a domestic violence order.” *Id.* at 698.

143. *Id.*

144. N.J. STAT. ANN. § 2C:25-17 (West 1991).

145. See *A.B. v. L.M.*, 672 A.2d 1296, 1298 (N.J. App. Div. 1996) (“[T]he law of domestic violence was substantially revised with the passage of the 1991 Act. Police and judicial responsibilities were enhanced . . .”).

146. See 12 N.J. PRAC., FAMILY LAW & PRACTICE § 47.21 (“A victim who reconciles with a defendant adjudicated of having committed domestic violence, by resuming their pre-complaint relationship, generally destroys the viability of a restraining order and serves as a de facto vacation of the order.”).

147. 672 A.2d 751 (N.J. Ch. Div. 1995). The court in *Carfagno* did not dissolve the protection order pursuant to the defendant’s petition. See *id.* at 760 (applying eleven factors for determining whether a protection order should be dissolved per a defendant’s petitioner and finding that the protection order should not be dissolved in this case).

148. See *id.* at 756–57 (noting that the factors for consideration “need to be weighed qualitatively, and not quantitatively, to determine whether defendant has met the required burden”).

the relationship between the parties today; (4) the number of times that the defendant has been convicted of contempt for violating the order; (5) whether the defendant has a continuing involvement with drug or alcohol abuse; (6) whether the defendant has been involved in other violent acts with other persons; (7) whether the defendant has engaged in counseling; (8) the age and health of the defendant; (9) whether the victim is acting in good faith when opposing the defendant's request; (10) whether another jurisdiction has entered a restraining order protecting the victim from the defendant; and (11) other factors deemed relevant by the court.<sup>149</sup>

This test allows New Jersey's courts to take a complete survey of the relationship between the abuser and the protected party when assessing the removal of the order.<sup>150</sup> Additionally, this test allows the *respondent* to petition the court to have an order removed if he feels that the two parties have reconciled and should be able to continue their relationship.<sup>151</sup> With this test, the couple can come back into contact, reconcile, and petition the court without the respondent violating the protection order.<sup>152</sup>

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149. *Id.* Other New Jersey decisions have created factors to consider before granting a petition for dissolution because of reconciliation. The factors used in *Torres v. Lancellotti* include:

- 1) The previous history of domestic violence between the plaintiff and defendant; . . .
- 2) The existence of immediate danger to person or property;
- 3) The financial circumstances of the plaintiff and defendant;
- 4) The best interests of the victim and any child;
- 5) In determining custody and visitation the protection of the victim's safety; and
- 6) The existence of a verifiable order of protection from another jurisdiction, as well as any proof of changed circumstances since the entry of the order.

*Torres v. Lancellotti*, 607 A.2d 1375, 1377 (N.J. Ch. Div. 1992).

150. *See Carfango*, 672 A.2d at 756–57 (providing the test for reconciliation in New Jersey).

151. *See id.* (noting that this test allows the defendant to petition the court for relief as long as he can satisfy the requirements of the test).

152. This will help prevent a violation from occurring in situations where no abuse was reported, but a violation occurred because of the specific circumstances. For example, in the case of Laura and Frank Bullington, neither party complained of abuse, rather a police officer discovered the protection order when he had the respondent pulled over for a routine traffic violation. *City of N. Olmstead v. Bullington*, 744 N.E.2d 1225, 1225 (Ohio Ct. App. 2000). Or, in the example where the police officers simply noticed the respondent's car outside of the petitioner's house and went inside to ensure that everything was okay. *Henley v. Iowa Dist. Court for Emmet Cnty.*, 533 N.W.2d 199, 201 (Iowa 1995).

The test does not remove the possibility of a violation, but instead provides a specific method for removing the protection order with a proper showing of reconciliation and a rehabilitated relationship.<sup>153</sup>

### *C. Fining the Protected Party*

Another approach to remedying the problem of victim enticement is to fine the petitioner for her continued contact with her abuser. In one Kentucky court the judge did just that, fining two women who had taken out protection orders against their abusers and then continued to contact them in violation of the order.<sup>154</sup> The women were fined the small amounts of \$100 and \$200, but the point of the fine was to signal to the women that they could not continue to contact their abuser and go unpenalized.<sup>155</sup> The judge was experienced in the domestic abuse docket, and was sick of seeing women who “awake . . . her at 2 a.m. with pleas for emergency orders. And then, within days . . . [come] back in her court—arm in arm with the men they say they fear.”<sup>156</sup>

This Kentucky court is not the only court that has become fed up with petitioners’ tendencies to reconnect with their abusers. In North Carolina courts, “some judges have taken to charging women a \$65 fee if they apply for a protective order then decide to drop the matter.”<sup>157</sup> The courts argue that the fine forces women to seriously consider the consequences of filing a protection order, rather than petitioning for an order one day and dropping the order the next. In reality, this type of fine creates a substantial

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153. See *Carfagno v. Carfagno*, 672 A.2d 751, 760 (N.J. Ch. Div. 1995) (providing the test for reconciliation in New Jersey).

