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A QUESTION OF INTENT: THE MASSACHUSETTS ABUSE PROTECTION ORDER AND THE INNOCENT DOER OF HARM

*Courts can never abandon insistence upon the evil intent as a prerequisite to criminality, partly because the real menace to social interests is the intentional, not the innocent, doer of harm.*¹

I. INTRODUCTION

The Massachusetts Abuse Prevention Order (209A) does not distinguish an individual who intentionally violates a restraining order from one who accidentally violates a 209A order.² A 209A order does not speak specifically to the defendant's state of mind; it is silent concerning the *mens rea* required to violate a 209A order.³ The violation of a 209A order is a strict liability offense that only requires a defendant to have prior knowledge of the existence of a 209A order.⁴ Theorists argue that some

¹ Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 68 (1933).

² See generally MASS. GEN. LAWS. ch. 209A, § 7 (West 1992) (civil remedy that provides protective order to ensure safety of abused victims and protect them from further abuse). Many criminal offenses are defined in terms of intent, that is, "the prosecution must prove that the defendant intentionally committed the social harm that constitutes the actus reus of the offense." JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 105 (1995). A person intentionally causes the social harm of an offense if he desires to cause the social harm, or he acts with knowledge that the social harm will occur as a result of his conduct. *Mill v. State*, 585 P.2d 546, 549 (Alaska 1978).

³ See MASS. GEN. LAWS. ch. 209A, § 7 (1992); Dressler, *supra* note 2 (analyzing the term *mens rea*). *Mens rea* is defined as "a general immorality of motive, vicious will, or an evil-meaning mind." *Morrisette v. United States*, 342 U.S. 246, 252 (1952). The term *mens rea* suggests a general notion of moral blameworthiness, i.e., that the defendant committed the actus reus of an offense with a morally blameworthy state of mind. *Commonwealth v. Buckley*, 354 Mass. 508, 510, 238 N.E.2d 335, 337 (1968). *Mens rea* may also be defined, as "the particular mental state provided for in the definition of an offense." Dressler, *supra* note 2, at 103.

⁴ See *Commonwealth v. Crimmins*, 46 Mass. App. Ct. 489, 490, 707 N.E.2d 832,

mens rea should apply to the elements of the strict liability offense, especially if it permits the imposition of a severe penalty such as incarceration.⁵

Without the additional requirement of *mens rea*, according to a 209A order, even if a plaintiff initiates contact with a defendant, such as going to his home, the defendant is still liable.⁶ A defendant would also be guilty of a violation if he entered the subway on his way home from work and the plaintiff was sitting inside.⁷ Although the defendant did not intend to cause any social harm in the above circumstance, he is nevertheless guilty of violating a 209A restraining order.⁸ He is guilty without the court even looking into his state of mind, or the mitigating circumstances surrounding the encounter.⁹

This note argues that the substantial penalty imposed for a violation of a 209A restraining order should remove the statute from the realm of a public welfare offense, requiring the Commonwealth to show that the defendant intended to violate the order before finding the defendant guilty of a 209A violation. Part II of this note traces the history and development of the 209A order in Massachusetts. The third part analyzes the 209A restraining order as a strict liability crime and considers its constitutionality. Finally, part IV concludes by suggesting a 209A order should include language requiring that, to be found guilty, a defendant must intend to violate the order.

833 (1999) (acknowledging Commonwealth must prove defendant had knowledge of order); *Commonwealth v. Delaney*, 425 Mass. 587, 591, 682 N.E.2d 611, 614 (1997) (holding violation requires no more knowledge than defendant knew of order). A showing that the court served a defendant with a copy of court order is strong evidence that a defendant had knowledge. *Bongiovi v. LaBeet*, 155 A.D.2d 320, 321 (New York 1989). The failure of such service is not fatal where the defendant had actual knowledge of the terms of the order. *Id.*

⁵ See 4 Bl. Comm. *21 (advocating "vicious will" necessary to constitute crime). *But see Lambert v. California*, 355 U.S. 225, 228 (1958) (stating "vicious will" not always necessary to constitute crime). The *Lambert* decision suggests conduct alone, without regard to intent of doer, is often sufficient to constitute a crime. *Id.*

⁶ See generally MASS. GEN. LAWS. ch. 209A, § 7.

