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REFORMING BAIL REFORM: BALANCING THE INTERESTS OF DEFENDANTS AND VICTIMS THROUGH THE LENS OF DOMESTIC VIOLENCE OFFENSES

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In 2010, Kalief Browder, a young Black man in New York City, was arrested and accused of stealing a backpack.[1] Because he was on probation for a prior incident, he was detained at Rikers Island ahead of his trial.[2] His bail was set at $3,000, and when his family could not afford to pay it while Mr. Browder was still eligible for release, he remained in detention.[3] Mr. Browder spent three years behind bars awaiting trial and maintaining his innocence.[4] Most of that time was spent in solitary confinement.[5] The charges against Mr. Browder were finally dropped due to a lack of evidence,[6] but he was unable to shake the trauma of his time spent at Rikers.[7] He committed suicide at age twenty-two.[8]

Amanda Harvey was a "funny, smart, loving mother of three" who loved to rescue animals.[9] She was born and raised in Rochester, New York, but moved to Michigan to be with her boyfriend of thirteen years.[10] Ms. Harvey's boyfriend, Erik Fry, had four prior domestic violence charges and had been recently been released without bond on another new domestic charge just before Ms. Harvey's death.[11] Family and friends

1. Nicole Triplett, *New York May Finally Do Something to Help Prevent What Happened to Kalief Browder*, N.Y. C.L. UNION (Mar. 4, 2019, 11:00 AM), https://www.nyclu.org/en/news/new-york-may-finally-do-something-help-prevent-what-happened-kalief-browder; P.R. Lockhart, *New York's Justice System Failed Kalief Browder. Now the City Will Pay His Family $3.3 Million*, VOX (Jan. 25, 2019, 11:50 AM), https://www.vox.com/2019/1/25/18196524/kalief-browder-estate-settlement-new-york-rikers; Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, THE MARSHALL PROJECT (June 9, 2015, 6:04 PM), https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder.

2. Lockhart, *supra* note 1.

3. *Id.*; Santo, *supra* note 1.

4. Triplett, *supra* note 1; Lockhart, *supra* note 1; Santo, *supra* note 1.

5. Triplett, *supra* note 1; Lockhart, *supra* note 1.

6. Triplett, *supra* note 1.

7. *Id.*; Santo, *supra* note 1.

8. Lockhart, *supra* note 1.

9. Jayne Chacko, *Greece Mother Seeks Justice After Daughter Murdered in Michigan*, 13WHAM (Dec. 3, 2021), https://13wham.com/news/local/greece-mother-seeks-justice-after-daughter-murdered-in-michigan; *see also Deaf Michigan Man Charged with First-Degree Murder of Girlfriend*, DAILY MOTH (Dec. 1, 2021), https://www.dailymoth.com/blog/deaf-michigan-man-charged-with-first-degree-murder-of-girlfriend [hereinafter DAILY MOTH].

10. Chacko, *supra* note 9; DAILY MOTH, *supra* note 9.

11. *See Warren Police: Man Released Without Bond for Domestic Violence, Kills Woman with Hammer*, FOX 2 (Nov. 30, 2021), https://www.fox2detroit.com/news/warren-police-man-released-without-bond-for-domestic-violence-kills-woman-with-hammer; DAILY MOTH, *supra* note 9.

were concerned for Ms. Harvey's safety and asked the police to perform welfare checks on Sunday and Monday, but when no one answered the door, the police left.[12] Tuesday, the day Fry was due to appear in court, he called the police to tell them he "just killed a woman," and upon arrival the police discovered Ms. Harvey, who was found to be bludgeoned to death with a hammer.[13] She was thirty-four years old.[14]

Both cases are devastating, but these issues stemming from bail are not all that uncommon.[15] In response to Mr. Browder's tragic death, the calls for bail reform became stronger than ever.[16] Calls for eliminating cash bail, achieving racial equality, and establishing a presumption of release began to influence states looking to reform their justice systems.[17] To that end, New York created categories of cases that are bailable,[18] Vermont began explicitly considering a defendant's financial situation when setting bail,[19] and New Jersey started looking to eliminate cash bail entirely.[20] All of these emerging systems have one goal in common: protecting the defendant's interest in pretrial release by creating an equitable system for bail determinations.

12. DAILY MOTH, *supra* note 9.

13. Chacko, *supra* note 9.

14. *Id.*

15. *See* Andrea Coppola, Note, *RE: The Pretrial Risk Assessment—How New Jersey's Bail Overhaul is Shaping Bail Reform Across the Country*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 87, 87–88 (2020) (explaining Pedro Hernandez was held at Rikers on $255,000 bail for over a year while eight witnesses maintained Hernandez was innocent); Anders Anglesey, *Man Released from Jail Breaks Off GPS Monitor, Kills Ex-Girlfriend, Police Say*, NEWSWEEK (Sep. 30, 2021, 12:38 PM), https://www.newsweek.com/man-released-jail-breaks-off-gps-monitor-kills-ex-girlfriend-florida-1634338; *see also* Corinne Ramey et al., *The Waukesha Parade Suspect Was Out on Bail. Now the DA is Probing How Bail is Set.*, WALL ST. J. (Nov. 24, 2021, 12:01 AM), https://www.wsj.com/articles/waukesha-parade-tragedy-sparks-debate-over-bail-policies-11637699382 (describing that the suspect who drove his car through the Waukesha Christmas Parade and killed six people was on bail for a domestic crime in which he punched the mother of his child and then ran her over with his car).

16. *See* INSHA RAHMAN, VERA INST. OF JUST., NEW YORK, NEW YORK: HIGHLIGHTS OF THE 2019 BAIL REFORM LAW 6 (2019), https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf; Santo, *supra* note 1.

17. *See* Isabella Jorgensen & Sandra Susan Smith, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States* 2 (Harvard Kennedy Sch., Working Paper No. 21-033, 2021).

18. CHRISTOPHER TYNER, UNIV. N.C. SCH. OF GOV'T, NEW YORK'S 2019 BAIL REFORM 1 (2019), https://cjil.sog.unc.edu/wp-content/uploads/sites/19452/2019/12/New-York-Bail-Reform-12132019.pdf.

19. *See* VT. STAT. ANN. tit. 13, § 7554 (2022).

20. N.J. JUDICIARY, CRIMINAL JUSTICE REFORM: FREQUENTLY ASKED QUESTIONS (2019), https://www.njcourts.gov/forms/12058_cjr_faq_brochure.pdf [hereinafter N.J. FAQ].

Yet cases like Ms. Harvey's loom large in the debate over loosening bail restrictions.[21] Opponents of bail reform argue that eliminating cash bail and promoting pretrial release in many cases will lead to increased criminal activity as dangerous and repeat offenders are set free.[22] Critics also cite restraining judicial discretion by mandating release in many instances as a failure of bail reform that can impact the safety of the public.[23]

This Note makes the case that states can fashion bail regimes that protect the rights of defendants pretrial and the safety of domestic violence victims. Within the broad bail reforms implemented by the states, there exists room for nuances that protect the victims of crime—such as unique conditions of release, and exceptions to the presumption of release. However, to achieve the goal of bail reform, these conditions can still be tailored to ensure that the defendant is not unduly punished when they have not yet been convicted.

While it is important to recognize that anyone can be a victim of a crime committed by an offender released pretrial, this Note focuses on how bail laws can address the specific concerns of domestic violence. Domestic violence is a serial crime; offenders often return to victimize the same person because of the intimate relationship aspect of the crime.[24] Further, domestic violence is a public health emergency.[25] Victims of domestic violence often experience physical injury and are at an increased risk of being murdered.[26] Victims of domestic violence may also suffer long-lasting mental, emotional, and physical consequences of abuse.[27] For these reasons, it is important to focus on domestic violence victims specifically when evaluating the efficacy of a reform system focused on the defendant's interests.

21. *See* Roxanna Asgarian, *The Controversy over New York's Bail Reform Law, Explained*, VOX (Jan. 17, 2020, 8:30 AM), https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained.

22. Jesse McKinley et al., *Why Abolishing Bail for Some Crimes Has Law Enforcement on Edge*, N.Y. TIMES (Feb. 23, 2021), https://www.nytimes.com/2019/12/31/nyregion/cash-bail-reform-new-york.html.

23. *Id.*

24. *See* Hannah Gutenplan, Note, *A Fairer, Safer, and More Just System for All New Yorkers: Domestic Violence and New York Bail Reform*, 40 COLUM. J. GENDER & L. 206, 233 (2020); Richard A. Berk et al., *Forecasting Domestic Violence: A Machine Learning Approach to Help Inform Arraignment Decisions*, 13 J. EMPIRICAL LEGAL STUD. 94, 96 (2016).

25. *Preventing Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html (last visited Oct. 11, 2022).

26. *Id.*

27. *Id.*

This Note seeks to balance the interests of the domestic violence offender and the interests of the domestic violence victim to create a bail system that is the most efficient and advantageous to everyone involved. Bail reform ought to be thought of as a two-tiered system with two sets of interests being weighed. As this Note argues, reformers can and should integrate the statutory and constitutional umbrella that provides pretrial protection for the defendant with release conditions that account for the victim's interest in safety. Viewing bail reform through this lens will best help states mix and match the components that suit the concerns of that state.

Part I of this Note details the history of bail and bail reform. Revisiting the successes and pitfalls of each wave of bail reform allows for a deeper understanding of how states have arrived at the statutory systems that are currently employed. The first wave focused on shifting away from a bail system that unduly punishes destitute defendants. The second wave pressured states to focus on addressing the dangers of releasing defendants pretrial. The current wave revisits the push for equitable treatment of defendants, but with the vestiges of the second wave's law and order approach still present.

Part II lays out three different types of bail reform that exist in states that have undertaken recent reform. I focus here on Vermont, New York, and New Jersey, as they each provide a compelling case study for a particular approach to bail reform. Each of these states have different constitutional provisions that affect how bail is administered and whether bail is set with the purpose of assuring a defendant's court appearance or protecting the public. Bits and pieces of each state's system can effectively be combined to create the optimal bail statute. It is important to recognize, however, that the system created from the statutory models described is most interested in equitable treatment of defendants.

Part III demonstrates how states can take elements of the aforementioned statutes to both protect defendants and prioritize the victim's interests. Bail reform is assessed through the lens of a domestic violence victim to place contingencies on the overarching statutes in an effort to avoid further harm. This part looks at how Vermont, New York, and New Jersey presently handle domestic violence cases. I then offer suggestions to develop and refine common pretrial release conditions to protect the victims of domestic violence. Ultimately, conditions on a defendant's release can be tailored in a way that preserves the victim's interests in safety while contributing to the broader goals of bail reform.

In Part IV, I provide recommendations for a state looking to reform its bail system. I draw from the three case studies to create a proposal

that includes the best of the progressive bail reforms described in Part II with effective specific conditions for domestic violence offenders, as seen in Part III. The ideal system accounts for the concerns of the present-day bail reform movement by eliminating cash bail and shifting toward a risk-based assessment. However, the ideal system also properly accounts for victim safety by placing conditions on a presumption of release to prevent further harm to victims of domestic violence. The final recommendation, if executed as described, would ideally give defendants, like Mr. Browder, and victims, like Ms. Harvey, the justice they deserve.