154. See Clines, *supra* note 117 (“‘You can’t have it both ways,’ said Judge Megan Lake Thornton of Fayette County District Court in recently fining two women \$100 and \$200 respectively for obtaining protective orders forbidding their partners from contacting them, then relenting and contacting the men.”).

155. *Id.*

156. Stephanie Simon, *Judges Push for Abused to Follow the Law*, L.A. TIMES (Jan. 22, 2002), <http://articles.latimes.com/2002/jan/22/news/mn-24141> (last visited Feb. 4, 2014) (on file with the Washington and Lee Law Review).

157. *Id.*

disincentive to petitioning for a protection order, and would be extremely detrimental to women who are in a manipulative relationship and are unsure about how to seek relief. In contrast to the fines that the Kentucky judge imposed *after* the protected party came back into contact with her abuser,<sup>158</sup> this type of fine penalizes the victim before she has done anything deserving of a penalty.<sup>159</sup>

These fines assessed against the protected party have created a strong push from domestic violence advocates to ban these types of penalties.<sup>160</sup> Although the Kentucky judge saw no excuse for the women's actions, advocates for abused women argue that it is not so easy for a woman to simply cut off all contact with her abuser, and situational factors complicate the party's prior reliance on each other.<sup>161</sup> The executive director of the Kentucky Domestic Violence Association argued that simply cutting off all contact is impossible because "[t]hey may have children in common. It's pretty hard to say, 'Never speak again.' People have financial difficulties. They may love the partner. It's not an easy thing."<sup>162</sup> But, this argument only supports communications by the victim that have a legitimate purpose—such as arranging child visitation or bill payment—this does not justify communication by the victim that is wrongfully used to entice the respondent into a violation.

Additionally, these arguments made by battered women advocates can be easily applied in the reverse direction. When the respondent has cut off all contact with the petitioner, he is going to have to deal with the same problems of reliance and

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158. See text *supra* note 154 (assessing fines on women who continued to contact their abusers after they received protection orders against the men).

159. See text *supra* note 157 (noting that one court charges a \$65 fee when a petitioner chooses to drop her petition for a protection order).

160. See Clines, *supra* note 117 ("Judge Thornton's ruling has alarmed advocates for battered women, who plan to appeal it. The advocates say the finding goes beyond existing law. . .").

161. See *id.* (finding Judge Thornton's actions "unrealistic because some renewed contacts often prove unavoidable in domestic abuse cases, which involve economic and family dependency and other complications of daily living").

162. Simon, *supra* note 156.

dependence that the female is facing.<sup>163</sup> If the petitioner is continuing to contact her abuser without penalty, the difficulty is amplified, complicating the respondent's efforts to ignore her constant communication.<sup>164</sup> Although ending communication is difficult, if the party who took the proactive step of petitioning for the protection order is simply communicating to entice a violation from the respondent, the protection order is transformed from a device that protects the victim into a tool that can be used for retribution.

#### *D. Issuing a Mutual Protection Order*

Another legal method for coping with the problem of enticement in protection orders is to issue a mutual protection order (mutual order), prohibiting both parties from communicating with each other.<sup>165</sup> These orders prevent the woman from enticing her abuser because both parties bear a penalty for violating the order if they come into contact, meaning she will be in violation of the order as soon as she reaches out to the respondent.<sup>166</sup>

##### *1. Obtaining a Mutual Protection Order*

Mutual orders come in three main forms: (1) mutual petitioning and abuse; (2) mutual finding of abuse without a separate petition; and (3) agreement for a mutual order without a finding of abuse or separate petition. The first form arises when both parties petition the court for a protection order, presenting

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163. See *supra* notes 161–62 and accompanying text (describing the difficulties in completely cutting off communication between the couple).

164. See *supra* note 161 (explaining the domestic advocate's argument that completely ending contact with an abuser is too difficult for the typical battered woman).

165. See Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 266 (1996) ("A mutual protection order is an order entered against both parties, requiring both to abide by the restraints and other forms of relief in the civil protection order.").

166. *Id.*

evidence of abuse committed by both parties, and the court later issuing an order that prevents either party from making contact.<sup>167</sup> The second form occurs when one party has petitioned the court for an order of protection, but during the trial and presentation of facts there is a finding of abuse from both parties, resulting in the judge issuing a mutual protection order without a petition from both parties.<sup>168</sup> The last method arises when the victim simply agrees to a mutual order to stay away from the abuser, even without a showing of abuse.<sup>169</sup> This last form often seems the most appealing to the victim at the time but can result in the harshest penalties for the victim in the long run because she submits herself to civil and criminal liability without having committed any abuse.<sup>170</sup>

Many states have chosen to explicitly prohibit mutual orders,<sup>171</sup> only issuing a mutual order when both parties have

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167. See Elizabeth Topliffe, *Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders are Not*, 67 IND. L.J. 1039, 1053–54 (1992) (explaining the process available for attaining a mutual order).

168. See COLO. REV. STAT. ANN. § 13-14-102(18) (2012) (stating that a mutual order can be issued if both parties have met their burden of showing abuse and the court makes separate findings of fact supporting the issuance of the order); MASS. GEN. LAWS Ann. ch. 209A, § 3 (2012) (“A court may issue a mutual restraining order or mutual no-contact order pursuant to any abuse prevention action only if the court has made specific written findings of fact.”).

169. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 44 (1991) (“[R]ather than face custody suits, women accept mutual orders of protection, which are inappropriate if the woman has not been violent and can hinder the effectiveness of the protective order.”); Topliffe, *supra* note 167, at 1053 (“Like other civil cases, protection orders can be negotiated or ‘settled.’ Battered wives can agree to mutual protection orders if they wish.”). This type of mutual order has been argued as hindering the effectiveness of the order because a woman may be less likely to report an incident of the respondent abusing her because of her fear that she will be held in violation of the order as well. *Id.*

170. See Topliffe, *supra* note 167, at 1055 (“[V]ictims do not often oppose [mutual] orders. They will agree to a mutual order for several reasons. They may want to expedite the process, cooperate with the lawyer and the judge, and avoid violent reactions from their abusers.”).

171. See A.B.A. COMM’N ON DOMESTIC VIOLENCE, STATES PERMITTING OR PROHIBITING MUTUAL PROTECTIVE ORDERS WITHOUT A SEPARATE PETITION (2007), <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/ProhibitingMutualProtectiveOrdersJuly2007.authcheckdam.pdf> [hereinafter STATES PERMITTING MUTUAL PROTECTION ORDERS] (listing California, Colorado, Idaho,



separately petitioned the court for relief.<sup>172</sup> In contrast, some states still allow mutual orders to be entered without a petition for relief if the judge determines both parties acted as the aggressor.<sup>173</sup> For example, Maryland allows mutual orders “if the judge makes a detailed finding of fact that . . . both parties acted primarily as aggressors; and . . . neither party acted primarily in self-defense.”<sup>174</sup> Currently, nine states allow mutual orders, twelve states are silent on mutual orders, and thirty states expressly prohibit mutual orders without a separate petition.<sup>175</sup>

## 2. *The Problems with Mutual Protection Orders*

Previously, mutual orders were used as a common tool for preventing abuse,<sup>176</sup> but significant scholarship and research has

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Maryland, Massachusetts, New York, South Carolina, South Dakota, and Washington as offering some form of a mutual protection order).

172. See 750 ILL. COMP. STAT. 60/215 (2012) (“Mutual orders of protection are prohibited.”); IND. CODE § 34-26-5-14 (2012) (“A court may not grant a mutual order for protection to opposing parties.”); IOWA CODE § 236.20 (2012) (“A court in an action under this chapter shall not issue mutual protective orders against the victim and the abuser unless both file a petition requesting a protective order.”); KAN. STAT. ANN. § 60-3107 (2012) (“No protection from abuse order shall be entered against the plaintiff unless: (1) The defendant properly files a written cross or counter petition seeking such a protection order.”); KY. REV. STAT. ANN. § 403.735 (West 2011) (“A court may issue mutual protective orders only if a separate petition is filed by the respondent.”); ME. REV. STAT. tit. 19-A, § 4007 (2012) (“The court may not issue a mutual order of protection or restraint.”).

173. See STATES PERMITTING MUTUAL PROTECTION ORDERS, *supra* note 171 (providing which states allow mutual orders).

174. MD. CODE. ANN, Fam. Law § 4-506 (2012); see also IDAHO CODE ANN. § 39-6306 (2012) (“In providing relief under this chapter, the court may realign the designation of the parties as ‘petitioner’ and ‘respondent’ where the court finds that the original petitioner is the abuser and the original respondent is the victim of domestic violence.”).

175. See STATES PERMITTING MUTUAL PROTECTION ORDERS, *supra* note 171 (providing which states allow mutual orders).

176. Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 839–40 (2004) (“Previously, it had been common practice for some courts to issue ‘mutual’ protection orders that required both parties to stay away from each other and adhere to other conditions without making any findings of fact or even requiring the respondent

illustrated the negative effects that the orders have on the petitioner, creating a shift away from their use.<sup>177</sup> One of the strongest arguments against mutual protection orders is the due process concern inherent in a mutual protection order.<sup>178</sup> Elizabeth Topliffe has argued that mutual protection orders violate due process because the woman's right to be free from unnecessary restraint is infringed when a judge issues a mutual order without a mutual showing of abuse.<sup>179</sup> Another argument against mutual orders is the placement of blame on the victims of abuse, which can create issues of further abuse because the abuser feels that the court has justified his actions by penalizing the victim.<sup>180</sup> Lastly, because of the lack of evidence necessary to issue a mutual order, it is believed that they can be issued hastily and without discretion, resulting in the woman's rights being restricted unnecessarily.<sup>181</sup> These procedural and social concerns

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to file a petition against the original petitioner.”).

177. See, e.g., Jennifer P. Hanft, *What's Really the Problem with Mutual Protection Orders*, WYO. LAW., Oct. 1999, at 23 (arguing that mutual protection orders are more dangerous than having no order at all); Phillips, *supra* note 80, at 34–36 (examining the many drawbacks related to mutual protection orders); Topliffe, *supra* note 167, at 1053–64 (looking at the negative repercussions of mutual protection orders).