⁷ See generally *id.*

⁸ See generally Dressler, *supra* note 2, at 95 (explaining some scholars state social harm is essential element of every crime). Social harm may be defined as the "negation, endangering, or destruction of an individual, group, or state interest which was deemed socially valuable." Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345, 413 (1965).

⁹ See *Commonwealth v. Collier* 427 Mass. 385, 389, 693 N.E.2d 673, 676 (1998) (noting statute requires no more knowledge than that defendant knew of order).

II. GENERAL OVERVIEW OF THE MASSACHUSETTS 209A ORDER

Chapter 209A provides a statutory mechanism by which victims can enlist the aid of the Commonwealth in prosecuting restraining order violations.¹⁰ A 209A order provides for the issuance of protective orders to ensure the safety and security of “abused”¹¹ victims and to protect them from future incidents of abuse.¹² A person suffering from abuse may file a complaint in the court requesting protection from such abuse.¹³ In deciding whether to issue an abuse prevention order, the judge must focus on whether serious physical harm is imminent.¹⁴ The court may then issue an

¹⁰ See MASS. GEN. LAWS. ch. 209A, § 1 (1992); *Commonwealth v. Gordon*, 407 Mass. 340, 344, 553 N.E.2d 915, 916 (1990) (supporting proposition victim may enlist help of Commonwealth).

¹¹ See MASS. GEN. LAWS. ch. 209A § 1 (1992). Chapter 209A § 1 defines abuse as: “the occurrence of one or more of the following acts between family or household members: (a) attempting to cause or causing physical harm; (b) placing another in fear of imminent serious physical harm; (c) causing another to engage involuntarily in sexual relations by force, threat or duress.” *Id.*

¹² See MASS. GEN. LAWS. ch. 209A, §§ 1-7 (1992); Esther M. Bixler, *The Legal Effects of the Massachusetts Abuse Prevention Act, the Stalking Statute, and the Marital Rape Exemption on Victims of Domestic Abuse*, 2 SUFFOLK J. TRIAL & APP. ADVOC. 79, 82 (1997) (stating statute protects victims from future incidents of abuse); 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 statute ensures safety of adults and minor children).

¹³ See MASS. GEN. LAWS. ch. 209A, § 3. The victim may request the court to issue orders which:

- (a) order the defendant to refrain from abusing the plaintiff, (b) order the defendant to vacate forthwith the household, (c) award the plaintiff ... temporary custody of a minor child, (d) order the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both, (e) order the defendant to pay to the person abused monetary compensation for losses suffered as a direct result of ... abuse, and (f) order the plaintiff's address to be impounded.

MASS. GEN. LAWS. ch. 209A, § 3 (a) - (f).

See also *Commonwealth v. Gordon*, 407 Mass. at 344, 553 N.E.2d at 917-18 (highlighting typical evidence supporting finding defendant placed spouse in fear of imminent physical harm).

¹⁴ See *Larkin v. Ayer Div. of Dist. Court Dept.* 425 Mass. 1020, 1020, 681 N.E.2d 817, 818 (1997) (sending complainant notices of future court proceedings did not constitute serious imminent harm); *Wooldridge v. Hickey*, 45 Mass. App. Ct. 637, 638, 700 N.E.2d 296, 298 (1998) (holding nervousness, feeling aggravated or hassled does not rise to fear of imminent serious physical harm).

order for a period of time not to exceed one year.¹⁵ The complainant may move for an extension when the prior order expires, which the court may grant if it is needed to protect the complainant from further abuse.¹⁶ Once the complainant has secured a 209A order, a defendant must either abide by its terms, or be prosecuted.¹⁷

