Closing the Loophole in Massachusetts Protection Order Legislation to Provide Greater Security for Victims of Sexual Assault: Has Massachusetts General Laws Chapter 258E Closed it Enough

Hayley Jodoin
CLOSING THE LOOPOHOLE IN MASSACHUSETTS PROTECTION ORDER LEGISLATION TO PROVIDE GREATER SECURITY FOR VICTIMS OF SEXUAL ASSAULT: HAS MASSACHUSETTS GENERAL LAWS CHAPTER 258E CLOSED IT ENOUGH?

I. INTRODUCTION

Jane was fourteen years old when two of her middle school classmates kidnapped her while she was walking to a friend’s house one afternoon. The perpetrators took her to a home owned by a relative, where they repeatedly raped and assaulted her at knifepoint. The boys kept her hostage in the home, going so far as to rip the phone out of the wall so that she could not call for help. Upon her escape, the perpetrators were arrested and charged with rape, kidnapping, indecent assault and battery, assault and battery with a dangerous weapon, breaking and entering, and intimidating a witness. They eventually entered into a plea bargain as youthful offenders, and were placed on probation for one year. They spent no time in jail.

Despite a no-contact order issued in connection with the criminal case, the perpetrators proceeded to threaten, intimidate, and harass Jane for reporting her assault to the police. The perpetrators showed up to school events, knowing that Jane was in attendance, and they engaged in deliberate acts of intimidation, including yelling obscenities at Jane in front of the entire crowd. On other occasions, they sat directly behind her at sporting events and stared at her until she left. The perpetrators also followed both Jane and her mother while driving, repeatedly drove by Jane’s house and, on occasion, got out of the car and stood in front of the home.

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1 Although this story is based upon actual events, all names have been changed to protect the privacy of the parties.

2 This is the true story of a client acquired by Boston Law firm Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. (“Mintz Levin”). Editorial, Defense Against Stalkers, BOS. GLOBE, Feb. 12, 2006, at E10 (noting client’s inability to gain protections through current restraining order scheme); John M. Guilfoil, New Law Gives More Protection to Victims of Stalking, Abuse, BOS. GLOBE, Feb. 10, 2010, at B4 (noting Mintz Levin’s difficulties in obtaining necessary protections for sexual assault victim). At the time, no protection order statute existed in Massachusetts that offered protections to victims of sexual assault who were not related to, living
Despite these terrorizing events, prior to May 2010, Jane and sexual assault victims like her could not seek a criminally enforceable protection order because they were not related to, living with, or romantically involved with their attackers.\footnote{3} Prior to May 2010, the only criminally-enforceable protection order available in Massachusetts to victims of sexual assault—other than a more complex family law or criminal proceeding—was the Chapter 209A Abuse Prevention Order, which requires that the plaintiff be married, related, living with, dating, or have a child in common with the person from whom they need protection.\footnote{4}

However, with the passage of Massachusetts General Laws Chapter 258E ("Chapter 258E")\footnote{5} in May 2010, victims of sexual assault falling outside the definition of domestic violence won major legal protections in their ability to file a criminally enforceable civil protection order against their attacker.\footnote{6} Chapter 258E, entitled "Harassment Prevention Orders," now provides victims of sexual assault\footnote{7} and stalking a right to file for a civil order of protection, regardless of their relationship to the perpetrator.\footnote{8} Because the majority of sexual assault victims—like

\begin{itemize}
  \item with, or romantically involved with their assailant. See Defense Against Stalkers, supra. Jane, therefore, was unable to obtain a civil order of protection that would impose criminal sanctions on the perpetrators if violated. \textit{Id.} Though Mintz Levin eventually negotiated a private settlement in which the assailants agreed to stay away from Jane, the settlement did not provide for criminal sanctions if the perpetrators violated the agreement. \textit{Id.} Recognizing that most victims would not have the opportunity to reach a private settlement with their attackers, the attorneys at Mintz Levin used Jane’s story to advocate for the inclusion of sexual assault victims in a new, specifically-tailored statute that would provide civil protection orders for victims who did not have the requisite relationship with the perpetrator to obtain a Chapter 209A Abuse Prevention Order. See Guilfoil, supra.
  \item See Martin W. Healy, Commentary, \textit{New Harassment Protections Signed into Law}, MASS. LAW. WKLY., Mar. 29, 2010, at 39 (describing unavailability of protection orders for non-domestic abuse victims prior to Chapter 258E); \textit{see also} MASS. GEN. LAWS ch. 209A, §§ 1-10 (2010) (enumerating requirements for sole protection order available prior to 2010).
  \item See ch. 209A, §§ 1, 3 (enumerating requirements for Chapter 209A protection order).
  \item MASS. GEN. LAWS ch. 258E, §§ 1-12 (2010).
  \item See \textit{id.} §§ 1, 3 (enabling survivors of sexual assault to obtain protection order regardless of relationship with perpetrator).
  \item The author notes that sexual assault is a common occurrence within the domestic violence context and that it is not limited to those persons outside of a dating or marriage relationship. However, for the purposes of this Note, the term "sexual assault" will be used to refer to victims of sexual assault falling outside the definition of domestic violence. The author also notes that both victims and perpetrators of sexual assault may be of either gender. However, because the majority of reported sexual assault victims are female, and the perpetrators male, for purposes of uniformity this note will refer to victims using the female pronoun and to perpetrators using the male pronoun. \textit{See generally} VICTIM RIGHTS LAW CTR., BEYOND THE CRIMINAL JUSTICE SYSTEM: TRANSFORMING OUR NATION’S RESPONSE TO RAPE, A PRACTICAL GUIDE TO REPRESENTING SEXUAL ASSAULT VICTIMS 1-1 (Susan H. Vickers et al. eds., 2003) (discussing choice of terminology regarding victims and perpetrators).
  \item See ch. 258E, § 3 (enumerating Chapter 258E protections).
\end{itemize}
Jane—are not related to, living with, or romantically involved with their assailant, Chapter 258E closed a “glaring loophole” in the law of Massachusetts and afforded these victims “the full extent of the justice system.”

Although Chapter 258E represents a major victory in the fight for the rights of sexual assault victims, the law, as written, has the potential to be misapplied to this crucial cohort of persons. This Note weighs the fundamental protections that the statute provides to victims of sexual assault against the flaws related to the law’s drafting, and it notes the statute’s potential for improvement. Part II outlines the complexities surrounding the problem of sexual assault and discusses the ways in which civil protection orders serve a vital purpose for these victims. Part III provides a detailed history of the loopholes in protection order legislation in Massachusetts prior to the passage of Chapter 258E. And, Part IV examines how Chapter 258E closed those loopholes. Finally, Part V discusses the flaws of the statute as applied to sexual assault victims, attempts to balance these concerns with practical benefits gained by the law, and advocates that sexual assault victims in Massachusetts would be better served with a protection order statute specifically tailored to address their unique needs.

II. FACTS

A. Sexual Assault as an Epidemic

Research on the prevalence of rape in the United States suggests

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9 See Guilfoil, supra note 2 (quoting Governor Deval Patrick on benefits of new law). In 2009, 60% of sexual assaults reported by female victims were perpetrated by an assailant who was neither an intimate partner nor a relative. See Jennifer L. Truman & Michael R. Rand, U.S. Dep’t of Justice, National Crime Victimization Survey: Criminal Victimization, 2009, at 7 (2010) [hereinafter 2009 Crime Victimization Survey] (outlining statistical data on sexual assault offender-victim relationship). These victims reported being raped or sexually assaulted by someone who was a friend, an acquaintance, or a stranger. Id. In the same study, 100% of sexual assaults reported by male survivors were perpetrated by an assailant that was neither an intimate partner nor a relative. Id.

10 See infra Part V.
11 See infra Parts II-V.
12 See infra Part II.
13 See infra Part III.
14 See infra Part IV.
15 See infra Part V.
16 Comm’n on Domestic Violence, Am. Bar Ass’n, Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases, at v (2007) [hereinafter Standards of Practice].
that between one in six and one in eight women have experienced at least one completed rape in their lifetime. Further research on the incidence of rape among women suggests that approximately 620,000 women age eighteen years or older are raped every year in the United States. Similar research on the prevalence of rape among men suggests that approximately one in forty-seven men have reported forcible penetration at least once within their lifetime.

The Massachusetts Department of Public Health has recognized sexual assault as a “serious social and public health problem in Massachusetts.” The Department estimates that in Massachusetts, 14.6% of women and 5.3% of men experience sexual assault at some point in their lifetime. Between July 1, 2009 and June 30, 2010, there were 2564 incidents of sexual assault reported to Massachusetts Department of Public Health-funded rape crisis centers.

Despite its prevalence, sexual assault is the “least reported, least indicted and least convicted felony” in the United States.

