

# WHEN THE CONSEQUENCES ARE LIFE AND DEATH: PRETRIAL DETENTION FOR DOMESTIC VIOLENCE OFFENDERS

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## ABSTRACT

*Domestic violence continues to be a critical societal issue that requires immediate attention, affecting one in three women in her lifetime. The main domestic abuse interventions in place – mandatory arrest policies, no-drop prosecution policies, and mandatory medical reporting – are salutary in their overall effects, but leave a gap in protection after the defendant is arrested and before he or she is prosecuted. During this time, the defendant may be free to pursue his or her victim. This Note proposes an under-considered intervention: pretrial detention or denial of bail for serious domestic violence offenders. Research indicates that the risk of violence is greatest when the abused individual is attempting to leave an abusive partner, which is likely to occur during the gap left by mandatory arrest and mandatory prosecution policies. Offenders have also been shown likely to violate protective orders. Bail reform could address this lethal break in protection. Several states have policies that contemplate pretrial detention for domestic violence offenders. This Note will propose legislation that provides a model for pretrial detention statutes for domestic violence offenders nationwide. Pretrial detention hearings should also be made mandatory in domestic violence cases that meet a certain number of risk factors for severe violence.*

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## INTRODUCTION

Jennifer Martel was twenty-seven years old, vivacious and outgoing.<sup>1</sup> “She didn’t have a mean bone in her body,” according to her uncle.<sup>2</sup> She was studying to become a teacher while working at a grocery store to make ends meet.<sup>3</sup> She shared an apartment in Waltham, Massachusetts with her boyfriend of five or six years, Jared Remy, and their four-year-old daughter.<sup>4</sup> On Tuesday, August 13, 2013, Jennifer and Jared got into an argument.<sup>5</sup> Jared slammed Jen-

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1. Brian Fraga, *Jennifer Martel, a Taunton High Graduate, Allegedly Killed by Son of Red Sox Announcer Jerry Remy*, HERALD NEWS (Aug. 16, 2013), [http://www.heraldnews.com/news/x273450060/Murder-victim-Jennifer-Martel-was-kind-and-outgoing-uncle-recalls?zc\\_p=1](http://www.heraldnews.com/news/x273450060/Murder-victim-Jennifer-Martel-was-kind-and-outgoing-uncle-recalls?zc_p=1).

2. *Id.*

3. *Id.*

4. *Id.*

5. David Abel, Eric Moskowitz & Todd Feathers, ‘He Went Back and Finished the Job’: Mother of Jennifer Martel Critical of Police Decision to Free Jared Remy on Bail, BOSTON GLOBE (Aug. 16, 2013), <http://www.bostonglobe.com/metro/2013/08/16/officials-investigate-fatal-stabbing-waltham-one-person-custody/YU4FICQ9NWW3286u3UKoL/story.html>.

nifer's head against a mirror.<sup>6</sup> Waltham police arrested him that night, and he was charged with assault and battery.<sup>7</sup> The next day, Jared was released on his personal recognizance.<sup>8</sup> The judge had issued Jennifer a temporary restraining order against Jared on Tuesday, but Jennifer declined to extend it on Wednesday in court.<sup>9</sup> Jared's mother had importuned her not to seek a permanent restraining order, saying it would ruin his life.<sup>10</sup> Two former girlfriends had taken out restraining orders against him in the past and he had been arrested and charged with beating a former girlfriend in 2005.<sup>11</sup>

The next day, Thursday, Waltham police were again called to Jennifer's apartment.<sup>12</sup> When they arrived, they found Jared covered in blood.<sup>13</sup> Jennifer's body lay lifeless on the couple's patio.<sup>14</sup> She had been stabbed to death.<sup>15</sup> Neighbors allegedly saw Jared on top of her and attempted to intervene.<sup>16</sup> "Neighbors tried to help, we tried to stop it. We couldn't," said a witness.<sup>17</sup> The muscular Jared, who had been fired from his job as a security guard at Fenway Park for steroid use, allegedly swung his knife at a neighbor trying to interfere.<sup>18</sup> Jared and Jennifer's four-year-old daughter was home at the time.<sup>19</sup> "I always used to say [Jennifer] was going to end up dead . . . He was always hitting her," said her uncle.<sup>20</sup> Jared would eventually plead guilty to Jennifer's murder, receiving a life sentence without the possibility of parole.<sup>21</sup>

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6. *Id.*

7. *Id.*

8. Brian Fraga, *Martel Slaying Highlights Frustrating Nature of Domestic Abuse Cases*, TAUNTON DAILY GAZETTE (Aug. 20, 2013), [http://www.tauntongazette.com/archive/x511614979/Martel-slaying-highlights-frustrating-nature-of-domestic-abuse-cases?zc\\_p=0](http://www.tauntongazette.com/archive/x511614979/Martel-slaying-highlights-frustrating-nature-of-domestic-abuse-cases?zc_p=0).

9. Abel et al., *supra* note 5.

10. *Id.*

11. Fraga, *supra* note 1.

12. Aditi Roy & Alexis Shaw, *Jennifer Martel's Family Speaks Out About Jared Remy: 'He Wanted Her for Himself,' Uncle Said*, GOOD MORNING AMERICA (Aug. 17, 2013, 1:27 PM), <http://gma.yahoo.com/jennifer-martels-family-speaks-jared-remy-wanted-her-170105338--abc-news-topstories.html>.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Fraga, *supra* note 1.

21. Eric Moskowitz, *Jared Remy Pleads Guilty Murder of Jennifer Martel*, BOSTON GLOBE (May 27, 2014), <http://www.bostonglobe.com/metro/2014/05/27/jared-remy-due-woburncourtroom-today-latest-hearing-jennifer-martel-murder-case/QRd1y01jtYjZFPtZccl9VN/story.html>.

A Massachusetts law would have enabled prosecutors to hold Jared without bail for up to ninety days following a dangerousness hearing if the court concluded that no conditions of release could assure Jennifer's safety.<sup>22</sup> However, prosecutors opted against this route, most likely due to Jennifer's reluctance to seek a restraining order: "Officials with the Middlesex prosecutor's office . . . [s]a[id] their conversations with Martel were a prominent factor in how they pursued charges against Remy."<sup>23</sup>

However, in retrospect, the risk factors pointing toward a violent denouement in Jennifer's tragic case seem all too clear. Commentators observe that Jared's steroid abuse, grabbing Jennifer by the neck in the past, history of battering, and control over her social life are all signs of "increased risk" of homicidal violence.<sup>24</sup> These factors are all noted in the empirically-derived *Danger Assessment* created by Jacquelyn Campbell, a leader in the study of violence against women, to determine the "likelihood of lethality or near lethality occurring in a case of intimate partner violence."<sup>25</sup> Jennifer's family also reported that she was attempting to leave Jared in those final days.<sup>26</sup> Jennifer sent emails to friends and family telling them she was frightened, and on the day of her death, she changed her Facebook relationship status from "In a Relationship" to "It's Complicated."<sup>27</sup> Her mother stated, "I talked to her on Wednesday; she said she was

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22. See MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06 (2014).

23. Amanda Marcotte, *Could Massachusetts Have Stopped Jared Remy from Allegedly Murdering Jennifer Martel?*, SLATE (Aug. 19, 2013), [http://www.slate.com/blogs/xx\\_factor/2013/08/19/jared\\_remy\\_walked\\_out\\_of\\_court\\_and\\_murdered\\_jennifer\\_martel\\_could\\_he\\_have.html](http://www.slate.com/blogs/xx_factor/2013/08/19/jared_remy_walked_out_of_court_and_murdered_jennifer_martel_could_he_have.html).

24. Yvonne Abraham, *In Remy Case, Everybody Figured Wrong*, BOSTON GLOBE (Aug. 22, 2013), <http://www.bostonglobe.com/metro/2013/08/21/everybody-guessed-wrong/gTaNuQsjA6FD4TZqAorkAI/story.html>.

25. Jacquelyn C. Campbell, Daniel W. Webster & Nancy Glass, *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 653 (2009). Campbell has "published more than 150 articles and 7 books on violence against women" and has "served on the congressionally appointed U.S. Department of Defense Domestic Violence Task Force." *Id.* at 673. Campbell and her colleagues determined risk factors from an eleven-city study of femicide cases (using proxy informants such as family or friends who knew details of the victim's relationship) and cases of attempted femicide (cases featuring "a nonfatal gunshot or stab wound to the head, neck, or torso, strangulation or near drowning with loss of consciousness, severe injuries inflicted that easily could have led to death, a gunshot or stab wound to other body part with evidence of unambiguous (additional to victim report) intent to kill on the part of a perpetrator who was a current or former intimate partner"). *Id.* at 659-60. The team then compared these cases to "abused controls," women who had been "physically assaulted or threatened with a weapon by a current or former intimate partner during the past 2 years." *Id.* at 661. See *infra* Appendix A for items in the Danger Assessment.

26. Fraga, *supra* note 1.

27. *Id.*

planning her escape."<sup>28</sup> If Jared had known Jennifer was planning to leave him, Campbell's assessment would have rated her risk as "severe."<sup>29</sup> The system in place, even in a jurisdiction with a law allowing a domestic violence offender to be held without bail, largely leaves to the victim the discretion to decide whether a dangerousness hearing is pursued.<sup>30</sup> And "victims tend to badly underestimate the risks," according to Campbell's findings.<sup>31</sup>

Middlesex District Attorney Marian T. Ryan has opened an internal investigation into her office's decision not to seek a dangerousness hearing for Jared.<sup>32</sup> Jared was no stranger to such a proceeding, having been held without bail for eighty-one days in 2005 following charges of assaulting and threatening a former girlfriend (including "threatening to kill her . . . cutting up her clothing and pictures, and punching and kicking her until she ran to a neighbor's house").<sup>33</sup> She survived.<sup>34</sup> Unfortunately, the findings of the District Attorney's Office can do nothing to reverse Jennifer's fate. The Massachusetts legislature has already sprung into action on behalf of Jennifer and future similar cases by introducing a bill on April 1, 2014 that would strengthen domestic violence laws and require judges to undergo bi-annual training on domestic violence issues.<sup>35</sup> This overhaul signals the willingness of lawmakers to take domestic violence crimes seriously and consider sweeping changes to existing policies in this area.<sup>36</sup>

Reforms of this nature can occur in conjunction with this Note's proposal to statutorily authorize pretrial detention of serious do-

28. Abel et al., *supra* note 5.

29. Abraham, *supra* note 24; see Campbell et al., *supra* note 25, at 655; see also *infra* Appendix A.

30. See Abraham, *supra* note 24.

31. *Id.*

32. Todd Wallack & Sean P. Murphy, *DA Promises Wide Review of Decision to Let Remy Go: Waltham Killing Came a Day Later*, BOSTON GLOBE (Aug. 20, 2013), <http://www.bostonglobe.com/metro/2013/08/19/middlesex-district-attorney-marian-ryan-orders-review-jared-remy-murder-case/eqoKGHUGqotRDDbZt3XHVL/story.html>.

