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The Legal Effects of the Massachusetts Abuse Prevention Act, the Stalking Statute, and the Marital Rape Exemption on Victims of Domestic Abuse

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THE LEGAL EFFECTS OF THE MASSACHUSETTS ABUSE PREVENTION ACT, THE STALKING STATUTE, AND THE MARITAL RAPE EXEMPTION ON VICTIMS OF DOMESTIC ABUSE

He threatened my life. He put 2 hands on my neck trying to choke me. Then he put his hands on my left arm making a motion to twist it. Meanwhile he said men are born to rule and men are the kings . . . He went on lecturing me on how to behave like a wife and a woman for 30 minutes. Then he demanded sex.¹

I. INTRODUCTION

Every year, domestic violence affects thousands of families resulting in injury and sometimes death.² Domestic abuse victims in Massachusetts seek approximately 42,000 civil restraining orders each year in an effort to stop the violence perpetrated against them and their children.³ Recently, the legislature and the judiciary have created and implemented three important tools in an attempt to deal with this increasing problem. The Supreme Judicial Court of Massachusetts abolished the marital rape exemption which provided a defense to marital rape based on the status of the parties.⁴ Additionally, the Massachusetts legislature passed both the Abuse Prevention Act (Act) and the stalking statute in response to the growing awareness of, and concern for, victims of domestic abuse.⁵

¹ SANDRA ADAMS & ANNE POWELL, *The Tragedies of Domestic Violence, A Qualitative Analysis of Civil Restraining Orders in Massachusetts*, OFFICE OF THE COMMISSIONER OF PROBATION, October 12, 1995.

² See ADAMS & POWELL, *supra* note 1, at 1 (finding 48.6% of domestic abuse victims report being physically abused).

³ MASSACHUSETTS PROBATION SERVICE, *Registry of Civil Restraining Orders Summary*, OFFICE OF THE COMMISSIONER OF PROBATION, July 1, 1995 - June 30, 1996 (detailing 42,323 civil restraining orders filed throughout Massachusetts).

⁴ See *Commonwealth v. Chretien*, 383 Mass. 123, 124, 417 N.E.2d 1203, 1205 (1981) (abolishing the marital rape exemption).

⁵ LENORE E. WALKER, *THE BATTERED WOMAN* 206-10 (1979). The seminal work in the domestic violence field is *The Battered Woman* where Lenore E. Walker discusses legislative action necessary to protect battered women from abuse. *Id.* The legislature anticipated these suggestions when, on July 17, 1978, it adopted the Abuse Prevention Act,

This article concludes that the Act, the stalking statute, and the abolishment of the marital rape exemption are necessary measures to help stem the tide of domestic violence. Section A discusses the marital rape exemption. Section B analyzes specific sections of the Act and the judicial interpretation of those sections. Section C analyzes the progressive aspects of the Act and how it effects protection for domestic violence victims. Section D compares the advantages and disadvantages of three types of statutory enforcement schemes and discusses the ways in which Massachusetts has effectively addressed enforcement. Section E discusses the stalking statute as additional legislative protection for domestic violence victims. Section F proposes that the legislature mandate that every defendant served with a protective order receive an information sheet detailing the Act's provisions and how those provisions restrict their conduct.

II. ANALYSIS

A. The Marital Rape Exemption

In 1857, Massachusetts became the first state to recognize the common law "marital rape exemption" which created a defense to rape occurring between married individuals.⁶ The Supreme Judicial Court began to erode this archaic

MASS. GEN. L. ch. 209A, §§ 1-10 (1996). The Act originally addressed all of the legal concerns Walker wrote about. *Id.* For example, Walker discusses the need for legislation protecting both married and unmarried individuals. LENORE E. WALKER, *THE BATTERED WOMAN* 206-10 (1979). The Act addressed this concern by defining the persons protected by the Act to include substantive dating relationships. MASS. GEN. L. ch. 209A, § 1 (1996). Additionally, the Act's language is gender neutral and therefore protects heterosexual as well as homosexual couples. *Id.*

The stalking statute, MASS. GEN. L. ch. 265, § 43 (West 1996), was adopted on May 18, 1992. The Supreme Judicial Court of Massachusetts (SJC) subsequently clarified the stalking statute's language in *Commonwealth v. Kwiatkowski*, 418 Mass. 543, 546, 637 N.E.2d 854, 857 (1994). The SJC in *Kwiatkowski* found the statute's language unconstitutionally vague as applied to the defendant but clarified the language so that it would be constitutional as applied to future violations. *Kwiatkowski*, 418 Mass. at 546, 637 N.E.2d at 857; *see also* *Commonwealth v. Matsos*, 421 Mass. 391, 399, 657 N.E.2d 467, 472 (1995) (affirming stalking conviction based on *Kwiatkowski* decision).

⁶ *See* *Commonwealth v. Fogerty*, 74 Mass. 489, 491 (1857) (holding marital rape exemption valid defense to rape charge). The *Fogerty* court reasoned that "it would always be competent for a party indicted to show, in defense of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife." *Id.*

law in *Commonwealth v. Chretien*.⁷ In *Chretien*, the defendant claimed the marital rape exemption for a rape that occurred before the end of a court ordered divorce nisi period.⁸ A divorce nisi judgment provides that within a statutorily prescribed period of time following the judgment either party may show cause why the decree ought to be set aside, or may successfully appeal the decree.⁹ The divorce decree is not final until the completion of the statutory period.¹⁰ The *Chretien* court held that when a rape occurs after a court grants a divorce nisi, the marital rape exemption no longer provides a valid defense to the rape charge because during the statutory nisi period the individuals are not legally married.¹¹

The *Chretien* court stated that the defendant had "fair warning of the criminality of his conduct" because forced intercourse is unlawful when it occurs prior to the expiration of the six month nisi period.¹² The court concluded that "under the statutes in effect at the time of the alleged offenses, the fact that the victim was the spouse of the defendant was no bar to a conviction of rape."¹³ This decision led to the eventual abolishment of the marital rape exemption in Massachusetts allowing the Commonwealth to successfully prosecute individuals charged with raping their spouse.

B. Abuse Prevention under Massachusetts General Laws Chapter 209A

The Massachusetts legislature responded to the growing intolerance of domestic violence when it passed the Abuse Prevention Act in July 1978.¹⁴ The

⁷ See *Commonwealth v. Chretien*, 383 Mass. 123, 125, 417 N.E.2d 1203, 1205 (1981) (holding decree of divorce nisi precludes defendant's utilization of marital rape exemption); Rene Augustine, *Marriage: The Safe Haven for Rapists*, 29 J. FAM. L. 559, 562 (1991) (recognizing Massachusetts as the first state to adopt the marital rape exemption).

⁸ *Chretien*, 383 Mass. at 125, 417 N.E.2d at 1205.

⁹ MASS. GEN. L. ch. 208, § 21 (1995). The statute reads in part as follows: "Judgments of divorce shall in the first instance be judgments nisi, and shall become absolute after the expiration of ninety days from the entry thereof . . ." *Id.*

¹⁰ *Id.* When the Supreme Judicial Court decided the *Chretien* case the statutory period was six months, however, the legislature has since amended the statute to a three month period. *Id.*

¹¹ *Chretien*, 383 Mass. at 125, 417 N.E.2d at 1205.

¹² *Commonwealth v. Chretien*, 383 Mass. 123, 124, 417 N.E.2d 1203, 1205 (1981).

¹³ *Id.* at 124, 417 N.E.2d at 1205.

¹⁴ MASS. GEN. L. ch. 209A, §§ 1-10 (1996); see also Miriam Goldstein Altman, *Litigating Domestic Abuse Cases Under ch. 209A*, 24 MASS. LAW. WKLY. NO. 7, October 23, 1995, at B6 (stating MASS. GEN. L. ch. 209A enacted during "social crisis" when domestic abuse victims ignored by law enforcement officials).

