

Correlative Rights and the Boundaries of Freedom: Protecting the Civil Rights of Endangered Women

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When Bonnie Woodring went to court to seek an order of protection from abuse by her husband—as so many women in this country do every day—she checked off boxes on the court form identifying six places where she wished to be shielded: her home, her workplace, her child’s school, her child’s day care, any place where she might be receiving ‘temporary shelter,’ and ‘other.’ For ‘other,’ she wrote in “stores (Walmart) within 50-100 feet.”¹ In effect, when battered women² check off such boxes, they are selecting circumscribed areas where they may be free from violence, conceding the persistence of danger outside of them. The forms reflect the common understanding that such places are sites of expected re-assault by the batterer, but underlying this accurate assumption is a far more troubling proposition: the state is acknowledging its inability or unwillingness to protect women outside of these spaces.

As a society, we have come to expect that this is an appropriate response to a battered woman’s pleas for help, but that expectation is deeply suspect. By granting an abused person rights to move freely only within these circumscribed zones, the state is implicitly granting the abuser the right to move freely in all the other zones. Although the state appears to be granting freedom and protection to a recipient of an order of protection, a more critical look reveals that it is not in fact offering much. Instead, the state is preserving a system of entitlements that guarantees a man’s freedom of movement at the expense of a woman’s. In effect, one might say that the restraining order has the perverse effect of restraining the liberty of the per-

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¹ Complaint and Motion for Domestic Violence Protective Order at 2, *Woodring v. Woodring*, No. 06CVD575 (N.C. Dist. Ct. Sept. 13, 2006) (on file with author).

² Because statistics indicate that 85% of intimate partner violence is committed against women by their partners, largely in heterosexual relationships, I use male referents for the batterer or abuser, and female referents for the victim. Further, femicide statistics indicate the prevalence of murders of female intimate partners by their male partners. See CALLIE MARIE RENNISON, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>. [hereinafter RENNISON, INTIMATE PARTNER VIOLENCE].

son protected by the order, rather than that of the person subject to the order.³

In the context of domestic violence, the civil rights analysis sketched above is complicated by the relationship between the two parties involved. Because of the unique nature of domestic abuse, the liberty interests at stake can amount to a zero-sum game in which one party may retain her liberty at the cost of the other's liberty. As a practical matter, the rights of the parties are "correlative."⁴ This condition demands a legal policy analysis that takes into account the texture and reality of the lived experience of an endangered woman and seeks to reverse the injustices of the present regime.

Orders of protection provide limited and unreliable protection from further abuse of the victim by the offender. Studies reveal that around a quarter of all orders of protection are violated⁵ and that those violations commonly go unpunished, leaving many battered women to fend for themselves. Aware of this under-enforcement, many battered women do not report violations of their orders, assuming (accurately) that the criminal justice system will not take their complaints seriously. Moreover, the alarming incidence of so-called "retribution assault," in which a batterer attacks his partner to punish her for seeking protection from him in the courts,⁶ highlights the hollowness of the order. Not only do the orders not benefit the victims, they sometimes expose the victims to even more harm. Batterers are well aware of this situation. Indeed, they often invoke law enforcement's lax response in specific threats to further harm the victim.⁷

³ The author thanks Grace Spulak for this insight.

⁴ This is a very brief reference to the concept of correlative rights, as proposed by Wesley Newcomb Hohfeld. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

⁵ See SUSAN L. KEILTZ ET AL., U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, CIVIL PROTECTION ORDERS: VICTIMS' VIEWS ON EFFECTIVENESS 2 (1998), available at <http://www.ncjrs.gov/pdffiles/fs000191.pdf>.