178. See Topliffe, *supra* note 167, at 1056–60 (describing the probability that mutual protection orders violate due process and citing state court decisions that have found a violation of due process).

179. See *id.* at 1060 (“[J]udges and lawyers must educate themselves regarding the procedural due process issues implicated by mutual protection orders. Once lawyers and judges become educated they can prevent these violations of procedural due process.”); see also *FitzGerald v. FitzGerald*, 406 N.W.2d 52, 54 (Minn. Ct. App. 1987) (holding that the lower court erred in issuing a mutual protection order when there was no evidence of abuse on the part of the petitioner); *Deacon v. Landers*, 587 N.E.2d 395, 398 (Ohio Ct. App. 1990) (holding that appellant was denied due process when a mutual order was issued against her without providing her an opportunity to cross examine or present evidence).

180. See Phillips, *supra* note 80, at 35 (“[T]he issuance of a mutual order of protection without specific findings may imply to an already troubled victim that he or she was partially at fault for the abuse. A mutual order of protection may also bolster an abuser’s belief that he is not at fault.”).

181. See Thomas L. Hafemeister, *If All You Have Is a Hammer: Society’s Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 990 (2011) (describing mutual orders as “highly controversial because they may be issued hastily and without evidence, or may restrict parties who were merely violent in self-defense”).

regarding mutual orders have produced a general aversion to mutual orders, preventing them from being an adequate solution to the problem of unjust enforcement of protection orders.<sup>182</sup>

#### *V. Preventing the Victim from Enticing Her Abuser*

While some states are using these legal options to provide a barrier to unjust enforcement, the legal system can do more to protect these men who do not always deserve punishment for their actions.<sup>183</sup> The previous approaches are not applied with any consistency, failing to notify both the petitioner and respondent of what the repercussions of their actions might be. A more unified and reliable approach to the rare circumstances where the respondent is enticed into contact will result in an equitable result for both parties; preventing the petitioner from receiving a penalty she did not know existed, and avoiding the unnecessarily penalization of a blameless respondent.

This subpart proposes three solutions that provide a circumstantial approach to violations, as opposed to the automatic punishment system that is currently in place in most jurisdictions. The proposals are provided in the order of weakest to strongest, ending with the proposal that is most effective remedy to the issue of enticement. The first proposal is a uniform fining system that would discourage the protected party from contacting their abuser unnecessarily.<sup>184</sup> Second, this Note will propose a mediation system that parties can choose in lieu of receiving an order for protection.<sup>185</sup> While these first two proposals seem appealing at first glance, the solutions are actually an ineffective response to the problem posed by this Note, which will be highlighted when explaining the proposals.<sup>186</sup> The third argument is the strongest solution to the problem of

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182. See *supra* note 177 (providing resources that are strongly opposed to mutual orders and their effect on abused women).

183. See *supra* Part IV (explaining the existing legal options protecting the restrained party from being enticed by the petitioner).

184. *Infra* Part V.A.

185. *Infra* Part V.B.

186. *Infra* Part V.A–B.

victim enticement.<sup>187</sup> This subpart advocates for remedying the problem of enticement at the back end, through the use of a factor-based approach to protection order violations,<sup>188</sup> along with issuing mutual protection orders once the victim has enticed her abuser into contact.<sup>189</sup> The final subpart of this section will advocate for uniform application of these rules in order for the problem of disparate enforcement to be fully addressed.<sup>190</sup>

### *A. Implementing a Fining System*

The first proposal is to create a fining system that is a component of each protection order issued that discourages victims from enticing their abuser back into contact.<sup>191</sup> Similar to Judge Thornton's sanctions, a fining system would make the victim aware that she should not be contacting her abuser, without imposing too severe of a penalty on the victim.<sup>192</sup> Fining the victim for repeated contact is not an uncommon occurrence in the court system, but because no state includes this penalty in their statutes for protection orders, the penalty usually comes up without the victim knowing that she had done anything that could be penalized.<sup>193</sup>

With the application of this penalty, along with a process for informing the petitioner of the possible fine, a victim would be less likely to contact her abuser for mere enticement purposes, and would be able to work towards ending communication with

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187. *Infra* Part V.C.

188. *Infra* Part V.C.1.

189. *Infra* Part V.C.2.

190. *Infra* Part V.D.

191. This penalty may implicate some of the same arguments that are made against mutual orders, primarily that the victim is being penalized without having done anything. *See supra* Part IV.D.2 (noting some of the criticisms of mutual orders and their negative impact on victims of domestic violence).

192. *See supra* notes 154–55 and accompanying text (providing Judge Thornton's decision to fine two victims of domestic violence for continuing to contact their abuser).

193. *See supra* Part IV.C (providing examples of judges that have fined the victim of a protection order because of their continued contact with their abuser).

her abuser all together. To avoid too severe of a penalty, a system could be imposed where the fine does not result until the respondent has provided evidence that the petitioner has contacted him more than once.