I. A BRIEF HISTORY OF BAIL AND BAIL REFORM

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[28] The right to bail is theoretically secured to all by way of the Eighth Amendment, but there has been some historical debate surrounding its use and implementation.[29] Some questions left largely unanswered include the goals of bail, how the states should incorporate these constitutional guidelines into their own judicial systems, and what an equitable yet effective bail system looks like.[30]

The earliest concept of bail can be traced back to medieval England where the stated purpose was to ensure that a defendant would not flee before trial.[31] This principle influenced early Americans who imported many of their legal ideals from England.[32] The idea of exchanging cash for pretrial release slowly evolved into the modern American concept of

28. U.S. CONST. amend. VIII.

29. *See id.* Early colonial legislation enacted separate protections for the right to bail and excessive bail. William M. Carlucci, Comment, *Death of a Bail Bondsman: The Implementation and Successes of Nonmonetary, Risk-Based Bail Systems*, 69 EMORY L.J. 1205, 1210–11 (2020). The Founders recognized that these were two distinct rights but failed to incorporate both in the Constitution. *Id.* at 1211. Courts have not determined whether a right to bail exists in every case because the question has never been raised. *Id.*; Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 711–12 (2019).

30. *See* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 3 (1985); Carlucci, *supra* note 29, at 1211 (explaining the Eighth Amendment is not incorporated against the states, but states have created their own systems of bail).

31. Gutenplan, *supra* note 24, at 212.

32. *Id.*; Van Brunt & Bowman, *supra* note 29, at 710.

bail that dominated jurisprudence until the first wave of reform in the 1950s and 1960s.[33]

A. Past Bail Reform Efforts and Precedents

In the 1951 decision *Stack v. Boyle*, the Supreme Court confirmed that the sole purpose of bail was to assure the defendant's return to court.[34] The Court in *Stack* also held that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[35] While this principle continued to be accepted as a fair constitutional standard,[36] advocates began raising concerns about the ability of the underprivileged to meet the burden of securing monetary bail, as well as whether the standards regarding bail were being respected by the courts.[37]

In response to these concerns, Congress passed the Bail Reform Act of 1966, aimed at introducing nonmonetary release conditions and a presumption of pretrial release in the federal system.[38] Following this federal reform measure, states began to examine their own bail systems to address discrimination against the poor and to ensure that an inability to pay was not the dominant factor for detaining defendants.[39] Despite these measures leading to lower detention rates and more equity among defendants with different financial means, such changes were short-lived in some states as tough-on-crime rhetoric became pervasive, and cash bail became commonplace even for relatively minor offenses.[40]

33. Carlucci, *supra* note 29, at 1211–12; CAROL T. LINKER & STEPHEN F. SLOAN, N.Y. SENATE RSCH. SERV., ACCUSED AND UNCONVICTED: A BRIEF ON BAIL PRACTICES 4 (1978) [hereinafter ACCUSED AND UNCONVICTED]; Goldkamp, *supra* note 30, at 3.

34. 342 U.S. 1, 5 (1951) (holding that "fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant").

35. *Id.*

36. Even though *Stack* was considered the guideline for bail statutes at the time, the Supreme Court was frequently moving between different positions. *See* ACCUSED AND UNCONVICTED, *supra* note 33, at 18; Carlson v. Landon, 342 U.S. 524, 538 (1952) (holding that anticipation of hurt is a justifiable rationale for detaining illegal aliens pretrial); Leigh v. United States, 82 S. Ct. 994, 996 (1962) (holding that bail may be denied when the community is threatened by the defendant's release). However, these alternative views of bail as a preventative safety measure were not codified until 1984. 18 U.S.C. § 3142(b).

37. Gutenplan, *supra* note 24, at 213; Rachel Smith, Note, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. ON POVERTY L. & POL'Y, 451, 454–56 (2018); *see* Carlucci, *supra* note 29, at 1214.

38. Gutenplan, *supra* note 24, at 213.

39. Carlucci, *supra* note 29, at 1217.

40. *Id.* at 1217–18.

The social landscape of the 1970s ushered in an era of stressing law and order in communities, leading states to begin altering the goals of their individual bail statutes to include public safety considerations.[41] Such changes on the state level ultimately culminated in Congress passing the Comprehensive Crime Control Act of 1984 ("1984 Act").[42] The 1984 Act codified the defendant's risk to public safety as a factor in bail determinations.[43] Despite the Supreme Court's holding in *Stack* that the purpose of bail was to assure the defendant's presence at trial,[44] the Court upheld the 1984 Act in *U.S. v. Salerno*.[45] Although the 1984 Act applied only to the federal court system, *Salerno* established the constitutionality of incorporating public safety into bail determinations on the state level.[46]

These reform movements have established that the bail statutes of states can serve a variety of goals, such as securing a defendant's court appearance and protecting the public, that are equally constitutional. As it became increasingly difficult for states to balance a presumption of release with protecting the safety of the community, the question of whether pretrial detention is constitutional under the Eighth Amendment was raised. The Supreme Court in *Salerno* also determined that pretrial detention is not a violation of the Eighth Amendment.[47] The Court justified this holding by stating that the 1984 Act's goals were regulatory and pretrial detention was not conceived "as punishment for dangerous individuals."[48]

B. A New Wave of Bail Reform

Despite some state governments' incorporation of pretrial detention for the purpose of preventing future crime into bail statutes, implementation has been problematic, and states struggle to create

41. Smith, *supra* note 37, at 456–57 ("By 1984, thirty-four states had some form of preventative detention law.").

42. *Id.* at 457; *see* Carlucci, *supra* note 29, at 1218–19.

43. Carlucci, *supra* note 29, at 1218–19; 18 U.S.C. § 3142(b) ("The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond . . . unless the judicial officer determines that such release . . . will endanger the safety of any other person or the community.").

44. Stack v. Boyle, 342 U.S. 1, 5 (1951).

45. United States v. Salerno, 481 U.S. 739, 754–55 (1987) ("We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.").

46. *Salerno*, 481 U.S. at 754–55; Gutenplan, *supra* note 24, at 214.

47. *Salerno*, 481 U.S. at 747–48.

48. *Id.* at 747; Suraji R. Wagage, Note, *When the Consequences Are Life and Death: Pretrial Detention for Domestic Violence Offenders*, 7 DREXEL L. REV. 195, 214 (2014).

equitable systems. Recent waves of reform in the states are set on rejecting federal guidance set forth in the 1984 Act by altering their own pretrial detention systems to eliminate cash bail and achieve racial and economic equity.[49]

While courts have upheld the constitutionality of pretrial detention as a mechanism for protecting the community, there are serious concerns that such a procedure infringes on a defendant's rights that are not contained in the Eighth Amendment.[50] A defendant's ability to prepare a defense and a defendant's access to counsel may be hampered by pretrial detention.[51] Also, a certain stigma attaches to defendants who are detained pretrial, which suggests guilt.[52] Defendants detained before trial may fear losing their jobs or may miss their families, and are more likely to plead guilty despite their innocence for these reasons.[53] Even though pretrial detention is constitutional under *Salerno*, states that utilize such a system should weigh the defendant's interests in a fair trial against the interests of the community.

Although *Stack* made a push toward establishing nonmonetary bail conditions, cash bail continues to be prevalent.[54] Only eight states and Washington D.C. have moved to completely eradicate cash bail.[55] Cash bail is problematic, regardless of its implementation. There is no connection between being able to afford bail and the risk of flight or future dangerousness.[56] Allowing wealthy people to post bail without

49. *See* Gutenplan, *supra* note 24, at 214–16; *The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 116th Cong. 10–15 (2019) [hereinafter *Hearing*] (statement of Brandon Buskey, Deputy Dir. of Smart Just. Litig., ACLU); Carlucci, *supra* note 29, at 1225.

50. *See* U.S. CONST. amend. VI; Wagage, *supra* note 48, at 213; ACCUSED AND UNCONVICTED, *supra* note 33, at 9.

51. ACCUSED AND UNCONVICTED, *supra* note 33, at 9.

52. *Id.* at 9–10 (explaining that forty-one percent of those released on their own recognizance pretrial were convicted, whereas seventy-seven percent of those detained pending trial were convicted).

53. *Hearing*, *supra* note 49, at 4; Gutenplan, *supra* note 24, at 215 (explaining that pretrial detention can constitute pretrial punishment where the defendant is held without having had a trial proving his guilt). Where bail statutes account for a defendant's Sixth Amendment right to a speedy trial, such inducements may be less pervasive. *See Hearing*, *supra* note 49, at 51; Gutenplan, *supra* note 24, at 207–15.

54. *Smart Justice—Ending Cash Bail*, ACLU PA., https://aclupa.org/en/smart-justice-ending-cash-bail (last visited Oct. 11, 2022).

55. *Id.*

56. ACCUSED AND UNCONVICTED, *supra* note 33, at 11.

assessing the risks they pose to the community can have negative consequences.[57]

Within the cash bail context, judges are afforded discretion when it comes to setting bail.[58] Without increased guidance from legislative tools or the ability to review information about the defendant beyond observable characteristics, judges can make snap judgments based on appearance.[59] As a result, Black defendants are more likely to be assigned cash bail than white defendants, and when cash bail is assigned, Black defendants receive amounts that are significantly greater.[60] The current systems in place allow for an overestimation of the dangerousness of Black and Hispanic defendants, leading to higher rates of pretrial detention and ultimately conviction.[61]

With a new call for reform to address financial and racial disparities in the federal and state bail systems, states have begun to embark on a renewed journey of altering their bail statutes. It is critical to keep in mind that the Eighth Amendment and relevant Supreme Court decisions continue to cast a shadow over many of these new bail decisions. Specifically, the constitutional interests of the criminal defendant must always be at the forefront of the minds of the legislature and the judiciary. The next part explores three current state statutory bail schemes that have attempted to ride this new wave of bail reform and address current societal concerns in different ways.

II. EXPLORING THE CURRENT STATE OF BAIL

Part II explores the present state of bail reform in Vermont, New York, and New Jersey. Each section reflects on how each state

57. The Times Editorial Board, *Editorial: How the Poor Get Locked up and the Rich Go Free*, L.A. TIMES (Aug. 16, 2017, 3:00 AM), https://www.latimes.com/opinion/editorials/la-ed-bail-reform-20170816-story.html. Robert Durst, a wealthy murder suspect, was able to post $300,000 bail before fleeing prosecution. *Id.* Maranda Lynn ODonnell was held in jail for driving with an invalid license and could not post $2,500. *Id.*

58. *See* David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1885–86 (2018).

59. *See id.*

60. *Id.* at 1886; *see also* ACLU PA., BROKEN RULES: HOW PENNSYLVANIA COURTS USE CASH BAIL TO INCARCERATE PEOPLE BEFORE TRIAL 12 (2021) [hereinafter BROKEN RULES], https://www.aclupa.org/sites/default/files/field_documents/broken_rules_statewide_bail_report.pdf. In Pennsylvania, "[a]mong Black defendants accused of a crime, MDJs set cash bail in 55.2% of cases. In comparison, among white defendants accused of a crime, MDJs imposed cash bail in 38.5% of cases." BROKEN RULES, *supra* note 60.