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17 See The Prevalence of Rape in the United States, COUNTER QUO (Dec. 22, 2011), http://http://www.counterquo.org/reference-materials/assets/files/reference/CQ%20Rape%20Stats%20Dec%202011.pdf [hereinafter Counter Quo Statistics] (reporting prevalence of rape among US women). These statistics were compiled from four methodologically reliable studies that span over fifteen years. Id. The four studies indicated that the prevalence of rape has been relatively stable overtime. Id. However, these studies only reflect one narrow definition of rape as “forcible penetration” and do not take into account the broad range of sexual offenses experienced by victims. Id. at 2. The fact that “[r]ape and all forms of sexual violence remain a vastly underreported crime in this country” further compounds this problem. Id. at 1. Therefore, although these statistics are “reliable and valid,” they reflect only a “part of the full problem of sexual violence.” Id. at 2.

18 See Counter Quo Statistics, supra note 17, at 3 (reporting research on annual incidence of rape). This figure is an underestimate of the actual incidence of rape each year, as it does not account for female rape victims under the age of eighteen. Id. Further, there is a “critical” distinction between the “prevalence” and the “incidence” of rape among women. Id. at 2. “Prevalence” refers to the number of people who are victims of rape. “Incidence” refers to the number of rapes (incidents) that occur.” Id. Understanding this distinction is imperative because “an individual victim may be raped multiple times in a lifetime, or over any time period.” Id. The incidence, or number of rapes, is higher in the United States than the number of people who are rape victims, suggesting that some victims are raped more than once in their lifetime. Id.

19 Id. at 3 (reporting prevalence of male rape in United States). The U.S. Department of Justice’s annual National Crime Victimization Survey reported that in 2009, 19.820 men age twelve years and older reported being victims of rape or sexual assault. See 2009 CRIME VICTIMIZATION SURVEY, supra note 9, at 7 (reporting incidence of rape and sexual assault by gender).


21 Id. (describing prevalence of sexual assault among men and women in Massachusetts).

22 Id. (describing number of reported sexual assaults to Massachusetts rape crisis centers).

23 See VICTIM RIGHTS LAW CTR., supra note 7, at 1-2 (discussing failure of criminal justice system for most sexual assault victims).
almost every state in the nation has reworked its existing sexual assault laws in hopes of making the criminal justice process fairer to victims, the criminal justice process has remained a largely unsuccessful avenue for most victims of sexual assault. 24

The first level at which the criminal justice system breaks down for victims of sexual assault is the victim's reluctance to report the crime. 25 Studies show that although reporting to law enforcement has increased since the reforms of the 1970s, estimates of reporting rates have remained at 16% since the early 1990s. 26 Even if a victim chooses to report a sexual assault, research shows that arrest rates for forcible rape have substantially

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24 See Jody Clay-Warner & Callie Harbin Burt, Rape Reporting After Reforms: Have Times Really Changed?, 11 VIOLENCE AGAINST WOMEN 150, 152 (2005) (discussing scope of rape law reform); Ilene Seidman & Susan Vickers, The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform, 38 SUFFOLK U. L. REV. 467, 467 (2005) (discussing rape reform movement). The changes made to rape laws since the 1970s have focused on four areas: “(a) a redefinition of rape, (b) the elimination or modification of the resistance requirement, (c) the elimination or modification of the corroboration requirement, and (d) the establishment of rape-shield laws that limited or prohibited the admissibility of a victim’s sexual history on cross-examination.” Clay-Warner & Harbin Burt, supra, at 152. Despite these changes, “studies of rape law reform have been unable to document significant increases in reports that could be directly attributed to the legislation.” Id. at 156; see Seidman & Vickers, supra, at 467 (labeling rape law reform as “a profound disappointment”); see also MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 103D CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE, at iii (Comm. Print 1993) [hereinafter RESPONSE TO RAPE] (“These findings reveal a justice system that fails by any standard to meet its goals—apprehending, convicting, and incarcerating violent criminals . . . .”); JESSICA E. MINDLIN & LIANI JEAN HEE REEVE, THE NAT’L CRIME VICTIM LAW INST. AT LEWIS & CLARK LAW SCHOOL, RIGHTS AND REMEDIES: MEETING THE CIVIL LEGAL NEEDS OF SEXUAL VIOLENCE SURVIVORS 17 (2005) [hereinafter RIGHTS AND REMEDIES] (“[H]igh rates of sexual violence are not reflected in the data for state and federal sexual assault prosecutions.”). In fact, a 1993 study conducted by the United States Senate Judiciary Committee found that “despite some reforms, serious legal barriers remained where women sought the prosecution of an attacker.” RESPONSE TO RAPE, supra, at 1. The same study found that “[n]inety-eight percent of the victims of rape never see their attacker caught, tried and imprisoned.” Id. at iii.

25 See RIGHTS AND REMEDIES, supra note 24, at 17 (discussing lack of reporting as contributing to low prosecution rate).

26 See KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, THE “JUSTICE GAP” FOR SEXUAL ASSAULT CASES: FUTURE DIRECTIONS FOR RESEARCH AND REFORM 6 (n.d.) (noting results of study on reporting to police “identical” to estimate reported in 1991); see also DEAN G. KILPATRICK ET AL., DRUG-FACILITATED, INCAPACITATED, AND FORCEBLE RAPE: A NATIONAL STUDY 2 (2007), available at www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf (finding 16% reporting rate in 2007 study). “This pattern of research findings thus corroborates the conclusion . . . that the likelihood of reporting a sexual assault to the police increased from the 1960s to the 1990s but has remained stable since that time.” LONSWAY & ARCHAMBAULT, supra, at 6. Factors influencing a victim’s decision to report included, “not wanting others to know about the rape, fear of retaliation, perception of insufficient evidence, uncertainty about how to report, and uncertainty about whether a crime was committed or whether harm was intended.” KILPATRICK ET AL., supra, at 2-3.
declined from the 50% range in the 1970s, to 26% in 2008.27 Assuming there is an arrest, as many as 48% of sexual assault cases will be dismissed before trial.28 If a sexual assault case does proceed to prosecution, of those defendants charged with rape, research suggests that only 54% are convicted of a felony.29 Of those convicted, nearly 25% are not sentenced to prison, but released on probation.30 In total, research shows that of all

27 See LONSWAY & ARCHAMBAULT, supra note 26, at 10. This "pattern of consistent decline" in arrest rates was not present in the ratio of arrests for other violent crimes. Id. One possible explanation for this decline in arrest rate is that fewer rapes reported today fit into the "cultural stereotype of 'real rape,'" as compared to the reports of rape in the 1970s. Id. For example, evidence suggests that rapes reported today often involve non-strangers, victims who are "incapacitated, severely disabled, or otherwise unable to consent, as well as those from specific vulnerable populations." Id. Research shows that "police officers and other members of society are frequently skeptical of reports that do not resemble the . . . stereotypic image of rape." Id. at 11. Another potential explanation is that fewer complaints of rape are being "formally documented with a police report" or "being coded as a crime and/or thoroughly investigated." Id. at 11-12; see also RESPONSE TO RAPE, supra note 24, at 2 (recognizing "prejudice" rape victims face when police refuse to take official reports). In addition, it is possible that many reports of sexual assault are considered "unfounded as a false or baseless report." LONSWAY & ARCHAMBAULT, supra note 26, at 12; see also RESPONSE TO RAPE, supra note 24, at 9 (finding police tendency to find alleged assault an "unfounded" rape complaint). Commentators also suggest that an increasing number of cases are not being "formally referred to the prosecutor's office," but instead, are "presented informally to prosecutors by law enforcement investigators," and, therefore, cases "could thus be rejected on the basis of a single conversation." LONSWAY & ARCHAMBAULT, supra note 26, at 12. Another potential explanation for declining arrest rates are victims' unwillingness to proceed with the case. Id. at 12-13.

28 See RESPONSE TO RAPE, supra note 24, at 9-10 (discussing dismissal rate of rape cases). One study found that "[n]ine out of ten rape cases that do not result in a conviction are the result of a dismissal rather than an acquittal." Id. at 10. Further, a rape case is 40% more likely to be dismissed than a robbery case. Id. The study notes that cases may be dismissed for any number of reasons, such as problems with physical evidence or lack of victim cooperation. Id. In fact, prosecutors generally do not proceed with sexual assault cases without the consent and cooperation of the victim. See Douglas Evan Belof, The Third Model of Criminal Process: The Victim Participation Model, 1999 UTAH L. REV. 289, 300 (1999) (discussing prosecutorial unwillingness to go forward without consent of victim); VICTIM RIGHTS LAW CTR., supra note 7, at 9-8 (discussing victim consent central to prosecutorial indictments). However, one study found that in rape cases, "the most common factor which prevents cases from going forward" is a prior relationship between the victim and offender because prosecutors believe that the likelihood of conviction is lower in acquaintance rape cases. RESPONSE TO RAPE, supra note 24, at 10 (discussing results of gender bias study).

29 See LONSWAY & ARCHAMBAULT, supra note 26, at 20 (noting conviction rate statistics for rape). A 1993 study conducted by the Majority Staff of the U.S. Senate Judiciary Committee found that "over half of all rape prosecutions are either dismissed before trial or result in an acquittal." RESPONSE TO RAPE, supra note 24, at 1 (discussing findings of six-month study). The same study found that a rape charge is 30% more likely to be dismissed than a robbery charge. Id. (noting "serious legal barriers remained where women sought the prosecution of an attacker").