33. *Id.*

34. See *id.*

35. Bob Salsberg, *Bill Calls for Tougher Domestic Violence Penalties*, AP NEWS ARCHIVES (Apr. 1, 2014, 4:10 PM), [http://www.apnewsarchive.com/2014/Bill\\_calls\\_for\\_tougher\\_domestic\\_violence\\_penalties/id-713e3f93847349328e354ae0c9321766](http://www.apnewsarchive.com/2014/Bill_calls_for_tougher_domestic_violence_penalties/id-713e3f93847349328e354ae0c9321766). The bill additionally calls for: domestic violence suspects to be held in custody for at least six hours post-arrest to allow a safety plan to be developed for the accuser; a written assessment of any safety risks posed by the defendant's release if bail is granted; judges to have access to all prior charges and past restraining orders against the defendant when making a bail or sentencing decision; and new categories of domestic violence crimes with greater penalties (such as the crimes of strangulation and suffocation). *Id.*

36. See *id.*

mestic violence offenders with mandatory detention hearings if a certain number of risk factors are met. Part I of this Note will present data on the prevalence of domestic violence and outline the types of domestic violence interventions. It will delineate the statutory and constitutional support for denial of bail or pretrial detention. It will also explain the importance of pretrial detention in this context and summarize the status of bail statutes nationwide with regard to domestic violence offenses. Statutes nationwide are highly variable, and the great majority do not mention denial of bail or pretrial detention for domestic violence cases. Even in states that have statutory provisions to hold suspects without bail in domestic violence cases, such hearings are not mandatory and are under-utilized because victims are unwilling to work with prosecutors and police. Part II of this Note will argue that pretrial detention will likely produce benefits similar to mandatory arrest and no-drop prosecution policies in terms of reducing recidivism and will also protect victims at the most critical junction: the time of attempted separation from an abuser. Mandatory arrest and no-drop prosecution policies offer no protection during this period, the most dangerous time for a domestic violence victim. Accordingly, Part III of this Note will propose model legislation that will allow pretrial detention for serious domestic violence offenders. This model legislation is based upon existing statutory schemes. Part III will also argue that pretrial detention hearings should be mandatory in serious cases. Finally, Part III will explain safeguards for the defendant's constitutional rights which are incorporated into the model legislation, and suggest means to enact such statutes.

## I. DOMESTIC VIOLENCE PREVALENCE AND INTERVENTIONS

### *A. Domestic Violence Statistics*

Statistics on domestic violence underscore the prevalence of this societal issue and its need for legal attention. Domestic violence is the largest cause of "serious injury" to women in the United States:

[Domestic violence] account[s] for more injurious episodes than rape, auto accidents, and mugging combined. . . . A woman is beaten every twelve seconds. Fifteen hundred women a year (approximately four per day) die at the hands of an abusive male partner. Roughly twenty-one thousand domestic crimes against women are reported every week—more than a million assaults, murders, and rapes in a year. These are the reported crimes. Police estimate that

for each of these crimes, three more go unreported. In all, there are an estimated 1.8 to 4 million incidents of domestic violence each year.<sup>37</sup>

Such statistics belie common assumptions that domestic violence is “exceptional.”<sup>38</sup> On the contrary, more than one in three women and more than one in four men have “experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime,” according to the National Center for Injury Prevention and Control, a branch of the Department of Health and Human Services.<sup>39</sup> Approximately one in four women has experienced severe physical violence by a partner at some point in her lifetime (such as being “hit with a fist or something hard, beaten, [or] slammed against something”).<sup>40</sup>

Intimate partner homicide has been declining for the past two decades, but it continues to be a significant concern.<sup>41</sup> Though there has been a decrease in marital homicide, there has been an increase in the rate of unmarried males killing their partners,<sup>42</sup> as in the case of Jennifer Martel. The majority of female homicide victims are killed by men with whom they have been romantically involved.<sup>43</sup>

37. David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1158–59 (1995). Other sources estimate that a woman is beaten every nine seconds by a domestic partner and that ten women die every day due to domestic violence. Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533, 534 (citing *Not Just a “Family Matter”*: Hearings on Domestic Violence Before the Subcomm. on Criminal Justice of the H. Judiciary Comm., 103d Cong., 2d Sess. 9 (1994) (testimony of Vicki Coffey, Executive Director, Chicago Abused Women Coalition)).

38. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 3 (1991).

39. DIV. OF VIOLENCE PROT., NAT’L CTR. FOR DISEASE PREVENTION & CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: EXECUTIVE SUMMARY 2 (2010). This statistic underscores the reality that both men and women are victims of domestic violence. However, research and scholarship tend to refer to domestic violence victims as female and perpetrators as male due to the greater likelihood that a victim of a physically severe act of domestic violence will be female. See *infra* text accompanying notes 45–46. Empirical research in particular focuses on female victims and male perpetrators, limiting efforts to draw conclusions about both sexes and necessitating the use of gendered nouns. There is also a dearth of research on interventions with same-sex couples.

40. See DIV. OF VIOLENCE PROT., *supra* note 39, at 2.

41. See SHANNON CATALANO ET AL., BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF VIOLENCE 1, 4 (2009), available at <http://www.bjs.gov/content/pub/pdf/fvv.pdf>. Between 1993 and 2007, intimate partner homicides of females decreased 35%, and intimate partner homicides of males decreased 46%. *Id.*

42. See Laura Dugan et al., *Explaining the Decline in Intimate Partner Homicide: The Effects of Changing Domesticity, Women’s Status, and Domestic Violence Resources*, 3 HOMICIDE STUDIES 187, 187 (1999).

43. Compare Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, in ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS 85, 86 (Jacquelyn C. Campbell ed., 2d ed. 2007) (reporting that “greater than 90%” of female homicide victims are

The decline in overall intimate partner homicide rates has been attributed to a decline in spousal homicide and female-perpetrated homicides.<sup>44</sup> Domestic violence research indicates two large sex differences: in cases of women killing an intimate partner, the woman is likely to have been the victim of abuse, while this is uncommon in cases of men killing their partner.<sup>45</sup> Also, women are far more likely to incur serious bodily injury from intimate violence than men, though surveys indicate that women and men are equally likely to be physically aggressive toward their partners.<sup>46</sup> The U.S. Department of Justice's National Crime Victimization Survey found that 72% of the victims of intimate partner homicide and 85% of the victims of non-lethal intimate partner violence were women.<sup>47</sup> Researchers posit that declining rates of intimate partner homicide are due to: a decline in domesticity (increase in divorce rates and decrease in marriage rates) leading to decreased exposure to violence by partners; the increasing economic status of women leading to reduced financial dependence on men; and domestic violence interventions and resources.<sup>48</sup>

### *B. Domestic Violence Laws and Interventions*

Domestic violence has historically been treated as a private matter, not a public concern. Under early American common law, the doctrine of "chastisement" legally entitled husbands to physically punish their wives short of permanent injury.<sup>49</sup> This was seen as an extension of, and corollary to, the concept of coverture, whereby a woman's legal identity was subsumed by her husband's upon marriage and her husband became master over her person, labor, and property.<sup>50</sup> And "as master of the household, a husband could

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killed by former or current intimate partners), and Emma Morton et al., *Partner Homicide-Suicide Involving Female Homicide Victims: A Population-Based Study in North Carolina, 1988-1992*, 13 *VIOLENCE & VICTIMS* 91, 91 (1998) (reporting that of all female homicide victims in four years in NC, in 86% of cases the perpetrator was a current or former partner of the victim), with CATALANO ET AL., *supra* note 41, at 3 (reporting that 64% of female homicide victims in 2007 were killed by a family member or intimate partner, and an additional 25% of victims were killed by others they knew).

44. See Dugan et al., *supra* note 42, at 190.

45. *Id.*

46. *Id.*

47. CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993-2001 1 (2003), available at <http://www.bjs.gov/content/pub/pdf/ipv01.pdf>.

48. Dugan et al., *supra* note 42, at 191-95.

49. Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2118 (1996).

50. *Id.* at 2122.

command his wife's obedience" through "corporal punishment."<sup>51</sup> Even after the right of chastisement was rescinded, the American legal system treated domestic violence as distinct from assault in the name of "domestic harmony."<sup>52</sup> Authorities were loath to intervene in such cases, believing that such matters were private and not to be interfered with by the government.<sup>53</sup> Police officers would attempt to "mediate" between couples having an altercation and would rarely arrest abusers.<sup>54</sup> Prosecutors would decline to press charges since victims were generally unwilling to proceed.<sup>55</sup> In the 1970s, the feminist movement sought to recast these "private" concerns as an important public matter.<sup>56</sup> Their efforts resulted in legal reforms to protect women against domestic violence, such as statutory orders of protection, which enabled victims to access the judicial system without police involvement.<sup>57</sup> However, these reforms did not sufficiently address the systematic responses of police and prosecutors, leading to the development of "mandatory" interventions—mandatory arrest and no-drop prosecution policies—that would limit police and prosecutorial discretion in the matter.

### 1. *Mandatory arrest*

Mandatory arrest policies require police to arrest a suspect if there is probable cause to believe the suspect committed a domestic violence offense.<sup>58</sup> Prior to the advent of these policies, police were reluctant to arrest for domestic violence offenses.<sup>59</sup> Statutes in most jurisdictions enabled police to arrest for a misdemeanor offense only if the offense had been committed in the officer's presence or if an ar-

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51. *Id.* at 2123.

52. *Id.* at 2120.

53. Zlotnick, *supra* note 37, at 1167.

54. Jo Dixon, *Mandatory Domestic Violence Arrest and Prosecution Policies: Recidivism and Social Governance*, 7 *CRIMINOLOGY & PUB. POL'Y* 663, 664 (2008).