61. *See* Arnold et al., *supra* note 58, at 1885–86; Gutenplan, *supra* note 24, at 215–16, 243; Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

constitution and supplemental statutes define the goals of bail, and whether there is a presumption of release in any or all cases.

A. Vermont: The Financial Factor Method

Vermont's state constitution lays out a detailed outline of the protections afforded to citizens when it comes to bail. The document provides that "[a]ll persons shall be bailable by sufficient sureties," except in certain instances where the person is accused of an offense punishable by death or life imprisonment, or where the person is accused of a felony involving an act of violence.[62] Vermont's constitution further states that persons accused of a violent felony may only be held "when the evidence of guilt is great" and the court determines that "the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence."[63]

Vermont relies on statutes to supplement the constitution and to govern bail for persons charged with offenses other than those specified in the constitution.[64] Vermont's Criminal Procedure Statutes provide in section 7554 that defendants should be released under nonmonetary conditions so long as such conditions could reasonably mitigate the risk of flight.[65]

Where nonmonetary conditions are insufficient to ensure the defendant's appearance, section 7554 permits monetary bail, but only after the court finds it to be absolutely necessary in light of the defendant's financial position.[66] Specifically, the court cannot assign monetary bail without explicitly considering the defendant's financial means.[67] When the court does set cash bail, section 7554 permits defendants to post just ten percent of the bond to ensure they are not being detained for their inability to pay.[68] The court is further limited in cases where the defendant commits certain listed misdemeanor crimes,

62. VT. CONST. ch. II, § 40.

63. *Id.*

64. *See* VT. STAT. ANN. tit. 13, § 7554(a) (2022).

65. *Id.* § 7554(a)(1); *see* State v. Pratt, 166 A.3d 600, 604 (holding that section 7554 presumes pretrial release unless no condition could reasonably assure the defendant's appearance).

66. tit. 13, § 7554(b)(1).

67. *Id.*; *see also* State v. Bloom, No. 18-359, 2018 WL 6168838, at *3 (Vt. Nov. 21, 2018) (considering a defendant's financial means is a statutory requirement to which the court must adhere).

68. *See* tit. 13, § 7554(a)(1)(D).

as there is a $200 cap.[69] Because of the heavy emphasis on incorporating a defendant's financial status into all bail decisions, Vermont's bail statute can be best classified as the "financial factor method."

In addition to financial resources, section 7554 provides other factors for the courts to consider in making bail determinations. Such factors include: the circumstances of the offense, the weight of the evidence, employment, mental condition, ties to the community, and record of appearance.[70] No one factor is dispositive or controlling, as the legislature recognizes that many of these factors are intrinsically tied to a defendant's financial situation.[71]

Interestingly, section 7554 also provides that courts may consider public safety in these cases of lesser offenses, which is not contemplated by the constitution.[72] The courts may impose travel restrictions, require drug and alcohol treatment, or any other condition that may protect the public.[73] Because this is not constitutionally legitimate on its own,[74] the court may only impose certain nonmonetary conditions of release to protect the public where such conditions serve the ultimate purpose of assuring the presence of the accused.[75]

In sum, Vermont's constitution, coupled with section 7554, provides that the purpose of bail is to ensure the defendant's appearance in court, except where a violent offender may be held to protect the public.[76] It also offers a presumption of release.[77] The legislature has directly responded to the new wave of bail reform by offering protections to defendants, such as requiring the imposition of the least restrictive conditions to assure appearance and creating factors that consider a defendant's financial means.[78] The legislature has also created a $200 bail cap on lesser misdemeanor offenses.[79]

69. *Id.* § 7551(b)(2); *id.* § 7601(4)(a) (qualifying offenses include misdemeanors that are *not*: an offense involving sexual exploitation of children, an offense involving violation of a protection order, prostitution, a predicate offense, or any offense under VT. STAT. ANN. tit. 13, § 5301(7)).

70. *Id.* § 7554(b).

71. *See* State v. Pratt, 166 A.3d 600, 606 (Vt. 2017).

72. tit. 13, § 7554(a)(2); VT. CONST. ch. II, § 40.

73. tit. 13, § 7554(a)(2). Such conditions cannot be physically restrictive except in extraordinary circumstances. *Id.* § 7554(a)(2)(D).

74. *See Pratt*, 166 A.3d at 605.

75. *Id.*

76. tit. 13, § 7554(a)(1); VT. CONST. ch. II, § 40.

77. *See* VT. CONST. ch. II, § 40. This public safety provision appears to be a vestige of the 1984 Act. *See* 18 U.S.C. § 3142(b).

78. *See supra* notes 62–77.

79. tit. 13, § 7551(b)(2).

Although Vermont's system still perpetuates the inequities of cash bail, Vermont's bail statutes recognize that the connection between finances and likelihood to appear in court is tenuous at best. The bail reform statutes are concerned with ensuring the accused is not detained and unduly punished because they cannot afford bail.

B. New York: The Charge-Based Method

In contrast to Vermont's detailed constitutional provisions regarding bail, New York's constitution largely tracks the United States Constitution.[80] New York's constitution simply states that "[e]xcessive bail shall not be required," and similar to the Federal Constitution, affords no guarantee that a defendant will be granted bail.[81] Just as the Supreme Court clarified the Eighth Amendment in *Stack v. Boyle*,[82] the highest court of New York explained that the "amount [of bail] must be no more than is necessary to guarantee [the accused person's] presence at the trial."[83] This holding was codified, making it clear that the purpose of bail is to secure the defendant's attendance in court, and nothing more.[84]

Despite defining bail as a mechanism to ensure court appearances, New York jails remained flooded with accused detained pretrial simply because they could not afford to post bail.[85] In the 1970s, in response to this issue, New York established legislation focused on expanding bail alternatives.[86] Even though public opinion on bail changed over time, New York's legislation remained largely untouched and in effect until 2019.[87]

In 2019, the New York legislature passed a sweeping reform that takes a "charge-based approach" by distinguishing between "qualifying offenses" for which cash bail may be set and all other offenses, for which

80. *Compare* N.Y. CONST. art. I, § 5, *with* U.S. CONST. amend. VIII.

81. N.Y. CONST. art. I, § 5; *see* U.S. CONST. amend. VIII. Because of this vagueness, New York and the United States have relied on more statutes and caselaw to clarify this provision than Vermont has, thus creating a richer history of reform.

82. 342 U.S. 1, 5 (1951).

83. People *ex rel.* Lobell v. McDonnell, 71 N.E.2d 423, 425 (N.Y. 1947); Emmanuel Hiram Arnaud & Beulah Sims-Agbabiaka, *New York Bail Reform: A Quick Guide to Common Questions and Concerns*, 106 CORNELL L. REV. ONLINE 1, 5 (2020).

84. Arnaud & Sims-Agbabiaka, *supra* note 83, at 6; N.Y. CRIM. PROC. LAW § 510.30 (McKinney 2022). Like Vermont, preventative detention is used in some circumstances such as allowing the courts to consider prior violations of protective orders and a history of firearm use. Arnaud & Sims-Agbabiaka, *supra* note 83, at 6 n.18.

85. Arnaud & Sims-Agbabiaka, *supra* note 83, at 6.

86. RAHMAN, *supra* note 16, at 4, 8.

87. *Id.* at 4; Arnaud & Sims-Agbabiaka, *supra* note 83, at 7.

cash bail is not an option.[88] Under this statute, there is a presumption that a person accused of a misdemeanor must be released on their own recognizance or on nonmonetary conditions if reasonably necessary to mitigate the risk of flight.[89] Cash bail is available for violent felonies and a select few nonviolent felonies, but only if the court finds that release on recognizance or nonmonetary conditions are not sufficient to assure the defendant's return to court.[90] Judges must always implement the least restrictive conditions, must consider financial hardship, and are never required to impose cash bail, but can employ their own discretion.[91] Although risk assessment is not a cornerstone of New York's policy, judges may use such screening tools to decide which nonmonetary conditions are appropriate.[92] Pretrial detention may only be ordered in cases involving a qualifying felony.[93]

Following the 2019 bail reform bill, the New York Police Department ("NYPD") and conservative groups cited public safety concerns in an effort to pressure the legislature to amend the law.[94] As a result, the 2020 amendments were passed, making a large swath of misdemeanors and

88. RAHMAN, *supra* note 16, at 9; TYNER, *supra* note 18, at 1; Arnaud & Sims-Agbabiaka, *supra* note 83, at 9; *see also* MICHAEL REMPEL & KRYSTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM IN NEW YORK: LEGISLATIVE PROVISIONS AND IMPLICATIONS FOR NEW YORK CITY 3–4 (2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf (listing the nine qualifying offenses).

89. Arnaud & Sims-Agbabiaka, *supra* note 83, at 10; RAHMAN, *supra* note 16, at 9. *But see* REMPEL & RODRIGUEZ, supra note 88, at 2 (explaining that monetary bail can be set in cases of misdemeanor sex offenses and misdemeanor criminal contempt with an underlying domestic violence allegation).

90. RAHMAN, *supra* note 16, at 9.

91. *Id.* at 10; TYNER, *supra* note 18, at 1–2.

92. TYNER, *supra* note 18, at 4 (explaining that risk assessments are used to inform determinations of release conditions and do not replace the charge-based approach for determining if a defendant should be released at all).

93. *Id.* at 2; MICHAEL REMPEL & TIA POOLER, CTR. FOR CT. INNOVATION, REDUCING PRETRIAL DETENTION IN NEW YORK CITY 7 (2020), https://www.courtinnovation.org/sites/default/files/media/documents/2020-06/reducing_pretrial_detention_in_nyc_ceja_6.1.2020_website_version.pdf (explaining judges are not permitted to order pretrial detention in ninety percent of cases).