30 See RESPONSE TO RAPE, supra note 24, at iii-iv (discussing likelihood of convicted rapist being released on probation). Nearly 25% of convicted rapists receive an average sentence of eleven months in a local jail. Id. at iii. Taken together, these figures indicate that almost half of
rapes committed against women, only 0.35% were reported, prosecuted, convicted, and resulted in the incarceration of the offender.\textsuperscript{31}

\textbf{B. Why Sexual Assault Victims Need Protection Orders}

Given the overwhelming majority of assailants who are not punished criminally, sexual assault victims require protections beyond what criminal prosecutions offer.\textsuperscript{32} This need is particularly enhanced in light of startling evidence that sexual assault victims face significant safety risks following an attack.\textsuperscript{33} In some cases, the assailant may pose a risk of assaulting the victim again.\textsuperscript{34} In other cases, the assailant may utilize the fear created by the first attack to continue to threaten, intimidate, or prevent the victim from seeking assistance or reporting the incident to law enforcement.\textsuperscript{35} The victim may also be vulnerable to retaliation by the assailant if she chooses to seek assistance or report the crime to law enforcement.\textsuperscript{36} Other victims often experience stalking in conjunction with all convicted rapists spend an average of less than one year in prison. \textit{Id.}

\textsuperscript{31} See \textit{LONSWAY} & \textit{ARCHAMBAULT}, supra note 26, at 20 (discussing research findings on conviction and incarceration rates of rape).

\textsuperscript{32} See \textit{VICTIM RIGHTS LAW CTR.}, supra note 7, at 1-1 (discussing sexual assault victims’ need for civil remedies outside criminal justice system); see also supra notes 23-31 and accompanying text (discussing lack of criminal justice remedies for sexual assault survivors).

\textsuperscript{33} See \textit{RIGHTS AND REMEDIES}, supra note 24, at 20 (discussing varying safety risks for survivors of sexual assault). Sexual assault survivors’ safety risks fall along a continuum based on a number of factors. \textit{Id.} These factors include, but are not limited to, who the assailant is; how much the assailant knows about the survivor; the location of the sexual assault; whether the assailant acted alone or with others; whether the assault involved the use of weapons; the extent of physical injuries from the assault; and the degree of contact with the assailant, both before and after the assault. \textit{Id.}


\textsuperscript{35} See O’Connell, supra note 34, at 2 (discussing assailant’s use of fear to intimidate and threaten victim); \textit{VICTIM RIGHTS LAW CTR.}, supra note 7, at 3-1 (explaining assailant’s use of fear to prevent victim from seeking remedies).

\textsuperscript{36} See \textit{Protective Orders for Sexual Assault Victims}, \textit{THE NAT’L CTR. FOR VICTIMS OF CRIME} 1, 1 (2005).
their assault. 37 Moreover, all of these risks are heightened if the victim is subject to on-going contact with the assailant. 38 The victim may be at particular risk if the assailant knows where the victim lives, works, or goes to school. 39

Civil protection orders serve to protect the victim from her assailant, and they reduce the occurrence of future violence. 40 Civil protection orders combat the serious safety risks facing sexual assault victims because they provide police probable cause to arrest the assailant, should he violate the order. 41 The threat of such penalties serves to increase the victim’s safety by deterring the assailant from engaging in future acts of intimidation or harm. 42 Having such penalties attach to these orders works as an invaluable resource for victims whose safety concerns may not otherwise be recognized as an arrestable offense. 43 In this very crucial way, civil protection orders also make the threat to a victim’s safety more credible to the police. 44 In creating a legally-arrestable offense that is
punishable by incarceration or a substantial fine, civil protection orders, at
the very least, provide an element of leverage with which to prevent further
contact with the assailant.\textsuperscript{45}

In addition to the vulnerability of a victim’s actual safety following
an attack, a victim’s perceptions of physical safety are often virtually
destroyed.\textsuperscript{46} The victim may become “hyper-vigilant, anxious and
frightened” for weeks, months, or years after being sexually assaulted.\textsuperscript{47}
Such fear is even more exacerbated for the majority of victims who know
their attackers, and who will be subject to on-going contact with them after
an assault.\textsuperscript{48} For many victims, this terror will never go away.\textsuperscript{49}

Assault Face Barriers to Prot. from Further Abuse and Harassment (Feb. 6, 2006) [hereinafter
Mintz Levin Press Release], available at http://www.mintz.com/news/557/Victims_of_Stalking_and_Sexual_Assault_Face_Barriers_to_Protected_from_Further_Abuse_and_Harassment (quoting stalking victim Barbara Vacarr, Ph.D. on the legitimacy protection orders provide victims). In the words of one victim who testified at a State House hearing concerning the passage of Chapter 258E, “I can’t imagine not having . . . that piece of paper to give me some credibility that I’m in trouble and I need help.” See Anne Baker, Restraining Orders: Now With More Unph!, DIG BOS. (Sept. 23, 2009), http://digboston.com/think/2009/09/23552/ (quoting victim able to obtain a protection order because perpetrator was former roommate).


\textsuperscript{46} See \textit{Victim Rights Law Ctr.}, supra note 7, at 1-23, 3-1 (discussing shattering effect sexual assault has on victim’s sense of safety). In a proposal to both the Massachusetts Senate and the House of Representatives concerning an early draft of a Chapter 258E-style protection order, Governor Deval Patrick noted, that “[rape and sexual assault] threaten the very core of a person’s safety and well-being.” Letter from Deval L. Patrick, Governor of Massachusetts, to the Massachusetts Senate and House of Representatives (June 4, 2009) [hereinafter Governor Patrick Proposal], available at http://www.mass.gov/governor/docs/legislation/0604crimebill.pdf. Others have noted, “Stalking and sexual assault are terrorizing for a victim. We tend to focus on the damage done by a physical act of terror but must not forget the long-term, serious psychological and emotional effects and on-going harassment and intimidation that often occurs.” Mintz Levin Press Release, supra note 44 (quoting Representative Peter Koutoujian, Massachusetts House of Representatives) (internal quotation marks omitted).

\textsuperscript{47} See \textit{Victim Rights Law Ctr.}, supra note 7, at 1-23 (explaining persistence of hyper-vigilance and fear occurring post-sexual assault); see also O’Connell, supra note 34, at 2 (noting victim’s fear may persist months and years after assault). The place where the perpetrator assaulted the victim may also exacerbate this terror. See Deer, supra note 43, at pt. 1.B (discussing fear victims face). For example, if the sexual assault occurred in the victim’s home, she may never want to return to that home again. Id. Alternatively, if the assault occurred outside of the home, the victim may struggle to leave her house. Id.

\textsuperscript{48} See O’Connell, supra note 34 (explaining continued contact with assailant heightens victim’s fear); \textit{Victim Rights Law Ctr.}, supra note 7, at 3-1 (discussing likelihood of victim’s fear increasing if ongoing contact with perpetrator exists). Studies show that roughly three-quarters of sexual assault victims must face ongoing contact with their assailant. See Jennika Kirkbride, Civil Legal Protection for Victims of Sexual Violence, \textit{3 Fam. & Intimate Partner Violence Q. 65, 65} (2010). Indeed, for many sexual assault victims, a mere encounter with their assailant can be as devastating and frightening as the actual attack. Id. at 67 (noting mere
Studies show that victims who obtain civil protection orders against their attackers subsequently experience increased feelings of safety after obtaining the order. In addition, research indicates that “one of the most significant benefits of seeking and obtaining an Order for Protection” is that it serves to empower the victim by allowing her to initiate a course of action after a dehumanizing attack. Moreover, victims often report that civil protection orders were instrumental in helping them recover and improve their overall feelings of well-being after an attack.

Civil protection orders also operate as a valuable tool for victims of sexual assault because they provide a remedy that is easy and quick to obtain, and they serve as a viable alternative to the criminal justice system. In contrast to the one- to two-year time frame for a resolution within the criminal justice system, civil protection orders are typically granted at least temporarily on the same day as they are requested, and most statutes provide for a final resolution within two weeks.
Furthermore, civil protection orders are intended to be low cost, and the Violence Against Women Act ("VAWA") prohibits the imposition of filing fees.55 In contrast to other legal remedies, these orders are also designed for a lay person to obtain without the assistance of a lawyer.56

Because civil protection orders are drafted specifically with victim assistance in mind, they are also designed to be more victim-friendly than the criminal justice system.57 Court procedures, filing systems, personnel, and hearings are tailored to ensure that the victim obtains the necessary protections she needs.58 Additionally, the burden of proof in protection order hearings is typically lower than the "beyond a reasonable doubt" standard used in the criminal process.59

Protection orders may also assist victims seeking to have an assailant removed from their daily environment, such as at their school, home, or place of employment.60 Many institutions, such as housing
authorities, schools, and employers, attempt to limit their potential liability to the assailant by refraining from removing the assailant from the victim’s surroundings, unless acting pursuant to a court order.\footnote{See id. (noting employer, school, and housing authority preference to rely on court order before taking action).} A civil protection order issued by a court often gives the victim the ability to negotiate with these organizations, and it may expedite the process for removing the assailant from the victim’s daily life.\footnote{See id. (discussing leverage protection orders provide in removing assailant from school, work, or housing).}