Act currently consists of ten sections detailing statutory protection, remedies, enforcement, and sentencing guidelines.¹⁵ The legislature designed the statute to give domestic violence victims an effective legal remedy and protect victims from future incidents of abuse.¹⁶ This remedy takes the form of a court imposed protective order, generally referred to as a "209A" order.¹⁷ Although a 209A order is a civil remedy, if an individual violates the order it is a criminal offense.¹⁸ A 209A order allows a judge to impose specific restrictions on an individual's behavior.¹⁹ The order becomes effective after the court notifies the

¹⁵ MASS. GEN. L. ch. 209A, §§ 1-10 (1996). The statute includes the following sections:

§ 1 Definitions

§ 2 Venue

§ 3 Remedies; period of relief

§ 4 Temporary orders; notice; hearing

§ 5 Granting of relief when court closed; certification

§ 6 Powers of police

§ 7 Abuse prevention orders; domestic violence record search; service of order; enforcement; violations

§ 8 Address of plaintiff; exclusion from court documents; confidentiality of records

§ 9 Form of complaints; promulgation

§ 10 Assessments against persons referred to certified batterer's treatment program as condition of probation.

Id.

¹⁶ See *Commonwealth v. Gordon*, 407 Mass. 340, 347, 553 N.E.2d 915, 919 (1990) (stating intent of statute is to prevent further abuse between parties). Additionally, the legislature attempted to prevent the abusive individual from initiating retaliatory legal action against the victim when it included a provision in the Act requiring the court to provide written judicial findings when granting protective orders to both parties. MASS. GEN. L. ch. 209A, § 3 (1996). The statute reads in part as follows, "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." *Id.*

¹⁷ See John P. Zanini, *Overview of Mass. Gen. L. ch. 209A, The Abuse Prevention Statute, and the Prosecutorial Role of the District Attorney's Office*, 28 NEW ENG. L. REV. 261, 261 (1993) (stating protective orders generally provide for the safety of abuse victims and children).

¹⁸ MASS. GEN. L. ch. 209A, § 7 (1996). The statute reads in part as follows: "Each abuse prevention order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE . . ." *Id.*

¹⁹ MASS. GEN. L. ch. 209A, § 3 (1996). Section three of the Act sets forth remedies available when a judge issues a 209A order. *Id.* The statute reads in part as follows:

A person suffering from abuse from an adult or minor family or household member may file a complaint in the court requesting protection from such abuse, including, but not limited to, the following orders:

(a) ordering the defendant to refrain from abusing the plaintiff, whether the

defendant of the order's existence.²⁰ If the defendant violates the order's provisions, the Commonwealth may prosecute the defendant.²¹

When the Commonwealth convicts a defendant for violating a protective order, the Act provides a flexible sentencing scheme that allows the sentencing judge to determine whether the defendant is amenable to rehabilitation through completion of a batterer's treatment program.²² A judge may sentence a defendant convicted for violating a protective order to a maximum of two and one half years in the house of correction and/or a maximum fine of five thousand dollars.²³ If, however, the defendant has no prior record of violent crime and a judge determines that the defendant is amenable to treatment, a judge may recommend that the defendant attend a recognized batterer's treatment program.²⁴ Failure to complete the court ordered batterer's program may result

defendant is an adult or minor;

(b) ordering the defendant to refrain from contacting the plaintiff, unless authorized by the court, whether the defendant is an adult or minor;

(c) ordering the defendant to vacate forthwith and remain away from the household, multiple family dwelling, and work place;

(d) awarding the plaintiff temporary custody of a minor child;

(e) ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both, when the defendant has a legal obligation to support such a person;

(f) ordering the defendant to pay the person abused monetary compensation for the losses suffered as a direct result of such abuse;

(g) ordering the plaintiff's address to be impounded as provided in section nine;

(h) ordering the defendant to refrain from abusing or contacting the plaintiff's child, or child in plaintiff's care or custody, unless authorized by the court;

(i) the judge may recommend to the defendant that the defendant attend a recognized batterer's treatment program.

Id.

²⁰ MASS. GEN. L. ch. 209A, § 7 (1996).

²¹ MASS. GEN. L. ch. 209A, § 3 (1996).

²² MASS. GEN. L. ch. 209A, § 3(i) (1996).

²³ MASS. GEN. L. ch. 209A, § 7 (1996). The statute reads in part as follows: Any violation of such [209A] order, or a protection order issued by another jurisdiction, shall be punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than two and one-half years in a house of correction, or by both such fine and imprisonment.

Id.

²⁴ MASS. GEN. L. ch. 209A, § 3(i) (1996). In 1977, a group of men in Cambridge, Massachusetts developed the first batterer's treatment program in the country. Emerge: Counseling and Education to Stop Male Violence, *Because Wanting To Stop Is Not Enough* (pamphlet issued by Emerge's main office at 18 Hurley Street, Cambridge, Massachusetts

in the court imposing any previously suspended sentence.²⁵ This flexible sentencing scheme allows a judge to assess whether first time violent offenders will benefit more from batterer's treatment than from a prison term.²⁶

The Act provides abuse victims who are unrepresented by counsel ready access to the courts because the procedure for seeking a protective order is simple. For example, a person seeking protection from abuse under chapter 209A may obtain an ex-parte protective or temporary order by filing a complaint in superior, district, or probate and family court.²⁷ Any individual, including

02141). In 1992, the Massachusetts Department of Public Health hired Emerge to train groups interested in qualifying as certified batterer's treatment programs under the Abuse Prevention Act. Elena Salzman, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 353 (1994). There are now approximately sixteen certified batterer's treatment programs throughout Massachusetts. Patricia Nealon, *Batterers: Common Characteristics*, BOSTON GLOBE, June 1, 1992, at 14.

²⁵ MASS. GEN. L. ch. 209A, § 7 (1996). The statute reads in part as follows: "If the defendant ordered to undergo treatment has received a suspended sentence, the original sentence shall be reimposed if the defendant fails to participate in said program as required by the terms of his probation." *Id.*

²⁶ *Id.* The statute further prescribes a standard certification requirement for all batterer's treatment programs throughout the state ensuring consistency between treatment techniques and programs. Mass. Gen. L. ch. 209A, § 3 note (St. 1990, ch. 403, § 16). The historical notes read in part as follows:

Within six months of the effective date of this act, guidelines and standards for the certification of batterer's treatment programs by the department of public health shall be set up by a commission to be established by the chief justice of the trial court department, one member of which shall be a district attorney or his designee, two of which shall be members of a recognized batterer's treatment program with training experience, two of which shall be members of a domestic violence program or the statewide coalition of programs which provide services to victims of domestic violence and one of whom shall be a member from a probation department. . . . The department of public health shall thereafter certify and monitor batterer's treatment programs according to the standards established and promulgated by the commission. Programs so certified shall be the only batterer's treatment programs appropriate for court referrals.

Id.