55. KEITH GUZIK, *ARRESTING ABUSE: MANDATORY LEGAL INTERVENTIONS, POWER, AND INTIMATE ABUSERS* 7 (2009).

56. Siegel, *supra* note 49, at 2118.

57. GUZIK, *supra* note 55, at 7.

58. *See, e.g.*, COLO. REV. STAT. § 18-6-803.6(1) (2013) ("When a peace officer determines that there is probable cause to believe that a crime or offense involving domestic violence . . . has been committed, the officer shall, without undue delay, arrest the person suspected of its commission . . ."); WIS. STAT. § 968.075(2)(b)(1) (2007) ("[A] law enforcement officer shall arrest and take a person into custody if . . . [t]he officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person's actions constitute the commission of a crime . . .").

59. *See* Wanless, *supra* note 37, at 541–42 (reporting the arrest rate at 3%–10% for domestic violence offenses when mandatory arrest policies are not in place).

rest warrant was issued, which gave police “de facto legal backing to do nothing” in domestic violence cases.<sup>60</sup> Police also continued to favor mediation, trying to “cool down” violent offenders and leave them at the scene rather than removing them.<sup>61</sup> Mediation techniques treated domestic violence as a “family dispute” where both parties were at fault.<sup>62</sup> Furthermore, officers commonly believed that the victims likely provoked the abuse or should not be assisted if they were unwilling to seek legal recourse against the abusers.<sup>63</sup> As one police chief explained, “if the woman didn’t do anything after she was hit, then why should we do anything[?]”<sup>64</sup>

Mandatory arrest policies were developed to combat these views, particularly on the heels of several highly publicized lawsuits against police for egregious cases of non-intervention.<sup>65</sup> These policies have been moderately successful in reducing the recidivism of domestic violence offenders. Randomized trials studying the efficacy of mandatory domestic violence interventions are scarce due to the difficulty of (and potential equal protection concerns involved with) randomly assigning defendants to different outcomes.<sup>66</sup> The studies that do exist are typically conducted under the aegis of the National Institute of Justice (NIJ).<sup>67</sup> An early study funded by the NIJ to determine the efficacy of mandatory arrest policies in reducing recidivism was promising.<sup>68</sup> This landmark study randomly assigned defendants in domestic violence cases in Minneapolis to mandatory arrest followed by at least one night in jail, physical separation for eight hours, or police mediation, and discovered that

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60. GUZIK, *supra* note 55, at 24; *see also* Wanless, *supra* note 37, at 537 (describing the “in presence” requirement in most states which forbids police officers from making warrantless arrests for misdemeanor offenses unless the police officer witnesses the crime).

61. *See* Wanless, *supra* note 37, at 536–37.

62. *Id.* at 537.

63. GUZIK, *supra* note 55, at 24.

64. *Id.*

65. Sarah M. Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN’S L.J. 213, 218–19 (1988) (citing *Thurman v. Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (awarding a domestic abuse victim \$2.3 million in a suit against the City of Torrington and its police officers for negligently failing to protect the victim and violating the equal protection clause by treating victims assaulted by a perpetrator with whom they have a relationship differently than victims assaulted by a stranger); *Sorichetti v. City of New York*, 482 N.E.2d 70 (N.Y. 1985); *Bruno v. Codd*, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev’d*, 407 N.Y.S.2d 165 (App. Div. 1978), *aff’d*, 393 N.E.2d 976 (N.Y. 1979); *Nearing v. Weaver*, 670 P.2d 137 (Or. 1983) (en banc).

66. *See, e.g.*, Dixon, *supra* note 54, at 664.

67. *See id.*

68. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 261 (1984).

mandatory arrest resulted in significantly lower recidivism rates over the following six months.<sup>69</sup>

Former U.S. Attorney General William French Smith cited the results of this study when he recommended that mandatory arrest be implemented as the standard response in domestic violence cases.<sup>70</sup> However, follow-up replication studies in six more cities funded by the NIJ had mixed results.<sup>71</sup> These studies uncovered a potential interaction effect at play wherein arrest led to a deterrent effect in employed or married offenders but had the opposite effect on unemployed or unmarried offenders.<sup>72</sup> Researchers theorized that arrest could deter offenders who were likely to be stigmatized by the arrest, but would be less likely to deter offenders who were unlikely to be stigmatized by arrest.<sup>73</sup> However, these studies are susceptible to the criticism that they did not successfully replicate the original study because the arrested abuser did not necessarily have to spend a night in jail.<sup>74</sup>

Regardless of the efficacy of mandatory arrest policies in deterring recidivism, such policies compelled police to take domestic violence seriously, and helped to shape public perception of domestic violence as a crime and not a private dispute.<sup>75</sup> These policies also provide ancillary benefits, such as ensuring more equitable police action across the races and socioeconomic statuses of offenders.<sup>76</sup> However, one drawback to mandatory arrest policies is victim arrest, wherein the victim is arrested either as a result of the same event that caused the arrest of the abuser (dual arrest), or as a result

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69. *Id.* at 267 (reporting the recidivism rate after mandatory arrest as 13% and after separation as 26%). The authors did not provide the recidivism rate after mediation.

70. Wanless, *supra* note 37, at 554.

71. See Joel Garner et al., *Published Findings from the Spouse Assault Replication Program: A Critical Review*, 11 J. QUANTITATIVE CRIMINOLOGY 3, 5-7 (1995); Anthony M. Pate & Edwin E. Hamilton, *Formal and Informal Deterrents to Domestic Violence: The Dade County Spouse Assault Experiment*, 57 AM. SOC. REV. 691, 691-92 (1992); Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 165-67 (1992).

72. Garner et al., *supra* note 71, at 7.

73. Pate & Hamilton, *supra* note 71, at 692.

74. Wanless, *supra* note 37, at 556.

75. See *id.* at 559.

76. See Buel, *supra* note 65, at 220-24. Mandatory arrest policies, in addition to reducing recidivism, provide the benefits of: (1) clarifying the police's role; (2) decreasing police injuries (possibly because "a batterer who understands that he will be arrested for assaulting his partner may be less likely to assault the officer whom he sees as implementing a strict legal duty"); (3) resolving the victim's dilemma of whether or not to request that the perpetrator be arrested; and (4) treating victims and offenders more equitably, particularly in terms of racial and socioeconomic factors that cause police to exercise their discretion preferentially. *Id.*

of a false or exaggerated complaint filed by the abuser (retaliatory arrest).<sup>77</sup> These policies have also been criticized for limiting police discretion; however, police still have discretion to determine whether probable cause exists to believe a domestic violence offense has occurred.<sup>78</sup>

## 2. No-drop prosecution

No-drop prosecution policies require prosecutors to pursue domestic violence cases regardless of the victim's unwillingness to proceed.<sup>79</sup> Victims' desire not to press charges or testify, stemming from fear of or attachment to their abusers, had frequently hindered prosecution.<sup>80</sup> Prosecutors, however, can use alternative evidence such as photographs, physical evidence, medical reports, victim statements, and 911 tapes when a victim is unwilling to testify.<sup>81</sup> Studies of recidivism as a function of prosecution policy have found mixed results. There has only been one randomized study, funded by the NIJ, that measured the efficacy of no-drop prosecution in reducing recidivism.<sup>82</sup> This study found that women who had the option to drop the charges, but continued regardless, had the lowest rate of re-abuse, while women who had the option to drop the charges, and did so, had the highest rate of re-abuse (higher than women with no-drop charges).<sup>83</sup> However, for safety reasons, this

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77. MARY HAVILAND ET AL., URBAN JUSTICE CTR., THE FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1995: EXAMINING THE EFFECTS OF MANDATORY ARREST IN NEW YORK CITY 5 (2001).

78. See Wanless, *supra* note 37, at 543-44.

79. Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 856 (1994).

80. See *id.* at 857. In jurisdictions without no-drop prosecution policies, prosecutors dropped charges in domestic violence cases due to victim's request, recantation of testimony, or failure to appear in court in 50%-80% of all cases. In jurisdictions with no-drop prosecution policies, charges were dropped in only 10%-34% of cases. *Id.*

81. See Ruth E. Fleury, *Missing Voices: Patterns of Battered Women's Satisfaction with the Criminal Legal System*, 8 VIOLENCE AGAINST WOMEN 181, 199 (2002).

82. See LAWRENCE W. SHERMAN ET AL., NAT'L INST. OF JUSTICE, PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING (1998), available at <https://www.ncjrs.gov/works/> (click on "4. Family-Based Crime Prevention") (discussing the only empirical study on no-drop prosecution: DAVID A. FORD & MARY JEAN REGOLI, THE INDIANAPOLIS DOMESTIC VIOLENCE PROSECUTION EXPERIMENT (1993)). See *supra* text accompanying notes 66-67 for an explanation of the dearth of randomized studies of mandatory interventions.

83. FORD & REGOLI, *supra* note 82, at iv. This study compared three tracks in 480 men charged with misdemeanor assault of an intimate partner: pretrial diversion to counseling; prosecution to conviction with a recommended sentence of counseling; and prosecution to conviction with another sentence such as fines, probation, or jail time. Victims were either al-

study excluded many important groups of defendants: those with previous records of violence against the victim, those with criminal histories of violence, and those who posed serious threats of imminent danger.<sup>84</sup> Therefore, the results may not reflect the efficacy of no-drop prosecution policies with respect to all domestic violence defendants.<sup>85</sup> Correlational studies have been conducted on rearrest likelihood depending on various prosecutorial outcomes, such as *nolle prosequi*, dismissals, probation with treatment, and jail sentences, and have reached conflicting conclusions.<sup>86</sup> Notably, these studies did not compare no-drop prosecution to drop-permitted prosecution.<sup>87</sup>

In addition to the potential impact of no-drop prosecution policies on recidivism, other benefits of these policies include reduction of case attrition rates, facilitation of victim cooperation, and flexible prosecutorial strategies that do not necessarily depend on victim testimony.<sup>88</sup> Possible drawbacks include limiting prosecutorial discretion and potential retaliatory violence against victims.<sup>89</sup>

### 3. *Mandatory medical reporting*

Some states have called for policies that would require routine screening of women for intimate partner violence during emergency

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lowed or not allowed to drop charges. The researchers “ha[d] no reservations” in advocating a drop-permitted policy. *Id.* at 73.

84. Linda G. Mills, *Mandatory Arrest and Prosecution Policies for Domestic Violence: A Critical Literature Review and the Case for More Research to Test Victim Empowerment Approaches*, 25 *CRIM. JUST. & BEHAV.* 306, 312 (1998).