Civil protection orders may also serve the purpose of compensating victims for losses suffered as a result of an attack.\footnote{See Seidman & Vickers, supra note 24, at 476 (describing ability of some civil protection orders to provide economic restitution). “The economic consequences of a sexual assault can be staggering.” \textit{Victim Rights Law Ctr.}, supra note 7, at 4-1 (discussing economic consequences of sexual assault).} Both Chapters 209A and 258E, as well as a number of other protection order statutes from other states, allow for recovery of costs from the defendant for economic losses suffered in connection with an attack.\footnote{See, e.g., D.C. CODE § 16-1005 (LexisNexis 2008) (authorizing court to award costs and attorneys fees); \textsc{Ind. Code} § 34-26-5-9 (West 2011) (authorizing court to award attorneys fees and reimbursement for expenses related to abuse); \textsc{Mass. Gen. Laws} ch. 258E, § 3 (2010) (authorizing court to award monetary compensation for losses suffered as direct result of harassment); \textsc{Mass. Gen. Laws} ch. 209A, § 3 (2010) (authorizing court to award monetary compensation for losses suffered as direct result of such abuse).}

Additionally, public safety may benefit as a result of civil protection orders for sexual assault victims.\footnote{See Governor Patrick Proposal, supra note 46 (“Protective orders also enhance public safety because, when victims are safe, they are better able to participate in a criminal justice system that holds offenders accountable.”).} If a victim feels safe, she is more likely to report the attack and to cooperate with law enforcement agencies, which in turn allows the criminal justice system to operate more efficiently.\footnote{See \textit{Victim Rights Law Ctr.}, supra note 7, at 3-2 (noting security provided by protection order may motivate victim to participate in criminal justice system); Guilfoil, supra note 2 (“When victims are safe, they are better able and more likely to participate in criminal justice interventions that hold offenders accountable.”).} Finally, civil protection orders for sexual assault victims “send a strong message to the perpetrator and the community that sexual assault is not acceptable behavior.”\footnote{See Deer, supra note 43, at pt. IIIA (discussing message protection orders send to community).} Such a message may actually serve as a deterrent to both the offender and other potential sexual assailants.\footnote{See id. (discussing deterrent effect of civil protection orders).}
C. Limitations of Sexual Assault Protection Orders

Protection orders will not be effective for every victim of sexual assault. In some cases, a civil protection order may trigger more violence towards the victim. Similar limitations exist when the victim is assaulted by a stranger, because the victim has no way of discovering the information necessary to file an order against the perpetrator. Additionally, depending on the protection order process, the defendant may be given the right to cross-examine the victim. Although cross-examination in the civil protection order context may not be as intrusive as it is in the criminal justice process, a victim may nevertheless be unwilling to expose herself to such vulnerability. Additionally, filing a civil protection order creates an evidentiary record that later may be used against the victim in another course of action that she may want to pursue, such as the criminal or tort processes. Finally, no guarantee exists that a violent individual will cease threatening the victim in response to the protection order. Nevertheless, protection orders continue to provide an extra tool for victims of sexual assault. Some victims report that having the option to turn something down “is preferable to having no options at all.”


70 See RIGHTS AND REMEDIES, supra note 24, at 22; STANDARDS OF PRACTICE, supra note 16, at vi-vii (noting victims “regularly murdered by their assailants” notwithstanding civil protection order).

71 See Deer, supra note 43, at pt. III.C (discussing difficulty for victims of stranger rape to obtain protection order against assailant).

72 See VICTIM RIGHTS LAW CTR., supra note 7, at 3-5 (discussing general right to cross-examination in Chapter 209A hearings); Deer, supra note 43, at pt. III.C (noting potential for cross-examination).


74 See VICTIM RIGHTS LAW CTR., supra note 7, at 3-4. For example, if the petition for a protection order contains an affidavit that varies from a police report, the affidavit could be used in a subsequent criminal or civil trial to impeach the victim during cross-examination. Id.

75 See Carroll, supra note 69, at 6 (“[A sexual assault protection order] remedy is only meaningful for victims if the perpetrator is likely to abide by it.”); Deer, supra note 43, at pt. III.C (discussing lack of guarantee).

76 See Deer, supra note 43, at pt. III.C (suggesting protection orders provide “extra level of security beyond status quo”).

77 See id. (discussing ability to turn down option valuable for survivors of sexual assault).
III. HISTORY OF THE LOOHOLES

A. Civil Protection Orders, Generally

A civil protection order, commonly known as a restraining order, is a civil remedy used to protect a victim’s safety by placing a “legal burden on the assailant to have no further contact with the victim.” Such orders derive from the traditional common law civil injunction, and were adapted in the 1970s as a mechanism to protect victims of domestic violence. All United States jurisdictions have a statute that offers civil protection orders to victims of domestic violence. Although a number of states still require the existence of a “domestic violence” relationship to exist between the victim and perpetrator, since the 1990s a number of states have passed subsequent legislation aimed at broadening the categories for those eligible to obtain an order of protection. The crucial element of these protection orders is

78 See RIGHTS AND REMEDIES, supra note 24, at 22 (explaining nature of civil orders of protection); VICTIM RIGHTS LAW CTR., supra note 7, at 3-2 (discussing purpose and nature of civil protection orders). VAWA defines a “protection order” as “any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person.” 18 U.S.C. § 2266(5)(A) (2006); see also RIGHTS AND REMEDIES, supra note 24, at 31 (discussing definition of protection order under VAWA).


80 See Judith A. Smith, Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform, 23 YALE L. & POL’Y REV. 93, 100 (recognizing all fifty states have domestic violence protection orders); STANDARDS OF PRACTICE, supra note 16, at vi (noting availability of domestic violence protection orders in every state).

81 See Smith, supra note 80, at 102 (recognizing states’ movement towards broadening eligibility requirements). Twelve states still require that the victim have a domestic violence relationship with the perpetrator before obtaining an order of protection. See, e.g., ALA. CODE. §§ 30-5-1 to -8 (LexisNexis 2011); 23 PA. CONS. STAT. ANN. § 6106 (West 2010); W. VA. CODE ANN. § 48-27-202 (LexisNexis 2009 & Supp. 2011). Twelve other states allow victims of harassment and stalking to obtain a protection order without a domestic violence relationship. See, e.g., ARIZ. REV. STAT. ANN. § 12-1809 (West 2003 & Supp. 2011); NEB. REV. STAT. § 28-311.02 (2008); S. C. CODE ANN. § 16-3-1750 (2003 & Supp. 2011); WYO. STAT. ANN. § 7-3-507 (2011). A majority of states have a hybrid statute, placing sexual assault protections within a statute providing protections to other categories of victims. See, e.g., ALASKA STAT. §§ 18.65.850-870 (2010); HAW. REV. STAT. ANN. § 604-10.5 (LexisNexis Supp. 2011); MICH. COMP. LAWS ANN. § 600.2950a (West 2010). Only five states have a statute that is specifically
orders is that a violation of the order is a criminal offense, punishable by incarceration.\textsuperscript{82}

B. History of Civil Orders of Protection in Massachusetts (Chapter 209A)

In 1978, Massachusetts passed its first criminally-enforceable protection order statute, Massachusetts General Laws Chapter 209A ("Chapter 209A"), entitled "Abuse Prevention."\textsuperscript{83} The Legislature enacted the statute to combat the growing problem of domestic violence and intended the law to "provide victims with an accessible means of stopping the violence without resort to the more onerous criminal process or the protracted and often unwanted civil remedies."\textsuperscript{84}


\textsuperscript{82} \textit{See} Tarr, supra note 51, at 191 (discussing criminal charges as "][o]ne of the greatest developments of the Order for Protection statutes"); \textit{see also} supra notes 41-45 and accompanying text (discussing criminal penalties associated with civil protection orders).


\textsuperscript{84} \textit{See} Drew & Gresens, supra note 83, at 297 (discussing goals behind passage of Chapter 209A); \textit{see also} Jones v. Gallagher, 768 N.E.2d 1088, 1090 (Mass. App. Ct. 2002) ("[T]he statute . . . has been described as a 'statutory mechanism by which victims of family or household abuse can enlist the aid of the State to prevent further abuse.'"). Massachusetts was one of the first states to enact legislation to combat the problem of domestic violence and has since been known as a progressive leader in victim protection. \textit{See} Drew & Gresens, supra note 83, at 295-96 (discussing goals behind passage of Chapter 209A); \textit{see also} Beth L.Z. Boland & Susan M. Finegan, \textit{Survey of Key Developments in the SJC's Recent Approach to Domestic Violence Issues: Jacobsen, Frizado, Kwiatkowski, and R.H. v. B.F.}, \textit{40} Bos. J., Jan./Feb. 1996, at 10, 10 ("Batterers in Massachusetts now face some of the strongest anti-domestic violence laws and programs in the country.").
must suffer from “abuse from an adult or minor family or household member.” The statute defines “family or household members” as people 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 relationship.

Prior to Chapter 258E, a victim not dating, living with, or related to her attacker could not obtain protection without participating in the criminal justice system. Yet a victim who suffered from the same crime at the hands of her intimate partner, relative, or roommate was able to secure these vital protections.