The Commonwealth must prove four elements in order to convict a defendant of violating a 209A order.¹⁸ First, that the court issued a 209A ordering the defendant to refrain from abusing the alleged victim, to vacate and remain away from the household or workplace, and to refrain from contacting the alleged victim.¹⁹ Second, that the order was in effect on the date of the alleged violation.²⁰ Third, that the defendant knew that the restraining order was in effect.²¹ And fourth, that the defendant violated the order.²²

Even though a 209A order is a civil remedy, if an individual violates the order it is a criminal offense and that individual is subject to incarceration.²³ The statute provides a harsh penalty for violations of restraining orders.²⁴ A violation of a 209A order is “punishable by a fine of not more than five thousand dollars or by imprisonment for not more than two and one-half years in house of correction or both such fine and imprisonment.”²⁵

¹⁵ See MASS. GEN. LAWS. ch. 209A, § 3.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See Massachusetts Model Jury Instruction For Use in the District Courts, Instruction 5.61, Violation of an Abuse Prevention Order Under G.L. c. 209A (providing typical jury instruction for violating 209A order). See, e.g., *Commonwealth v. Delaney*, 425 Mass. 587, 595, 682 N.E.2d 611, 617 (1997) (summarizing typical jury instruction for violation of c. 209A order).

¹⁹ See *supra* note 18 and accompanying text.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See MASS. GEN. LAWS. ch. 209A, § 7 (1992). Chapter 209A provides, in pertinent part: “each order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.” *Id.*

²⁴ See MASS. GEN. LAWS. ch. 209A, § 7.

²⁵ See *id.*

III. ANALYSIS

A. *The 209A Order as a Strict Liability Offense*

A 209A order is silent concerning the *mens rea* required for a violation; it does not speak specifically to the defendant's state of mind.²⁶ A 209A order only requires that the defendant have actual or constructive knowledge of the order and its terms and conditions.²⁷ A jury may vote to convict based solely on the fact a defendant violated the order, regardless of whether or not he intended to violate the order.²⁸ In other words, the violation of a 209A order is a strict liability offense.²⁹

Strict liability crimes do not contain a *mens rea* requirement for one or more elements of the *actus reus*.³⁰ Thus, the defendant's culpability is irrelevant in strict liability crimes.³¹ Courts consider various factors in determining whether a statute that appears on its face to be one of strict liability should be treated as such.³² One of the various factors that may

²⁶ See generally MASS. GEN. LAWS. ch 209A, § 7.

²⁷ See *Commonwealth v. Crimmins*, 46 Mass. App. Ct. 489, 490, 707 N.E.2d 832, 833 (1999) (asserting conviction requires defendant had actual or constructive knowledge); *Commonwealth v. Delaney*, 425 Mass. 587, 591, 682 N.E.2d 611, 614 (1997) (holding violation requires no more knowledge than defendant knew of order). A showing that the court served a defendant with a copy of court order is strong evidence that a defendant had knowledge. *Bongiovi v. LaBeet*, 155 A.D.2d 320, 321 (N.Y. 1989). The failure of such service is not fatal where the defendant had actual knowledge of the terms of the order. *Id.*

²⁸ See *Delaney*, 425 Mass. at 595, 682 N.E.2d at 617 (holding intent not essential element to prove violation of 209A order).

²⁹ See Dressler, *supra* note 2 at 125 (defining strict liability crimes as not containing *mens rea* requirement). In a strict liability offense, the prosecution must prove that the defendant committed the *actus reus*, but does not have to prove any *mens rea* in regard to the *actus reus*. *Id.*

³⁰ See *id.*

³¹ See *id.*

³² See *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960). Judge Blackmun set out various factors that may overcome the presumption of strict liability:

(1) that the statutory crime is not derived from the common law; (2) that there is an evident legislative policy that would be undermined by a *mens rea* requirement; (3) that the standard imposed by the statute is "reasonable and adherence thereto properly expected of a person"; (4) that the penalty is small; and (5) that the "conviction does not gravely besmirch."