²⁷ MASS. GEN. L. ch. 209A, § 2 (1996). The statute reads in part as follows: "Proceedings under this chapter shall be filed, heard and determined in the superior court department or the Boston municipal court department or respective divisions of the probate and family or district court departments having venue over the plaintiff's residence." *Id.* Additionally, a domestic abuse victim may obtain an emergency protective order at any time, including when courts are not in session. MASS. GEN. L. ch. 209A, § 5 (1996). The statute reads in part, as follows:

When the court is closed for business . . . any justice of the superior,

indigent victims, may file for a protective order because the Act does not require a filing fee.²⁸ Additionally, victim witness advocates are available in most courts to assist plaintiffs with the 209A application procedure, obviating the need for an attorney.²⁹

The Act also provides that the court may not consider the length of the time since the last incident of abuse when deciding whether to grant an order.³⁰ As a result, individuals are not prevented or discouraged from obtaining or extending an order if the last incident of abuse occurred some time ago.³¹ Additionally, new legislation allows a third party to apply for a restraining order

probate and family, district or Boston municipal court departments may grant relief to the plaintiff as provided under section four [by granting a temporary protective order] if the plaintiff demonstrates a substantial likelihood of immediate danger of abuse. In the discretion of the justice, such relief may be granted and communicated by telephone to an officer or employee of an appropriate law enforcement agency, who shall record such order on a form . . . and shall deliver a copy of this order on the next court day to the clerk-magistrate of the court having venue and jurisdiction over the matter. If relief has been granted without the filing of a complaint . . . then the plaintiff shall appear in court on the next available business day to file said complaint.

Id.

²⁸ MASS. GEN. L. ch. 209A, § 3 (1996). The statute reads in part as follows: "No filing fee shall be charged for the filing of the complaint." *Id.*; MASS. GEN. L. ch. 209A, § 9 (1996). The statute reads in part as follows:

The administrative justices of the superior court, probate and family court, district court, and the Boston municipal court departments shall jointly promulgate a form of complaint for use under this chapter which shall be in such form and language to permit a plaintiff to prepare and file such complaint pro se.

Id.

²⁹ See MASSACHUSETTS OFFICE FOR VICTIM ASSISTANCE, COMMONWEALTH OF MASSACHUSETTS, A GUIDE TO DOMESTIC VIOLENCE COURT ADVOCACY IN MASSACHUSETTS 10, 17-19 (1993) (stating necessity of specialized domestic violence advocate in court sessions wherein civil protective orders granted); Salzman, *supra* note 20, at 341 (describing Quincy District Court's specialized domestic violence clerks' role of assisting victims seeking protective orders).

³⁰ MASS. GEN. L. ch. 209A, § 3 (1996). The statute reads in part as follows: The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order, of allowing an order to expire or be vacated, or for refusing to issue a new order. . . . A court shall not deny any complaint filed under this chapter solely because it was not filed within a particular time period after the last alleged incident of abuse.

Id.

³¹ *Id.*

on behalf of a plaintiff who is physically unable to do so.³² All of these provisions simplify the procedure for obtaining a protective order for pro se plaintiffs.

After the plaintiff files the complaint, a judge reviews the complaint and the victim's supporting affidavit during an ex parte hearing. The judge grants a temporary order provided that the plaintiff demonstrates a "substantial likelihood of immediate danger of abuse."³³ The plaintiff may file and receive a temporary order at any time because the statute does not require both parties to be present at the hearing.³⁴ The court issues a temporary order at the ex parte hearing for an initial ten day period.³⁵ Following the ex parte hearing, the defendant is served with the order and notified when the court will hold a full hearing on the order.³⁶ At this hearing, often called a "ten day hearing," the

³² MASS. GEN. L. ch. 209A, § 5 (1996). The 1996 addition to this statutory provision reads as follows:

If the plaintiff in such a case [demonstrates a substantial likelihood of immediate danger of abuse, and] is unable to appear in court without severe hardship due to the plaintiff's physical condition, then a representative may appear in court on the plaintiff's behalf and file the requisite complaint with an affidavit setting forth the circumstances preventing the plaintiff from appearing personally.

Id.

³³ MASS. GEN. L. ch. 209A, § 4 (1996). The statute reads in part as follows: "If the plaintiff demonstrates a substantial likelihood of immediate danger of abuse, the court may enter such temporary relief orders without notice as it deems necessary to protect the plaintiff from abuse" *Id.*

³⁴ *Id.*

³⁵ *Id.*; Altman, *supra* note 14, at B6. In 1992, the Massachusetts Commissioner of Probation implemented "the nation's first statewide, centrally computerized, domestic violence record keeping system" called the Registry of Civil Restraining Orders. ADAMS & POWELL, *supra* note 1, at 3. This system makes available to court and police personnel information regarding the issuance of restraining orders in Massachusetts on the day the order is issued. ADAMS & POWELL, *supra* note 1, at 3.

³⁶ MASS. GEN. L. ch. 209A, § 4 (1996). The statute reads in part as follows: [T]he court may enter such temporary relief orders without notice as it deems necessary to protect the plaintiff from abuse and shall immediately thereafter notify the defendant that the temporary orders have been issued. The court shall give the defendant an opportunity to be heard on the question of continuing the temporary order and of granting other relief as requested by the plaintiff no later than ten court business days after such orders are entered.

Id.

In *Commonwealth v. McCarthy*, LAW. WKLY. No. 16-033-96 (Docket # 9651CR2591), Judge Sanders of the Waltham District Court held that when no evidence exists that a defendant was served with a 209A order and the defendant was not otherwise

court gives the defendant an opportunity to be heard.³⁷ If the defendant fails to attend the ten day hearing, the court will automatically extend the temporary order for one year.³⁸ If the plaintiff fails to attend the hearing, however, the court will vacate the order. After the initial one year period the plaintiff may renew the order for an additional year or seek to have the order permanently imposed.³⁹

Recent case law illustrates the limiting effects of 209A restrictions and the need for the legislature to include a provision within the Act that informs defendants served with protective orders what conduct a court will find to violate the order. For example, once a judge has granted a no contact order, if the defendant subsequently contacts the plaintiff in any way, the defendant has violated the order and the Commonwealth may prosecute the defendant for the violation.⁴⁰ In *Commonwealth v. Butler*,⁴¹ the Massachusetts Court of Appeals held that a defendant, who anonymously sent a flower arrangement to his girlfriend while on notice that a 209A order was in effect, violated the "no contact" provision of the order because he acted indirectly, through someone else, to contact the plaintiff.⁴² The defendant argued that the "no contact" provision was unconstitutionally vague.⁴³ The court disagreed, finding the

notified of the order's existence, the defendant can not be held to have violated the order. Judge Sanders stated in part:

I do not view this requirement of service [of a 209A order] as a technical one. If a 209A order is to afford any real protection to victims of domestic abuse, then the target of the order must be on clear notice as to what he must refrain from doing and that he is subject to criminal penalties if he does not obey the specific terms that the order sets forth.

McCarthy, LAW. WKLY. No. 16-033-96 (Docket # 9651CR2591).

³⁷ MASS. GEN. L. ch. 209A, § 4 (1996).

³⁸ MASS. GEN. L. ch. 209A, § 4 (1996). The statute reads in part as follows: "If the defendant does not appear at such subsequent [ten day] hearing, the temporary orders shall continue in effect without further order of the court." *Id.*; MASS. GEN. L. ch. 209A, § 3 (1996). The statute reads in part as follows: "Any relief granted by the court shall be for a fixed period of time not to exceed one year." MASS. GEN. L. ch. 209A, § 3 (1996).

³⁹ MASS. GEN. L. ch. 209A, § 3 (1996). The statute reads in part as follows: "If the plaintiff appears at the court at the date and time the order is to expire, the court shall determine whether or not to extend the order for any additional time reasonably necessary to protect the plaintiff or to enter a permanent order." *Id.*

⁴⁰ See DIANE JULIAR & CAROLYN KESHIAN, *The Abuse Prevention Act: Chapter 209A - Summary*, OFFICE OF THE ATTORNEY GENERAL, at 11, October 1995 (listing 209A violations resulting in criminal sanctions).

⁴¹ 40 Mass. App. Ct. 906, 661 N.E.2d 666 (1996).

⁴² *Butler*, 40 Mass. App. Ct. at 907, 661 N.E.2d at 667.