C. Remedies for Sexual Assault Victims in Massachusetts Prior to Chapter 258E

Before enactment of Chapter 258E, victims of sexual assault who did not qualify for a Chapter 209A protection order in Massachusetts were faced with “inadequate alternatives” in seeking protection from their attackers. If a sexual assault victim chose to participate in the criminal justice system, the court could issue an order requiring the perpetrator to stay away from the victim. If the perpetrator violated such an order by contacting or intimidating the victim, the defendant could be arrested and incarcerated. However, these orders only applied while the criminal case

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85 Ch. 209A, § 3. “Abuse” is defined by the statute as “(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. § 1.
86 Id. § 1.
87 See Elissa Flynn-Poppey & Stefanie Giuliano Abhar, Chapter 258E Harassment Prevention Orders—Balancing the Rights of Victims and Defendants, 94 MASS. L. REV. 23, 23 (2011) (discussing unavailability of protection orders prior to Chapter 258E); see also supra notes 3-4 and accompanying text (discussing lack of protections prior to Chapter 258E).
88 See supra notes 3-4 and accompanying text (discussing lack of protections prior to 258E).
89 See Seidman & Vickers, supra note 24, at 476-78 (discussing sexual assault victims’ inability to obtain protection order prior to Chapter 258E).
90 See VICTIM RIGHTS LAW CTR., supra note 7, at 3-9 (discussing criminal stay-away orders); Seidman & Vickers, supra note 24, at 476 (explaining stay-away orders issued in context of criminal cases).
91 See VICTIM RIGHTS LAW CTR., supra note 7, at 3-9 (discussing consequences for violation
was on-going, and were only available to those victims who chose to participate in the criminal justice process.\textsuperscript{92}

Alternatively, a victim could have also sought a traditional injunction in superior court.\textsuperscript{93} Filing for a traditional injunction, however, “is time-consuming, expensive, and generally requires the assistance of a lawyer.”\textsuperscript{94} Most importantly, a violation of this type of injunctive relief is not automatically a criminal offense, but rather, is enforced only through contempt of court.\textsuperscript{95} Therefore, a perpetrator could continually violate a civil injunction and be subject only to contempt of court charges, “providing a weak deterrent at best and leaving the victim with little recourse.”\textsuperscript{96} Furthermore, the process for obtaining a civil injunction “exposes the victim to greater contact with the perpetrator without any consummate protection.”\textsuperscript{97} As such, civil injunctions provided “significantly less protection in case of a violation than the abuse

of stay-away orders issued in criminal cases).

\textsuperscript{92} See id. (detailing violation of stay-away orders issued in criminal case).

\textsuperscript{93} See Flynn-Poppey & Abhar, supra note 87, at 23 (discussing option of filing traditional injunction prior to Chapter 258E); Seidman & Vickers, supra note 24, at 477 (listing process for seeking injunctive relief in Massachusetts Superior Court); see also MASS. R. CIV. P. 65 (enumerating requirements for superior court injunction).

\textsuperscript{94} Flynn-Poppey & Abhar, supra note 87, at 23 (discussing civil injunction process). In Massachusetts, “[t]he requirements for preliminary injunctive relief are: 1) the likelihood of success on the merits; 2) the risk of irreparable harm to the plaintiff if the injunction is not issued; and 3) the absence of irreparable harm to the defendant if the injunction is granted.” Seidman & Vickers, supra note 24, at 478 n.56 (citing Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 26 (Mass. App. Ct. 1986)). Furthermore, this process requires the payment of a “security” in an amount to be determined by the court, for the payment of costs that may accrue to the adverse party “who is found to have been wrongfully enjoined or restrained.” See MASS. R. CIV. P. 65 (requiring payment of “security”). This cost could be upwards of hundreds of dollars. See Flynn-Poppey & Abhar, supra note 87, at 23 n.8 (noting average filing fees for civil injunction as $395.00); David Abel, Restraining-Order Filings Unbound, BOS. GLOBE, April 12, 2011, at A1 (discussing cost of hundreds of dollars to obtain civil injunction in superior court).

\textsuperscript{95} See Flynn-Poppey & Abhar, supra note 87, at 23. In order to seek enforcement of a civil injunction after a violation, the plaintiff must initiate a contempt of court proceeding. MASS. R. CIV. P. 65.3. To do so, the plaintiff must file a complaint for contempt with the clerk of the court where the order has been violated. Id. The defendant must be served with a summons and be given an opportunity to file an answer to the complaint. Id. The parties will then conduct discovery, and then a trial may be held. Id. Furthermore, the standard for contempt is based on a “clear and undoubted disobedience of a clear and unequivocal command,” and must be proved beyond a reasonable doubt. See VICTIM RIGHTS LAW CTR., supra note 7, at 3-8 (quoting Peggy Lawton Kitchens, Inc. v. Hogan, 532 N.E.2d 54, 55 (Mass. 1989)) (internal quotation marks omitted).

\textsuperscript{96} Brief Amici Curiae of the Victim Rights Law Center et al., at 7-8, O’Brien v. Borowski, No. SJC-10866 (Mass. filed Oct. 17, 2011), 2011 WL 5118359, at *7-8; see also Flynn-Poppey & Abhar, supra note 87, at 23 (discussing penalties for violation of civil injunctions).

\textsuperscript{97} Brief Amici Curiae of the Victim Rights Law Center et al. at 8, O’Brien, No. SJC-10866, 2011 WL 5118359, at *8.
prevention orders available to domestic violence victims. 98

IV. MASSACHUSETTS’S RESPONSE TO THE “GLARING LOOPHOLE” 99

A. Legislative History of Chapter 258E

The dangers of stalking served as the original catalyst that initiated the dialogue advocating for the expansion of Chapter 209A protections to victims who did not qualify under the statute. 100 In 2000, the death of a Massachusetts woman, Sandra Berfield, made major headlines after Steven S. Caruso, a man who had stalked her for two years prior to her death, killed her by placing a package bomb on her doorstep. 101 Although Caruso engaged in repeated violent and threatening acts against Berfield, the two had no pre-existing relationship: they had never dated, were not related, and were not living together. 102 Berfield’s death exposed an enormous gap in the existing Massachusetts protection order legislation, because despite attempting to obtain a Chapter 209A protection order against Caruso, Berfield did not have the requisite relationship to obtain that protection order, and her petition was denied. 103 In response, the Massachusetts Legislature began drafting a statute that would allow victims who had no prior relationship with their perpetrators to obtain an order of protection. 104

Drafters of the statute originally intended the law to protect only victims of stalking and harassment. 105 However, when the Boston law firm Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. (“Mintz Levin”) accepted the case of Jane, discussed above, they soon discovered that

98 See Seidman & Vickers, supra note 24, at 478 (discussing “cumbersome” enforcement of traditional injunctions and inadequate remedies for sexual assault victims).
99 See Guilfoil, supra note 2 (quoting Governor Deval Patrick on benefits of new law).
100 See id. (discussing ten-year dialogue on creation of stalking protections).
102 See Editorial, Harassment Orders May Cause More Problems Than They Solve, MASS. LAW. WKLY., Dec. 13, 2010, at 38 (discussing lack of prior relationship between perpetrator and victim); Kirkman, supra note 101, at 174 (discussing no prior relationship between Berfield and Caruso); Dave Wedge, House Votes Protections for Victims of Stalkers, BOS. HERALD, Jan. 29, 2010, at 14 (describing Caruso’s threatening behavior and lack of relationship with Berfield).
104 See Guilfoil, supra note 2 (outlining beginnings of drafting process).
105 See id. (discussing roots of bill).
victims of sexual assault needed the same protections as victims of stalking, because sexual assault victims faced identical barriers when they were not related to, living with, or romantically involved with their assailant.\textsuperscript{106} Attorneys at Mintz Levin then joined the legislative drafting team to ensure that the law also included victims of sexual assault.\textsuperscript{107} The statute faced many barriers to enactment, and its passage took the Massachusetts Legislature nearly ten years.\textsuperscript{108} Governor Deval Patrick signed the bill into law on February 9, 2010, and it came into effect on May 10, 2010.\textsuperscript{109}

B. Protections for Sexual Assault Victims Under Chapter 258E

The Chapter 258E Harassment Prevention Order allows any person suffering from “harassment” to file for protection.\textsuperscript{110} The statute provides three definitions for harassment.\textsuperscript{111} The first, aimed at protecting victims of

\textsuperscript{106} See id. (discussing barriers Mintz Levin faced with sexual assault client); see also supra note 2 and accompanying text (detailing history of Jane’s case).

\textsuperscript{107} See Guilfoil, supra note 2 (discussing Mintz Levin’s involvement in drafting process); Healy, supra note 3 (discussing Mintz Levin’s involvement in redrafting of statute); John J. Monahan, New Law Fights Stalkers, Abusers, TELEGRAM & GAZETTE (Worcester, Mass.), Feb 10, 2010, at A1 (discussing Mintz Levin’s taking “lead” of final drafting process on pro bono basis).