This solution is the weakest proposal because it brings up some of the arguments that are made against treating the victim as an aider and abetter<sup>194</sup> or penalizing the respondent by issuing a mutual protection order.<sup>195</sup> Many advocates for battered women are strongly opposed to the victim being penalized for any of her actions because she is not the party who committed the abuse in the first place, and creating this later penalty discourages the battered woman from seeking protection.<sup>196</sup> Although some jurisdictions have already implemented this type of monetary penalty, another option that does not place blame on the petitioner would be more accepted by the legal community.<sup>197</sup>

### *B. Providing Mediation Rather than an Order*

Protection orders frequently end because the parties involved decide to reconcile. This reconciliation often results because the woman never wanted to have a complete prohibition on contact with her abuser, but obtained the protection order in an effort to end the abuse.<sup>198</sup> The majority of courts refuse to allow couples in abusive relationships to have it both ways, meaning they are not going to step in to police the relationship, and still allow the

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194. See *supra* note 141 and accompanying text (arguing that charging the victim as an aider and abetter in a violation would have a chilling effect on victims seeking relief).

195. See *supra* Part IV.D.2 (highlighting the negative effects of mutual orders including due process concerns and the risk that the victim will feel that her abuser's actions are justified).

196. See *supra* notes 161–62 and accompanying text (arguing that a woman should not be penalized for any contact she might make with her abuser because of her precarious mental and physical state).

197. *Supra* note 157.

198. See Goldfarb, *supra* note 94, at 1512 (explaining the difficulty in maintaining a couple's relationship once a domestic abuse charge occurs).

couple to live together.<sup>199</sup> Because of this approach, a woman who simply wants a prohibition on further abuse—rather than ending the relationship—may not be able to do so; and is forced to obtain a protection order completely barring contact.<sup>200</sup> In a Wisconsin study designed to determine victim satisfaction with protection orders, the protection orders issued against the victim's wishes were more likely to be violated by the victims themselves than the orders where the victim was supportive.<sup>201</sup> If a woman does not support the order she obtains, she is unlikely to stop contacting her abuser, possibly leading to the types of provoked violations that this Note addresses.

In contrast to simply issuing an order of protection, many scholars have argued that mediation provides a legal alternative that is beneficial to both parties in working to end the abuse, without completely ending the relationship.<sup>202</sup> The Mediation and Restorative Justice Centre, located in Edmonton, Alberta, Canada has been developing a mediation program that works to protect the victim while facilitating the best result for the couple as a whole.<sup>203</sup> The mediation process is divided into three steps,

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199. See *id.* at 1550 (explaining the court's trend towards dissolving a relationship rather than working to fix the relationship for the benefit of both parties); see also *Stevenson v. Stevenson*, 714 A.2d 986, 994–95 (N.J. Ch. 1998) (refusing to grant the victim's request that a protection order be removed, even when she was the one petitioning the court for removal).

200. See Goldfarb, *supra* note 94, at 1505 (“[A] battered woman who wants to obtain a protection order designed to end the violence but not the relationship may be unable to do so.”).

201. See *id.* at 1512 (“According to the Wisconsin study, women were at higher risk for non-compliance with the protection order if they did not want to end the relationship or were ambivalent about it. Much of the non-compliance took the form of violations of prohibitions on contact.”).

202. See Lauren K. Williams, *The Use of Mediation as a Complement to the Integrated Domestic Violence Courts of New York*, 13 CARDOZO J. CONFLICT RESOL. 713, 737 (2012) (“[M]any victims have been frustrated with the process of seeking an order of protection and the public nature of the courtroom experience, and might be interested in mediation, if it was an option.”).

203. See ALAN EDWARDS & JENNIFER HASLETT, DOMESTIC VIOLENCE AND RESTORATIVE JUSTICE: ADVANCING THE DIALOGUE 1 (2003), <http://www.voma.org/docs/DVandRJPaper2003.pdf> (“The Victim Offender Mediation (VOM) program of the Mediation and Restorative Justice Centre (MRJC) . . . has been conducting restorative dialogue sessions with domestic violence victims and offenders since 1998.”); see also Williams, *supra* note 202, at 723–24 (explaining the process that is used in the Centre's domestic violence mediation program).

allowing the greatest protection for the victim and the possibility of a positive outcome.<sup>204</sup> The steps consist of: (1) an independent meeting with each party “in order to determine that the mediation can be done safely;” (2) a meeting where both parties are present to discuss the problems facing the couple, and a solution is reached; and (3) a second series of independent meetings to ensure that both parties are independently happy with the results of the mediation.<sup>205</sup>

This process provides a remedy for victims who want to maintain their relationship with their abuser, but need a legal mechanism to prevent the abuse from continuing.<sup>206</sup> A protection order provides a limited number of legal remedies that are not always tailored to the victim’s needs; in contrast, many scholars argue that “mediation allows the parties to structure the solutions themselves and to create solutions that would be unavailable through the court process.”<sup>207</sup> If the parties are unable to reach an agreement in the mediation session provided, the victim still has the option of appearing in court to receive a formal protection order to prevent further abuse.<sup>208</sup>

While these scholars and the Mediation and Restorative Justice Centre have worked to make mediation a viable option, this is an unrealistic approach to attacking abuse in the United States. Specifically, scholars have noted the extreme unreliability that mediation provides a couple in an abusive relationship,<sup>209</sup> and the extensive levels of training and enforcement that would be required by this type of system.<sup>210</sup> Even advocates who support

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204. Williams, *supra* note 202, at 723.