Dressler, *supra* note 2, at 126 (quoting *Holdridge v. United States*, 282

overcome the presumption against strict liability is that the penalty is small.³³ Unlike other typical strict liability offenses, the penalty for violating a 209A order is not small, but rather quite severe.³⁴

The *mens rea* requirement for a crime is firmly embedded in criminal law.³⁵ The common law rule requiring *mens rea* is "followed in regard to statutory crimes even where the statutory definition did not in terms include it."³⁶ The Supreme Court warns that offenses that do not contain a *mens rea* element have a generally disfavored status.³⁷ A statute that dispenses with *mens rea* may criminalize innocent conduct.³⁸ Unlike the Supreme Court, Massachusetts courts have tended to concentrate more upon the defendant's conduct than upon the issue of his specific intent to commit a crime.³⁹

F.2d 302, 310 (8th Cir. 1960)).

³³ See *supra* note 32 (stating various factors that may overcome strict liability offenses).

³⁴ See MASS. GEN. LAWS, ch. 209A, § 7 (West 1992) (providing violation is criminal offense and subject to fine, incarceration, or both).

³⁵ See *Dennis v. United States*, 341 U.S. 494, 500 (1951) (emphasizing existence of *mens rea* rule of criminal jurisprudence); *Commonwealth v. Balint*, 258 U.S. 250 (1922) (explaining courts have read *mens rea* requirement into statute, even if not included in language). Justice Jackson observed in *Morrisette*:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory, "But, I didn't mean to," and has afforded a rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Morrisette v. United States, 342 U.S. 246, 250-51 (1952).

³⁶ *United States v. Balint*, 258 U.S. 250, 251-52.

³⁷ See *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1979) (attesting to strict liability offenses generally disfavored status).

³⁸ See *Liparota v. United States*, 471 U.S. 419, 419 (1985) (interpreting federal statute to dispense with *mens rea* would criminalize innocent conduct).

³⁹ See Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 68 (1933) (noting court should look at defendant's state of mind). The article emphasizes:

All criminal law is a compromise between two fundamentally conflicting interests, -that of the public which demands restraint of all who injure or menace the social well-being and that of the individual which demands maximum liberty and freedom from interference. The history of criminal law shows a constant swinging of the pendulum so as to favor now the

B. Limitations of Strict Liability Offenses

Despite the Supreme Court's affirmation of the constitutionality of strict liability offenses, the Court has suggested that such offenses are limited by the Constitution.⁴⁰ The Court recognized the existence of certain strict liability offenses where some *mens rea* must attach to the statute in order to criminalize the violations.⁴¹ Massachusetts courts have held that when prosecuting under 209A, the Commonwealth is not required to show the defendant intended to violate the order.⁴² The Massachusetts Supreme Judicial Court, however, has read a *mens rea* requirement into 209A in rare circumstances, such as when a third party has been involved in the act that results in the violation.⁴³ In such situations, the Commonwealth is required to prove beyond a reasonable doubt the defendant intended to violate the order.⁴⁴

Massachusetts courts should consider the law of criminal contempt when analyzing whether a 209A order should include an element of intent on the part of the defendant to engage in conduct that violates the order.⁴⁵ The law of criminal contempt, relating to the elements the Commonwealth needs to prove to obtain a conviction, is not so different from that of violating a restraining order.⁴⁶ The Commonwealth must prove that "there

one, now the other, of these opposing interests. *Id.*

⁴⁰ See Dressler, *supra* note 2, at 129-30 (summarizing mens rea not constitutional requirement).

⁴¹ See *Smith v. California*, 361 U.S. 147, 147 (1959) (holding punishment based on strict liability with regard to conduct of First Amendment is unconstitutional). See generally Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (providing overview of cases recognizing some form of culpability attaching to strict liability offenses).