85. *See id.* at 313.

86. Compare Robert C. Davis et al., *The Deterrent Effect of Prosecuting Domestic Violence Misdemeanors*, 44 *CRIME & DELINQ.* 434, 441 (1998) (reporting that prosecution outcome did not affect the likelihood of recidivism), with Christopher M. Murphy, Peter H. Musser & Kenneth I. Maton, *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism*, 13 *J. FAM. VIOLENCE* 263, 273–77 (1998) (finding that the combined effects of prosecution, probation, and court-ordered counseling were associated with reductions in recidivism), and John Wooldredge & Amy Thistlethwaite, *Reconsidering Domestic Violence Recidivism: Conditioned Effects of Legal Controls by Individual and Aggregate Levels of Stake in Conformity*, 18 *J. QUANTITATIVE CRIMINOLOGY* 45 (2002) (finding that recidivism was more likely in suspects who had no formal charges filed against them and less likely in suspects undergoing counseling or serving probation and/or jail sentences).

87. *See* Davis et al., *supra* note 86; Murphy et al., *supra* note 86; Wooldredge & Thistlethwaite, *supra* note 86. These studies did not examine the difference between no-drop and drop-permitted prosecution because their correlational design did not allow random assignment to either condition, and jurisdictions only allow one policy or the other.

88. Corsilles, *supra* note 79, at 873–74.

89. *Id.* at 875–76.

room visits.<sup>90</sup> Health care providers may be statutorily required to report such domestic violence to the police.<sup>91</sup> Generally, studies show that the majority of women—in some studies, the great majority of women—support screening for domestic violence during hospital visits and mandatory reporting.<sup>92</sup> Women's support varies by whether they have been (or are being) abused.<sup>93</sup> Abused women are typically less likely to support mandatory reporting than non-abused women, with exceptions.<sup>94</sup>

The benefits of such policies include facilitating the prosecution of abusers and encouraging health care personnel to identify domestic violence, thereby helping to prevent serious domestic violence assaults and homicides.<sup>95</sup> Medical screening could also furnish victims with documentation for future court cases and potential referrals to community resources for education on prevention, safety planning, and options for leaving.<sup>96</sup> Drawbacks include potential retaliatory

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90. Andrea Carlson Gielen et al., *Women's Opinions About Domestic Violence Screening and Mandatory Reporting*, 19 AM. J. PREVENTIVE MED. 279, 279 (2000); see also Michael C. Wadman & Robert L. Muelleman, *Domestic Violence Homicides: ED Use Before Victimization*, 17 AM. J. EMERGENCY MED. 689, 689-90 (1999) (noting that 44% of domestic violence homicide victims over five years in Kansas City, Missouri had presented to an emergency room within two years of their deaths, suggesting that emergency room visits could be used to screen for domestic violence and prevent domestic violence homicide).

91. Gielen et al., *supra* note 90, at 279 (noting that six states in 2000 had mandated that health care personnel report domestic violence to the criminal justice system).

92. See, e.g., Nancy Glass et al., *Intimate Partner Violence Screening and Intervention: Data from Eleven Pennsylvania and California Community Hospital Emergency Departments*, 27 J. EMERGENCY NURSING 141, 147 (2001) (reporting that, in a very large eleven-site study with 4,641 survey participants, 76%-90% of women supported health care providers reporting domestic violence to the police); Jean Ramsay et al., *Should Health Professionals Screen Women for Domestic Violence? Systematic Review*, 325 BRIT. MED. J. 1, 7-8 (2002) (noting that 43%-85% of women in four surveys supported medical screening, but two-thirds of physicians and nearly half of emergency room nurses did not support screening); Michael A. Rodríguez, et al., *Mandatory Reporting of Domestic Violence Injuries to the Police*, 286 JAMA 580, 581 (2001) (finding that about 70% of all women supported mandatory medical reporting); see also Gielen et al., *supra* note 90, at 279 (reporting that 48% of participants believed medical professionals should routinely screen all women for abuse at all visits). Gendered nouns are used consistent with the studies cited.

93. See Rodríguez et al., *supra* note 92, at 580.

94. Compare Glass et al., *supra* note 92, at 145 (90% of non-abused women supported mandatory reporting while 76%-82% of abused women supported mandatory reporting), and Rodríguez et al., *supra* note 92, at 580 (70.7% of non-abused women supported mandatory reporting while 55.7% of abused women supported mandatory reporting), with Gielen et al., *supra* note 90, at 283 (42% of non-abused women versus 54% of abused women). Notably, subjects in the Gielen study were surveyed by phone, not at emergency rooms as in the other studies.

95. See Rodríguez et al., *supra* note 92, at 580.

96. Gielen et al., *supra* note 90, at 279.

violence by perpetrators, reducing patients' autonomy, and compromising doctor-patient confidentiality.<sup>97</sup>

#### 4. *GPS monitoring*

Many states have statutes allowing judges to order that the defendant be monitored by a global positioning system (GPS) as a condition of bail, and a majority of states either have passed, or are considering, statutes that require pre-trial GPS monitoring in cases of domestic violence.<sup>98</sup> Use of a GPS device is often limited to cases in which the defendant has violated a protection order, committed a crime of domestic violence, or has been deemed "high-risk."<sup>99</sup> Defendants may be statutorily required to pay the cost of GPS monitoring, estimated at around ten dollars per day.<sup>100</sup> Also, GPS systems can be designed to only transmit information about the defendant's location when a protective order violation has taken place, thereby mitigating Fourth Amendment privacy concerns.<sup>101</sup> GPS monitoring is often "bilateral," monitoring both offenders and their victims in order to ensure victim safety.<sup>102</sup> Research shows that GPS monitor-

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97. Rodríguez et al., *supra* note 92, at 580.

98. Edna Erez et al., *Using GPS in Domestic Violence Cases: Lessons from a Study of Pretrial Programs*, 25 J. OFFENDER MONITORING 5, 5 (2013); see, e.g., 725 ILL. COMP. STAT. 5/110-5(f) (2006) amended by 2014 Ill. Laws 98-1012 (H.B. 3744) ("[T]he court may order that the person, as a condition of bail, be placed under electronic surveillance . . ."); IND. CODE § 35-33-8-11 (2012) ("A court may require a person who has been charged with a crime of domestic violence . . . to wear a GPS tracking device as a condition of bail."); KY. REV. STAT. ANN. § 431.517 (West Supp. 2014) ("A court ordering home incarceration as a form of pretrial release pursuant to this section may order the defendant to participate in a global positioning monitoring system program during all or part of the time of pretrial release . . .").

99. Nicole R. Bissonnette, *Domestic Violence and Enforcement of Protection from Abuse Orders: Simple Fixes to Help Prevent Intra-Family Homicide*, 65 ME. L. REV. 285, 313 (2012).

100. *Id.* at 314 (citing the cost of monitoring); see, e.g., MICH. COMP. LAWS § 765.6b (2013) ("A defendant described in this subsection shall only be released under this section if he or she agrees to pay the cost of the device and any monitoring as a condition of release or to perform community service work in lieu of paying that cost.").

101. Leah Satine, *Maximal Safety, Minimal Intrusion: Monitoring Civil Protective Orders Without Implicating Privacy*, 43 HARV. C.R.-C.L. L. REV. 267, 268-70 (2008) (noting that one of two methodologies may be used: (1) reverse tagging, in which the abuser wears the signal receiving component of the GPS device and the monitoring device is placed with the victim; and (2) filtering, in which the monitor is programmed to accept only coordinates that correspond to the areas geographically limited by the protective order).

102. See Edna Erez & Peter R. Ibarra, *Making Your Home a Shelter: Electronic Monitoring and Victim Re-entry in Domestic Violence Cases*, 47 BRIT. J. CRIMINOLOGY 100, 102 (2007).

As with a 'home detention' system, the abuser is equipped with a tamper-resistant, ankle-worn transmitter. A receiver in the abuser's residence confirms his presence during curfew hours. A receiver in the victim's home detects the presence of an abuser when he enters a radius of up to 500 feet around her residence. Radius penetration of a victim's home perimeter results in an immediate call to the police from

ing is effective at reducing offenders' likelihood of reoffending, both in the short and long term.<sup>103</sup> GPS monitoring has been lauded for allowing victims to re-enter society by enabling them to remain in their homes instead of relocating to shelters and to perform daily tasks without fear due to mobile monitoring.<sup>104</sup> Potential disadvantages reported by victims include worries of over-dependence on the monitoring, psychological debilitation when the monitors are removed, and fear caused by false alarms.<sup>105</sup>

### 5. *Bail statutes*

Bail statutes can serve as a domestic violence intervention in two main ways: the defendant may be released on conditional bail, or the bail statute may authorize pretrial detention (denial of bail). The legal system has not widely considered denial of bail as a source of domestic violence intervention, but this approach covers a potentially lethal gap in the coverage left by other interventions. A domestic violence offender may be arrested and prosecuted, but in the meantime he or she may be set free to seek out and attack the victim; to "finish[] the job," as Jennifer Martel's mother said.<sup>106</sup> Conditional

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the monitoring facility and an alert to the victim. Receivers are ordinarily monitored 24/7 by a monitoring facility via normal phone lines. In addition, the victim may be given a duress pendant and/or a cellular phone pre-programmed to notify authorities. The victim may also carry a field-monitoring device to alert her to the approach of the anklet-wearer while she is away from her home receiver.

*Id.* at 102 n.6.

103. See EDNA EREZ ET AL., GPS MONITORING TECHNOLOGIES AND DOMESTIC VIOLENCE: AN EVALUATION STUDY 127-38 (2012) (noting that in the short term, defendants had "practically no contact attempts" with the victim, and that in the long term, over a one-year follow up period, defendants who had previously been under GPS monitoring had a lower likelihood of rearrest for a domestic violence offense than defendants who had not been under GPS monitoring); Edna Erez, Peter R. Ibarra & Norman A. Lurie, *Electronic Monitoring of Domestic Violence Cases: A Study of Two Bilateral Programs*, 68 FED. PROBATION 15, 18 (2004); Kathy G. Padgett et al., *Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring*, 5 CRIMINOLOGY & PUB. POL'Y 61, 61 (2006) (reporting that, in a study of 75,661 serious offenders—not solely domestic violence offenders—in Florida from 1998-2002, GPS monitoring significantly reduced offenders' likelihood of reoffending).