⁴³ *Id.*

statutory language needed no further explanation.⁴⁴ This case illustrates that although the statutory language does not explicitly state every situation that may result in a no-contact violation, the court presumes that defendants understand that any contact that they cause, no matter how far removed, will violate the court's order.

Additionally, 209A orders restrict conduct because they limit where the defendant may and may not go depending on the defendant's physical proximity to the plaintiff. For example, where the police found a defendant across the street from a plaintiff's workplace, they arrested the defendant for violating a protective order.⁴⁵ The order mandated that the defendant stay at least one hundred yards away from the plaintiff and stay away from her workplace.⁴⁶ The plaintiff, however, was not at work during the time period in which the defendant was near her workplace.⁴⁷ The Massachusetts Court of Appeals reversed the defendant's conviction because, regardless of his intent, the defendant was never within one hundred yards of the plaintiff, and never entered the plaintiff's workplace.⁴⁸ The court determined that, under the circumstances, the defendant did not violate the order.⁴⁹ The previous two scenarios emphasize the need to inform defendants specifically what behavior the court will consider to violate a protective order because the statute is not specific enough to accomplish this goal.

C. The Progressive Aspects of Massachusetts General Laws Chapter 209A.

1. Victim Protection

The Abuse Prevention Act, in addition to protecting married persons, provides protection for individuals who are involved in substantive dating relationships with individuals of the same or different genders, or members of the same household.⁵⁰ These latter two classes of individuals are not always protected by the statutes of other states.⁵¹ The Act defines *family or household*

⁴⁴ *Id.*

⁴⁵ *Commonwealth v. O'Shea*, 41 Mass. App. Ct. 115, 115, 668 N.E.2d 861, 861 (1996).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ MASS. GEN. L. ch. 209A, § 1 (1996).

⁵¹ *See* ALA. CODE § 30-5-2 (1989) (excluding individuals in substantive dating relationships from class of individuals protected under abuse prevention statute); DEL. CODE ANN. tit. 10, § 901(9) (1994) (specifying gender of individuals protected under abuse

members to include the following relationships:

[P]ersons who:

- (a) are or were married to one another;
- (b) are or were residing together in the same household;
- (c) are or were related by blood or marriage;
- (d) having a child in common regardless of whether they have ever married or lived together; or
- (e) are or have been in a substantive dating or engagement relationship⁵²

The legislature's inclusion of an abuse victim involved in a substantive dating relationship is a progressive approach to protecting individuals who are not similarly protected under the statutes of other states.⁵³

Almost fifty percent of the 209A orders issued in Massachusetts involve individuals who are or have been in a dating relationship.⁵⁴ Couples involved in substantive dating relationships include individuals who are neither married, nor living together, regardless of gender.⁵⁵ The Act protects those individuals involved in a relationship who once lived together and those individuals who were previously involved, but never lived together.⁵⁶ A court considers the following factors to determine whether a couple is involved in a substantive dating relationship: (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the parties; and (4) the length of time elapsed since the termination of the relationship.⁵⁷

The Supreme Judicial Court of Massachusetts partially defined the parameters of a substantive dating relationship in *Brossard v. West Roxbury Division of District Court*.⁵⁸ The *Brossard* court held that a fourteen month sexual relationship, where the couple saw each other two to three times a week,

prevention statute).

⁵² MASS. GEN. L. ch. 209A, § 1 (1996).

⁵³ See ALA. CODE § 30-5-2 (1989) (omitting substantive dating relationship from *Family or Household Member* statutory definition); ARK. CODE ANN. § 9-15-103 (Michie 1993) (omitting substantive dating relationship from *Family or Household Members* definition).

⁵⁴ See ADAMS & POWELL, *supra* note 1, at 1 (finding 48.9% of protective orders issued to persons previously or currently involved in dating relationships).

⁵⁵ MASS. GEN. L. ch. 209A, § 1 (1996). The use of gender specific language is notably absent from the Act. *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 417 Mass. 183, 629 N.E.2d 295 (1994).

qualified as a substantive dating relationship.⁵⁹ Although the complainant lived with another man during the same time period, the *Brossard* court recognized that the statute does not preclude the victim from involvement in more than one substantive relationship at a time.⁶⁰

In contrast to the breadth of the Massachusetts Act, the Arkansas abuse prevention statute does not provide protection for individuals involved in substantive dating relationships.⁶¹ The Arkansas statute specifically protects those family or household members who are or have been married, live or have lived together, are children or parents, and are related to the fourth degree of consanguinity.⁶² This definition precludes statutory protection for persons who are or have been involved in a substantive dating relationship, but have never lived together, and protects individuals who are or have been involved in a substantive dating relationship who have lived together.⁶³ Compared to the Arkansas statute, the Massachusetts Act offers protection to a wider class of individuals.

In addition to protecting individuals in substantive dating relationships, the Massachusetts Act is gender neutral because it applies to both female and male victims as well as heterosexual and homosexual domestic disputes.⁶⁴ In contrast,

⁵⁹ *Id.* at 185, 629 N.E.2d at 296.

⁶⁰ *Id.*

⁶¹ ARK. CODE ANN. § 9-15-103 (Michie 1993).

⁶² ARK. CODE ANN. § 9-15-103 (Michie 1993). The statute reads in part as follows: "Family or household members' means spouses, former spouses, parents and children, persons related by blood within the fourth degree of consanguinity, and persons who are presently or in the past have resided or co-habitated together." *Id.*

⁶³ *Id.*

⁶⁴ See MASS. GEN. L. ch. 209A, § 1 (1995) (defining *family or household members* as *persons*, absent gender descriptions); JULIAR & KESHIAN, *supra* note 39, at 2 (describing individuals protected by the Abuse Prevention Act). Juliar and Keshian describe the individuals protected by the Massachusetts Abuse Prevention Act, as follows:

Chapter 209A can be used by both men and women, adults and minors, and in heterosexual or same-sex relationships. For example, under the definition of "family or household member," any person, regardless of sex or age, who has been abused by a spouse, former spouse, household member or former household member (who need not be of the opposite sex), past or present in-laws, step-children, or a blood relative, including a minor child, may file a c. 209A abuse petition. Blood relatives, in-laws, step-children, someone who has a child in common, and someone who is or was involved in a "substantive dating or engagement relationship" need not ever have resided with the plaintiff.

JULIAR & KESHIAN, *supra* note 40, at 2. Additionally, the Massachusetts sexual assault statutes are gender neutral. MASS. GEN. L. ch. 265, §§ 22-24 (1980).

the Arizona Abuse Prevention statute explicitly defines individuals eligible for protection as "persons of the *opposite sex* residing or having resided in the same household."⁶⁵ This definition precludes protection for individuals involved in same sex relationships.⁶⁶ Similarly, the Delaware abuse prevention statute defines protected classes as "family members and former spouses, a man and a woman co-habiting together with or without a child of either or both, or a man and a woman living separate and apart with a child in common."⁶⁷ Unlike the Massachusetts Act, both Arizona and Delaware preclude individuals who are living with and abused by a same sex partner from statutory protection.

2. Protective Order Violation

Evincing the legislature's serious regard for domestic violence, the Massachusetts Act imposes a harsh penalty on a defendant who is convicted of violating a protective order.⁶⁸ The penalty provided in the statute mandates that every restraining order served on a defendant contain the following language:

Violation of this order is a criminal offense. Any violation of such order

⁶⁵ ARIZ. REV. STAT. ANN. § 13-3601 (1994) (emphasis added). The statute reads in part as follows:

"Domestic violence" means any act which is a dangerous crime . . . if the relationship between the victim and the defendant is one of marriage or former marriage or of persons of the opposite sex residing or having resided in the same household or if the victim and defendant or the defendant's spouse are related to each other by consanguinity or affinity to the second degree.

Id.