⁴² See *Commonwealth v. Collier*, 427 Mass. 385, 389, 693 N.E.2d 673, 676 (1998) (reaffirming principle Commonwealth not required to show that defendant intended to violate order).

⁴³ See *id.* (holding that Commonwealth is required to prove intentional act). Even though this case involved a third party in an act that resulted in the violation of the protective order, the Commonwealth was required to prove an intentional act by the defendant under MASS. GEN. LAWS. ch. 209A, § 7. *Id.*

⁴⁴ See *id.*

⁴⁵ See *Commonwealth v. Delaney*, 425 Mass. 587, 595, 682 N.E.2d 611, 617 (1997). The defendant urged the court to look into the law of contempt and conclude that an essential element of the crime of violating a 209A order is a finding that the defendant intended to violate the order. *Id.*, 682 N.E.2d at 617. Compare *Commonwealth v. Brogan*, 415 Mass. 169, 171, 612 N.E.2d 656 (1993) (quoting *Furtado v. Furtado*, 380 Mass. 137, 145, 402 N.E.2d 1024 (1980)) (holding intent element of crime of criminal contempt); with *Commonwealth v. Delaney*, 425 Mass. at 595, 682 N.E.2d at 617 (1997).

⁴⁶ See *supra* note 45 and accompanying text (summarizing elements of prosecuting

was a clear, outstanding order of the court, that the defendant knew of the order, and that the defendant clearly and intentionally disobeyed that order in circumstances in which he was able to obey it," to prove a defendant guilty of criminal contempt.⁴⁷ The *mens rea* requirement is consistent with the principle that one who does not choose to cause social harm, does not deserve to be punished.⁴⁸

Even though a 209A order is silent concerning the *mens rea* required for a violation, silence on this point does not necessarily suggest that the legislature intended to dispense with a conventional *mens rea* element.⁴⁹ In the absence of specific words of *mens rea*, it is not supposed "that the legislature intended to make accidents and mistake crimes."⁵⁰ This is especially true where the violation calls for a severe penalty, such as two and one-half years of imprisonment.⁵¹ In such a case, there should be additional *mens rea* requirements added into the statute because the courts traditionally required some element of knowledge or intent before they could impose punishment.⁵² A *mens rea* requirement under a criminal statute is a question of law that the court may determine, even if the statute dispenses with a mental state.⁵³ Just as with a contempt order, a

209A order violation). *But see supra* note 18 and accompanying text (listing elements of criminal contempt case).

⁴⁷ See *Brogan*, 415 Mass. at 171, 402 N.E.2d at 1024.

⁴⁸ See *Dressler*, *supra* note 2, at 127.

⁴⁹ See *Staples v. United States*, 511 U.S. 600, 619 (1994) (holding silence does not necessarily suggest Congress dispensed with *mens rea*); *United States v. Balint*, 258 U.S. 250, 250 (1922) (stating *mens rea* necessary element in every crime). *But see Lambert v. California*, 355 U.S. 225, 228 (1957) (stating there is latitude in lawmakers to exclude elements of knowledge from its definition).

⁵⁰ See *Kansas v. Brown*, 38 Kan. 390, 393 (1888); see also *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 364, 439 N.E.2d 848, 850 (1982) (noting it is not supposed legislature intended to make accidents and mistake crimes).

⁵¹ See I W. LAFAYE & A.W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 3.5(e) (1986) (emphasizing courts traditionally require some element of *mens rea* where there exists severe penalty).

⁵² See *Collier*, 427 Mass. at 389, 693 N.E.2d at 676. The court in *Collier* reasoned, "where the definition of a crime requires some forbidden act by the defendant, his bodily movement, to qualify as an act, must be voluntary." *Id.* To some extent, then, all crimes of affirmative action require something in the way of the mental element-- at least an intention to make the bodily movement which constitutes the act which the crime requires. *Id.*; *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 364, 439 N.E.2d 848, 850 (1982) (reiterating some *mens rea* was required before punishment could be imposed).