104. See Erez & Ibarra, *supra* note 102, at 100. A victim in this study stated,

In my home I feel safe; all five of us are very fine. And we, it's almost like—whoa, he's not coming. I'm not worried. I can open my bedroom window and not worry. I like that. He broke in through that way before. He broke in the back door. He broke in through my garage . . . He broke in both my windows . . . But ever since [GPS monitoring], he's really just stayed away.

*Id.* at 109. See *supra* note 102 for a description of mobile monitoring.

105. Erez et al., *supra* note 103, at 18 (noting that false alarms could be caused by power outages or the monitoring center's mandated notification when the defendant had not arrived home by curfew).

106. Abel et al., *supra* note 5.

bail does not rectify this danger because a determined defendant will not be deterred by mere judicial stipulations that he or she should stay away from the victim.<sup>107</sup> Assaults and intimate partner homicides that take place while a defendant is under a protection order illustrate this grim reality.<sup>108</sup> Protective orders have been shown to reduce the risk of violence but do not eliminate it by any means, and can sometimes spur retaliatory violence.<sup>109</sup>

Bail statutes that authorize denial of bail or pretrial detention could prevent such tragedies, and such statutes carry congressional and Supreme Court approval. Denial of bail on the basis of future dangerousness was enabled in the federal system by the Bail Reform Act of 1984: "If, after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial."<sup>110</sup> The statute requires a clear and convincing standard of proof to hold a defendant on the basis of future dangerousness.<sup>111</sup> A detention hearing must be held in a case involving certain offenses.<sup>112</sup> Such offenses include: crimes of violence that carry a maximum sentence of life imprisonment or death, controlled substance offenses for which the maximum term of im-

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107. See GUZIK, *supra* note 55, at 23 (describing an incident of a husband killing his wife despite a restraining order and numerous calls made by the wife to police regarding her husband's violation of a restraining order).

108. See Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate Partner Homicide*, 37 *LAW & SOC'Y REV.* 169, 194 (2003) (reporting that prosecutorial willingness to take cases of protection order violations was associated with increased homicides of married and unmarried white females); J. Reid Meloy et al., *Domestic Protection Orders and the Prediction of Subsequent Criminality and Violence Toward Protectees*, 34 *PSYCHOTHERAPY* 447, 454 (1997) (noting that 27% of victims who had taken out a protection order were violently assaulted after issuance); Morton et al., *supra* note 43, at 91 (reporting that nearly half of their sample of female homicide victims had sought protection from the perpetrator prior to the homicide).

109. See Victoria L. Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 *JAMA* 589, 589 (2002) (noting that permanent protection orders were associated with a significant decrease in reported violence against women, but that temporary protection orders were not); Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 *AM. J. PUB. HEALTH* 613, 616 (2004) (reporting that women who applied for a two-year protective order experienced lower levels of violence, but 44% of women granted a two-year protection order reported at least one violation over eighteen months); Meloy et al., *supra* note 108, at 447 (noting that mutual protection orders—issued to both parties—were related to decreased risk of rearrest due to domestic violence but that non-mutual protective orders—issued only to the offending party—increased the probability of rearrest due to domestic violence).

110. 18 U.S.C. § 3142(e) (2012).

111. *Id.* § 3142(b).

112. *Id.* § 3142(f).

prisonment is ten years or more, a felony if the defendant has been convicted of two or more of the preceding offenses, or any felony involving a minor victim or possession of a dangerous weapon.<sup>113</sup> The First, Third, and Fifth Circuits have determined that defendants may not be detained unless their charges fit one of the above four categories.<sup>114</sup> However, since most domestic violence cases are brought at the state, not federal, level, these policies are not dispositive. Therefore, the Bail Reform Act of 1984 serves to open the door to pretrial detention based on future dangerousness in the context of domestic violence.<sup>115</sup>

The Bail Reform Act of 1984 followed the Bail Reform Act of 1966, which attempted to restrict “needless[] . . . det[ention]” of defendants prior to trial.<sup>116</sup> The Bail Reform Act of 1966 even moved “towards eliminating ‘bail’ from the glossary of criminal procedure” by creating a “presumption” of non-monetary release before trial.<sup>117</sup> This was followed in 1969 by President Nixon’s exhortation for legislation to “permit ‘temporary pretrial detention’ of criminal defendants whose ‘pretrial release presents a clear danger to the community.’”<sup>118</sup>

The denial of bail potentially implicates three main constitutional issues: violation of the Eighth Amendment, violation of the presumption of innocence, and violation of due process.<sup>119</sup> The Eighth Amendment guarantees that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>120</sup> The presumption of innocence has been held to follow from the Fifth, Sixth, and Fourteenth Amendments.<sup>121</sup> The right to due process guarantees that “no person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>122</sup>

The United States Supreme Court considered the constitutionality of committing defendants to pretrial detention on the basis of future dangerousness under the Bail Reform Act of 1984 in *United States v.*

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113. *Id.* § 3142(f)(1).

114. FED. JUDICIAL CTR., THE BAIL REFORM ACT OF 1984, at 12 (2d ed. 1993).

115. *See id.*

116. Patricia M. Wald & Daniel J. Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A. J. 940, 940 (1966).

117. *Id.*

118. John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1223 (1969).

119. *Id.* at 1223–24.

120. U.S. CONST. amend. VIII.

121. *See In re Winship*, 397 U.S. 358, 360 (1970); *Coffin v. United States*, 156 U.S. 432, 454 (1895).

122. U.S. CONST. amend. V; *see* U.S. CONST. amend. XIV, § 1.

*Salerno*.<sup>123</sup> The Court determined that the Bail Reform Act was constitutional.<sup>124</sup> In an opinion written by Chief Justice Rehnquist, the Court held that the Bail Reform Act did not violate substantive or procedural due process, did not constitute “impermissible punishment before trial,” and did not violate the Eighth Amendment.<sup>125</sup> The Act did not violate the right to due process because it had a “legitimate and compelling . . . purpose” to prevent danger and offered procedural protections.<sup>126</sup> Procedural protections included reserving detention for serious crimes, ensuring a prompt hearing, and limiting the length of detention.<sup>127</sup> The Court considered the Act stringent enough to overcome the argument that it could lead to unjust incapacitation of those “merely suspected” of committing crimes because it required not only a finding of probable cause to believe the crime had been committed by the defendant, but also a “full-blown adversary hearing” with a clear and convincing evidentiary standard before the defendant could be detained.<sup>128</sup>

The Court also indicated that pretrial detention did not violate the Eighth Amendment’s ban on “cruel and unusual punishments” because it was not conceived by Congress as a punishment for dangerous individuals, but as a “potential solution to a pressing societal problem.”<sup>129</sup> The Bail Reform Act’s goal was therefore not punitive but regulatory, and “preventing danger to the community is a legitimate regulatory goal.”<sup>130</sup> The Court backed this reasoning with precedents in which it had “repeatedly” held that such a regulatory interest in safety may outweigh an individual’s liberty interest.<sup>131</sup> Therefore, the Supreme Court found pretrial detention of dangerous individuals constitutionally justified, a decision substantiated by a long line of precedents.<sup>132</sup>

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123. 481 U.S. 739 (1987).

124. *Id.* at 746.

125. *Id.*

126. *Id.* at 752.

127. *Id.* at 747.

128. *Id.* at 750.

129. *Id.* at 747; *see also* U.S. CONST. amend. VIII.

130. *Salerno*, 481 U.S. at 747 (citing *Schall v. Martin*, 467 U.S. 253, 269 (1984)).

131. *Id.* at 748–49 (citing *Ludecke v. Watkins*, 335 U.S. 160 (1948), in reference to detaining enemy aliens in wartime; *Moyer v. Peabody*, 212 U.S. 78, 84–85 (1909), in reference to detaining individuals in times of insurrection; *Carlson v. Landon*, 342 U.S. 524, 537–42 (1952) and *Wong Wing v. United States*, 163 U.S. 228 (1896), in reference to detaining dangerous aliens prior to deportation; *Addington v. Texas*, 441 U.S. 418 (1979), in reference to detaining dangerous mentally unstable individuals; and *Jackson v. Indiana*, 406 U.S. 715, 731–39 (1972) and *Greenwood v. United States*, 350 U.S. 366, (1956), in reference to detaining dangerous individuals who become incompetent to stand trial).

132. *Id.*

The Supreme Court of Massachusetts, one of the only states with a specific pretrial detention statute for domestic violence offenders, considered the constitutionality of this procedure in reference to domestic violence in *Mendonza v. Commonwealth* and *Commonwealth v. Callender*.<sup>133</sup> Mendonza, while being served by police with a protection order obtained by his wife which would require him to move out of the family home, barricaded himself in the bedroom with gasoline and threatened to burn the house down.<sup>134</sup> Callender was arrested for banging on the door of an apartment he was forbidden to visit, while on probation for three violations of protective orders.<sup>135</sup> In both cases, the Commonwealth moved for a dangerousness hearing.<sup>136</sup> The Supreme Court of Massachusetts determined that pretrial detention on the grounds of dangerousness for domestic violence offenses did not offend substantive due process rights or equal protection, following the precedent and reasoning of *Salerno*.<sup>137</sup> The court observed that “[t]he Federal statute followed extensive legislative fact-finding that tended to show that a surprising number of crimes are committed by persons awaiting trial.”<sup>138</sup> The court further noted that the lengthy periods of time between arrest and conclusion of a trial demonstrate the need for some preliminary means for the government to “incapacitat[e] persons who pose a particular danger to the public.”<sup>139</sup> The necessity for probable cause to believe the person had committed a serious crime and the conclusion of the trial as an “inevitable end point to the State’s preventive

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133. 673 N.E.2d 22 (Mass. 1996) (both cases are combined in one opinion). Due to the rarity of pretrial detention of more than a few days for domestic violence offenses, no other cases that specifically consider the constitutionality of this intervention have been found. *See also* *State v. Jones*, 130 So. 3d 1 (La. Ct. App. 2013) (holding that pretrial detention for domestic violence does not trigger the attachment of jeopardy, but “pretrial detention” in this case only constituted holding the defendant for six hours); *State v. Malette*, 509 S.E.2d 776 (N.C. 1999) (holding that North Carolina’s statute on bail and pretrial release for individuals accused of domestic violence offenses was constitutional as applied to the defendant (North Carolina does not have a policy of pretrial detention as considered herein, but allows holding a defendant for up to forty-eight hours pending a bail hearing)); *State v. Thompson*, 508 S.E.2d 277 (N.C. 1998) (holding that North Carolina’s statute allowing a domestic violence offender to be held for up to forty-eight hours did not facially violate substantive due process, procedural due process, or double jeopardy, but that the statute as applied to the defendant violated procedural due process because the magistrate scheduled the bail hearing for forty-eight hours after the defendant’s commitment even though there were judges available earlier).