205. *Id.*

206. *See id.* at 724 (“Victims may not want their abusers go to jail or leave the home they share; such measures are the two most common punishments meted by the courts. The parties’ perception as to what will work best for them may differ from the judge’s perspective . . .”).

207. *Id.*

208. *See id.* at 730–32 (providing the multistep process that should be used to determine whether victims should mediate or choose another legal route).

209. *See* Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Creating Effective Screens*, 39 FAM. L.Q. 53, 58 (2005) (explaining the difficulty in constructing screens to keep certain abusive relationships out of mediation).

210. *See* Sarah Krieger, *The Dangers of Mediation in Domestic Violence*

the use of mediation have noted that “[v]ictims of domestic violence who have experienced a ‘culture of battering’ . . . characterized by forms of physical, emotional, sexual, familial and/or financial abuse . . . are in virtually all instances, not appropriate candidates for mediation.”<sup>211</sup> Because of the volatile relationship between abusive couples, mediation will likely only provide a temporary remedy, with inevitable relapse in many scenarios. If the court is going to intervene into an abusive relationship, it cannot afford to adopt a system that has a high possibility of relapse, leaving the woman in a vulnerable position for additional abuse.

Additionally, scholars against the use of mediation have highlighted that “[m]ediation is never considered . . . in criminal cases. Therefore it should not be considered in domestic violence cases.”<sup>212</sup> Because of the protection order’s character as a civil remedy with criminal penalties, the approach that is used in criminal cases should be equally applied to the civil realm of a protection order.<sup>213</sup> While mediation seems appealing at first glance, the unreliability of the protection that is provided is not an effective solution to the problem of victim enticement.

### *C. Providing a Remedy at the Back End of Enticement*

#### *1. A Factor-Based Approach*

Another solution to the problem of unjust enforcement is to create a factor-based approach to assessing violations of an order. This approach would allow the court to consider the circumstances leading to the violation, helping to prevent the

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*Cases*, 8 CARDOZO WOMEN’S L.J. 235, 259 (2002) (“Due to poor screening for domestic violence, the absence of legislative mandates for mediator training, and the inevitable re-privatization of domestic violence which will set back the legislative progress achieved by the battered women’s movement, mediation continues to be an inadequate response to family issues.”).

211. Murphy & Rubinson, *supra* note 209, at 58.

212. Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. ILL. U. L.J. 559, 572 (2002).

213. See *supra* notes 85–86 and accompanying text (noting that a protection order has both civil and criminal penalties).



type of disparity in enforcement that was illustrated by Eric Nolen's and Mark Hunt's cases at the beginning of this Note.<sup>214</sup> Similar to the test used in *Carfagno v. Carfagno*, the courts would apply this test when assessing a protection order violation, allowing the court to consider not only the positive circumstances of the violation, but also any negative factors that should be considered, such as the history of violations and abuse.<sup>215</sup> With this type of test, cases where the restrained party contacted the protected party out of necessity—such as having to take her to the hospital—would not necessarily be penalized because the circumstances of the violation would be considered in assessing the penalty.<sup>216</sup>

Many states already have a system of mitigating and aggravating factors in their criminal system that are used when assessing what penalty will be imposed once an individual has been convicted of a certain crime.<sup>217</sup> These factors are applied differently in each state, but they allow the court to consider the circumstances surrounding the crime when determining the proper penalty for the defendant.<sup>218</sup> For example, under South Carolina's factors for mitigation of criminal sexual conduct, the court considers: the defendant's prior history; the defendant's state of mind; whether the defendant was under duress or

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214. See *supra* Part I (providing two illustrations of violations of protection orders that arose from very different circumstances).

215. See *Carfagno v. Carfagno*, 672 A.2d 751, 760 (N.J. Ch. Div. 1995) (applying eleven factors for determining whether a protection order should be dissolved per a defendant's petition and finding that the protection order should not be dissolved in this case).

216. See *State v. Hunt*, No. 106,296, 2012 WL 3966535, at \*1 (Kan. Ct. App. 2012) (finding Mark Hunt violated the protection order his wife had against him for driving her to the hospital when she had pneumonia).

217. See *Aggravating and Mitigating Factors for Kidnapping*, 0030 SURVEYS 29 (Westlaw) (providing references for each state's factors that are considered when sentencing an individual for kidnapping); *Aggravating and Mitigating Factors for Sex Crimes*, 0030 SURVEYS 31 (Westlaw) (providing references for each state's factors that are considered when sentencing an individual for sexual assault).