\textsuperscript{108} See Guilfoil, supra note 2 (marking enactment of bill as “the culmination of a decade’s worth of effort”); Healy, supra note 3 (noting “10-year legislative effort” in passing bill). The bill was “repeatedly stalled” and re-filed in the legislature every year since 2000. See Wedge, supra note 102 (discussing ten-year refiling process). Many of the early opponents expressed “drafting concerns” over the language of the original bill and were worried that the law “would suffer constitutional infirmities in its application of vague language.” Healy, supra note 3 (discussing ten-year opposition to passage of law). In addition to concerns that the law would limit civil liberties and leave it susceptible to exploitation and misapplication (such as neighbors seeking orders against one another), other opponents believed that the existing legislation offered enough protection to victims of stalking and sexual assault. See Baker, supra note 44 (discussing barriers to passage of statute). However, on February 4, 2010, both the Massachusetts House of Representatives and Senate passed the bill unanimously. See Flynn-Poppey & Abhar, supra note 87, at 23 (discussing passage of bill). The passage of Chapter 258E was the first time in many years that “legislation with criminal implications” passed unanimously in both the Massachusetts House of Representatives and Senate. Id.


\textsuperscript{110} Ch. 258E, § 3 (discussing remedies under protection order).

\textsuperscript{111} Ch. 258E, § 1 (enumerating types of harassment).
stalking, requires “[three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property.” The second definition, applying to non-domestic violence victims of sexual assault, defines harassment as one act that “by force, threat or duress causes another to involuntarily engage in sexual relations.” The third definition, intended to protect victims of various crimes that do not fall within the first two definitions, defines harassment as one act that “constitutes a violation” of a number of enumerated sexually-based criminal offenses.

The process for obtaining a Chapter 258E protection order is largely modeled after the process for obtaining a Chapter 209A protection order, and intends to give similar protections to victims of harassment and sexual assault. A difference between the two statutes exists, however, in that the standard under Chapter 258E is higher than that under Chapter 209A. Specifically, to obtain an order under Chapter 258E, the plaintiff

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112 Id.
113 Id.
114 Id. The offenses include indecent assault and battery, rape, assault with intent to commit rape, enticement of child under age sixteen, stalking, criminal harassment, and drugging persons for sexual intercourse. Id.


116 See Brief of the Plaintiff-Appellee Tracy A. Lawrence at 12, Lawrence, No. 2011-P-0924, 2011 WL 3806932, at *12 (“[T]he Legislature choose [sic] not to include the [Chapter 209A] definition of abuse in G.L.c. 258E § 1.”); Flynn-Poppey & Abhar, supra note 87, at 23 (“Massachusetts General Laws Chapter 258E ... implemented a standard higher than that required for the issuance of an abuse prevention order.”); Editorial, A Welcome New Law in Mass. Aimed at Stalkers, MASS. LAW. WKLY., Apr. 5, 2010, at 38 (discussing higher standard under Chapter 258E than under Chapter 209A); Healy, supra note 3 (discussing same). The inclusion of a higher standard for Chapter 258E “was not an arbitrary decision but rather a result of the collaborative efforts of legislators, the trial court department, district attorneys, law enforcement officials, criminal defense attorneys, victims’ rights advocacy groups, public defenders, and a private law firm to ensure that the legislation would be implemented appropriately.” Flynn-
must show “a substantial likelihood of immediate danger of harassment,” whereas under Chapter 209A, the plaintiff must only prove “a substantial likelihood of immediate danger of abuse.”

Under the Chapter 209A definition of “abuse,” the plaintiff need only demonstrate that the defendant “attempt[ed] to cause or caus[ed] physical harm” or “plac[ed] another in fear of imminent serious physical harm.” Chapter 258E, in contrast, “does not have a requirement that the plaintiff fear serious physical harm.” Rather, under the Chapter 258E definition of “harassment,” the plaintiff must prove either (a) “[three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property,” (b) one act that “by force, threat or duress causes another to involuntarily engage in sexual relations,” or (c) one act that “constitutes a violation” of one of the enumerated sexually based criminal offenses. By requiring a plaintiff to prove that the defendant’s conduct satisfies the definition of “harassment,” Chapter 258E imposes a “much more significant burden on the plaintiff” than Chapter 209A.

If the plaintiff meets the burden under Chapter 258E, the court may enter a temporary order “to protect the plaintiff from harassment” without the presence of the defendant. However, the court must schedule a hearing within ten days, at which time the defendant will be provided “an opportunity to be heard on the question of continuing the temporary order.” If the court determines that the plaintiff is in continuing need of protection from harassment, the court may enter an order of protection for a period of up to one year, at which time the order expires. When the order expires, the parties must reappear in court, and a hearing is held to

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117 Ch. 209A, § 4; ch. 258E, § 5; see also Brief of the Plaintiff-Appellee Tracy A. Lawrence at 12, Lawrence, No. 2011-P-0924, 2011 WL 3806932, at *12 (discussing standard differences between Chapter 209A and Chapter 258E); Flynn-Poppey & Abhar, supra note 87, at 25 (enumerating difference between Chapter 209A and Chapter 258E standards).

118 See ch. 209A, § 1 (enumerating definition of “abuse”); see also Flynn-Poppey & Abhar, supra note 87, at 25 (discussing definition of “abuse” under Chapter 209A).


120 See ch. 258E, § 1; see also Flynn-Poppey & Abhar, supra note 87, at 25 (discussing standard under Chapter 258E).

121 Flynn-Poppey & Abhar, supra note 87, at 25 (explaining heightened standard under Chapter 258E).

122 See ch. 258E, § 5 (discussing issuance of temporary orders).

123 See id. (discussing process for ten-day hearing).

124 See id. § 3(d) (discussing initial relief period of granted order).
“determine whether or not to extend the order for any additional time reasonably necessary to protect the plaintiff or to enter a permanent order.”

Similar to Chapter 209A, Chapter 258E enumerates a number of remedies that the issuing judge may provide for in the order. These remedies include ordering the defendant to stop abusing the plaintiff, to stop harassing the plaintiff, to cease contact with the plaintiff, and to stay away from the plaintiff’s home or workplace. The statute also allows for the payment of monetary damages to the plaintiff for losses suffered as a result of the harassment. The proceedings for issuing a Chapter 258E order of protection, like Chapter 209A, are civil; however, a violation of the order is criminal in nature. Additionally, a violation of the order is punishable by a fine of up to $5000 or imprisonment of up to two and a half years, or both.

C. Chapter 258E in Practice

Before Chapter 258E came into effect in May 2010, commentators praised the law for its even-handed approach to a difficult issue. At its signing, many considered the law a collaborative bipartisan success and brought together various group from the community, including advocates, law enforcement, and “both sides of the defense/prosecution divide.” An editorial analyzing the new law stated, that “certain law makers deserve credit for a new statute regarding restraining orders that is both noble in its design and appropriate in its scope.”

125 See id. (discussing rehearing process after expiration of order). Like Chapter 209A, Chapter 258E specifically states “[t]he fact that harassment has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order, or allowing an order to expire or be vacated or for refusing to issue a new order.” Id.
126 See id. § 3 (enumerating remedies).
127 See ch. 258E, § 3(a)(i)-(iii) (enumerating remedies allowed in Chapter 258E order).
128 See id. § 3(a)(iv) (permitting payment of monetary damages to plaintiff).
129 See ch. 258E, § 4 (discussing civil nature of proceedings and criminal nature of violation).
130 See id. § 9 (enumerating penalties for violation of order).
131 See A Welcome New Law in Mass. Aimed at Stalkers, supra note 116 (“[C]ertain lawmakers deserve credit for a new statute regarding restraining orders that is both noble in its design and appropriate in its scope.”).
132 See id. (discussing credit due to lawmakers); see also Flynn-Poppey & Abhar, supra note 87, at 23 (discussing many different groups involved in Chapter 258E’s creation); Healy, supra note 3 (viewing enactment of law as “a show of lawmaking unity”); Patrick, supra note 34 (quoting bill Representative Cory Atkins’s view on cooperation “from both sides of the aisle”).
133 See A Welcome New Law in Mass. Aimed at Stalkers, supra note 116 (discussing praise...
However, since its enactment, the law has faced significant criticism of its implementation in practice.\textsuperscript{134} Much of the criticism focuses on the large number of complaints filed by people not perceived as the “intended beneficiaries” of the statute.\textsuperscript{135} However, this criticism has largely not concerned the sexual assault prong of the harassment order.\textsuperscript{136}