134. *Mendonza*, 673 N.E.2d at 26.

135. *Id.*

136. *Id.*

137. *Id.* at 29; *see supra* notes 123–32 and accompanying text.

138. *Mendonza*, 673 N.E.2d at 29; *see infra* notes 170–71 and accompanying text.

139. *Mendonza*, 673 N.E.2d at 29; *see infra* note 169 and accompanying text.

authority” provide protections for the defendant.<sup>140</sup> Therefore, the United States Supreme Court and the Supreme Court of Massachusetts have given their imprimatur to pretrial detention on the basis of future dangerousness and pretrial detention for domestic violence offenders on the basis of future dangerousness respectively.<sup>141</sup>

#### a. Bail statutes for domestic violence offenses nationwide

Bail statutes vary widely across the United States. Some states have a specific provision or provisions for bail in domestic violence (or “family violence”) cases, and some do not. States with a specific domestic violence provision fall into three categories. In the first and most common type, there is a presumption of conditional bail (not pretrial detention), and the defendant is required to go before a judge or magistrate.<sup>142</sup> Conditions of bail may include: avoiding the alleged victim’s home, school, and place of employment; visitation limitations with any children; refraining from damaging specifically identified property and from assaulting the alleged victim; abstaining from consumption of alcohol; and even GPS monitoring.<sup>143</sup> Twenty-two states have provisions of this nature.<sup>144</sup> Provisions in four of these states suggest bail denial or revocation for repeat do-

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140. *Mendonza*, 673 N.E.2d at 29.

141. *See* *United States v. Salerno*, 481 U.S. 739, 748 (1987); *Mendonza*, 673 N.E.2d at 31.

142. *See, e.g.*, ALA. CODE § 15-13-190 (2011).

143. *See, e.g., id.*

144. **Alabama**, ALA. CODE § 15-13-190 (2011); **Alaska**, ALASKA STAT. § 12.30.011 (2014); ALASKA STAT. § 12.30.027 (2014); **Georgia**, GA. CODE ANN. § 17-6-1 (West 2014); 9 GA. CRIM. P. § 7:10; **Idaho**, IDAHO CODE ANN. § 19-2903 (West 2014); IDAHO MISD. CRIM. R. 13 (amended 2014); **Illinois**, 725 ILL. COMP. STAT. 5/110-5 (2014), *amended by* 2014 Ill. Laws 98-1012 (H.B. 3744); 725 ILL. COMP. STAT. 5/110-5.1 (2013); **Indiana**, IND. CODE § 35-33-8-4 (2012); IND. CODE § 35-33-8-6.5 (2012); IND. CODE ANN. § 35-33-8-11 (West 2012); **Kentucky**, KY. REV. STAT. ANN. § 67.372 (West Supp. 2014); KY. REV. STAT. ANN. § 403.750 (West Supp. 2014); KY. REV. STAT. ANN. § 431.064 (West Supp. 2014); KY. REV. STAT. ANN. § 431.517 (West Supp. 2014); **Maryland**, MD. CODE ANN., CRIM. PROC. § 5-202 (West 2011 & Supp. 2014); MD. R. CRIM. P. 4-216; **Michigan**, MICH. COMP. LAWS § 765.6b (2000); MICH. COMP. LAWS § 780.582a (2007); **Minnesota**, MINN. STAT. § 629.72 (2009); **Mississippi**, MISS. CODE ANN. § 99-5-37 (West 2006); MISS. CODE ANN. § 99-5-38 (West 2006); **Montana**, MONT. CODE ANN. § 46-9-302 (West 2009); **New Jersey**, N.J. STAT. ANN. § 2A:162-12 (West Supp. 2014); N.J. STAT. ANN. § 2C:25-26 (West Supp. 2014); **New York**, N.Y. CRIM. PROC. LAW § 530.12 (McKinney Supp. 2014); **North Carolina**, N.C. GEN. STAT. § 15A-534.1 (2009); **North Dakota**, N.D. CENT. CODE § 14-07.1-10 (2008); N.D. R. CRIM. P. 46; **Ohio**, OHIO REV. CODE ANN. § 2919.251 (West 2006); OHIO REV. CODE ANN. § 2937.23 (West 2006); **Oklahoma**, OKLA. STAT. tit. 22, § 1101 (2011); OKLA. STAT. tit. 22, § 1105 (2011); **Oregon**, OR. REV. STAT. § 135.245 (2003); OR. REV. STAT. § 135.247 (2013); OR. REV. STAT. § 135.250 (2003); **Tennessee**, TENN. CODE ANN. § 40-11-150 (West 2008); **Texas**, TEX. CRIM. PROC. CODE ANN. art. 17.152 (West 2014); **Virginia**, VA. CODE ANN. § 18.2-57.2 (West 2012); VA. CODE ANN. § 19.2-120 (West 2007).

mestic violence offenders or for violations of conditions of protective orders or bail.<sup>145</sup>

In the second type of domestic violence bail provision, however, the statute explicitly suggests pretrial detention (denial of bail) for domestic violence offenses without reference to repeat offenses.<sup>146</sup> Five states have provisions of this nature.<sup>147</sup> Some of these provisions list various serious offenses that may qualify for denial of bail and include domestic violence among the list,<sup>148</sup> while others, including Massachusetts and New Hampshire, have several statutes or even chapters devoted to bail for domestic violence offenses alone.<sup>149</sup> Part III of this Note will discuss Massachusetts's and New Hampshire's statutes as a model for a system permitting pretrial detention for domestic violence offenses.<sup>150</sup>

In the third type of domestic violence bail provision, the defendant need not go before a judge or can avoid it if certain conditions are met, and denial of bail is not mentioned.<sup>151</sup> Seven states have provisions of this nature.<sup>152</sup> In California, for example, the defendant need not go before a judge if the "arresting officer determines that there is not a reasonable likelihood that the offense will continue."<sup>153</sup> This statute directs each city and county to "develop a protocol to

145. **Maryland**, MD. CODE ANN., CRIM. PROC. § 5-202 (West 2011 & Supp. 2014); **New York**, N.Y. CRIM. PROC. LAW § 530.12 (McKinney Supp. 2014); **Texas**, TEX. CRIM. PROC. CODE ANN. art. 17.152 (West 2014); **Virginia**, VA. CODE ANN. § 19.2-120 (West 2007).

146. See, e.g., FLA. STAT. § 907.041 (2001).

147. **Florida**, FLA. STAT. § 741.28 (2010); FLA. STAT. § 907.041 (2001); FLA. R. CRIM. P. 3.131; **Maine**, ME. REV. STAT. tit. 15, § 1023 (2003 & Supp. 2014); ME. REV. STAT. tit. 15, § 1097 (2003 & Supp. 2014); **Massachusetts**, MASS. GEN. LAWS ch. 276, § 58A (Supp. 2014); MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS §§ 8:04, 8:05, 8:06, 8:07, 8:08 (2014); **New Hampshire**, N.H. REV. STAT. ANN. § 597:2 (Supp. 2014); N.H. DOMESTIC VIOLENCE PROTOCOLS §§ 12-3, 12-4, 12-5, 12-6 (2014); **Utah**, UTAH CODE ANN. § 77-36-2.5 (West Supp. 2014).

148. **Florida**, FLA. STAT. § 907.041 (2001).

149. **Maine**, ME. REV. STAT. tit. 15, § 1023 (2003 & Supp. 2014); ME. REV. STAT. tit. 15, § 1097 (2003 & Supp. 2014); **Massachusetts**, MASS. GEN. LAWS ch. 276, § 58A (Supp. 2014); MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS §§ 8:04, 8:05, 8:06, 8:07, 8:08; **New Hampshire**, N.H. REV. STAT. ANN. § 597:2 (Supp. 2014); N.H. DOMESTIC VIOLENCE PROTOCOLS §§ 12-3, 12-4, 12-5, 12-6.

150. See *infra* Part III.

151. See, e.g., CAL. PENAL CODE § 1269c (West 2012).

152. **California**, CAL. PENAL CODE § 853.6 (West 2012); CAL. PENAL CODE § 1269c (West 2012); CAL. PENAL CODE § 1270.1 (West 2012); CAL. PENAL CODE § 1275 (West 2012); **Connecticut**, CONN. GEN. STAT. § 54-53 (2009); CONN. GEN. STAT. § 54-63c (2009); **Louisiana**, LA. REV. STAT. ANN. § 46:2143 (2010); LA. CODE CRIM. PROC. ANN. art. 330.1 (2003) (allowing pretrial detention, but not specifically mentioning domestic violence offenses); LA. CODE CRIM. PROC. ANN. art. 334 (2003); **Nevada**, NEV. REV. STAT. § 178.484 (2000); **Pennsylvania**, 18 PA. CONS. STAT. § 2711 (2000); PA. R. CRIM. P. 523; **Rhode Island**, R.I. GEN. LAWS § 12-29-4 (2001); **West Virginia**, W. VA. CODE § 62-1C-1 (2002); W. VA. CODE § 62-1C-17c (2002).

153. CAL. PENAL CODE § 853.6 (West 2012).

assist officers to determine when arrest and release is appropriate.”<sup>154</sup> In these states, the police officer may set bail and impose conditions on release.<sup>155</sup>

States without a specific domestic violence provision for bail follow one of two approaches. In the first, denial of bail is not mentioned and the defendant is often not required to go before a judge.<sup>156</sup> Bail may be assigned by a law enforcement officer or bail commissioner based upon a bail schedule stipulating monetary amounts for different offenses.<sup>157</sup> If the defendant must go before a judge, the judge has discretion to set conditions of the release that will ensure the defendant’s appearance in court.<sup>158</sup> Nine states have provisions of this nature.<sup>159</sup>

In the second approach, statutes provide for pretrial detention or denial of bail for serious offenses, though domestic violence offenses are not mentioned specifically. Seven states have provisions of this nature.<sup>160</sup> In these states, denial of bail may only be available if serious aggravating factors are present.<sup>161</sup> In states where pretrial deten-

154. *Id.*

155. *See, e.g., id.*

156. *See, e.g.,* ARK. CODE ANN. § 16-81-109 (2013).