⁶ The term "separation assault" was developed by Martha Mahoney to describe the intensified violent assault an abuser inflicts upon his victim as a punishment for her attempting to leave the relationship. See Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65-66 (1991). I use the term "retribution assault" to describe how the batterer's sense of entitlement is violated when the abused partner seeks protection from the justice system, often in direct contravention of his explicit instructions not to do so. Diane Rosenfeld with Kirstin Sheffler, *GPS Monitoring Systems for Batterers: Exploring a New Paradigm of Offender Accountability and Victim/Survivor Safety*, DOMESTIC VIOLENCE REPORT, Apr./May 2007 at 58. For example, Dorothy Giunta-Cotter stated to the court in her affidavit that her husband beat her specifically as punishment, saying "I told you never to get a restraining order out against me." Affidavit of Dorothy Giunta-Cotter at p.2, Feb. 22, 2002. Commonwealth of Massachusetts, The Trial Court, Probate and Family Court, ESSEX, No. 02D-0079-CUI. The numerous lethal attacks on victims that coincide with court dates further attest to the retributive nature of this violence.

⁷ For example, in Lewiston, Maine, Kenneth Emrick killed his long-time intimate partner Carol Cross the day after she obtained an order of protection. Abused women in the area, hearing of the murder, stopped showing up for their order of protection hearings at the rate of 75%, according to Chris Fenno, the executive director of the Abused Women's Advocacy Project. In addition to the crisis in citizenship this statistic describes — when citizens are unable to access the justice system — the way in which batterers in the area were using the murder to

In Bonnie Woodring's case, John Woodring beat her again when she went home after receiving her order of protection from the court. There is no record of her reporting this violation. Bonnie went to the hospital, and when she left the hospital, fled with her thirteen-year-old son to a battered women's shelter instead of trying to go back home, even though her order of protection ostensibly gave her a legal right to be safe there. Over the next week, John called and e-mailed her repeatedly and sent flowers to her place of employment—all in violation of the order of protection prohibiting any contact with her. The night before Bonnie and John were to return to court for a full hearing on the order of protection, John tracked Bonnie down at a shelter and shot her to death in the kitchen. Her son was in another room at the time.⁸

Bonnie's murder at a battered women's shelter calls into question the safety of shelters and demonstrates how hiding from a stalking predator is often not a viable option. Her fate is all too common. With distressing frequency, domestic violence ends, not in escape and reconstruction of the woman's life, but in murder or murder/suicide. In the United States, three women are killed each day by their intimate partners.⁹ Approximately one-quarter of them are known to have had an order of protection.¹⁰ This murder rate is atrocious and signifies a grave deprivation of civil rights.¹¹

While the number of women murdered by their intimate partners is only a small percentage of women who report being beaten and abused,¹² these murders have enormous symbolic value. They are the background against which so much sub-lethal violence is committed. Many battered women do not know whether the next beating will be a fatal one.¹³ Batterers know that their victims are aware that murder is possible and consequently terrorize them more easily.

further threaten their victims was chilling. "What upsets her the most, [Fenno] says, is that callers are saying their abusers are using the murder as a threat, clipping newspaper articles about it and leaving them around the house, threatening that the women could end up like Cross if they dare leave." Meadow Rue Merrill, *Murder Has Abuse Victims Terrified*, BOSTON GLOBE, Sept. 12, 1999, at C11.

⁸ David Lohr, "Crime Writer Turns Fugitive After Gunning Down His Estranged Wife," COURT TV CRIME LIBRARY, Sept. 26, 2006, available at http://www.crimelibrary.com/news/original/0906/2601_crime_writer_killer.html.

⁹ Family Violence Prevention Fund, *Domestic Violence is a Serious, Widespread Social Problem in America: The Facts*, available at <http://www.endabuse.org/resources/facts/> (last visited Oct. 31, 2007).

¹⁰ See LINDA LANGFORD ET AL., PEACE AT HOME, HOMICIDES RELATED TO INTIMATE PARTNER VIOLENCE IN MASSACHUSETTS 1991-1995 11 (1999), <http://www.peaceathome.org/pdfs/homrepo.pdf>.

¹¹ For further discussion, see Catharine MacKinnon, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES (2007).