In addition to the number of complaints being filed by “unintended beneficiaries,” the statute’s constitutionality has also come into question.\textsuperscript{137} As of the date of publication of this article, a challenge to Chapter 258E’s constitutionality is being reviewed by the Supreme Judicial Court of Massachusetts.\textsuperscript{138} This challenge focuses on whether the statute unconstitutionally prohibits protected speech.\textsuperscript{139} Furthermore, the challenge is based on an argument that is only applicable to the first prong of the statute.\textsuperscript{140} However, the challenge appears to be directed at the entirety of the statute, including the prong relating to a single act of sexual assault.\textsuperscript{141}

\begin{itemize}
  \item \textsuperscript{134} See, e.g., Abel, supra note 94 (discussing “surge” in restraining order filings under Chapter 258E); Bantz, supra note 133 (discussing perceptions of misuse of statute); Harassment Orders May Cause More Problems Than They Solve, supra note 102 (noting reach of statute is “troublingly broad”); Steven E. Kramer, Letter to the Editor, Harassment Protection Statute is Being Abused, MASS. LAW. WKLY., July 12, 2010, at 39 (discussing abuse of statute since passage).
  \item \textsuperscript{135} See supra notes 134-35135 (outlining criticism of statute).
  \item \textsuperscript{136} See supra notes 134-35135 (outlining criticism of statute).
  \item \textsuperscript{138} See id. (outlining request for review by Supreme Judicial Court). The case arose from the issuance of a Chapter 258E order against the appellant, Robert O’Brien, filed by the plaintiff-appellee, Alan Borowski. Id. at 1-2. Plaintiff-Appellee Borowski is a Northhampton, Massachusetts police officer who filed for a Harassment Prevention Order after a series of interactions with O’Brien in which he felt threatened. Id. at 3. Appellant O’Brien appealed the order, claiming that “(1) the harassment prevention statute is unconstitutionally overbroad to the extent that it covers protected speech; and (2) the acts complained of in Borowski’s application for prevention order constituted protected free speech.” Id. at 2.
  \item \textsuperscript{139} See Brief of Amicus Curiae American Civil Liberties Union of Massachusetts at 4, Borowski v. O’Brien, No. SJC-10866 (Mass. filed Nov. 3, 2011), 2011 WL 5564203, at *4 (announcing constitutional argument).
  \item \textsuperscript{140} See id. at *4 (outlining constitutional argument).
  \item \textsuperscript{141} See Brief and Record Appendix of Appellant, Robert O’Brien at 15, O’Brien, No. SJC-
Although Chapter 258E appears to be under attack, it is unquestionably working for victims of sexual assault. Proponents of the law have noted that Chapter 258E “is probably one of the most important laws on the books for sexual assault and rape victims.” Although there are no available statistics on the number of Chapter 258E orders granted since the law’s enactment, according to SAFEPLAN, a Massachusetts court advocate program that helps victims file for restraining orders, as of July 2011, 119 sexual assault victims had requested Chapter 258E protection orders through SAFEPLAN since enactment of the law. This number is in contrast to the 1,134 total number of Chapter 258E orders filed through SAFEPLAN since the enactment of the law. In addition, as of January 2011, the Victim Rights Law Center, which is “a Boston non-profit providing free legal services to sexual assault victims[,] has helped over 30 sexual assault victims obtain these orders, with every single victim


142 See Abel, supra note 94 (discussing importance of law for sexual assault victims).

143 See Abel, supra note 94 (quoting Colby Bruno, managing attorney of Victim Rights Law Center).


145 See E-mail from Kristen Rappa, SAFEPLAN Program Coordinator, Mass. Office for Victims Assistance, to author (Aug. 26, 2011, 15:55 EST) (on file with author) (describing number of 258E orders sought in SAFEPLAN courts). SAFEPLAN does not assist every victim filing for a protection order in the Massachusetts courts. Id. These numbers, therefore, do not represent every protection order issued or granted within Massachusetts since enactment of Chapter 258E. Id.

146 Id.
returning to court for the extension hearing."

V. ANALYSIS

The passage of Massachusetts General Law Chapter 258E was an enormous step in providing victims of sexual assault access to a means of protection from their attackers. Without this law, sexual assault victims would be left without the opportunity to protect themselves from the continued threat of their attackers. The law currently prevents exposure to continued threats for many victims of sexual assault, and serves as an invaluable resource for this group of victims who would not otherwise have these protections.

Despite the obvious value that the statute provides to victims of sexual assault, there are several critical problems with the statute as it applies to sexual assault victims. The first major problem with Chapter 258E is that the Massachusetts Legislature did not draft the statute with the sexual assault victim in mind. Rather, Massachusetts legislators intended the statute to serve as—and it is still widely considered—a “harassment protection order,” not a statute designed to provide sexual assault victims with protections.

147 See Colby Bruno, Letter to the Editor, Groups Disappointed by Editorial on Harassment Orders, MASS. LAW. WKLY., Jan. 10, 2011, at 47.
148 See supra notes 6, 8-9 and accompanying text (discussing major protections afforded to victims of sexual assault through passage of Chapter 258E).
149 See supra notes 32-39 and accompanying text (discussing risks post-attack).
150 See supra notes 142-47 and accompanying text (discussing Chapter 258E statistics).
151 See infra notes 152-84 and accompanying text (outlining drafting problems inherent in Chapter 258E).
152 See Kirkbride, supra note 48, at 67 (stating not written with victims in mind); see also supra notes 100, 105-07107 and accompanying text (discussing original intention of Chapter 258E as applying to harassment victims).
153 See Brief of the Plaintiff-Appellee Tracy A. Lawrence at 11, Lawrence v. Gauthier, No. 2011-P-0924 (Mass. App. Ct. filed Aug. 10, 2011), 2011 WL 3806932, at *11 (stating intention of law to protect only stalking victims); A Welcome New Law In Mass. Aimed at Stalkers, supra note 116 (failing to mention sexual assault as eligible for Chapter 258E); Monahan, supra note 107 (discussing law as combating harassment and stalking with only vague mention of “abuse”); Kramer, supra note 134 (failing to mention sexual assault as eligible to obtain Chapter 258E). In fact, much of the discourse surrounding the statute does not mention the fact that one instance of sexual assault qualifies a person to obtain the order. Id. (same); see also A Welcome New Law In Mass. Aimed at Stalkers, supra note 116 (failing to mention sexual assault as eligible for 258E); Monahan, supra note 107 (discussing law as combating harassment and stalking with only vague mention of “abuse”). Even the statute’s name, “Harassment Prevention Order,” does not refer to sexual assault victims, and only a close reading into the definition of “harassment” reveals any mention of sexual assault. MASS. GEN. LAWS ch. 258E, §§ 1-10 (2010) (announcing name of statute as “Harassment Prevention Orders”).
The problem with including sexual assault in a statute that is largely intended as a harassment statute is that sexual assault is not synonymous with harassment, and it implicates considerations different than those encountered by harassment victims. This problem becomes evident when looking at the heightened standard imposed on victims under Chapter 258E. The standard was deliberately set higher than the standard under Chapter 209A, in an attempt to prevent plaintiffs from potentially abusing the statute and to “ensure that only those victims who really needed protection in fact received it.” However, the concerns underlying the adoption of the heightened standard under Chapter 258E—neighbor arguments, “bar fights,” “landlord tenant disputes,” “minor violent crimes,” and other “frivolous reasons”—are not considerations that are applicable to sexual assault victims. Rather, claims for protection by sexual assault victims, like those of domestic violence victims, are inherently non-frivolous due to the serious violent nature of the crime. The Massachusetts Legislature implicitly recognized this right by including “one act” of sexual assault within the definition of “harassment.”

As a result, the standard under Chapter 258E leads to confusion when it is applied to sexual assault victims. Under the statute, a victim of one instance of sexual assault may qualify for the order under the second definition of “harassment,” defined as “an act that . . . by force, threat or duress causes another to involuntarily engage in sexual relations.” To obtain the protection order, the plaintiff must demonstrate a “substantial likelihood of immediate danger of harassment.” However, it is unclear from the statute whether a sexual assault victim who obtains an order under the second definition of harassment may utilize the other two definitions of

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154 See Kirkbride, supra note 48, at 67 (discussing differences in experience between harassment and sexual assault victims).
155 See supra notes 116-20 and accompanying text (discussing heightened standard under Chapter 258E than under Chapter 209A).
156 See Flynn-Poppey & Abhar, supra note 87, at 24 (discussing motivations behind including heightened standard under Chapter 258E).
157 See Flynn-Poppey & Abhar, supra note 87, at 24 (discussing reasons behind adoption of high standard under Chapter 258E).
158 See Flynn-Poppey & Abhar, supra note 87, at 30 (distinguishing legislature’s use of different “branches” within Chapter 258E harassment definition).
159 See MASS. GEN. LAWS ch. 258E, § 1 (2010); see also Flynn-Poppey & Abhar, supra note 87, at 30 (“Unlike the first branch of harassment, the drafters were simply unwilling to require a plaintiff to suffer more than one instance of sexual assault in order to qualify for protection from the court.”).
160 See infra notes 161-72 (discussing flaws in statute’s drafting).
161 Ch. 258E, § 1 (defining eligibility under definition of harassment).
162 Id. § 5 (defining standard).
harassment to meet the statute’s burden.\textsuperscript{163}

For instance, the statute would appear to require the sexual assault plaintiff to prove that she is in a substantial likelihood of immediate danger of the same type of “harassment” alleged when she initially filed the order.\textsuperscript{164} In other words, that she is in danger of “an act that . . . by force, threat or duress causes another to involuntarily engage in sexual relations.”\textsuperscript{165} However, many sexual assault victims may not be in a substantial likelihood of being sexually assaulted again.\textsuperscript{166} They may, however, be vulnerable to harassment, intimidation, or other physical or psychological harm at the hands of their attacker.\textsuperscript{167}

Additionally, the statute is unclear as to whether a sexual assault plaintiff who uses the second definition of harassment to qualify for the order may utilize the first definition of harassment—“three or more acts of willful and malicious conduct . . . with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property”—to meet the statute’s burden.\textsuperscript{168} Even if the statute were to allow a sexual assault plaintiff to utilize the first definition of harassment to meet her burden of proof, many sexual assault victims would not qualify under this prong either.\textsuperscript{169} Many sexual assault victims do not experience the heightened level of stalking or harassment that is required under the standard for Chapter 258E.\textsuperscript{170} Many do, however, experience continued contact with their assailant, which although may not rise to the level of harassment as defined under Chapter 258E, is every bit as humiliating, frightening, and dangerous to the victim as the behavior intended under the first prong of Chapter 258E.\textsuperscript{171}

While the standard under Chapter 258E is relevant to individuals seeking protection from harassment, it imposes a strange burden on the sexual assault plaintiff.\textsuperscript{172} Due to the complexity of sexual assault, and the

\textsuperscript{163} See generally id. §§ 1, 5 (indicating lack of clarity under definition of harassment); see also supra notes 116-17 (comparing and contrasting definitions of abuse and harassment in Chapter 258E with Chapter 209A).