⁶⁶ *Id.*

⁶⁷ DEL. CODE ANN. tit. 10, § 901(9) (1994). The statute reads in part as follows: "Family" means husband and wife; a man and woman co-habiting in a home in which there are children of either or both; custodian and child; or any group of persons related by blood or marriage who are residing in one home under one head." *Id.*; DEL. CODE ANN. tit. 10, § 1041 (1994). The statute reads in part as follows:

(2) "Domestic violence" means abuse perpetrated by one member against another member of the following protected classes:

(i) Family, as that term is defined in § 901(9) of this title, regardless, however, of state of residence of the parties; or

(ii) Former spouses, a man and a woman co-habiting together with or without a child of either or both, or a man and a woman living separate and apart with a child in common.

DEL. CODE ANN. tit. 10, § 1041 (1994).

⁶⁸ See MASS. GEN. L. ch. 209A, § 7 (1996) (defining the penalty for a protective order violation). But see MASS. GEN. L. ch. 209A, § 3 (i) (1996) (allowing sentence suspension for protective order violation if judge orders defendant to complete batterer's treatment program and defendant completes program).

or a protection order issued by another jurisdiction, shall be punishable by a fine of not more than \$5,000, or by imprisonment for not more than two and one half years in a house of correction, or by both such fine and imprisonment.⁶⁹

Notifying defendants of the consequences of a restraining order violation may deter them from committing subsequent violations. Not every state statute, however, has such high penalties associated with protective order violations. For example, violation of the Arkansas protective order statute may result in a maximum sentence of one year in prison, or a maximum fine of one thousand dollars, or both.⁷⁰

In contrast, Alabama's abuse prevention statute's maximum penalty scheme takes an entirely different approach by delineating higher penalties for each subsequent conviction.⁷¹ A first offense is punishable as a Class A misdemeanor which requires no minimum sentence or fine.⁷² A second conviction is "punishable by a minimum of 48 hours of continuous imprisonment in addition to any permissible fine," and the third conviction is punishable by a minimum sentence of thirty days imprisonment plus any permissible fine.⁷³ These sentences cannot be suspended.⁷⁴

⁶⁹ MASS. GEN. L. ch. 209A, § 7 (1996).

⁷⁰ ARK. CODE ANN. § 9-15-207 (Michie 1993). The statute reads in part as follows: "Any order of protection shall include a notice to the respondent or party restrained that a violation of the order is a Class A misdemeanor carrying a maximum penalty of one (1) year imprisonment in the county jail or a fine of up to one thousand dollars (\$1,000), or both." *Id.*

⁷¹ See ALA. CODE § 30-5A-3 (1989) (detailing the penalty scheme for protective order violations).

⁷² *Id.* The ALA. CODE § 30-5A-3 (1989), reads as follows:

Any violation of this chapter is a Class A misdemeanor. A second conviction for violation of this chapter shall, in addition to any permissible fine, be punishable by a minimum of 48 hours continuous imprisonment which may not be suspended. A third, or subsequent conviction shall, in addition to any permissible fine, be punishable by a minimum sentence of 30 days imprisonment which may not be suspended.

Id. A Class A misdemeanor prison term is defined as follows: "Sentences for misdemeanors shall be a definite term of imprisonment in the county jail or to hard labor for the county, within the following limitations: (1) For a Class A misdemeanor, not more than one year." ALA. CODE § 13A-5-7 (1978). A Class A misdemeanor fine is defined as follows: "(a) A sentence to pay a fine for a misdemeanor shall be for a definite amount, fixed by the court, within the following limitations: (1) For a Class A misdemeanor, not more than \$2,000 . . ." ALA. CODE § 13A-5-12 (1980).

⁷³ ALA. CODE § 30-5A-3 (1989).

⁷⁴ *Id.*

The Alabama scheme increases the penalty for each successive conviction and also sets out continuous, mandatory, non-suspendable sentences for offenders.⁷⁵ The penalties, however, remain too low to convince defendants that violation of a protective order is a serious offense. This scheme would deter abuse prevention order violations more effectively if the Alabama legislature increased the initial statutory penalty. For example, if the first offense was punishable by a minimum of forty eight hours in the county jail and the second offense punishable by a minimum of fifteen days in the county jail, then the deterrent effect would be greater.

3. Full Faith and Credit Consideration For Out of State Protective Orders

The Massachusetts legislature amended the Abuse Prevention Act in 1996 to define a protection order issued by another jurisdiction as an order issued by another state or United States Territory that prevents contact with or abuse from the person served with the order.⁷⁶ The amendment provides that Massachusetts must give full faith and credit to all restraining orders granted in other jurisdictions.⁷⁷ This amendment protects individuals who possess out of state orders while they are in Massachusetts.⁷⁸

Law enforcement officials are able to enforce orders from other jurisdictions because the Massachusetts statewide Registry of Civil Restraining Orders (Registry) contains information on valid protective orders filed with Massachusetts courts.⁷⁹ The statewide Registry contains information regarding

⁷⁵ *Id.*

⁷⁶ MASS. GEN. L. ch. 209A, § 1 (1996). The statute reads in part as follows: Protection order issued by another jurisdiction, any injunction or other order issued by a court of another state, territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, or tribal court that is issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to another person, including temporary and final orders issued by civil and criminal courts filed by or on behalf of a person seeking protection.

Id.

⁷⁷ MASS. GEN. L. ch. 209A, § 5A (1996). The statute reads in part as follows: "Any protection order issued by another jurisdiction, as defined in section one, shall be given full faith and credit throughout the commonwealth and enforced as if it were issued in the commonwealth for as long as the order is in effect in the issuing jurisdiction." *Id.*

⁷⁸ *Id.*

⁷⁹ MASS. GEN. L. ch. 209A, § 5A (1996). The statute reads in part as follows: A person entitled to protection under a protection order issued by another jurisdiction may file such order in the superior court department or the Boston municipal court department or any division of the probate and family

defendants who are on probation, parole, the subject of a valid 209A order, or wanted for default warrants.⁸⁰ Following the passage of the amendment to the Abuse Prevention Act in 1996, the Registry now contains information regarding persons in the Commonwealth of Massachusetts who are the subject of valid, extraterritorial protective orders.⁸¹ When a person protected by an extraterritorial order files it in the appropriate Massachusetts court, the information is added to the Registry.⁸² The amendment also notes that a court will presume an order's validity if any individual gives an out of state protective order to a law enforcement officer accompanied by a statement from the protected individual corroborating the order's validity.⁸³ The addition of extraterritorial protective orders to the Registry ensures that when law enforcement officers consult the Registry they will know whether an individual is the subject of a protective order, extraterritorial or otherwise.

Massachusetts protective orders are also enforceable on United States military property. In *Cobb v. Cobb*,⁸⁴ the Supreme Judicial Court of Massachusetts addressed two questions of law, namely, whether Massachusetts judges have the authority to issue protective orders that take effect on land ceded to the federal government, and whether those orders are thereafter valid and enforceable.⁸⁵ The court reasoned that past case law "does not bar extension of the benefits and burdens of all State laws to inhabitants of land ceded to the

or district court departments by filing with the court a certified copy of such order which shall be entered into the statewide domestic violence record keeping system established pursuant to the provisions of section seven of chapter one hundred and eighty-eight of the acts of nineteen hundred and ninety-two and maintained by the office of the commissioner of probation.

Id.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ MASS. GEN. L. ch. 209A, § 5A (1996). The statute reads in part as follows: A law enforcement officer may presume the validity of, and enforce in accordance with section six, a copy of a protection order issued by another jurisdiction which has been provided to the law enforcement officer by any source: provided, however, that the officer is also provided with a statement by the person protected by the order that such order remains in effect. Law enforcement officers may rely on such statement by the person protected by such order.