¹² Around 1,300 women a year are killed by intimate partners. RENNISON, INTIMATE PARTNER VIOLENCE, *supra* note 2. Between two and four million women a year report being battered. *Domestic Violence is a Serious, Widespread Social Problem in America*, *supra* note 9.

¹³ See Andrea Dworkin, *A Battered Woman Survives*, in LETTERS FROM A WAR ZONE: WRITINGS 1976-1989, 100-06 (1988).

Unlike most other homicides, domestic violence homicides are so predictable as to be preventable.¹⁴ The cases that result in murder are not a random sample of domestic violence cases. Death is far more likely when certain factors are present than when they are absent. When the state intervenes effectively in a domestic situation, it can prevent the violence from escalating. On the other hand, weak state intervention will leave battered women in a more dangerous situation—even worse off than if she had not sought help from the criminal justice system in the first place.¹⁵

In recent years, the legal rights of women to be protected against male sexual violence have become weaker, not stronger. The Supreme Court has struck down the right to be free from gender-motivated violence¹⁶ and the right to compel enforcement of an order of protection from domestic violence.¹⁷ The probability that these decisions will be reversed in the near future is low. If we wish to right the current imbalance, we need to look for new approaches.

¹⁴ Diane Rosenfeld, *Law Enforcement Sends Mixed Signals*, CHICAGO TRIBUNE, July 30, 1994, at 19.

¹⁵ Weak state intervention forecloses the battered woman's access to the justice system, or at least her belief that it will provide help and protection. For example, one woman described how her husband would laugh after the police left following their response to a domestic violence call to the home without arresting the batterer. See DEFENDING OUR LIVES (Cambridge Documentary Films 1993) (recording a woman's account of how her abuser laughed at her, continued the beatings, and said "What are you going to do now?").

¹⁶ *U.S. v. Morrison*, 529 U.S. 598 (2000). The Court struck down the civil rights remedy provision of the Violence Against Women Act, which provided that "[a] person . . . who commits a crime of violence motivated by gender and thus deprives another of . . . [the right to be free from crimes motivated by gender] shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." The analysis centered around whether violence against women had a sufficient relationship to interstate commerce to justify congressional action, and found it did not. Despite four years of congressional testimony establishing a record precisely to this effect, the Court ruled that remedies for gender-motivated violence lay more properly within state jurisdiction. This decision failed to recognize that states had conducted and presented their own studies of gender bias in the court system, and had not only supported the civil rights remedy, but had also asked for it to assist them in addressing the persistent problem of gender violence and inequality. For an in-depth analysis of *Morrison*, see Catharine MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000).

¹⁷ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 767 (2005). The plaintiff, Jessica Gonzales, sought assistance from the Castle Rock police in enforcing her order of protection against her estranged husband Simon Gonzales. Simon kidnapped their three daughters from Jessica's front lawn. The police refused to help over the course of an evening. At first, they said that they could not enforce the order because they did not know where Simon was, and they told Jessica to call back after ten o'clock PM if he did not show up with the girls. Jessica then found out where Simon was, called the police back, and informed them of his location, again pleading for them to enforce her court order. The police refused. This went on for several hours, culminating in the lack of any police action to attempt to apprehend Mr. Gonzales. At three o'clock the following morning, Simon drove his truck into the police station, opened fire, and the police shot him dead. The three girls lay murdered in the back of Simon's truck, shot with a gun he had purchased that night. For a discussion of the Gonzales case and its effect on state protection from gender violence, see G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111 (2005).

One promising initiative is the use of Global Positioning System (GPS) monitoring of domestic abusers. This technology offers a way to enforce the terms of an order of protection, holding both the offender and the state accountable for making the order offer the protection it claims to provide. This technology monitors the offender with an ankle bracelet to make sure that he does not violate the terms of the order of protection by entering forbidden zones where he would have the opportunity to re-assault or further terrorize the victim. Thus, rather than another legal-reform effort, the GPS initiative is a way to ensure that rights already promised by the justice system are delivered.