157. *See id.* (authorizing the arresting officer to approve bail in the manner prescribed by law where the arrest is made).

158. *See, e.g.,* NEB. REV. STAT. § 29-901.01 (2009).

159. **Arkansas**, ARK. CODE ANN. § 16-81-109 (2013); **Delaware**, DEL. CODE ANN. tit. 11, § 2104 (West 2010); **Kansas**, KAN. STAT. ANN. § 22-2802 (West 2008); **Nebraska**, NEB. REV. STAT. § 29-901 (2009); **New Mexico**, N.M. STAT. ANN. § 31-4-16 (2013); N.M. R. DIST. CT. R.C.R.P. 5-401; **South Carolina**, S.C. CODE ANN. § 17-15-10 (2014); S.C. CODE ANN. § 18-1-90 (2014); **South Dakota**, S.D. CODIFIED LAWS § 23A-43-4 (2004); **Washington**, WA. ST. SUPER. CT. CR. R. 3.2; **Wyoming**, WYO. STAT. ANN. § 5-9-132 (2007); WYO. STAT. ANN. § 7-10-101 (2007).

160. **Arizona**, ARIZ. CONST. art. II, § 22; ARIZ. REV. STAT. ANN. § 13-3961 (Supp. 2014) (West); ARIZ. REV. STAT. ANN. § 13-3967 (West 2010); **Colorado**, COLO. CONST. art. II, § 19; COLO. REV. STAT. § 16-4-101 (2006); COLO. REV. STAT. § 16-4-105 (2006); COLO. REV. STAT. § 16-1-104 (2006); **Hawaii**, HAW. REV. STAT. § 709-906 (2008); HAW. REV. STAT. § 804-3 (2008); **Iowa**, IOWA CODE § 702.11 (2003); IOWA CODE § 708.2A (2003); IOWA CODE § 811.1 (2003); IOWA CODE § 811.1A (2013); **Missouri**, MO. REV. STAT. § 544.455 (2002); MO. REV. STAT. § 544.457 (2002); **Vermont**, VT. STAT. ANN. tit. 13, § 1043 (2007) (first-degree aggravated domestic assault is considered a “violent act” for the purposes of bail); VT. STAT. ANN. tit. 13, § 7553A (2007); VT. STAT. ANN. tit. 13, § 7575 (2007); **Wisconsin**, WIS. STAT. § 968.075 (2007); WIS. STAT. § 969.035 (2007).

161. *Compare Arizona*, ARIZ. CONST. art. II, § 22; ARIZ. REV. STAT. ANN. § 13-3967 (Supp. 2014), *and Colorado*, COLO. REV. STAT. § 16-4-101 (2006) (where bail may be denied if the defendant committed the “crime of violence” while on probation or parole or on bail for a previous crime of violence charge, after previous felony convictions, et cetera), *with Hawaii*, HAW. REV. STAT. § 709-906 (2008); HAW. REV. STAT. § 804-3 (2008), *and Missouri*, MO. REV. STAT. § 544.455 (2002); MO. REV. STAT. § 544.457 (2002) (where bail may be denied if the defendant poses a danger to any person or the community), *and Iowa*, IOWA CODE § 702.11 (2003); IOWA CODE § 708.2A (2003); IOWA CODE § 811.1 (2003); IOWA CODE § 811.1A (2013), *and Wisconsin*,

tion for serious offenses is possible but its application to domestic violence offenses is not statutorily authorized, judges may be unlikely to extend the statute to domestic violence cases. However, such statutes may serve as the foundation for extension to domestic violence offenses.

In total, nine states reference denial of bail for domestic violence offenses, either initially or after repeat offenses.<sup>162</sup>

## II. BAIL STATUTES ARE A CRITICAL FOCAL POINT FOR DOMESTIC VIOLENCE INTERVENTIONS

An analysis of the practical utility of pretrial detention in deterring domestic violence is complicated by the fact that there is no empirical research on this topic given the rarity of pretrial detention statutes for domestic violence offenders.<sup>163</sup> However, the importance of this intervention can be imputed from existing research on mandatory arrest and no-drop prosecution policies and the danger of assault following victims' attempted separation from their abusers.<sup>164</sup>

### *A. The Effects of Mandatory Arrest Policies and No-Drop Prosecution Extended to Pretrial Detention*

As discussed in Part I, research on violence recidivism rates following use of mandatory arrest or no-drop prosecution is promising, if qualified.<sup>165</sup> Contrary to concerns that violence could increase following mandatory state intervention, violence tended to decrease.<sup>166</sup> This result may be extended to pretrial detention in that reducing the defendant's exposure to the victim reduces violence.<sup>167</sup>

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WIS. STAT. § 968.075 (2007); WIS. STAT. § 969.035 (2007) (where bail may be denied for certain forcible felonies and "violent crimes").

162. Florida, Massachusetts, Maine, New Hampshire, and Utah allow pretrial detention for domestic violence offenses without reference to repeat offenses. *See supra* notes 146–49 and accompanying text. Maryland, New York, Texas, and Virginia allow pretrial detention for domestic violence offenses after repeat offenses. *See supra* note 145 and accompanying text.

163. *See supra* text accompanying notes 66–67 for an explanation of the difficulty in conducting empirical research on statutory domestic violence interventions.

164. *See* FORD & REGOLI, *supra* note 82; Sherman & Berk, *supra* note 68; *see generally supra* notes 68–74, 82–87 and accompanying text and *infra* notes 172–79 and accompanying text (providing an overview of the studies determining the efficacy of both mandatory arrest policies and no-drop prosecution in reducing recidivism, as well as studies confirming increased rates of violence upon separation of women from their abusive partners).

165. *See* FORD & REGOLI, *supra* note 82; Sherman & Berk, *supra* note 68; *see supra* notes 68–74, 82–87 and accompanying text.

166. *See, e.g.,* Sherman & Berk, *supra* note 68.

167. *See* Dugan et al., *supra* note 42, at 191–95; Dugan et al., *supra* note 108, at 193–95.

However, as noted, mandatory arrest and prosecution policies may spur retaliatory effects.<sup>168</sup> In this regard, pretrial detention would carry the additional benefit of physically preventing a domestic violence offender from accessing his or her intended victim. Empirical research is required to determine whether pretrial detention could spur a retaliatory effect upon the defendant's release for reasons distinct from mandatory arrest or no-drop prosecution policies, but small sample sizes may impede such research.

*B. Pivotal Juncture Covered by Bail Statutes: Recognition of the Phenomenon of Separation Assault*

Pretrial detention also covers a critical gap left by mandatory arrest and no-drop prosecution policies: the period between arrest and disposition, which is often lengthy.<sup>169</sup> As observed by the Court in *Salerno*, the risk of offenders committing dangerous acts post-arrest and pre-sentencing is high, as determined by congressional findings.<sup>170</sup> These findings indicated that anywhere from one in six to one in four defendants were rearrested during the pretrial period, a third of whom were rearrested more than once.<sup>171</sup>

This risk is particularly relevant to domestic violence offenses, in which research has consistently shown that the period of separation from one's abuser is the most dangerous.<sup>172</sup> The need for pretrial de-

168. See *supra* text accompanying notes 72-73, 77.

169. See Yair Listokin, *Crime and (with a Lag) Punishment: The Implications of Discounting for Equitable Sentencing*, 44 AM. CRIM. L. REV. 115, 121 (2007) (reporting the lag between arrest and disposition in sixteen cities at an average of 126 days).

170. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

171. S. REP. NO. 98-225, at 6 (1984) reprinted in 1984 U.S.C.C.A.N. 3182, 3189 (citing LAZAR INST., PRETRIAL RELEASE: AN EVALUATION OF DEFENDANT OUTCOMES AND PROGRAM IMPACT 48 (1981) and JEFFREY A. ROTH & PAUL B. WICE, INST. FOR LAW & SOC. RESEARCH, PRETRIAL RELEASE AND MISCONDUCT IN THE DISTRICT OF COLUMBIA 41 (1980)):

In a recent study of release practices in eight jurisdictions, approximately one out of every six defendants in the sample studied were rearrested during the pretrial period—one-third of these defendants were rearrested more than once, and some were rearrested as many as four times. Similar levels of pretrial criminality were reported in a study of release practices in the District of Columbia, where thirteen percent of all felony defendants released were rearrested. Among defendants released on surety bond, which under the District of Columbia code, like the Bail Reform Act, is the form of release reserved for those defendants who are the most serious bail risks, pretrial rearrest occurred at the alarming rate of twenty-five percent. The disturbing rate of recidivism among released defendants requires the law to recognize that the danger a defendant may pose to others should receive at least as much consideration in the pretrial release determination as the likelihood that he will not appear for trial.

*Id.*

172. See, e.g., George W. Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCH. LAW 271 (1982); Walter S. DeKeseredy et al., *Separation/Divorce Sexual*

attention may commonly arise in such circumstances, when the victim is attempting to leave his or her abuser, as Jennifer Martel was—according to her family—attempting to leave Jared Remy when she was murdered.<sup>173</sup> Martha Mahoney famously termed this danger “separation assault”: “[a]t the moment of separation or attempted separation—for many women, the first encounter with the authority of law—the *batterer’s quest for control* often becomes most acutely violent and potentially lethal.”<sup>174</sup> Mahoney and domestic violence research characterize “the batterer’s quest for control of the woman . . . as the heart of the battering process.”<sup>175</sup> Hence, when the victim begins to attempt to reassert control by leaving the abuser, she or he is at an increased risk of violence. Many studies confirm “increased rates of violence, particularly lethal violence upon perceived, attempted, or actual separation of women from their abusive partners.”<sup>176</sup> A woman’s attempt to leave the relationship is the most common precursor to intimate partner homicide.<sup>177</sup> The temporal element is crucial, with the danger of assault most acute immediately after separation and diminishing over time.<sup>178</sup> Post-separation violence is common and severe: “one in four survivors experienced at least one form of severe or potentially lethal violence more than once a month,” such as being “kicked, raped, choked, stabbed, or shot.”<sup>179</sup>

These grim findings highlight crucial areas that can be addressed by pretrial detention: protection during the period of separation from the victim’s abuser and particularly protection immediately

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*Assault: The Current State of Social Scientific Knowledge*, 9 AGGRESSION & VIOLENT BEHAV. 675 (2004); 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, 56 (2000); Aysan Sev’er, *Recent or Imminent Separation and Intimate Violence Against Women: A Conceptual Overview and Some Canadian Examples*, 3 VIOLENCE AGAINST WOMEN 566 (1997); Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE AND VICTIMS 3 (1993).