218. See *Aggravating and Mitigating Factors for Kidnapping*, *supra* note 217 (“Jurisdictions vary on how aggravating and mitigating factors are applied (i.e.: moving the sentence within an already defined statutory high and low or allowing the sentence to move beyond the scope of the statutorily mandated range).”).

domination by another person; and factors that would reduce the defendant's level of culpability.<sup>219</sup> These factors easily translate to the context of protection order violations, and when applied in conjunction with the factors created by the reconciliation tests, the current issue of the victim enticing her abuser is diminished.<sup>220</sup>

Rather than applying these factors at the sentencing phase of the hearing, the factors should be applied at the stage when the court is determining whether the individual has violated the order in the first place.<sup>221</sup> Similar to the defense of consent in rape cases, these factors would consider the circumstances of the violation and the role that the victim played in enticing her abuser into contact.<sup>222</sup> Even if the victim was not intentionally enticing her abuser, the circumstances of her contact may have made it very difficult for the restrained party to not reach out to the victim.<sup>223</sup> With this factor based approach, a restrained party

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219. See S.C. CODE ANN. § 16-3-655 (2012)

(b) Mitigating circumstances: (i) The defendant has no significant history of prior criminal convictions involving the use of violence against another person. (ii) The crime was committed while the defendant was under the influence of mental or emotional disturbance. (iii) The defendant was an accomplice in the crime committed by another person and his participation was relatively minor. (iv) The defendant acted under duress or under the domination of another person. (v) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (vi) The age or mentality of the defendant at the time of the crime. (vii) The defendant was below the age of eighteen at the time of the crime.

These South Carolina factors are meant to provide a model for the development of factors for the domestic violence context. In order for this to be applied in the protection order context, a new set of factors would need to be developed, with the woman's role in the violation being one of the necessary considerations.

220. See *Carfagno*, 672 A.2d at 760 (applying eleven factors for determining whether a protection order should be dissolved per a defendant's petition and finding that the protection order should not be dissolved in this case).

221. See *supra* notes 217–20 (providing examples of factors that can be considered in evaluating a protection order violation).

222. See 65 AM. JUR. 2D *Rape* § 84 (2013) (explaining how consent works as a defense to rape).

223. See, e.g., *State v. Hunt*, No. 106,296, 2012 WL 3966535, at \*1 (Kan. Ct. App. 2012) (finding Mark Hunt violated the protection order his wife had against him for driving her to the hospital when she had pneumonia); *State v.*

would be able to offer evidence supporting his reason for violating the order, while still allowing the court to consider any aggravating factors such as prior incidents of abuse, or manipulation of the victim.<sup>224</sup>

## 2. Issuing Mutual Protection Orders Post-Enticement

Another option for providing a solution *after* the victim has been active in contacting her abuser is to provide an option for a one-sided protection order to be transformed into a mutual order.<sup>225</sup> This remedy would allow the court to create an order preventing communication from both parties if the court finds that the victim has been consistently contacting her abuser with the intent to induce a violation.

This solution removes the due process concern that arises when a mutual order is issued.<sup>226</sup> As discussed previously, scholars are concerned that the issuance of a mutual order infringes on a woman's right to be free from unnecessary restraint when she did not do anything worthy of punishment.<sup>227</sup> When a mutual order is issued *after* the woman has attempted to entice her abuser, the woman has been given the opportunity to be free from restraint, but has lost this option because of her consistent contact with her abuser in hopes of inducing a violation. Issuing a mutual order on the back end removes the problem of inducement, while preventing the unnecessary punishment of a victim before she has done anything wrong.

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Lucas, 795 N.E.2d 642, 642 (Ohio 2003) (noting that the petitioner of the protection order invited her abuser over to celebrate their mutual son's birthday).

224. See *supra* note 217 (providing examples of mitigating and aggravating factors in kidnapping and sexual assault cases).

225. See *supra* Part IV.D.1–2 (explaining a mutual order).

226. See Topliffe, *supra* note 167, at 1056–60 (arguing that mutual orders violate due process and citing state court decisions that have found a mutual order to be a violation of due process).

227. See *id.* (“[I]ssuing mutual orders without hearing evidence is arguably a violation of due process, especially when the respondent does not request a mutual order.”).

*D. Uniform Application of the Remedies*

Regardless of the path chosen to remedy the problem of disparate enforcement, the solution needs to have uniform application across the states in order to be effective. While there is the obvious argument for uniform application in order to provide the greatest benefit to the greatest number of people, there is another argument rooted in interstate treatment of protection orders that is more crucial to the solution. To understand this argument, it is important to first understand how full faith and credit is applied to protection orders.

Full faith and credit plays a crucial role in providing protection to the victim of abuse when she crosses over state lines. Once a protection order is in place, many victims remain fearful of their abuser and choose to relocate across state lines to avoid additional contact with their abuser.<sup>228</sup> State law governs the enforcement of protection orders,<sup>229</sup> but federal law ensures that the order will be given full faith and credit when a victim decides to make the move across state lines.<sup>230</sup> In 1994, Congress enacted the Violence Against Women Act (VAWA),<sup>231</sup> requiring all states to give full faith and credit to protection orders issued by sister states.<sup>232</sup> The text of VAWA reads:

Any protection order issued . . . shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.<sup>233</sup>

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228. See Leigh Goodmark, *Going Underground: The Ethics of Advising a Battered Women Fleeing an Abusive Relationship*, 75 UMKC L. REV. 999, 999–1000 (2007) (“Although some domestic violence agencies disavow the idea of an ‘underground railroad’ for battered women, it is undeniable that women flee from their abusers and attempt to keep their whereabouts hidden.”).