⁵³ See *Staples v. United States*, 511 U.S. 600, 611 (1994) (addressing fact of *mens rea* requirement under criminal statute is question of law); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (holding courts, through interpretation of statute, define the *mens rea* required for conviction).

209A order should contain language requiring that, in order to be convicted, a defendant must clearly and intentionally violate the order.⁵⁴

C. Constitutional Question of the 209A Restraining Order as a Strict Liability Crime

The legislature is entrusted with defining the elements of a criminal offense.⁵⁵ The Massachusetts legislature did not include any *mens rea* for 209A violations with respect to any element of the crime, but “certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.”⁵⁶ The failure of the statute to require a showing of intentional violation before liability may be imposed may be found unconstitutional, but only in certain situations.⁵⁷

For instance, the Supreme Court and the Massachusetts Supreme Judicial Court have mandated minimum mental states for strict liability crimes to preserve interests protected under the First Amendment.⁵⁸ Academics have also argued that the Constitution places restrictions on strict liability in the criminal law.⁵⁹ Some theorists have argued that strict liability should be unconstitutional and that some *mens rea* should apply to the elements of the offense.⁶⁰ Others have argued that “strict liability is

⁵⁴ See *Commonwealth v. O’Shea*, 41 Mass. App. Ct. 115, 118, 668 N.E.2d 861, 863 (1996) (addressing issue of contempt). The court looked to the law of contempt and concluded that an essential element of the crime of violating a 209A order is finding that the defendant intended to violate the order. *Id.*

⁵⁵ See *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978) (indicating legislature defines elements of criminal offense).

⁵⁶ *Id.* at 436-37 (quoting *Morissette*, 342 U.S. 246, 263 (1952)).

⁵⁷ *Id.* at 436-37.

⁵⁸ See *Lambert v. California*, 355 U.S. 225, 225-28 (holding due process clause may require knowledge in range of situations not limited to those which have First Amendment aspects); *Commonwealth v. Buckley*, 354 Mass. 508, 510, 238 N.E.2d 335, 337 (1968) (discussing statutes preserving interests protected under First Amendment). Statutes that may “impinge upon the public’s access to constitutionally protected material” have been construed to require *mens rea*. *Demetropolos v. Commonwealth*, 342 Mass. 658, 661, 175 N.E.2d 259 (1961).

⁵⁹ See Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 829 (1999) (concluding Supreme Court should recognize constitutional limitations on strict liability crimes).

⁶⁰ See *id.* at 833 (arguing for constitutional requirement of *mens rea* in strict liability crimes).

unconstitutional for any offense punishable by imprisonment."⁶¹

According to the principle of "constitutional innocence," strict liability crimes are unconstitutional when the innocent conduct, by itself, could not be a crime.⁶² Constitutional innocence is consistent with a minimum culpability for every element of an offense.⁶³ Although an offense may impose strict liability, such offenses generally do not apply strict liability to every element.⁶⁴ Crimes described as imposing strict liability under the element analysis approach are not strict liability crimes at all, because the offenses require some morally blameworthy state of mind.⁶⁵ "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear."⁶⁶

A 209A order permits the imposition of a severe penalty for violations; as much as two and one half years in prison.⁶⁷ This should not be regarded a minor offense and should require clear legislative language to dispense with *mens rea*.⁶⁸ Any other interpretation might raise serious constitutional doubts.⁶⁹ The Model Penal Code provides the general rule that no criminal conviction may be obtained unless the prosecution proves some form of culpability regarding each material element of an offense.⁷⁰

The penalty for a strict liability offense should not be imprisonment.⁷¹ The penalty for a 209A violation is severe because it includes a

⁶¹ See John Calvin Jeffries, Jr. & Paul B. Stephen III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1376 (1979).

⁶² See Michaels, *supra* note 41, at 836 (proposing answer to question, if some conduct is too innocent to be punished, what principle underlies that judgment, and how can it be grounded in the Constitution).