\textsuperscript{164} See generally ch. 258E, §§ 1, 5 (enumerating standard of proof).

\textsuperscript{165} See id. § 1.

\textsuperscript{166} See Kirkbride, supra note 48, at 67 (indicating sexual assault victims may only be assaulted once).

\textsuperscript{167} See supra notes 32-39, 46-48 and accompanying text (discussing safety risks and psychological harm to victims post-assault).

\textsuperscript{168} See generally ch. 258E, §§ 1, 5 (enumerating standard of proof).

\textsuperscript{169} See Kirkbride, supra note 48, at 67 (explaining lack of harassment experienced by some victims).

\textsuperscript{170} See id. (explaining experiences of sexual assault victims post-assault).

\textsuperscript{171} See id. (same).

\textsuperscript{172} See Bantz, supra note 133 (discussing heightened standard as mechanism to prevent
varying experiences of its victims, a better standard for victims of sexual assault would resemble the standard under Chapter 209A.\footnote{See MASS. GEN. LAWS ch. 209A, § 4 (2010) (enumerating standard as “substantial likelihood of immediate danger of abuse”).} Under that statute, a victim of domestic violence must prove a “substantial likelihood of immediate danger of abuse,” which means “physical harm, fear of imminent harm, or causing another to engage involuntarily in sexual relations by force threat or duress.”\footnote{See id. §§ 1, 4 (enumerating standard and definition of “abuse”).} Like domestic violence victims, sexual assault victims also experience a range of emotions and reactions following their attack that are distinct from those experienced by harassment victims.\footnote{See supra notes 33-34, 46-49 (discussing experience of sexual assault victims).} Some may be at risk of being sexually assaulted again, while others may be at risk of intimidation, physical abuse, or other frightening experiences.\footnote{See supra notes 166-67 and accompanying text (discussing varying risks of harm sexual assault victims face post-assault); see also Abel, supra note 94 (discussing suggestion Chapter 258E standard be “in fear of serious physical harm or financial harm”).} Creating a standard that resembles the Chapter 209A standard, which is based on a “generalized fear” or risk of physical harm, is much better tailored to the unique and often varied experiences of the sexual assault victim.\footnote{See supra notes 134-35 and accompanying text (discussing criticism of statute).}

In addition to the statute’s intent and drafting, there are other problems associated with Chapter 258E.\footnote{See infra notes 179-84 (discussing additional problems with statute’s intent and drafting).} When protections for sexual assault victims are classified incorrectly under a “harassment statute,” such a misclassification not only diminishes public awareness of the statute’s intentions, but also misleads eligible individuals into believing that the statute does not offer them protection.\footnote{See supra Part IV.B (discussing statute’s focus on “harassment”).} Furthermore, such a mischaracterization of sexual assault within a harassment statute exposes sexual assault victims to misdirected opposition.\footnote{See supra note 133 (discussing negative view of statute as being abused by those other than sexual assault victims); Kramer, supra note 134 (discussing abuse of statute while failing to mention sexual assault as eligible).} Chapter 258E is currently suffering from an onslaught of criticism, almost entirely directed at the “harassment” prong of the statute.\footnote{See Bantz, supra note 133 (discussing negative view of statute as being abused by those other than sexual assault victims); Kramer, supra note 134 (discussing abuse of statute while failing to mention sexual assault as eligible).} This misdirected criticism serves as a dangerous threat to the availability of protections for sexual assault victims because it has led to a constitutional challenge of the statute as a whole, currently under review by the Supreme Judicial Court of
This constitutional challenge, although having the potential to affect the entirety of the statute, is based on a claim brought solely under the non-sexual assault definition of “harassment,” and is only applicable to that non-sexual assault definition of “harassment.” If the court strikes down the statute, sexual assault victims will lose the vital protections that they so desperately need, solely because the crime of which they are a victim is misclassified with an unrelated crime.

A specifically-tailored statute intended for sexual assault victims would alleviate many of the aforementioned problems. Several other states have already enacted similar sexual assault-specific statutes that have received wide acclaim. A sexual assault-specific protection order statute in Massachusetts with a standard based on the victim’s generalized fear of harm would create a standard that is appropriate to the crime of sexual assault, and would alleviate the statutory confusion stemming from its misclassification with an unrelated crime. Such a statute would also alleviate confusion about its intended purpose and may publicly attract qualified victims who may not have been aware of their eligibility for protection. With a statute drafted specifically for sexual assault victims, and having an appropriate standard based on generalized fear of harm, sexual assault victims would be far better protected from the threat of their attackers.

Though it has its problems, Chapter 258E is unquestionably

182 See supra notes 137-41 and accompanying text (discussing constitutional challenge to Chapter 258E).
183 See supra notes 137-41 (same).
185 See generally Kirkbride, supra note 48, at 70-73 (arguing for sexual assault-specific statutes).
186 See WASH. REV. CODE ANN. §§ 7.90.005-.900 (West 2007 & Supp. 2012); Kirkbride, supra note 48 (lauding Washington statute for providing specialized protections to sexual assault victims); O’Connell, supra note 34, at 2 (praising Washington statute for providing protections to sexual assault victims); see also FLA. STAT. ANN. § 784.046 (West 2007 & Supp. 2012) (providing specialized cause of action for protection order for sexual assault victims); 740 ILL. COMP. STAT. ANN. 22/102 (West 2010) (enumerating specialized sexual assault civil protection order); NEV. REV. STAT. ANN. § 200.378 (LexisNexis Supp. 2009) (giving specialized civil protection order protections to victims of sexual assault); see also supra notes 161-76 and accompanying text (discussing statutory confusion created by law).
187 See supra text accompanying note 179 (discussing misleading victims); see also supra Part IV.B.
188 See Kirkbride, supra note 48, at 67 (explaining need for sexual assault-specific statute).
working for victims of sexual assault. J 0 Judges seem to understand the inherent intent of the statute, despite its actual language, and are appropriately applying it to sexual assault victims. J 1 However, so long as sexual assault is included in a harassment statute with a standard that does not correctly apply to them, sexual assault victims stand at risk of the statute being read literally, thereby not obtaining the protections they need and deserve. J 2 Furthermore, sexual assault victims are continually exposed to the negative reputation surrounding the “harassment” prong of the statute. J 3 Such a negative reputation compounds the threat of the statute being challenged or struck down, based on reasons unrelated to the sexual assault prong of the statute. J 4 To combat these concerns, the Massachusetts Legislature should consider the protections afforded under Chapter 258E, and evaluate whether the current statute is the best solution for victims of sexual assault. J 5 Rather than misclassify the problem under harassment, and expose sexual assault victims to unintended criticism, the Massachusetts Legislature should create a specialized protection order specifically intended for victims of sexual assault. J 6

VI. CONCLUSION

The enactment of Massachusetts General Laws Chapter 258E was a major success that provides victims of sexual assault with vital protections against their assailants. Sexual assault victims rarely see their attackers brought to justice, and they are in need of a way to keep their attackers from further harming or intimidating them. Although Chapter 258E is working well to provide victims of sexual assault with a mechanism to protect them from potential harm, the statute could be working better. As a hybrid statute drafted originally as a harassment statute, Chapter 258E, as written, has the potential to deprive victims of sexual assault of the protections they so desperately need. By creating a narrowly tailored statute that is specifically intended for victims of sexual

190 See supra notes 142-47 and accompanying text (discussing success of statute for sexual assault victims).
191 See supra note 147 and accompanying text (discussing success of sexual assault victims in obtaining Chapter 258E orders).
192 See supra notes 161-76 and accompanying text (discussing confusion stemming from current drafting of statute).
193 See supra notes 134-35, 180-84 (analyzing negative criticism directed at statute).
194 See supra notes 134-35, 180-84 and accompanying text (same).
195 See supra notes 185-89 (outlining need for sexual-assault-specific statute in Massachusetts).
196 See Kirkbride, supra note 48, at 67; O’Connell, supra note 34, at 1.
assault, Massachusetts could provide these victims with remedies that would be more appropriate for the unique experience of sexual assault, and the state could once again take its place in the forefront of victims’ rights.

Hayley Jodoin