Id.

⁸⁴ 406 Mass. 21, 545 N.E.2d 1161 (1989).

⁸⁵ *Cobb*, 406 Mass. at 21, 545 N.E.2d at 1161. Although the case was moot at the time of decision because the order expired without the defendant violating it, the court addressed both questions. *Id.*

federal government.”⁸⁶ The court concluded that Massachusetts judges do have the authority to issue protective orders that take effect on land ceded to the Federal government and that those orders are both valid and enforceable.⁸⁷ This decision clarifies the ambiguity surrounding a Massachusetts judge’s authority with respect to issuing protective orders that take effect on property within Massachusetts, but under federal government control.

D. Enforcement Of Massachusetts General Laws Chapter 209A Through Police Action And Variations On The Authority To Arrest

After an abuse victim obtains a protective order, police enforcement of the order can help to ensure his/her safety. A person who violates the vacate, no contact, and/or refrain from abuse provisions of a 209A order is subject to criminal sanctions and arrest.⁸⁸ Most state domestic violence arrest policies allow police to make warrantless misdemeanor arrests when the officer believes an individual committed a crime.⁸⁹ Warrantless misdemeanor arrest allows police officers to detain the violator of a protective order upon reasonable belief that a violation occurred without actually seeing the violation first hand.⁹⁰ An officer may make a warrantless arrest if the officer believes that the defendant placed an individual protected under a 209A order in fear of imminent serious physical harm.⁹¹ As a result, police may arrest individuals in domestic violence situations even where the police do not witness the abuse.

The amount of discretion an arrest policy gives police officers in making domestic arrests may effect the victim’s safety. The three statutory warrantless arrest schemes are characterized as permissive, pro-arrest, and mandatory

⁸⁶ *Id.* at 24, 545 N.E.2d at 1163.

⁸⁷ *Id.* at 26, 545 N.E.2d at 1164.

⁸⁸ JULIAR & KESHIAN, *supra* note 40.

⁸⁹ See Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1148-49 (1994) (describing warrantless arrest policies). At common law, an officer may make a warrantless misdemeanor arrest in the following circumstances: (1) the defendant’s actions involve a breach of the peace; (2) the arresting officer views the act or the act occurs in the officer’s presence; and (3) the act is “continuing at the time of the arrest or only interrupted, so that the offense and the arrest form parts of one transaction.” *Commonwealth v. Gorman*, 288 Mass. 294, 297, 192 N.E.2d 618, 619 (1934).

⁹⁰ Welch, *supra* note 89, at 1149. A protective order violation need not be the result of abuse. An individual may also violate the no contact or vacate provisions of a protective order.

⁹¹ *Commonwealth v. Jacobsen*, 419 Mass. 269, 273, 644 N.E.2d 213, 216 (1995).

arrest.⁹² Each scheme varies with regard to the amount of discretion police officers may use when making domestic arrests. For example, a permissive arrest policy leaves the choice of whether to arrest either party involved in a domestic dispute entirely to the responding officer's discretion if the officer finds probable cause to arrest.⁹³ When the choice to arrest is left to the officer's discretion, however, many officers choose not to arrest.⁹⁴ The police officer's decision is based on many factors including the seriousness of the victim's injuries and the reasons the perpetrator gives for the abuse.⁹⁵ Therefore, the victim's immediate safety becomes dependent upon the individual officer's perception of the situation which may lead to inconsistent application of the permissive arrest policy.⁹⁶

Unlike permissive arrest policies, mandatory arrest policies remove police discretion and may result in the officer arresting both the victim and the abusive individual.⁹⁷ Under a mandatory arrest scheme, an officer who finds probable cause that one or both parties committed a crime or violated a protective order must arrest the party or parties.⁹⁸ While officers are more likely to follow this policy consistently, a mandatory arrest scheme may potentially discourage victims from calling the police if the victim does not want the police to arrest the abusive individual.⁹⁹ Additionally, this policy may result in arrest of both the

⁹² Welch, *supra* note 89, at 1149.

⁹³ Welch, *supra* note 89, at 1149.

⁹⁴ Sarah M. Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 217 (1988) (citing statistical studies wherein police officers permitted to use discretion chose not to arrest). Under a permissive arrest scheme, a Milwaukee study found that while eighty-two percent of domestic abuse victims requested the police to arrest their batterers', the police arrested only fourteen percent of those individuals. Bowker, *Police Services to Battered Women: Bad or Not So Bad?*, 9 CRIM. JUST. & BEHAV. 476, 485-86 (1982).

⁹⁵ See Buel, *supra* note 94, at 217 (discussing various considerations police officers utilize in deciding whether to arrest).

⁹⁶ Buel, *supra* note 94, at 217.

⁹⁷ Buel, *supra* note 94, at 217.

⁹⁸ See The Harv. L. Rev. Assoc., *New State and Federal Responses to Domestic Violence*, 106 HARV. L. REV. 1528, 1537 (1993) (describing mandatory arrest policies); Buel, *supra* note 94, at 225 (discussing circumstances when police make dual arrests in domestic violence situations).

⁹⁹ See Buel, *supra* note 94, at 222 (noting reasons why victims may not want the abuser arrested). A few of these reasons include the following:

(1) fearing that the batterer will become more abusive in retaliation for the arrest; (2) not wanting the children to witness their father's arrest; (3) not wanting the batterer to lose his job or stop providing support to the family; or (4) believing that the violence was her fault and she should have done

offender and the abuse victim regardless of the police officer's belief that the victim used justifiable force to protect themselves.¹⁰⁰

Massachusetts maintains a pro-arrest policy that effectively combines aspects of both mandatory and permissive arrest policies.¹⁰¹ The Massachusetts pro-arrest policy mandates arrest when the officer believes that a person violated a temporary or permanent protective order.¹⁰² This policy allows police officers to use discretion to arrest where the circumstances warrant, while mandating

something to prevent the abuse.

Buel, *supra* note 94, at 222.

¹⁰⁰ See The Harv. L. Rev. Assoc., *supra* note 98, at 1538-39 (describing circumstances where mandatory arrest results in arrest of both victim and abuser). Mandatory arrest requires police officers to arrest any individual who causes bodily harm upon another. The Harv. L. Rev. Assoc., *supra* note 98, at 1538-39. Therefore, under a mandatory arrest scheme, in addition to arresting the abusive partner the police must also arrest a victim who may have caused harm while attempting to protect her or himself. The Harv. L. Rev. Assoc., *supra* note 98, at 1538-39. Advantages to a mandatory arrest scheme, however, do exist. The Harv. L. Rev. Assoc., *supra* note 98, at 1538-39. For example, mandatory arrest provisions prevent police officers from making arrests for discriminatory reasons. The Harv. L. Rev. Assoc., *supra* note 98, at 1538-39.

¹⁰¹ MASS. GEN. L. ch. 209A, § 6 (1996); see Welch, *supra* note 94, at 1150 (describing aspects of pro-arrest policies). Section six of chapter 209A of the Massachusetts General Laws reads in part as follows:

Whenever any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, such officer shall take, but not be limited to the following action:

....

(7) arrest any person a law officer witnesses or has probable cause to believe has violated a temporary or permanent vacate, restraining, or no-contact order or judgment issued pursuant to section eighteen, thirty-four B or thirty-four C of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, section three, three B, three C, four or five of this chapter, or sections fifteen or twenty of chapter two hundred and nine C, or similar protection order issued by another jurisdiction. When there are no vacate, restraining or no contact orders or judgments in effect, arrest shall be the preferred response whenever an officer witnesses or has probable cause to believe that a person:

- (a) has committed a felony;
- (b) has committed a misdemeanor involving abuse as defined in section one of this chapter;
- (c) has committed an assault and battery in violation of section thirteen A of chapter two hundred and sixty-five.