Several jurisdictions are now beginning to use GPS technology for domestic violence offenders. In Massachusetts, recent legislation explicitly authorizes the use of this technology in domestic violence cases. The Massachusetts legislation (“An Act Relative to Enhanced Protection for Victims of Domestic Violence”) provides judges with the option of ordering offenders who have violated an order of protection to wear a GPS monitoring device.¹⁸ The bill allows the court to establish, as a condition of probation, geographic exclusion zones, which can include the victim’s residence, place of work, her children’s schools, or other places that she frequents. These GPS devices track the offender’s movements to ensure that he is obeying the terms of the order of protection. If an offender enters geographic exclusion zones set by the court while wearing a GPS device, both the authorities and the victim are automatically notified. If the court finds that the offender violated the order of protection, it can order imprisonment, a fine, or both. The bill also allows the court to require the violator to pay the costs associated with the monitoring, which are estimated to be about ten dollars per day. The Probation Department is responsible for administration of the program.¹⁹

Different vendors offer various plans for GPS monitoring of domestic violence offenders. Systems appropriate for use in domestic violence cases will focus on victim safety without infringing on privacy rights of the victim. Secure Alert is a company that does its own monitoring of domestic violence offenders with trained staff who operate from a script to avoid personal bonding with the offender.²⁰ The operators work closely with law enforcement and describe the relationship as serving as “personal assistants” to probation officers or other officials. When their attempts to control the behavior of the offender fail, they immediately notify law enforcement for fol-

¹⁸ H.B. 30, 184th Gen. Ct., Reg. Sess. (Mass. 2005).

¹⁹ MASS. GEN. LAWS ANN. ch. 209A § 7 (2007). For a description of the legislation and its potential to protect victims of domestic violence, see Kerry Healey & Jarrett Barrios, Op-Ed., *Technology Against Violence*, BOSTON GLOBE, Jan. 11, 2007, at A11. Former Massachusetts lieutenant governor Kerry Healey was instrumental in passing this groundbreaking legislation.

²⁰ The GPS tracking device is an ankle bracelet with a phone and an alarm built in to the unit. Communication takes place with the phone; a 90-decibel alarm can be activated remotely by the monitors. For a demonstration, see <http://www.securealert.com/tpfeatures.htm>.

low-up. Secure Alert also has a victim-safety program, in which the victim is given a special monitor that informs her if the offender has breached a forbidden zone.²¹ Rather than giving law enforcement all the information about an offender's whereabouts, the company retains the information and only reports if there is a violation. Moreover, the company gives the information to law enforcement only when necessary to prove violations. Thus, concerns about excessive surveillance abate.

Another company that provides GPS monitoring for law enforcement is iSECUREtrac. Both agencies and victims can be notified in real-time if the offender has entered a forbidden zone. When this happens, a violation flag is raised and the monitoring agent is notified. Monitoring is done on computers by probation or other law enforcement officials.²²

Part of the potential for GPS to change the paradigm of domestic abuse is that it 'operationalizes' a battered woman's right to be free from the violent control of the perpetrator. It puts the law on her side by helping to enforce the terms of the order of protection and gives law enforcement knowledge of violations where previously they may have had none. Thus, it facilitates law enforcement response by pinpointing the location of the offender and by proving violations so that a court can impose more stringent controls on the offender.

Traditionally, law enforcement and the criminal justice system as a whole tended to discount the level of danger that an abuser presents to a victim. The use of GPS monitoring could make this danger clear by showing which perpetrators were violating orders of protection. This feature is important because violations of an order of protection signify that the offender believes he can violate the court order with impunity. The violations themselves are indications of increased dangerousness.