94. Marina Villeneuve, *Groups Worry New Bail Reform Law Will Land More New Yorkers Behind Bars*, NBC N.Y. (July 3, 2020, 10:38 AM), https://www.nbcnewyork.com/news/local/groups-worry-new-bail-reform-law-will-land-more-new-yorkers-behind-bars/2497818/; Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. FOR JUST. (Apr. 16, 2020), https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained; Rocco Parascandola & Leonard Greene, *Many Suspects Freed Under Bail Reform Go on to Commit Major Crimes: NYPD*, N.Y. DAILY NEWS (Mar. 5, 2020, 5:28 PM), https://www.nydailynews.com/new-york/ny-crime-bail-reform-20200305-orj4edxnh5awfojesnohu276mq-story.html.

nonviolent felonies now bail-eligible, which was a rollback of the 2019 policy.[95]

With more offenses eligible for cash bail, New York may see a trend away from release,[96] which is counter to the goals of bail reform. Even with the 2020 amendments, critics still fear an uptick in crime by reasoning that a charge-based approach that does not give judges discretion when it comes to assessing a defendant's likelihood to flee or reoffend on a case-by-case basis allows dangerous defendants to roam free.[97]

While New York's constitution provides little direction when it comes to bail, the legislature has filled the gaps. There is a presumption of release in all cases and bail may only be justified to ensure future court attendance.[98] In response to the call to make the bail system more equitable, New York has eliminated cash bail for most misdemeanors and requires the court to consider a defendant's financial means where permitted.[99] The current bail system in New York is a "charge-based approach" that creates hard lines and categories of offenses in which cash bail, detention, or release are either permitted or forbidden.[100]

C. New Jersey: The Risk Assessment Method

While New Jersey's constitution, like the constitutions of New York and the United States, prohibits excessive bail, New Jersey's constitution also affords a presumption of pretrial release for all defendants.[101] New Jersey's constitution specifies pretrial release may be denied if no monetary or nonmonetary condition could "reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process."[102] Despite the

95. MICHAEL REMPEL & KRYSTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM REVISITED: THE IMPACT OF NEW YORK'S AMENDED BAIL LAW ON PRETRIAL DETENTION 2–4 (2020) [hereinafter BAIL REFORM REVISITED], https://www.courtinnovation.org/sites/default/files/media/document/2020/bail_reform_revisited_05272020.pdf; *see* N.Y. CRIM. PROC. LAW § 510.10(4) (McKinney 2022) (codifying the up-to-date bail eligible offenses).

96. *See* BAIL REFORM REVISITED, *supra* note 95, at 17–18.

97. Christina Maxouris, *New York's Bail Reform Law Still Has Gaping Loopholes, Critics Say. An Alleged Serial Bank Robber's Case Might Prove It*, CNN (Jan. 19, 2020, 4:14 AM), https://www.cnn.com/2020/01/19/us/new-york-bail-reform-examples-backlash/index.html.

98. BAIL REFORM REVISITED, *supra* note 95, at 5; CRIM. PROC. § 510.10.

99. *See* TYNER, *supra* note 18, at 1; RAHMAN, *supra* note 16, at 10.

100. TYNER, *supra* note 18, at 1; RAHMAN, *supra* note 16, at 9.

101. N.J. CONST. art I, ¶¶ 11–12.

102. *Id.* ¶ 11.

constitution's mention of monetary bail, statutes provide that it may only be set in cases where no other conditions of release will reasonably assure the defendant's appearance in court.[103]

Like the federal government, Vermont, and New York, New Jersey also responded to the new call for bail reform. In 2017, New Jersey moved from a monetary bail system to an objective risk-based system that better promotes public safety.[104] Such a system is fairer to defendants because it serves to sever the connection between dangerousness and socioeconomic status.[105] It also addresses the concern that wealthy, high-risk defendants may be eligible for release despite their status as a danger to the public or a flight risk.[106]

The most distinguishing feature of New Jersey's bail statutes is the court's reliance on the Public Safety Assessment ("PSA") as prepared by pretrial services.[107] The PSA uses nine factors to assess the likelihood of the defendant's pretrial success.[108] These factors include: current age, current violent offense, pending charge at the time of arrest, prior misdemeanor conviction, prior felony conviction, prior violent conviction, prior failure to appear in the past two years, prior failure to appear older than two years, and prior sentence to incarceration.[109]

Different combinations of these factors can "predict" three different pretrial outcomes: failure to appear ("FTA"), new criminal arrest ("NCA"), and new violent criminal arrest ("NVCA").[110] These factors are

103. N.J. STAT. ANN. § 2A:162-15 (West 2022). Despite having a statutory provision allowing it, cash bail is not prevalent in New Jersey. GLENN A. GRANT, N.J. CTS., REPORT TO THE GOVERNOR AND THE LEGISLATURE 43 (2019), https://www.njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf. Defendants held on cash bail are typically ordered to post bail after failing to appear for a scheduled court date. *Id.* Even then, the bail is for $2,500 or less. *Id.*

104. N.J. FAQ, *supra* note 20.

105. *Id.*; *see also* MARIE VANNOSTRAND, NEW JERSEY JAIL POPULATION ANALYSIS 13 (2013). Marie VanNostrand's studies of New Jersey's jail population uncovered that twelve percent of inmates were in custody because they could not afford to pay $2,500 or less. VANNOSTRAND, *supra*. About 800 of those inmates could not afford to pay $500 or less. *Id.* This was a leading catalyst for New Jersey to reform its bail statutes. *Id.*

106. N.J. FAQ, *supra* note 20.

107. *See* N.J. JUDICIARY, CRIMINAL JUSTICE REFORM: A STEP-BY-STEP GUIDE (2021) [hereinafter N.J. STEP-BY-STEP], https://www.njcourts.gov/forms/12221_cjr_stepbystep.pdf; N.J. STAT. ANN. § 2A:162-25 (West 2022).

108. *About the Public Safety Assessment*, ADVANCING PRETRIAL POL'Y & RSCH., https://advancingpretrial.org/psa/factors/ (last visited Oct. 11, 2022).

109. *Id.*

110. ADVANCING PRETRIAL POL'Y & RSCH., PUBLIC SAFETY ASSESSMENT: HOW IT WORKS 1 (2020), https://cdn.filestackcontent.com/security=policy:eyJleHBpcnkiOjQwNzg3NjQwMDAsImNhbGwiOlsicGljayIsInJlYWQiLCJ3cml0ZSIsIndyaXRlVXJsIiwic3RvcmUiLCJjb252ZXJ0IiwicmVtb3ZlIiwicnVuV29ya2Zsb

then weighted depending on the correlation to the specific outcome.[111] The result is a final score on a scale of one to six for FTA and NCA, while points for NVCA generate a flag.[112]

Pretrial services then utilize the decision-making framework ("DMF") to generate a release recommendation for the court to consider.[113] It is important to keep in mind that the PSA is just another tool for the court, and the court can still consider the nature of the offense, the weight of the evidence, the defendant's character, and the danger posed by release when making pretrial decisions.[114] Even though judges can still exercise a range of discretion in pretrial decisions, the use of these specific factors and the PSA purports to shield the process from being unfairly tainted by a defendant's ethnicity, income, education level, employment, or other demographics.[115]

Despite seemingly accounting for public safety while looking out for a defendant's best constitutional interests, New Jersey's Criminal Justice Reform package has been met with a fair share of criticism. There are concerns that the elimination of bail and presumption of release will result in an uptick in crime.[116] However, new criminal activity rates remained steady between 2017 and 2018.[117] Data also shows that defendants continued to appear for their court dates at a rate of ninety percent despite the shift away from monetary bail.[118] Even with these

3ciXX0=,signature:9df63ee50143fbd862145c8fb4ed2fcc17d068183103740b1212c4c9bc858f63/5gCeQzRTuWKKCf5WL7mg.

111. *Id.* at 2.

112. *Id.*

113. *See* Directive from Glenn A. Grant, Administrative Director of N.J. Courts 1–2 (Aug. 2, 2022), https://www.njcourts.gov/notices/2022/n220802c.pdf (describing changes to the DMF updated in August 2022).

114. N.J. STAT. ANN. § 2A:162-20 (West 2022); State v. Robinson, 160 A.3d 1, 9 (N.J. 2017).

115. Coppola, *supra* note 15, at 100. Although this is the PSA's stated rationale, it is important to acknowledge that the factors used by the PSA, such as prior convictions, are tainted by the bias that exists throughout the entire criminal justice process. Brian Buskey & Andrea Woods, *Making Sense of Pretrial Risk Assessments*, NAT'L ASS'N CRIM. DEF. LAWS. (June 2018), https://www.nacdl.org/Article/June2018-MakingSenseofPretrialRiskAsses. Therefore, it is important to be skeptical of a system that claims to be bias-free. *Id.* Regardless, the PSA does do more to eliminate bias than the charge-based approach. *Id.*

116. Joe Hernandez, *N.J. Officials Finally Released Date on Bail Reform. Their Conclusion? It's Working*, WHYY (Apr. 2, 2019), https://whyy.org/articles/n-j-officials-have-finally-released-data-on-bail-reform-their-conclusion-its-working/; Nicholas Pugliese, *Did NJ Bail Reform Cause a Surge in Crime? Court Analysis Says No*, NORTHJERSEY.COM (Apr. 2, 2019, 5:20 PM), https://www.northjersey.com/story/news/new-jersey/2019/04/02/nj-bail-reform-no-crime-surge-pretrial-release/3336423002/.

117. GRANT, *supra* note 103, at 5.

118. *Id.* at 2, 7.

clear successes, critics cite continued racial inequities that must be addressed moving forward.[119]

New Jersey's "risk-based approach" to bail reform incorporates public safety in a way other approaches do not. It also effectively eliminates cash bail from almost all instances by creating a dichotomy of either release the defendant if they are not a safety or flight risk or detain them if they are.[120] A risk-based approach allows for judges to make pretrial decisions based on the defendant's criminal record rather than their socioeconomic status.[121] As a result, a defendant's financial status is generally removed from the decision-making equation.[122]

III. THE UNIQUE CASE OF DOMESTIC VIOLENCE

Domestic violence is generally characterized as the "willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another."[123] Because such violence is perpetrated against someone the offender has a close relationship with, there exists an opportunity to reoffend.[124]

Domestic violence is a public health concern.[125] One in five women have experienced physical or sexual violence at the hands of an intimate partner during their lifetime.[126] Not only is this a tragic disheartening reality, but there are significant individual and societal costs associated with domestic violence.[127] National data suggests that one in five homicide victims are killed by an intimate partner.[128] Victims can suffer

119. *Id.* at 10 ("Black defendants continued to make up 55 percent of the jail population in 2019.").

120. N.J. STAT. ANN. § 2A:162-16 (West 2022). The options are: release on own recognizance, release on nonmonetary conditions, release on monetary bail, or detain. *Id.*

121. *See About the Public Safety Assessment*, *supra* note 108; Coppola, *supra* note 15, at 100.

122. *See* § 2A:162-20. Financial means can be considered under a defendant's character but are not a separate factor. *Id.*

123. *Learn More*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/learn-more (last visited Oct. 11, 2022).

124. Gutenplan, *supra* note 24, at 233; *see* N.J. DEP'T OF L. & PUB. SAFETY, DOMESTIC VIOLENCE IN NEW JERSEY (2019), https://www.njsp.org/ucr/pdf/domesticviolence/2019_NJ_Domestic_Violence.pdf (finding in eighteen percent of offenses (10,761 out of 59,645), a prior TRO was issued, thus indicating re-offense).

125. *Preventing Intimate Partner Violence*, *supra* note 25.

126. *Id.*

127. *Id.*

128. *Id.*

long-lasting physical, mental, and emotional injuries that result in large economic costs to both the victim and society.[129]

Further, studies pinpoint the exact moment of separation or threat of separation from the perpetrator as the most dangerous time for victims of domestic violence.[130] It naturally follows that once the victim involves law enforcement, such risk to safety increases and the pretrial period could become extremely dangerous.

For these reasons, as well as the clear moral necessity to protect vulnerable citizens, it is critical that states incorporate protections into their bail determinations. The ultimate question is: how?