MASS. GEN. L. ch. 209A, § 6 (1996).

¹⁰² MASS. GEN. L. ch. 209A, § 6 (1996).

arrest when an individual violates a protective order.¹⁰³ Police officers are more likely to consistently arrest under this policy because it specifically dictates those instances when an arrest is discretionary and when it is mandatory.¹⁰⁴

E. An Additional Massachusetts Statutory Enactment Affording Protection From Abuse: The Stalking Statute.

In 1991, the Massachusetts state legislature further enhanced statutory protection for domestic abuse victims by criminalizing stalking in violation of a temporary or permanent vacate, restraining, or no-contact order.¹⁰⁵ In enacting this statute, the legislature recognized that ninety percent of women killed by their husbands and boyfriends are initially stalked by them.¹⁰⁶ Prior to the criminalization of stalking, victims stalked by their abusers, who did not possess a 209A order, had no remedy until the abuser committed a crime.¹⁰⁷

The language of the stalking statute was constitutionally challenged in *Commonwealth v. Kwiatkowski*.¹⁰⁸ The defendant argued that the statutory language did not clearly state whether a violation required repeated acts of harassment or a single continuous series of acts.¹⁰⁹ The Supreme Judicial Court

¹⁰³ *Id.* If, however, there is no protective order in place and the officer believes that a person committed an assault and battery, a felony, or violated a protective order's abuse provisions, then the Act does not mandate the officer to arrest the offender. *Id.*; see also BOSTON POLICE DEPARTMENT RULES AND PROCEDURES, R. 327, § 5 (1992). The Boston Police Department R. 327 on criminal complaints reads as follows: "Arrests will be made and criminal complaints will be sought for all violations of c. 209A orders which occur within the City of Boston, regardless of the city/town or court where the action originated" BOSTON POLICE DEPARTMENT RULES AND PROCEDURES, R. 327, § 5 (1992).

¹⁰⁴ See Buel, *supra* note 94, at 217 (describing circumstances when police officers are likely to arrest).

¹⁰⁵ MASS. GEN. LAWS ANN. ch. 265, § 43 (West 1996). This statute also protects individuals who do not have a protective order in place under MASS. GEN. L. ch. 209A.

¹⁰⁶ See Robert A. Guy Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 996 (1993) (citing statistics wherein victims are previously stalked by their abuser).

¹⁰⁷ *Id.*

¹⁰⁸ 418 Mass. 543, 637 N.E.2d 854 (1994).

¹⁰⁹ *Kwiatkowski*, 418 Mass. at 546, 637 N.E.2d at 857. The language of the stalking statute originally read as follows:

Whoever willfully, maliciously, and repeatedly follows or harasses another person and who makes a threat with the intent to place that person in imminent fear of death or serious bodily injury shall be guilty of the crime of stalking and shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars, or imprisonment in the house of correction for not more than two and one-half

of Massachusetts clarified the language by requiring that a "pattern of conduct" and "series of acts" involve more than two incidents.¹¹⁰ In response to the *Kwiatkowski* opinion, the Massachusetts legislature formally adopted the Supreme Judicial Court's language in a 1996 amendment making the statutory language constitutional on its face.¹¹¹ Additionally, the legislature further amended the stalking statute in 1997 to include threats via mail or electronic mediums.¹¹²

The enactment of the stalking legislation was a welcome and necessary complement to the Abuse Prevention Act because it criminalized harassing conduct that previously remained unpenalized. Violation of Mass. Gen. L. ch. 265, § 43 carries a penalty with a maximum sentence of five years in the state prison, or a fine not to exceed one thousand dollars.¹¹³ When the crime of stalking, however, is in violation of a temporary or permanent restraining order, the court must impose a mandatory minimum sentence of one year and not more

years or both.

MASS. GEN. LAWS ANN. ch. 265, § 43 (West 1996).

¹¹⁰ *Kwiatkowski*, 418 Mass. at 546, 637 N.E.2d at 857. The *Kwiatkowski* court applied the clarification of the statute's language prospectively, resulting in the reversal of the defendant's conviction. *Id.*; see also *Commonwealth v. Matsos*, 421 Mass. 391, 399, 657 N.E.2d 467, 472 (1995) (affirming stalking conviction based on *Kwiatkowski* decision).

The revised language of MASS. GEN. LAWS ANN. ch. 265, § 43 (West 1994), reads as follows:

(a) Whoever (1) wilfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place that person in imminent fear of death or bodily injury, shall be guilty of the crime of stalking.

MASS. GEN. L. ch. 265, § 43 (1996).

¹¹¹ MASS. GEN. L. ch. 265, § 43(b) (1996); see *Kwiatkowski*, 418 Mass. at 547, 637 N.E.2d at 849 (clarifying statutory language).

¹¹² MASS. GEN. LAWS ch. 265, § 43 (West Supp. 1997). The statute reads, in pertinent part: "Such conduct, acts or threats described in this paragraph shall include, but not be limited to, electronic mail, internet communications and facsimile communications." *Id.*

¹¹³ MASS. GEN. L. ch. 265, § 43 (1996). The statute reads in part as follows: Whoever . . . shall be guilty of the crime of stalking and shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars, or imprisonment in the house of correction for not more than two and one-half years or both.

Id.

than five years of imprisonment in jail or state prison.¹¹⁴ A subsequent conviction under the statute carries a mandatory minimum sentence of two years and not more than ten years in state prison.¹¹⁵ By enacting this legislation, the legislature recognized the importance of protecting victims of domestic violence from being stalked by their abusive partners.

F. Proposed Addition to 209A Law: Dissemination of Helpful Information to Defendants.

The current Abuse Prevention Act provides for the dissemination of an information sheet to victims providing referral numbers for shelters, hot-lines, legal services, hospitals, and police and details victim rights and responsibilities under the 209A order.¹¹⁶ The information sheet is a vital part of the 209A law because it provides victims with information which may aid them in further protecting themselves from future abusive incidents. Aside from the order itself, however, the Act does not provide a defendant subject to protective order

¹¹⁴ MASS. GEN. L. ch. 265, § 43(b) (1996). The statute reads in part as follows: "No sentence imposed under the provisions of this subsection shall be less than a mandatory minimum term of imprisonment of one year." *Id.*

¹¹⁵ MASS. GEN. L. ch. 265, § 43(c) (1996).

¹¹⁶ MASS. GEN. L. ch. 209A, § 6 (1996). The statute reads in part as follows:
Whenever any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, such officer shall

....

(4) give such person immediate and adequate notice of his or her rights. Such notice shall consist of handing said person a copy of the statement which follows below and reading the same to said person. Where said person's native language is not English, the statement shall be then provided in said person's native language whenever possible.

'You have the right to appear at the Superior, Probate and Family, District or Boston Municipal Court, if you reside within the appropriate jurisdiction, and file a complaint requesting any of the following applicable orders: (a) an order restraining your attacker from abusing you; (b) an order directing your attacker to leave your household, building or workplace; (c) an order awarding you custody of a minor child; (d) an order directing your attacker to pay support for you or any minor child in your custody, if the attacker has a legal obligation of support; and (e) an order directing your attacker to pay you for losses suffered as a result of abuse, including medical and moving expenses, loss of earnings or support, costs for restoring utilities and replacing locks, reasonable attorney's fees and other out-of-pocket losses for injuries and property damage sustained.