Whether a judge is willing to employ this new remedy may well reveal how seriously the judge takes the issuance of an order of protection. Moreover, the court may take the process of evaluating the domestic violence situation in terms of potential lethality much more seriously if there are real consequences for violating the order.²³

This monitoring, in the context of a comprehensive law enforcement response discussed more fully below, has the potential to disrupt the cycle of domestic violence and give meaning to an order of protection. Specifically, aligning responsibility with the person who committed an illegal act — rather than placing the responsibility on the person who suffered the violence — will enable a battered woman to stay safely at home rather than

²¹ Care must be given here to avoid any monitoring of the victim's movements, as this may give rise to unintended infringements on her liberty.

²² See www.isecuretrac.com.

²³ Indeed, courts could develop a system of different levels of orders of protection based upon how dangerous the situation appears, according to a dangerousness assessment. Thanks to Alexis Kuznick for this insight.

being forced to hide in a battered women's shelter, thus reversing the injustices in the current system.²⁴

A key component of a comprehensive response to domestic violence, as well as to the effective administration of a GPS monitoring program, is the use of dangerousness assessments. A sophisticated body of research supports the administration of a fairly simple tool that law enforcement authorities can use to identify which batterers present a high risk to their victims. Years of study of domestic homicides by experts, such as Dr. Jacqueline Campbell of Johns Hopkins Medical School, have revealed that specific factors—referred to as “risk assessment factors”—are present in domestic homicides and attempted murders.²⁵ Because domestic homicides take place in the context of an abusive relationship, analyzing features of domestic violence attacks and patterns in a relationship can help to predict the chance of future lethal attacks.

A dangerousness assessment red flags cases with lethality indicators so that the criminal justice system can monitor the batterer and be responsive to any signs of increased danger. The dangerousness assessment must be conducted and re-evaluated on an ongoing basis as the nature of the danger an offender poses to a victim changes at predictable trigger points, such as court dates, the expiration of an order of protection, or a new intimate partner relationship involving the victim/survivor.

Examples of lethality indicators include whether the abuser has threatened to kill the victim; whether the abuser has attempted strangulation; whether the abuser owns a weapon; whether the victim is attempting or has attempted to leave the abuser; whether the abuser has committed violence to children or pets; whether the abuser has previously been violent or threatened to the victim; and (perhaps less obviously) whether the abuser has threatened suicide. When called to a domestic violence scene, police can easily screen for these and other factors.²⁶

The importance of requiring the criminal justice system to investigate the potential lethality of a domestic violence assault cannot be underestimated. Dangerousness assessment and risk management protocols will help judges, prosecutors, and probation officers to determine which domestic violence cases would be appropriate for GPS monitoring of the offender. These tools enable a coordinated community response, including law enforcement, victims' services, batterer intervention programs, and courts working together to identify who may be at greatest risk of being further victimized.

²⁴ For a more detailed analysis of this concept, see Diane L. Rosenfeld, *Why Doesn't He Leave?: Restoring Liberty to Battered Women*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 535 (Catharine MacKinnon & Reva Siegel eds., 2003).

²⁵ JACQUELYN C. CAMPBELL ET AL., NAT'L INST. OF JUSTICE, *ASSESSING RISK FACTORS FOR INTIMATE PARTNER HOMICIDE* 1, 14-19 (2003), available at <http://www.ncjrs.gov/pdffiles1/jr000250e.pdf>.

²⁶ A pilot program in Maryland based on Campbell's model is showing positive results. See Donna St. George, *Police Tool Assesses Domestic Abuse 'Lethality'*, WASHINGTON POST, Oct. 2, 2007, at A1.

A promising program based in Newburyport, Massachusetts, which relies in part on GPS technology, is receiving national attention for its efforts²⁷ and is serving as a model for other jurisdictions seeking new ways of effectively addressing domestic violence. The Greater Newburyport Domestic Violence High Risk Case Response Team was formed after Dorothy Giunta-Cotter was gunned down in her home by her estranged husband while she had an order of protection and was receiving assistance from advocates at the Jeanne Geiger Crisis Center. As the founders explained, “[t]he system was not equipped to protect a high risk victim who chose not to leave her life, job and support system behind and live in hiding. We realized that while each individual component of the system worked, the lack of coordination and communication of our efforts created gaps in the system, ultimately compromising Dorothy’s safety.”²⁸