A. The State of Domestic Violence Law

By virtue of having different methods of assessing bail, Vermont, New York, and New Jersey deal with domestic violence offenses differently. Vermont's financial factor approach requires the court to consider a defendant's financial means in all bail decisions.[131] There is also a $200 bail cap on certain misdemeanor offenses.[132] Domestic violence crimes including assault, stalking, aggravated assault, sexual assault, and aggravated sexual assault of any degree are not qualifying misdemeanors subject to the bail cap.[133] However, such crimes are not eligible for pretrial detention.[134]

In *State v. Bloom*, the defendant was charged with first-degree aggravated domestic assault with a weapon and simple assault, crimes which are bailable under Vermont's statutes.[135] The trial court set $5,000 bail and the defendant appealed arguing that the trial court did not do a proper section 7554 analysis of his financial means.[136] The appellate

129. *Id.*

130. Gutenplan, *supra* note 24, at 233; *Why Do Victims Stay?*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/why-do-victims-stay (last visited Oct. 11, 2022); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65–66 (1991); *see also DV Stats and Facts*, RESPOND, https://www.respondinc.org/dv-facts-stats/ (last visited Oct. 11, 2022) ("It takes an average of seven attempts for a survivor to leave their abuser and stay separated for good. Leaving is the most dangerous time in an abusive relationship.").

131. VT. STAT. ANN. tit. 13, § 7554(b)(1) (2022).

132. *Id.* § 7551(b)(2).

133. *Id.* § 7601(4)(A)(i); *id.* § 5301(7).

134. *Id.* § 7553(a) (allowing pretrial detention without bail for defendants charged with felonies where an element is an act of violence).

135. State v. Bloom, No. 18-359, 2018 WL 6168838, at *1 (Vt. Nov. 21, 2018) ("[The defendant] allegedly chased several people, including his girlfriend, with a knife, threatening to kill them.").

136. *Id.*

court held the imposition of cash bail to be inappropriate absent an assessment of the defendant's risk of flight, weight of the evidence of the crime, employment, financial resources, and other elements highlighted in section 7554.[137] While the court is permitted to factor in the seriousness of the offense and charges, it must make the requisite findings as they pertain to the defendant's risk of flight only.[138]

New York's charge-based approach, like Vermont, specifies which crimes are bailable and which are subject to automatic release. Unlike Vermont, however, New York does not have offenses that are considered domestic violence offenses.[139] New York's offenses are generic but can be applied to the domestic violence context.[140] Such classification may result in all offenses being treated the same in the context of bail and release conditions despite domestic victims appearing more vulnerable.[141]

Under the most recent iteration of New York's bail statute, most violent felonies, few nonviolent felonies, and few misdemeanors are bailable.[142] Notably, some assaults, strangulation, witness tampering, witness intimidation, contempt in relation to domestic relationships, and unlawful imprisonment are qualifying offenses.[143] New York also makes repeat felony or class A misdemeanor offenses bailable where the harm occurs to the same property or victim while the defendant is on pretrial release.[144] However, misdemeanor assault, aggravated harassment, menacing, and stalking, which are common offenses committed against domestic partners, are not eligible for cash bail without another qualifying offense.[145] When the qualifying offense is a felony, the court may detain the defendant.[146]

Specific offenses are not dispositive when determining bail in New Jersey because of the risk-based model used by the state. However, New Jersey does allow bail decisions to be made based on public safety and can thus impose a larger variety of nonmonetary release conditions.[147] Some conditions include prohibiting contact with victims, restricting travel and residence, regular reporting to law enforcement, prohibiting

137. *Id.* at *2–*3.

138. *Id.* at *7–*8 (finding that $5,000 was too steep for first-degree aggravated assault charges because bail can only be set to mitigate the risk of flight); tit. 13, § 7554.

139. *Domestic Violence Acts/Crimes*, NYCOURTS.GOV (Aug. 13, 2019), https://www.nycourts.gov/CourtHelp/Safety/DVacts.shtml.

140. *See id.*

141. *See* Gutenplan, *supra* note 24, at 238–39.

142. N.Y. CRIM. PROC. LAW § 530.40(4) (McKinney 2022).

143. *Id.*

144. *Id.* § 530.40(4)(t).

145. Gutenplan, *supra* note 24, at 238.

146. CRIM. PROC. § 510.10(4).

147. N.J. FAQ, *supra* note 20; N.J. CT. R. 3:26-2(b)(3)(A)–(L).

firearm possession, implementing curfews, and requiring behavioral health treatment.[148] New Jersey also permits the pretrial detention of an eligible defendant charged with any crime or offense involving domestic violence.[149]

While the procedures of the police and other law enforcement officers may not be implicated in bail decisions in other jurisdictions, it is important to note that New Jersey requires law enforcement to complete an Ontario Domestic Assault Risk Assessment ("ODARA") upon taking a defendant into custody.[150] Officers interview the victim and review the defendant's criminal record to determine whether to make an arrest.[151] Prosecutors then use the score calculated by the police to request detention.[152] While judges hear the information learned from the ODARA in detention hearings, they have declined to incorporate the ODARA in decision making absent legislative authority.[153] Without ODARA, there is no comparable PSA factor that accounts for the risk to safety that is linked to domestic violence crimes.

The financial factor method, charge-based approach, and risk-based approach all leave gaps that allow domestic violence offenders to slip through the cracks and endanger victims. To rectify these concerns, it is critical to alter how states view domestic violence, how states consider detaining or releasing domestic violence offenders, how states support victims, how states select release conditions, and how states respect the rights and interests of the defendant.

IV. REFINING BAIL STATUTES TO SUPPORT VICTIMS OF DOMESTIC VIOLENCE

This part discusses how Vermont, New York, and New Jersey can refine their bail statutes, as well as their domestic violence statutes generally, to better support victims of domestic violence while still promoting the goals of bail reform. Such solutions include revisiting

148. N.J. CT. R. 3:26-2(b)(3)(A)–(L).

149. N.J. STAT. ANN. § 2A:162-19(a)(6) (West 2022) (interpreting "eligible" as defined under N.J. STAT. ANN. § 2A:162-15); *see also id.* § 2C:25-19(a)(1)–(19) (defining acts of domestic violence).

150. Directive from Christopher S. Porrino, Attorney General of N.J. 1–2 (Sept. 27, 2017), https://www.nj.gov/lps/dcj/agguide/directives/ag-directive-2016-6_v3-0.pdf; Thomas Moriarty, *Courts Ask, After 2 Killings: Can We Assess Domestic Violence Risk?*, NJ.COM (Apr. 25, 2018, 11:30 AM), https://www.nj.com/essex/2018/04/courts_explore_domestic_violence_factors_after_kil.html.

151. Directive from Christopher S. Porrino, *supra* note 150, at 1.

152. *Id.*

153. *Id.* at 2.

domestic violence statutes, rethinking the goals of bail reform, promoting conditional release for domestic violence offenders, implementing a domestic violence risk assessment, and allowing judges to prescribe pretrial detention in cases where it is necessary.

A. Statutes Matter

Before embarking on recommending a better, more equitable bail system for victims and defendants alike, states must take initiative to reform their domestic violence statutes. Vermont, New York, and New Jersey all take very different statutory approaches to domestic violence that may present some issues when it comes to prosecution of offenses committed in the domestic violence context.

Vermont's domestic violence statutes only cover first and second-degree aggravated assault.[154] Other crimes that could be generally classified as domestic violence such as harassment, stalking, menacing, unlawful confinement, and sexual abuse are not categorized as domestic assault crimes.[155]

New York does not have "domestic violence" laws.[156] Crimes that are generally associated with domestic offenses are not processed any differently based on the identity of the victim.[157] However, New York does add domestic violence contingencies on criminal strangulation and contempt when making bail determinations.[158]

In contrast to New York, New Jersey created a statute to encapsulate all the offenses that fall under the umbrella of domestic violence.[159] New Jersey makes clear that they are processed differently when the victim has an intimate relationship with the defendant.[160] New Jersey also

154. VT. STAT. ANN. tit. 13, §§ 1041–1044 (2022).

155. *Id.*

156. *Domestic Violence Acts/Crimes*, *supra* note 139; *New York Domestic Violence Laws*, FINDLAW (Mar. 26, 2018), https://www.findlaw.com/state/new-york-law/new-york-domestic-violence-laws.html ("While New York's criminal laws do not differentiate between domestic-violence related crimes and other offenses, it nonetheless criminalizes several violent acts which may occur between members of the same family or household.").

157. *See New York Domestic Violence Laws*, *supra* note 156 ("New York family courts and criminal courts have concurrent jurisdiction over 'family offenses' such as assault, sexual misconduct or abuse, stalking, menacing, and strangulation."); *see also* N.Y. FAM. CT. ACT § 812 (McKinney 2022).

158. N.Y. CRIM. PRO. LAW § 530.40(4)(h), (k) (McKinney 2022); *see also* Gutenplan, *supra* note 24, at 238.

159. N.J. STAT. ANN. § 2C:25-19 (West 2022).

160. *See id.*; *id.* § 2C:25-21 (describing the separate procedure law enforcement and the judiciary must follow when it comes to domestic violence offenses that is not required in other cases).

considers more offenses than New York and Vermont, such as robbery, lewdness, criminal trespass, terroristic threats, and burglary.[161]

One last thing to consider is the location of the domestic violence statutes within a state's code. New Jersey's domestic violence chapter can be found under the broader chapter of offenses against other persons.[162] Vermont's domestic assault statutes are located under a chapter on breach of the peace.[163] Breach of the peace also houses statutes regarding riots, religious disturbances, and labor disputes.[164] The location of Vermont's statutes among less dangerous offenses can signal to victims that their concerns will not be taken seriously.[165]

The optimal domestic violence statute would have its own place in the state's code where it is surrounded by crimes of a similar caliber. It is also critical for states to recognize domestic violence as a crime in and of itself, and not simply tack it on to other offenses. New Jersey's codification of domestic violence seemingly fits all these boxes. Emphasizing the seriousness of these offenses goes a long way for ensuring victim safety. When domestic violence offenses are considered serious crimes, increased bail conditions and pretrial detention are justified.

B. Goals of Bail

The next step to modifying bail reform would be to alter the state's goal of bail to incorporate a public safety element. While bail is traditionally imposed to ensure a defendant's return to court, it is also well established that bail can be imposed with an eye for protecting the public.[166] New Jersey explicitly allows bail decisions to be made based on public safety, as established by the new criminal activity measure employed by the PSA.[167] Vermont only allows for public safety risk to be assessed in very particular circumstances involving violent felonies.[168]

161. *Id.* § 2C:25-19; *cf.* VT. STAT. ANN. tit. 13, §§ 1041–1044 (2022).

162. *See* N.J. STAT. ANN. § 2C:25-19.

163. *See* VT. STAT. ANN. tit. 13, §§ 1041–1044.

164. tit. 13, §§ 901–905 (2022) (riots); *id.* §§ 971–976 (religious disturbances); *id.* §§ 931–933 (labor disputes).

165. Gutenplan, *supra* note 24, at 239.

166. *See supra* Section I.A.