Id.

restrictions with any explanatory information.¹¹⁷

Approximately seventeen percent of defendants served with protective orders violate the order within one year of the order's issuance.¹¹⁸ An information sheet given to each defendant served with a 209A order would serve to educate them as to their duties and responsibilities under the order while mitigating the confusion and anger that accompanies receipt of such notice.¹¹⁹ The information sheet should explain what a protective order is, how it limits the defendant's conduct, and the applicable penalties for violating the order.¹²⁰ Additionally, the sheet should be given to all defendants when they are served with process or mailed to each defendant after the filing of the 209A order with the court. This additional educational information will help to prevent future violations.

III. CONCLUSION

While Massachusetts was unfortunately the first state to adopt the marital rape exemption in 1857, the Commonwealth was also one of the first states to adopt progressive abuse prevention measures. Massachusetts has steadily enhanced victim protection through the abolishment of the marital rape exemption and enactment of both the Massachusetts Abuse Prevention Statute and the Stalking Statute. The legislature has also adopted amendments providing for full faith and credit for extraterritorial protective orders. The Massachusetts legislature should continue this trend by amending the Abuse Prevention Act. Such an amendment should include mandatory dissemination of information regarding a 209A order's provisions and restrictions in an effort to decrease the frequency of protective order violations.

Esther M. Bixler

¹¹⁷ See MASS. GEN. L. ch. 209A, § 7 (1996) (noting violation of protective order is criminal offense).

¹¹⁸ See ADAMS & POWELL, *supra* note 1, at 2 (finding 17.3% of defendants violate protective order within one year).

¹¹⁹ See attached information sheet originally created by Attorney Stephen Russo, 33 Vernon Street, Boston, Massachusetts 02108, and modified with the assistance of Assistant District Attorney John P. Zanini, Suffolk County District Attorney's Office, in accordance with his own opinions and understanding. The proposed information sheet should not be regarded as having the imprimatur of the District Attorney for the Suffolk District.

¹²⁰ See attached information sheet.

ANSWERS TO DEFENDANT'S QUESTIONS ABOUT 209A RESTRAINING ORDERS

The information provided is intended to answer some common questions you may have about your order. If you need legal advice, you must consult an attorney.

WHAT IS A 209A RESTRAINING ORDER?

The court has issued a restraining order against you pursuant to Massachusetts General Laws chapter 209A (The Massachusetts Abuse Prevention Law). This law enables a family or household member suffering from abuse to file a complaint requesting court protection against physical harm or attempted physical harm, fear of physical harm, or sexual relations.

The 209A Order means that the court has found that there is a substantial likelihood of immediate danger or abuse to the individual who filed the 209A complaint against you [hereinafter "plaintiff"].

In order to protect the plaintiff, the court has ordered you:

- ☐ NOT TO ABUSE THE VICTIM;
- ☐ NOT TO CONTACT THE VICTIM;
- ☐ TO STAY AWAY FROM THE VICTIM;
- ☐ TO STAY AWAY FROM THE VICTIM'S WORK PLACE;
- ☐ TO STAY AWAY FROM THE PLAINTIFF'S MINOR CHILDREN; AND
- ☐ TO VACATE THE HOUSEHOLD.

ABUSE IS A CRIMINAL ACT, but the restraining order is a civil order, not a criminal order. This means that you do not have a criminal record as a result of the order.

However, violation of the order can result in arrest, criminal charges, and a criminal record.

IT IS IN YOUR BEST INTEREST TO UNDERSTAND WHAT THE ORDER MEANS, WHAT YOU MUST DO OR NOT DO TO COMPLY WITH THE ORDER, AND WHAT WILL HAPPEN TO YOU IF YOU VIOLATE THE ORDER.

HOW LONG DOES THE ORDER LAST?

The 209A Order is in effect up to one year

and can be extended by the court. Only the plaintiff can ask the court to shorten the time period. Do not assume or believe this order has been terminated unless you get an order from the court saying that the order has been terminated. If the plaintiff tells you that the order has ended, and this is not true, you can be arrested and punished for a violation of the order if you contact the plaintiff.

Unless the court has changed the order you must comply even if you think the plaintiff has changed his/her mind or you think you have the plaintiff's permission. If a violation occurs, the court will focus on YOUR behavior, not the plaintiff's. YOU will be held responsible for your own behavior.

WHAT DOES NO CONTACT MEAN?

The no contact order includes ANY FORM of direct and indirect contact. You cannot call, write, approach, or follow the plaintiff or have someone else call, write, approach, or follow that person for you. You can not send the victim flowers or cards, anonymously, or otherwise. You can not leave messages on the plaintiff's answering machine, voice mail, or send the plaintiff E-mail.

You cannot have the plaintiff served with legal papers unless the order specifically allows service of process.

WHAT ABOUT MY PERSONAL BELONGINGS?

If you have been ordered to leave and stay away from the plaintiff's residence and belongings are left behind, you must get court permission to pick up the belongings and must contact the police to accompany you. If you have a dispute with the plaintiff over the belongings, you must go to court to resolve the dispute.

CAN I CALL OR VISIT MY CHILDREN?

If you have been ordered not to contact your children and to surrender custody of them to the plaintiff, you cannot call or visit them. You must go to Probate and Family Court to get permission to visit them.

If you obtain an order allowing visitation rights and a prior order prohibiting contact with the plaintiff is still in effect, you must make arrangements with a third party to see the children. You should also carry a copy of both orders with you to avoid being arrested.

WHAT IF THE PLAINTIFF CONTACTS ME?

The 209A order governs YOUR behavior, not the plaintiff's. If the plaintiff contacts you, you are still subject to the court's order and are prohibited from contact. If the plaintiff harasses, threatens, or intimidates you, you may seek a protective order from the district court or call the police.

If you are in a public place and the plaintiff walks in, YOU must leave. It doesn't matter who was there first.

WHAT ELSE CAN'T I DO?

You cannot keep keys to the plaintiff's residence, damage the plaintiff's belongings, cause to be shut off the plaintiff's utilities, discontinue the plaintiff's mail service, trespass on the plaintiff's residence or workplace, or drive/walk past the plaintiff's residence. Additionally, you may not drive/walk past the plaintiff's workplace when the plaintiff is at work.

The order may also contain additional terms that apply to you. Understand all the terms of the order. You will not be able to claim ignorance as a defense if you violate the order.

WHAT WILL HAPPEN IF I VIOLATE THE ORDER?

VIOLATION OF THE RESTRAINING ORDER IS A CRIME punishable by 2 ½ years in prison or a \$5,000.00 fine, or both.

Violation can result in arrest, criminal charges, and a criminal record.

It is mandatory for a police officer to arrest a suspect whenever that officer has probable cause to believe that the suspect has violated a restraining order. If you are arrested, you will be charged with the criminal offense of violating the order.

You may also be subject to additional criminal charges such as assault and battery, threats, harassment, trespassing, and stalking.

Stalking is harassment or repeated following of another person. Stalking in violation of a court order, including a restraining order, carries a mandatory minimum penalty of one year in the House of Correction and a maximum of five years in State Prison.

HOW DO I COMPLY WITH THE 209A ORDER?

Whether or not you agree with the order, you are legally required to obey it. As long as your order is in effect, you must respect it. Do not try to take matters into your own hands. Accept the legal process as the only way to resolve a dispute concerning the order and consult an attorney if you need legal advice.

Make sure you understand what your order says. The Court expects you to know and understand all of its contents. If you violate part of an order, you will not be able to defend yourself by claiming you forgot that part or did not realize it was included in the order.

Remember, a 209A order is not a criminal conviction, but VIOLATION OF THE ORDER IS A CRIMINAL ACT AND CAN LEAD TO ARREST, CONVICTION, AND IMPRISONMENT. IF YOU NEED HELP IN ORDER TO COMPLY WITH THE ORDER, GET IT AND HELP YOURSELF AVOID THE CRIMINAL CONSEQUENCES OF VIOLATING THE ORDER. Consider a certified batterer's program, alcohol/drug counseling, or both.