This team of professionals works to identify the most dangerous cases of domestic violence and monitor the cases more closely according to the level of danger indicated. The team recently published its two-year report, and the results demonstrate the effectiveness of using both dangerousness assessments and GPS monitoring. In the forty-two cases the team has identified as high-risk, there have only been two re-assaults. Eight offenders are on GPS monitoring, and neither of the re-assaults involved these men.²⁹

As the success of the Newburyport program suggests, GPS monitoring is most effective when used as part of an expanded system of options, including dangerousness assessment tools to identify high-risk cases and different containment options that are part of a graduated sanctions structure to address any threat of or commission of further violence. Fortunately, years of study of domestic violence enable us to incorporate an entire body of knowledge into effective law enforcement initiatives that are responsive to the unique but ubiquitous commission of domestic violence.

Although a significant step forward, the GPS legislation in itself will not provide protection. Further steps must be taken to protect endangered women, and we need to rethink the fundamental civil rights and civil liberties underlying the current and proposed protections. Other important initiatives in this area include the mandatory use of dangerousness assessments and other containment options for the batterer, such as detention centers. The implementation of GPS monitoring is an important step that requires state

²⁷ The Jeanne Geiger Crisis Center’s Greater Newburyport High Risk Case Response Team was awarded the first Spirit of Advocacy Award for its work by the National Network to End Domestic Violence in October 2007. See Laura Crimaldi, *Special Report; Program Offers Hope in Domestic Abuse Cases*, BOSTON HERALD, Sept. 3, 2007, at 4.

²⁸ Kelly Dunne & Marta Chadwick, *Redefining Safety: Do You Have a Safety Plan If a Victim Says “No” to Shelter?*, DOMESTIC VIOLENCE REPORT VOL. 12 NO. 4 (Civic Research Institute), April/May 2007, at 60.

²⁹ GREATER NEWBURYPORT DOMESTIC VIOLENCE HIGH RISK CASE RESPONSE TEAM, REPORT 2005-2007 (on file with author). In this report, 100% of the cases involved a male perpetrator and a female victim; 86% of the victims had restraining orders against their perpetrators at the time the case was accepted; and 55% had reported non-fatal strangulation incidents.

officials to acknowledge the inadequacy of the protection currently offered to victims of intimate partner violence.

Rights exist only to the extent that there are remedies to enforce them. A failure by states to pass legislation authorizing the use of GPS monitoring in domestic violence cases, or a refusal by judges or police to use this new tool, would expose the hollowness of the promises of protection we currently make to battered women. That exposure, in turn, might start us down a path of intensified activism by women around questions of equal protection.

RECOMMENDATIONS FOR MODEL GPS MONITORING LEGISLATION

Model legislation authorizing GPS monitoring must center on the organizing principle of victim safety. The key component of legislation is its responsiveness to the likelihood of increased danger that a batterer poses to the victim once the crime has been reported or alleged in the context of a civil proceeding. Set forth below are recommended features of such a statute:

* Law enforcement officers responding to any call involving a domestic incident should assess the potential lethality of the situation through the use of an approved dangerousness assessment and risk-management protocol to evaluate the risk of escalating violence in the situation.

* Upon reviewing conditions of dangerousness posed by a person alleged to have committed any type of domestic assault, a judge may, in her discretion, require the use of GPS electronic monitoring of an alleged offender as a condition of bail.

* A judge may order a domestic violence offender to be placed on GPS electronic monitoring to augment and help enforce the terms of an order of protection.

* A judge may furnish the domestic violence victim with a protective tracking device that informs the victim if the offender breaches impermissible geographic zones.

* Upon a showing of dangerousness, an alleged offender can be held until a hearing before a judge, in order to prevent re-assault opportunities and to protect the victim pending trial.

* The state may not use information gained through the use of GPS monitoring of domestic violence offenders for purposes unrelated to the domestic assault.