167. N.J. CONST. art I, ¶ 11; *see About the Public Safety Assessment*, *supra* note 108.

168. VT. CONST. ch. II, § 40. Bail may be withheld for a person charged with a violent felony only if the State proves by clear and convincing evidence that the person poses a *substantial* threat to public safety, VT. STAT. ANN. tit. 13, § 7553a, demonstrating that a violent felon is not per se ineligible for bail. *See, e.g.*, State v. Bloom, No. 2018-359, 2018 WL 6168838, at *2, *3 (Vt. Nov. 21, 2018) (noting lower court's finding that a suspect

New York's highest courts have held that the only legitimate purpose of bail is to mitigate risk of flight.[169]

The best way to protect victims of domestic violence is to consider their safety and the safety of the public when determining a defendant's bail. This may cut against the interests of the defendant in pretrial release and minimal bail conditions, as domestic violence offenders are almost always a threat to public safety. Yet such concerns can be mitigated by employing different conditions of release and adding more factors to consider when assessing bail.[170]

C. Crafting Pretrial Release Conditions

As part of the effort to reform bail statutes and eliminate cash bail, states have established nonmonetary release conditions for defendants that cannot be released on their own recognizance.[171] Such nonmonetary conditions must be applied in the least restrictive fashion to achieve the bail goals of the state.[172] Common nonmonetary release conditions include regular contact with a pretrial service agency, efforts to maintain or seek employment or education, and restrictions on travel.[173] In the domestic violence context, courts often employ more restrictive measures such as no contact orders, electronic monitoring, mandatory participation in counseling programs, and mandatory surrender of firearms.[174] Each of these conditions can be improved and tailored to equally support the interests of the defendant and the victim.

1. Temporary Restraining Orders

Temporary restraining orders ("TROs") are frequently employed as conditions of release regardless of the nature of the offense.[175] TROs can be used to prevent the defendant from associating with persons who are

charged with first-degree aggravated domestic assault with a weapon did not pose a sufficiently substantial threat to deny bail and reversing on other grounds).

169. *See* People *ex rel.* Lobell v. McDonnell, 71 N.E.2d 423, 425 (N.Y. 1947).

170. *See infra* Section IV.C.

171. *See, e.g.*, N.J. STAT. ANN. § 2A:162-17 (West 2022); N.Y. CRIM. PROC. LAW § 500.10(3-a) (McKinney 2022); VT. STAT. ANN. tit. 13, § 7554 (2022).

172. *See* N.J. STAT. ANN. § 2A:162-17; N.Y. CRIM. PROC. LAW § 500.10(3-a); VT. STAT. ANN. tit. 13, § 7554.

173. *See, e.g.*, N.J. CT. R. 3:26-2(b)(3)(A)–(L); N.Y. CRIM. PROC. LAW § 500.10(3-a); VT. STAT. ANN. tit. 13, § 7554.

174. *See* N.J. CT. R. 3:26-2(b)(3)(A)–(L); N.Y. CRIM. PROC. LAW § 500.10(3-a); VT. STAT. ANN. tit. 13, § 7554.

175. ACLU OF N.J. ET AL., THE NEW JERSEY PRETRIAL JUSTICE MANUAL 18 (2016), https://www.nacdl.org/getattachment/50e0c53b-6641-4a79-8b49-c733def39e37/the-new-jersey-pretrial-justice-manual.pdf.

connected to the charge at hand, such as witnesses, victims, or co-defendants.[176] However, as the name suggests, these orders are temporary and are only in effect when a case is being litigated.[177] After a case is resolved a victim can apply for a final restraining order, but in some cases, those must be renewed every few years.[178]

In addition to preventing contact with persons involved with the instant charges, TROs may also incorporate provisions requiring the forfeiture of firearms and firearm licenses.[179] Such provisions are extremely relevant in the domestic violence context. Studies show that over half of all intimate partner homicides are the result of gun violence.[180] Further, "a woman is five times more likely to be murdered when her abuser has access to a gun."[181] Therefore, the possibility of firearm surrender is an important condition of TROs.

Despite widespread use of TROs, studies have also shown that orders of protection are insufficient.[182] When such orders are issued in criminal cases as a condition of release, the offender "has already shown a willingness to violate the law."[183] Given how dangerous the pretrial period of separation is for the victim, it seems unreasonable to believe offenders will obey a piece of paper to avoid detention.[184]

Violations of TROs, even as conditions of release, can expose the defendant to criminal contempt charges.[185] However, such charges are

176. N.Y. CRIM. PROC. LAW § 500.10(3-a)(e).

177. Robin L. Barton, *Do Orders of Protection Actually Shield Domestic Violence Victims?*, THE CRIME REPORT (Jan. 23, 2018), https://thecrimereport.org/2018/01/23/do-orders-of-protection-actually-shield-victims/.

178. *Id.*; *cf. Legal Information: New York*, WOMENSLAW.ORG (Dec. 31, 2021), https://www.womenslaw.org/laws/ny/restraining-orders/orders-protection/basic-information-and-definitions/what-types-orders ("Usually the order will be granted for up to 2 **years** but if the judge determines that one or more 'aggravating circumstances' exist, you can request that your order last for up to 5 years.").

179. N.Y. CRIM. PROC. LAW § 530.14.

180. *Domestic Violence and Firearms*, THE EDUC. FUND TO STOP GUN VIOLENCE (July 2020), https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/.

181. *Id.*

182. Wagage, *supra* note 48, at 221 (citing Mindy B. Mechanic et al., *Intimate Partner Violence and Stalking Behavior: Exploration of Patterns and Correlates in a Sample of Acutely Battered Women*, 15 VIOLENCE & VICTIMS 55, 67 (2000) (showing that almost half of abused women experienced a protection order violation within six months of issuance)).

183. Barton, *supra* note 177.

184. *Id.*; *see supra* Part III.

185. State v. McCray, 233 A.3d 523, 526 (N.J. 2020) (citing State v. Gandhi, 989 A.2d 256 (N.J. 2010)).

generally classified as class E felonies or disorderly persons offenses.[186] Release can be revoked if a TRO is violated,[187] but additional jail time or fines are typically minimal, even when such violations are intentional.[188] Because of insufficient penalties and the self-policing nature of TROs, the present implementation of such orders is lacking. This can be mitigated by increasing the penalties for the first violation and adding additional, increasingly severe penalties for second and third offenses.[189] Victims should also be given the option to pursue a final permanent restraining order at this early stage, with the order never expiring unless the victim seeks to have it reviewed. Because such adjustments to TRO implementation do not tend to negatively impact the defendant's interests in release, these changes are in line with the current goals of bail reform.[190]

2. Electronic Monitoring

In addition to TROs, courts can employ electronic/GPS monitoring in domestic violence cases.[191] Electronic location monitoring can be used in conjunction with a TRO to ensure that a defendant is not interacting with certain people or visiting certain locations.[192] It can also be used to ensure the defendant is complying with other conditions of release, such as attending school, work, and counseling programs. Despite being a condition of release, defendants who are subject to electronic monitoring can be considered "in custody" for speedy trial purposes.[193]

Unlike TROs, electronic monitoring has proven "effective at reducing offenders' likelihood of reoffending, both in the short and long term. "[194] Defendants who know their location is being tracked have made fewer attempts to contact victims pretrial and after having monitors

186. *See* NAT'L CTR. ON PROT. ORDS. & FULL FAITH & CREDIT, PROTECTION ORDER VIOLATIONS MATRIX 83, 89 (2017), https://www.bwjp.org/assets/documents/pdfs/2020-fall-violations-matrix.pdf.

187. *See id.* at 86.

188. *See generally id.*(describing how fines typically range from $50 to $2,000 and jail time is typically around thirty days to six months, and not usually more than one year).

189. *See id.* at 125 (describing more severe penalties of up to three years imprisonment and $25,000 in fines for repeat offenders in Vermont).

190. *See* Wagage, *supra* note 48, at 211 n.109, 216 (discussing some states' provisions for denying or revoking bail for repeat domestic violence offenders and the safety provided by permanent orders to victims).

191. *See* N.Y. CRIM. PROC. LAW § 500.10(3-a)(j) (McKinney 2022); Wagage, *supra* note 48, at 209 (explaining that GPS monitoring is often limited to the high-risk cases).

192. Wagage, *supra* note 48, at 209–11.

193. REMPEL & RODRIGUEZ, *supra* note 88, at 5.

194. Wagage, *supra* note 48, at 210.

removed.[195] It is important to keep in mind that electronic monitoring is not to be employed as a punitive measure, but as a form of crime control, thus it does not reach beyond the constitutional scope of bail.[196]

Electronic monitoring does raise some concern when it comes to funding. Private monitoring companies are in the unique position to gouge defendants for hundreds of dollars to secure their release.[197] While the use of private companies is being challenged,[198] states can require defendants to pay for their own monitoring if they are financially able.[199] Because the state would incur similar costs when detaining an offender, it is feasible for states to fund electronic monitoring where pretrial detention may be required.[200] Electronic monitoring ensures the safety of the victim while protecting the defendant's interest in nonmonetary release where the state covers the cost of the program.

3. Pretrial Counseling and Intervention

As a nonmonetary condition of release, judges may refer defendants to pretrial programs, such as batterers' intervention courses or substance abuse counseling.[201] Typically, judges will require participation in these programs during the pretrial period with the hope that the defendant will receive assistance and establish community ties before returning to court

195. *Id.* at 210 n.103.

196. *See* REMPEL & RODRIGUEZ, *supra* note 88, at 5.

197. *Hearing*, *supra* note 49, at 12 (citing Ayo v. Dunn, No. 17-CV-526, 2018 WL 435519, at *2 (M.D. La. Sept. 12, 2018)).

198. *Id.*

199. N.J. CT. R. 3:26-2(b)(3)(K).

200. *See The Price of Electronic Prison*, HARV. POL. REV. (July 14, 2014), https://harvardpolitics.com/price-electronic-prison/. Even considering that jail provides housing, meals, and medical care, electronic monitoring plus welfare is forty-five percent of that cost. *Id.* When it comes to electronic monitoring there are concerns about the privacy of defendants who are released pretrial with an electronic monitoring condition. *But cf.* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1350 (2014). There are also concerns that Black defendants receive electronic monitoring conditions twice as frequently as white defendants. Amy Cross et al., *Reducing the Overrepresentation of Black People in the Jail Population and Criminal Justice System More Broadly*, VERA INST. OF JUST. (May 2020), https://www.vera.org/jail-incarceration-in-wayne-county-michigan/reducing-the-overrepresentation-of-black-people-in-the-jail-population-and-criminal-justice-system-more-broadly. Perpetuating a system of electronic monitoring can be dangerous in the realms of privacy and race. Still, electronic monitoring is preferable to pretrial detention. Wiseman, *supra*, at 1348. In the limited circumstance of serial offenses, like domestic violence, the defendant's interest in pretrial release and the government's interest in monitoring outweighs the concerns. *Id.* at 1348–49.