229. See *supra* note 50 and accompanying text (providing the requirements for obtaining a protection order in each state).

230. See 18 U.S.C. § 2265 (2012) (providing the requirements for a protection order to be given full faith and credit).

231. *Id.*

232. *Id.*

233. *Id.* § 2265(a).

In application, when a victim crosses over state lines, the protection afforded by her protection order carries over with her into the new state, even without choosing to register the order with the state.<sup>234</sup> If the woman chooses to register the protection order with the state, the state is forbidden from notifying the responding party of the order's registration in the new state.<sup>235</sup> No state requires an order to be registered with the enforcing state, but registration is beneficial in preparing enforcement officers for a possible violation, and makes it possible for the order to be enforced without the victim having to present the order to the enforcement officer.<sup>236</sup> Additionally, having the order registered with the state allows the victim to confirm with local authority that all the required elements are met for enforcement to occur.<sup>237</sup> Another state's order will be presumed valid if "it has the correct names of the parties, has not expired, and is signed by an issuing authority."<sup>238</sup> Once the validity of the protection order is determined, the officer is obligated to enforce all of the order's terms as issued, but will use the enforcing state's procedures for enforcing the order.<sup>239</sup>

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234. *See id.* § 2265(d)(2) ("No prior registration or filing as prerequisite for enforcement. Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State, tribal, or territorial jurisdiction.").

235. *See id.* § 2265(d)(1) ("A State . . . shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State . . . unless requested to do so by the party protected under such order.").

236. *See* VIOLENCE AGAINST WOMEN ONLINE RESOURCES, *supra* note 29 (advising victims crossing over state lines to "get certified copies of [the] protection order and carry at least one copy . . . at all times. . . [and p]rovide copies of the protection order to any law enforcement agency that you may ask to enforce your protection order").

237. *See id.* (advising the victim to register her order in order to ensure adequate enforcement of the order).

238. NAT'L CTR. ON PROTECTION ORDERS & FULL FAITH & CREDIT, FULL FAITH AND CREDIT: ENFORCING PROTECTION ORDERS, [http://www.bwjp.org/files/bwjp/files/PocketGuide\\_forWeb.pdf](http://www.bwjp.org/files/bwjp/files/PocketGuide_forWeb.pdf).

239. *See id.* ("A responding officer must enforce the terms and conditions of the order as written by the issuing jurisdiction. . . . [The order] should be enforced pursuant to departmental policy and the laws of the enforcing jurisdiction.").

Because of this application of full faith and credit to protection orders, without a uniform application of the remedies, a protected party would be able to cross state lines to avoid the remedies or penalties offered in her own state, and still get the enforcement from the new state.<sup>240</sup> For example, if the fining system did not exist universally, the penalty assessed to the fleeing petitioner would vary based on which state she is in. With a universal system, every state would mete out a penalty for the victim's repeated contact with her abuser, and there would be no excuse for a woman to claim that she did not know that her actions would bear a penalty. Creating a uniform system of any of the proposed remedies allows for an adequate response to this disparate enforcement, while also reducing the confusion that the petitioner or respondent may incur when trying to determine how the protection order will be applied.

#### VI. Conclusion

The law of domestic violence has evolved in the past few decades to provide the maximum protection to the victims of abuse, which typically requires the dissolution of the relationship.<sup>241</sup> Although domestic violence is stereotypically a crime against women, recent studies have shown that abuse between couples is increasingly mutual, making it difficult to determine who should be the restrained party in the typical protection order scenario.<sup>242</sup> With these changes in the roles that parties in an abusive relationship play, there is a need to recognize the circumstances surrounding a violation, and, most importantly, the role that the protected party plays in the violation.<sup>243</sup>

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240. See *supra* Part V.A–C (providing the proposed remedies).

241. See Goldfarb, *supra* note 94, at 1550 (“More recently, the law has offered victims legal relief, but the relief generally requires ending the relationship.”).

242. See *supra* notes 8–9 (referencing recent findings that women are more likely to be the perpetrator of abuse and a growing trend of mutual abuse in domestic abuser relationships).

243. See *supra* notes 8–9 (noting the changing social norms of protection orders, including same sex domestic abuse, and increased frequency of the male

A violation that occurs when a man is driving his wife to the hospital is not equivalent to a situation where a man shows up at his victim's house and severely beats her.<sup>244</sup> The law needs to provide a mechanism to distinguish between these two scenarios, ensuring that punishment occurs when it is deserved, rather than as an automatic penalty to contact. The strongest avenue for providing a solution is to create mechanisms that come into effect at the back end of a violation, stepping in to protect the respondent when the victim's actions have undermined the purpose of the protection order.<sup>245</sup> With changes to the system of protection order issuance and enforcement, the system will be able to provide a remedy to individuals in an abusive relationship that provides the victim protection, while preventing the victim from abusing the purpose of the order.

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being the victim of abuse).

244. See *supra* Part I (comparing two disparate situations of domestic abuse and the resulting penalties).

245. See *supra* Part V.C (advocating for a system that would consider the role of the woman's enticement after the violation has been reported).