⁶³ See *id.* at 836. The actor may not be punished if she is as careful as possible. *Id.* However, the legislature defines the terms "as careful as possible." *Id.*

⁶⁴ *Id.* at 840 (examining strict liability from offense analysis perspective).

⁶⁵ See Michaels, *supra* note 41, at 839.

⁶⁶ *Lambert v. California*, 355 U.S. 225, 229 (quoting Oliver Wendell Holmes).

⁶⁷ See generally MASS. GEN. LAWS. ch. 209A, § 7.

⁶⁸ See The American Law Institute Model Penal Code Official Draft § 2.02(1) (1962).

⁶⁹ See *id.*

⁷⁰ See The American Law Institute Model Penal Code Official Draft § 2.02(1) (1962). Section 2.02(1) considers the minimum requirements of culpability and provides, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently as the law may require, with respect to each material element of the offense." *Id.*

⁷¹ See Sayre, *supra* note 1, at 72 (commenting subjecting defendants, who lack *mens rea*, to incarceration is "revolting to the community sense of justice"); The American Law Institute Model Penal Code And Commentaries § 2.05, note 1 (1962) (attacking strict li-

term of incarceration without litigating culpability.⁷² If the offense is punishable by imprisonment, the defendant's personal interest weighs too heavily against allowing conviction without any proof of *mens rea*, such as intent.⁷³

The penalty for violating a restraining order is severe and does not complement the small penalties typically attached to strict liability offenses.⁷⁴ Considering the severity of the penalty imposed is one way to distinguish strict liability offenses from other non-public-welfare offenses, that permit conviction.⁷⁵ Commentators argue that offenses punishable by imprisonment must require *mens rea*.⁷⁶ A severe penalty tends to suggest that the legislature did not intend to eliminate a *mens rea* requirement, even though the statute is silent pertaining to *mens rea*.⁷⁷

IV. CONCLUSION

Chapter 209A should require that, to be convicted, a defendant must clearly and intentionally violate the restraining order. It should speak specifically to the defendant's state of mind. The legislature should add

ability offenses whenever offense carries possibility of criminal conviction).

⁷² See MASS. GEN. LAWS. ch. 209A, § 7.

⁷³ See The American Law Institute Model Penal Code And Commentaries § 2.05, Comment 1 (1962). Comment 1 further explains that:

Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed. *Id.*

⁷⁴ See *Staples v. United States*, 511 U.S. 600, 616-17 (1994) (commenting small penalties attached to such offenses complimented absence of *mens rea*); *Morissette v. United States* 342 U.S. 246, 256 (cautioning "penalties commonly are relatively small" for strict liability offenses); see also *Sayre*, *supra* note, at 70 (imposing severe punishments for offenses require no *mens rea* would seem incongruous).

⁷⁵ See *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000); see also *Morissette*, 342 U.S. at 256 (stating penalties of public welfare offenses are relatively small); *Sayre* *supra* note 1, at 72 (stating penalty of public welfare offenses should not be severe).

⁷⁶ See *Staples*, 511 U.S. at 617 (arguing offenses punished by imprisonment must require *mens rea*); see also *Sayre*, *supra* note 1, at 72 (quoting "Crimes punishable with prison sentences ordinarily require proof of a guilty mind").

⁷⁷ See *Staples*, 511 U.S. at 618 (asserting severe penalty, such as imprisonment, is further factor tending to suggest Congress did not intend to eliminate *mens rea* requirement). See 18 U.S.C. § 3559 (West 1999). Title 18 U.S.C. § 3559 makes any crime punishable by more than one year in prison a felony. 18 U.S.C. § 3559 (West 1999).

mens rea requirements to the statute that require some element of intent in order for the Commonwealth to obtain a conviction. Alternatively, a judge could charge the jury with an intent instruction, even though nothing in the language of the statute suggests that the defendant must have intended to violate the order. A defendant who does not intend to cause any social harm does not deserve to be punished.

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