201. *See* Gutenplan, *supra* note 24, at 230.

to enter a plea or go to trial.[202] Such programs help ensure the defendant will return to court and abide by their other release conditions.[203]

The traditional view of pretrial services is as explicated above, but New Jersey has recently implemented Pretrial Intervention ("PTI") aimed at rehabilitating defendants in exchange for avoiding prosecution altogether.[204] Qualified defendants can apply to participate in PTI to receive "counseling, supervision, and other services to . . . get [their] li[ves] back on track."[205] A defendant is not qualified to apply to participate in PTI if they have previously participated in PTI, have a prior conviction and do not have the prosecutor's permission to apply, or are charged with a disorderly persons offense except where that offense was in the domestic violence context.[206] Further, there is currently a general presumption against PTI in instances of domestic violence where the crime involved violence or a serious threat of violence, but PTI has been used in limited circumstances.[207]

Once a defendant is accepted into a PTI program, a judge can postpone criminal action for up to thirty-six months.[208] During that time, a defendant must follow the course of action prescribed by the court.[209] If the defendant fails to meet the conditions, they may be removed from the program, have their charges reinstated, and face prosecution once again.[210] If PTI is completed, there will be no conviction on a defendant's record.[211]

PTI is a noble program in the sense that it allows first-time offenders an opportunity to learn from their mistakes and get the support they need to avoid further entanglement with the criminal justice system. While it is not a condition of release in the traditional sense, it could be effective for first-time domestic violence offenders to ensure that criminal

202. DIV. OF PROB. & CORR. ALTS., NEW YORK STATE PRETRIAL RELEASE SERVICE STANDARDS 13, 28 (2007), https://www.criminaljustice.ny.gov/opca/pdfs/pretrialstandardsfinalmarch2007.pdf.

203. *Id.* at 18.

204. N.J. JUDICIARY, PRETRIAL INTERVENTION (PTI) (2019), https://www.njcourts.gov/forms/10304_pti.pdf?c=6jx [hereinafter PTI].

205. *Id.*

206. *Id.*; N.J. CT. R. 3:28-1(c)–(d) (providing an exception for a domestic violence disorderly offense).

207. N.J. CT. R. 3:28-1(e)(2); *see* Charles M. Blow, *Ray Rice and His Rage*, N.Y. TIMES (Sept. 14, 2014), https://www.nytimes.com/2014/09/15/opinion/charles-blow-ray-rice-and-his-rage.html (describing how Ray Rice was afforded the opportunity to participate in PTI following a domestic violence charge).

208. PTI, *supra* note 204.

209. *Id.*

210. *Id.*

211. *Id.*

activity does not continue.[212] And although PTI in its present form only covers a specific subset of offenses, it can be expanded to deter more types of criminal behavior.[213]

While using PTI in the domestic violence context would work well in states like New York or Vermont, PTI may prevent accurate record-keeping in states that use a risk assessment method. PTI participants can file for an expungement of the arrest from their criminal record upon completion of the program.[214] However, such expungement would, by its very nature, not appear on risk assessment reports which could inaccurately predict the defendant's likelihood of reoffending. Applying PTI to the domestic violence context would require an alteration of the record keeping system within the state to ensure that successful participation is on file, but that such a file would not impact the life of a reformed defendant.

4. Criminal Contempt Charges

Theoretically, TROs, electronic monitoring, PTI, and other conditions all serve the purpose of protecting the victim and setting the defendant up for pretrial success.[215] But what happens when the defendant fails to obey the conditions set by the court? As discussed above, violation of a TRO results in contempt charges and violation of PTI results in prosecution. However, such consequences do not tend to apply to the violation of standard conditions such as curfew, travel, and reporting.[216] Defendants who violate these conditions cannot be charged with contempt and can also not be detained unless the court makes a finding that such violation was serious in nature and no other condition can reasonably assure the defendant's appearance in court or the public's

212. *See* Berk et al., *supra* note 24, at 111; Dino Flammia, *Is Drug Court Working? NJ Tracks Progress of Defendants*, N.J. 101.5 (Jan. 30, 2019), https://nj1015.com/is-drug-court-working-nj-tracks-progress-of-defendants/ (noting that data from 2019 shows only 2.5% of graduates of Drug Court, a form of PTI, landed behind bars within three years of program completion). Most notably, NFL player Ray Rice was admitted to New Jersey's PTI program following a low-level domestic violence offense. *See* Blow, *supra* note 207. A search of Ray Rice's name does not reveal any charges since his completion of the PTI program. Despite this success, PTI is rarely used in domestic violence cases. *See* Philip J. Victor, *Ex-NFL Star Ray Rice Has Domestic Violence Charges Dismissed*, AL JAZEERA AM. (May 21, 2015, 1:30 PM), http://america.aljazeera.com/articles/2015/5/21/ray-rice-has-domestic-violence-charges-dismissed.html.

213. N.J. CT. R. 3:28-1(c)–(e).

214. PTI, *supra* note 204.

215. There are risks associated with these conditions, but the benefits outweigh such risks. *See supra* Section IV.C; *see also* N.J. CT. R. 3:26-2(b)(3)(K).

216. *See* State v. McCray, 233 A.3d 523, 535 (N.J. 2020).

safety.[217] Courts are encouraged to impose additional conditions if detention is not a viable possibility.[218]

While criminal contempt charges may not be the appropriate response to a violation of conditions of release, the court's inability to detain a defendant without making a finding, based on clear and convincing evidence, that no nonmonetary condition will be sufficient to achieve the goals of bail is limiting.[219] Where a defendant shows a disregard for obeying court ordered conditions, additional conditions are unlikely to curb violations.[220] It may be prudent to allow the court to detain defendants who show a repeated disregard for order of the court because such defiance tends to show a disrespect for the criminal justice system that will not likely be remedied by any amount of pretrial conditions.

5. Incorporating a Risk Assessment Tool for Domestic Violence

Courts consider anything from financial means to the nature of the offense when making bail determinations.[221] Such factors, in addition to various risk assessment instruments,[222] are used to inform decisions every day. However, few of the systems currently in place overtly account for the potential outcomes of releasing domestic violence offenders.[223] New Jersey employs the ODARA assessment for law enforcement officers,[224] and there exist lethality assessments[225] and sex offender assessments,[226] but how can such systems be crafted to help the courts determine release conditions?

The unique nature of domestic violence offenses allows for a more accurate use of risk assessment instruments than as applied to other

217. N.J. STAT. ANN. § 2A:162-24(a) (West 2022).
218. *Id.*
219. *Id.*
220. *See generally* Barton, *supra* note 177.
221. *See supra* Part II.
222. Corinne Ramey, *Algorithm Helps New York Decide Who Goes Free Before Trial*, WALL ST. J. (Sept. 20, 2020, 10:00 AM), https://www.wsj.com/articles/algorithm-helps-new-york-decide-who-goes-free-before-trial-11600610400; § 2A:162-25.
223. *See* N.Y. CRIM. PROC. LAW § 510.30 (McKinney 2022). There is no public safety consideration in New York, so the courts cannot consider the dangerousness of releasing an offender. *Id.*
224. Directive from Christopher S. Porrino, *supra* note 150, at 1–2.
225. Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 653 (2009).
226. *Risk Level & Designation Determination*, N.Y. STATE DIV. OF CRIM JUST. SERVS., https://www.criminaljustice.ny.gov/nsor/risk_levels.htm (last visited Oct. 11, 2022); N.Y. CORRECT. LAW §§ 168-l(5)(a)–(i) (McKinney 2022).

crimes.[227] The stress surrounding the separation period and the tendency for domestic violence offenders to target the same victim increase the necessity for predicting an offender's next move.[228] Other crimes, such as burglary, fraud, and even assault committed against a stranger, do not present the same concerns.[229] Therefore, something beyond a hardline rule or judicial discretion may be required for making bail determinations.

New York does not rely heavily on risk assessments when making general bail condition determinations,[230] but the state does employ such assessments in other areas, like sex offender registration upon sentencing.[231] When assigning a risk level to sex offenders, the court looks at the facts of the current offense, such as the use of violence, the relationship to the victim, and the type of contact made with the victim.[232] The court also considers the offender's history of abuse and the number and nature of prior offenses.[233] Using this information, the court assigns a risk level to the offender, which indicates the likelihood they are to reoffend and the danger they pose to the community.[234]

Although New York's sex offender risk assessment is used to determine registration upon sentencing, it is possible to adapt it in such a way that informs pretrial release decisions for domestic violence offenders. Such reliance upon risk assessment tools in other circumstances suggests an openness for the legislature to consider such use to inform pretrial decisions.

Perhaps the best way to adopt New York's assessment to domestic violence circumstances is to add some consideration of lethality, as lethality is a genuine concern when it comes to releasing offenders.[235] Jacquelyn Campbell, a preeminent scholar in the fields of danger

227. Domestic violence is a serial crime, with known and predictable factors. Berk et al., *supra* note 24, at 96; *see infra* notes 236–44 and accompanying text.

228. *See* Gutenplan, *supra* note 24, at 233–34; Berk et al., *supra* note 24, at 96 (stating "domestic violence often is serial").

229. Gutenplan, *supra* note 24, at 233.

230. *See* REMPEL & RODRIGUEZ, *supra* note 88, at 6–7 ("Courts *may* consider information from formal release assessment tools . . . ." (emphasis added)); *see also* RAHMAN, *supra* note 16, at 12–13.

231. *See Risk Level & Designation Determination*, *supra* note 226.

232. N.Y. CTS., SEX OFFENDER REGISTRATION ACT: RISK ASSESSMENT GUIDELINES AND COMMENTARY 7–9, 12 (2006) [hereinafter SEX OFFENDER REGISTRATION GUIDELINES], https://www.nycourts.gov/reporter/06_SORAGuidelines.pdf.; *see also Risk Level & Designation Determination*, *supra* note 226.

233. *See* SEX OFFENDER REGISTRATION GUIDELINES, *supra* note 232, at 13–15.

234. *Id.* at 2.

235. *See Preventing Intimate Partner Violence*, *supra* note 25 ("[A]bout [one] in [five] homicide victims are killed by an intimate partner.").

assessments and femicide, created an assessment to determine the likelihood of lethality occurring in a domestic violence situation.[236] Factors considered by Campbell include the frequency of violence, whether the abuser has a gun, whether separation has occurred, and whether the abuser makes threats of violence against the victim, the victim's children, or the victim's property.[237] Despite its relevance to criminal prosecution, Campbell's assessment is generally intended to be used to seek medical care or counseling.[238] Regardless of the assessment's limited usage, the factors identified by Campbell are extremely relevant for identifying potential violence against the victim.

New Jersey's ODARA assessment purports to incorporate factors highlighted in New York's sex offender assessment and Campbell's lethality assessment.[239] ODARA factors include threats to the victim and the victim's children, prior domestic incidents, substance abuse, and failure to comply with previous release conditions.[240] ODARA also uniquely considers non-domestic violent offenses.[241] This is critical because domestic violence is historically an underreported crime.[242] Victims may not have the means to report, they may fear retribution, or they may be discouraged by the criminal justice process.[243] Courts and risk assessment tools cannot properly consider an offender's prior crimes where they are unreported, so ODARA's usage of non-domestic violent offenses is critical.

In addition to the use of risk assessment instruments, there exists the potential to add factors to the statute itself. Much like how Vermont incorporates finances as a factor to determine bail,[244] the legislature could add a factor that requires the court to consider whether the offense is domestic in nature. However, considering only the present offense in making a bail determination does not give the court a big picture view of the offender's history which is critical when it comes to a crime that is often serial. A single factor is not sufficient to address safety concerns of the victim and therefore the use of risk assessment instruments is preferable.

236. Campbell et al., *supra* note 225, at 653; Wagage, *supra* note 48, at 198.

237. Campbell et al., *supra* note 225, at 655 fig.1.

238. *See id.* Once the assessment is complete, the answers are interpreted by a nurse, advocate, or counselor. *Id.*

239. *See* WAYPOINT CENTRE FOR MENTAL HEALTH CARE, ODARA SCORING FORM 2–4 (2017), https://www.nj.gov/lps/dcj/agguide/directives/ODARA-Scoring-Form.pdf.

240. *See id.*

241. *See id.* at 3–4.

242. *See* Gutenplan, *supra* note 24, at 238.

243. *See id.* at 211, 233, 238.

244. VT. STAT. ANN. tit. 13, § 7554(b)(1) (2022).

The only remaining question is how much weight should be given to such risk assessment tools and domestic violence factors. Because risk cannot be perfectly estimated due to underreporting, risk assessment tools cannot be entirely dispositive—some amount of judicial discretion is required. However, these tools, when they consider all the relevant factors, can be useful to prevent new crime, violence, or homicide. Further, such tools can be used to estimate the perfect release conditions; and even recommend detention.[245]

6. Pretrial Detention

The most obvious way to protect a victim from an offender released pretrial is to detain the offender when all other conditions fail. As discussed in Part I, the Supreme Court declared pretrial detention constitutional under the Eighth Amendment.[246] However, there are concerns about its usage, such as the effects pretrial detention might have on a fair trial.[247] Currently, Vermont and New York only allow for pretrial detention in few qualifying felony cases.[248] New Jersey does not delineate based on offense when determining pretrial detention but focuses on the risk of release.[249]

Because pretrial detention would help avoid the dangerousness of the separation period in domestic violence cases, it is important to consider detention as a viable option.[250] Pretrial detention in domestic violence could be effectively implemented by amending the statutes to make domestic violence a qualifying offense, or to create a presumption of detention in domestic violence cases. When an offender is before the judge at their detention hearing, the state would be required to show probable cause that the defendant committed the crime before pretrial detention is granted.[251]

While an overarching pretrial detention mechanism for domestic violence offenders is the clear choice for victim safety, such a system contradicts the goals of bail reform and the presumption of release. Allowing pretrial detention in domestic violence cases, but not presuming

245. *See generally* SEX OFFENDER REGISTRATION GUIDELINES, supra note 232, at 2–4 (stating that New York's sex offender assessment estimates the optimal monitoring and release conditions for any offender).

246. *See supra* Section I.A; United States v. Salerno, 481 U.S. 739, 747–48 (1987).

247. *See supra* Section I.B; ACCUSED AND UNCONVICTED, *supra* note 33, at 9.

248. *See* TYNER, *supra* note 18, at 2; VT. CONST. ch. II, § 40.

249. N.J. STAT. ANN. § 2A:162-15 (West 2022).

250. Wagage, *supra* note 48, at 220–22.

251. *See* State v. Ingram, 165 A.3d 797, 805 (N.J. 2017).

it, would be the best solution. States are free to consider the nature of the offense, the lack of available protections, and the weight of the evidence in making pretrial decisions. Because of the nature of domestic violence and the separation period, pretrial detention must be available as a discretionary remedy.

V. THE RECOMMENDATION

Considering the totality of the circumstances, including the pressures of the new bail reform wave and the concerns for victim safety, the ideal bail statute would be largely risk based, with a presumption of conditional release in all domestic violence cases.

To achieve the ideal statute, the state must first specify that bail is permitted to protect the public. This is permissible under *Salerno*,[252] and it need not be applied to every crime. Assigning bail to protect the public can be limited to qualifying offenses, which can include all domestic violence offenses, if specified.[253] To distinguish domestic violence offenses in this context, the state must also have clear domestic violence statutes. Such statutes should have their own category in the code and should include all misdemeanors and felonies that could be committed in the domestic violence context.[254]

New Jersey's risk assessment scheme is the ideal model for addressing the defendant's interests. Unlike New York and Vermont, New Jersey's model addresses most concerns about cash bail, and it purports to take race out of the equation to make determinations more equitable.[255] Vermont's financial factor model does not go far enough to limit the use of cash bail and to prevent bias.[256] New York's categorical approach to bail still employs cash bail and focuses on the offense rather than the offender's circumstances.[257] Such approach also does not allow for a judge to consider each case individually. For example, if an offender is arrested for misdemeanor assault on their spouse for the tenth time, such crime is an automatic release on recognizance, when perhaps the circumstances should be considered, and conditions should be imposed on release. Risk assessment accounts for these nuances in an offender's

252. United States v. Salerno, 481 U.S. 739, 747 (1987).

253. *See supra* notes 88–95 and accompanying text; *see also* VT. CONST. ch. II, § 40.

254. *See supra* Section IV.A.

255. *See supra* Section II.C. New Jersey attempts to take race out of the equation, but there are still inherent biases involved in risk assessments. *See supra* note 115 and accompanying text.

256. *See supra* Section II.A.

257. *See* BAIL REFORM REVISITED, *supra* note 95, at 2–4.

history and makes an appropriate recommendation, which helps protect the victim as well as offenders who would otherwise be held on cash bail.

Despite the merits of the risk assessment system, a presumption of release in all cases can be problematic in the domestic violence context. Victims would be better served if domestic violence offenses had a presumption of conditional release. Conditions, such as TROs or counseling, should be imposed on every domestic violence offender that is released under the risk assessment system. These conditions would not have a great burden on the defendant since there is no cash payment required, and there is no infringement on a defendant's right to bail or a fair trial. Further, such conditions can help the defendant avoid further entanglement with the criminal justice system.

As indicated in Part III, a state's release conditions may need to be reformed to better suit the interests of the defendant and the victim.[258] TROs work well as a primary condition of release for every offender because of their simplicity, but in situations where the defendant and the victim live together or share children, it would be a burden on the defendant to enforce them.[259] However, one portion of the TRO, the mandatory surrender of firearms, should be imposed upon the first offense. This condition should be severed from the TRO since the removal of firearms protects the victim, the offender, and third parties.

In addition to the surrender of firearms, the primary condition of release should be mandatory counseling. Such a program can look like individualized or group therapy once or twice a week within the defendant's own employment schedule. Further, the defendant may be required to submit to drug tests and report to pretrial services. Because such a condition is not onerous, would be funded by the state, and has

258. *See supra* Part III.

259. There may be a financial and emotional burden on the defendant when it comes to finding a new place to live or being housing insecure. *See generally Housing and Mental Health*, MIND (Oct. 2021), https://www.mind.org.uk/information-support/guides-to-support-and-services/housing/housing-and-mental-health/. There may also be difficulties in sharing custody of the children. *See generally Custody Issues*, ZENCARE, https://zencare.co/mental-health/custody-issues (last visited Oct. 11, 2022). Because of concerns about how this sudden instability might impact the treatment and rehabilitation of an offender, a TRO might not be an appropriate measure upon an offender's first arrest. *Id.* Instead, it would be fruitful for the courts to weigh the interests and desires of the victim against the interests of the offender when it is their first offense. *See* N.J. DIV. ON WOMEN, DOMESTIC VIOLENCE COURT PROCEDURES (1994), https://www.nj.gov/dcf/news/publications/DVCourtProcedures.pdf. TROs can be effective as a condition beyond the first offense, so long as there are increased contempt charges and a clear path to a final restraining order should the victim seek one. *See supra* Section IV.C.1.

proven effective, every domestic violence offender should have participation in counseling as a condition of release.[260]

In a similar vein, PTI should be employed more often in domestic violence cases. Defendants who are eligible can enter the program and have their charges dismissed upon successful completion.[261] PTI would run like the proposed mandatory counseling condition but would only be available to certain first-time offenders rather than everyone who is released. One of the concerns about PTI is the impact of the charge expungement on the risk assessment evaluation. In domestic violence cases, the charge will be expunged from public record, but the court may retain records of PTI participation and previous pretrial risk calculations for reference if the defendant is charged in the future.

Pretrial detention would be available as an option for domestic violence offenders within the ideal bail statute. To limit the use of pretrial detention to a very limited number of offenses, as Vermont does, would eliminate its use in circumstances where it may be necessary. If there are concerns about pretrial detention, electronic monitoring funded by the state is a viable alternative. Electronic monitoring would assuage concerns about infringements on a defendant's constitutional rights that occur when they remain in jail. Furthermore, defendants may be able to keep their jobs, meet with lawyers, and participate in counseling.

Finally, New Jersey's risk assessment must be tailored to account for factors relating to domestic violence. The ODARA assessment is a very good place to start, and the legislature should permit the courts to use it as a supplement to the PSA. Incorporating Campbell's lethality assessment is a viable option as well, but ODARA is far more comprehensive and prevents harms beside death.[262]

Overall, the ideal bail reform statute would be a risk assessment foundation in which judges have the authority to impose bail for the protection of the public. This would effectively eliminate the use of cash bail and help to limit bias. Domestic violence statutes would be composed to include all crimes, regardless of the level, that can be committed in an intimate relationship to ensure that factor is accounted for in bail determinations. Judges would have access to risk evaluations that

260. *See* Christopher I. Eckhardt et al., *The Effectiveness of Intervention Programs for Perpetrators and Victims of Intimate Partner Violence*, 4 PARTNER ABUSE 196, 225 (2013) ("[W]e would argue that the current state of research, on the whole, supports the idea that routine intervention for [intimate partner violence] in medical contexts can have measurable benefits in terms of mental health, physical health, and safety.").

261. PTI, *supra* note 204.

262. *See supra* notes 236–43 and accompanying text; Campbell et al., *supra* note 225, at 655; Directive from Christopher S. Porrino, *supra* note 150, at 1–2.

include factors tailored to domestic violence when making bail determinations.

There should be a presumption of conditional release with PTI or mandatory counseling, as well as mandatory surrender of firearms as the default conditions for every domestic violence offender. TROs can be used as a condition so long as the state imposes more strict contempt charges and a pathway for a final restraining order. Pretrial detention should be permitted, but electronic monitoring would be preferred as it avoids many of the constitutional concerns of detention.

CONCLUSION

It is clear from the cases of Mr. Browder and Ms. Harvey that changes to bail statutes need to happen. While it may seem as though the interests of offenders and the interests of victims are at odds, there exists a middle ground in which both parties can be satisfied. The new wave of bail reform, concerned with eliminating cash bail and biases, is bearing down on legislatures and judiciaries in every state. It is time for states to respond by answering the call for reform and assuaging the concerns of critics. It may seem nearly impossible to do both, but if states implement risk-based systems with comprehensive factors, effective release conditions, and pretrial detention available at the judge's discretion, they may find that the interests of victims and defendants are equally prioritized.