173. Fraga, *supra* note 1.

174. Mahoney, *supra* note 38, at 5–6 (emphasis added).

175. *Id.* at 5.

176. See, e.g., Mechanic et al., *supra* note 172, at 55.

177. Morton et al., *supra* note 43, at 91 (victim separation from perpetrator was the most common precursor to victim homicide (in 41% of cases), even more common than history of domestic violence (29%)).

178. See Ruth E. Fleury et al., *When Ending the Relationship Does Not End the Violence: Women’s Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363, 1371 (2000) (the majority of first assaults by an ex-partner took place within ten weeks of the woman’s exit from the shelter where she had gone in order to separate from her partner); Meloy et al., *supra* note 108, at 453–54 (58% of post-protective-order arrests for domestic violence occurred within the first six months after issuance of the protective order).

179. Fleury et al., *supra* note 178, at 1371.

upon separation (from the time of the abuser's arrest) when it is most needed. No other intervention can provide this depth of protection at this critical time: other mandatory policies cover only arrest, charging, and prosecution. Protective orders are insufficient; research shows that almost half of abused women experienced a violation of their order of protection within six months.<sup>180</sup> The only other intervention that covers this critical period is GPS monitoring, which can be used in conjunction with a policy of pretrial detention for domestic violence offenses.<sup>181</sup> A judge may determine in less severe cases to resort to electronic monitoring and in others to order pretrial detention, or GPS monitoring may be used once the defendant is released from pretrial detention or incarceration.

Research on separation assault belies past common assumptions that victims who did not leave their abusive mates were masochists who had a "conscious or unconscious need for pain and punishment."<sup>182</sup> Rather, in addition to psychological and sociological factors (learned helplessness, victim blaming, institutional sexism, patriarchal norms), research shows that victims in abusive relationships have a compelling reason not to leave their abusive partners: explicit or implicit and well-founded threats of violence.<sup>183</sup> Bail statute reform has the potential to alter this calculus in the victim's favor by providing protection not found in other domestic violence interventions.

Furthermore, legal interventions have the power to alter sociological conceptions of a crime, as observed by Elizabeth Schneider:

Various forms of legal process define the harm of battering differently and convey particular messages about its social impact . . . . The names that are used define the claims that are made . . . . The meaning of the name matters. Making battering a crime against the state has a broader social and more public meaning than granting an individual order of protection. Defining battering as a civil rights violation reflects a different set of social meanings than an individual ruling. Defining battering in the more general context of stalking, or as a violation of international human rights, conveys a different social message than a restraining order .

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180. Mechanic et al., *supra* note 172, at 67.

181. *See supra* notes 98–105 and accompanying text.

182. Deborah K. Anderson & Daniel G. Saunders, *Leaving an Abusive Partner: An Empirical Review of Predictors, the Process of Leaving, and Psychological Well-Being*, 4 *TRAUMA, VIOLENCE, & ABUSE* 163, 164 (2003).

183. *See, e.g., id.* at 165.

. . . *The development of legal process can shape social consciousness by identifying and redefining harm, breaking down the public-private dichotomy, and legitimizing the seriousness of the problem.*<sup>184</sup>

Mandatory arrest and no-drop prosecution policies have made great strides in converting domestic violence from a private affair in which the state feared to intrude into a public matter of societal concern.<sup>185</sup> The further step of categorizing domestic abuse as a serious offense that may require pretrial detention will push the sociological conception of abuse still further by legitimizing its seriousness as a crime on par with those singled out for pretrial detention.

### III. PROPOSED MODEL AND SUGGESTIONS FOR EXECUTION OF DOMESTIC VIOLENCE INTERVENTION THROUGH PRETRIAL DETENTION STATUTE

#### *A. Massachusetts and New Hampshire as Models*

Massachusetts's and New Hampshire's statutes together may serve as a model for statutory authorization of pretrial detention for domestic violence offenses.<sup>186</sup> New Hampshire clearly designates predicate domestic violence crimes that can qualify a defendant for a detention hearing.<sup>187</sup> Massachusetts establishes in detail the procedures for such a hearing,<sup>188</sup> while New Hampshire details many factors the court may and should consider in such a hearing.<sup>189</sup>

New Hampshire's statute broadly defines predicate domestic violence offenses that may fall under the pretrial detention provision.<sup>190</sup> Massachusetts's standards are more vague: the Commonwealth may seek a detention hearing for a defendant "charged with abuse."<sup>191</sup> A detention hearing is appropriate if prosecutors believe that the defendant's release "will endanger the safety of any other person or

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184. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 46 (2000) (emphasis added).

185. See Siegel, *supra* note 49, at 2118.

186. See MASS. GEN. LAWS ch. 276, § 58A (Supp. 2014); MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS §§ 8:04, 8:05, 8:06, 8:07, 8:08 (2014); N.H. REV. STAT. ANN. § 597:2 (Supp. 2014); N.H. DOMESTIC VIOLENCE PROTOCOLS §§ 12-3, 12-4, 12-5, 12-6 (2014).

187. See N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-5.

188. See MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06.

189. See N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-4.

190. See *id.* § 12-5.

191. MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:04.

the community.”<sup>192</sup> Once the court determines that there is probable cause to believe that the defendant committed the predicate crime, the defendant must be detained until the detention hearing.<sup>193</sup> The defendant has procedural rights at the hearing, including the rights to counsel, to testify, to present witnesses, to cross-examine witnesses, and to present information.<sup>194</sup> If “the judge finds by [a] clear and convincing [evidentiary standard] that no conditions of release will reasonably assure the safety of any other person or the community,” then the defendant must be detained for up to ninety days.<sup>195</sup>

The matter of how to determine whether no conditions will “reasonably assure” the victim’s safety is left unexplained by Massachusetts’s statutes,<sup>196</sup> but New Hampshire attempts to fill this gap with an extensive list of factors that the court may consider.<sup>197</sup>

A combination of elements from both Massachusetts’s and New Hampshire’s statutory provisions can serve as a comprehensive scheme for pretrial detention of domestic violence offenders.<sup>198</sup> New Hampshire’s list of offenses that can qualify as a predicate for a detention hearing is attractively broad yet specific: it encompasses a wide range of offenses, from harassment, criminal threatening, and unauthorized entry to assault and sexual assault, and it also clearly delineates qualifying offenses.<sup>199</sup> This broad scope would give prosecutors wide flexibility to pursue denial of bail for dangerous domestic violence offenders.<sup>200</sup> The specificity of the statute, in listing many offenses rather than merely stating “a defendant charged with abuse,” à la Massachusetts,<sup>201</sup> also encourages prosecutors to consider a detention hearing when they encounter any of the domestic violence offenses enumerated.<sup>202</sup>

Massachusetts’s detailed explication of the procedures of a detention hearing particular to domestic violence offenses would encourage streamlined implementation of such hearings.<sup>203</sup> Several elements of Massachusetts’s approach are noteworthy, apart from the

192. *Id.* at cmt. (citing MASS. GEN. LAWS. ch. 276, § 58A (Supp. 2014)).

193. *See id.* § 8:04.

194. *See* MASS. GEN. LAWS. ch. 276, § 58A.

195. MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06.

196. *Id.* § 8:04.

197. *See* N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-4 (2014); *see also infra* Part III.C § 4.

198. *See infra* Part III.C for model legislation.

199. N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-5.

200. *See id.*

201. MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:04.

202. *See* N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-5.

203. *See* MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06.

rarity of a comprehensive scheme for detention hearings for domestic violence offenders.<sup>204</sup> Massachusetts clarifies the role of the judicial actors in each stage: the Commonwealth must move for a detention hearing, and the judge must find probable cause to proceed.<sup>205</sup> The burden of proof is clear, as is the maximum duration of the defendant's confinement.<sup>206</sup> Additionally, procedural due process protections afforded to the defendant are specified.<sup>207</sup> Finally, New Hampshire completes the model system with a wide-ranging list of risk factors to consider when determining whether to detain the defendant without bail.<sup>208</sup> Combining New Hampshire's list of predicate offenses, Massachusetts's procedural rules, and New Hampshire's risk factors would yield a powerful system for detention hearings for domestic violence offenders.<sup>209</sup>

### *B. Further Changes to Encourage Use of Such Statutes*

Part of the widespread outrage following Jennifer Martel's case is attributable to the fact that her home state of Massachusetts has one of the most robust policies in place that might have prevented her tragic death, as indicated by media focus on Massachusetts's dangerousness hearing policy and the resultant internal investigation in the District Attorney's office.<sup>210</sup> This event draws into sharp relief the critical importance of prosecutorial discretion: the strongest pretrial detention statute in the nation will do nothing to protect victims if prosecutors choose not to resort to it. Therefore, a similar strategy to mandatory prosecution policies could be implemented: prosecutors should be required to request a detention hearing if a certain number of risk factors, as delineated by New Hampshire, are implicated in the case.

Furthermore, statutes may instruct judges to act notwithstanding the prosecutor's decision, as in Massachusetts's directive that "[t]he bail law should be read to require the judge to review the defendant's probation record before any . . . pretrial release decision is made . . . irrespective of the prosecution's recommendations on the

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204. *See id.*

205. *Id.*

206. *See id.*

207. *See id.*

208. N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-4 cmt. (2014).

209. *See infra* Part III.C for model legislation.

210. *See* Wallack & Murphy, *supra* note 32.

question of bail.”<sup>211</sup> Similarly, the model legislation for pretrial detention of domestic violence offenders contains a provision requiring the judge setting bail to consider *sua sponte* whether enough risk factors are met to justify a detention hearing.

### *C. Proposed Model Domestic Violence Pretrial Detention Statute*

The proposed model statute is as follows:

#### **§ 1. In this chapter:**<sup>212</sup>

“Abuse” or “domestic violence” means the commission, or attempted commission, of one or more of the acts described in subparagraphs (a) through (g) by a family or household member or by a current or former sexual or intimate partner, where such conduct is determined to constitute a credible present threat to the petitioner’s safety. The court may consider evidence of such acts, regardless of their proximity in time to the filing of the petition, which, in combination with recent conduct, reflects an ongoing pattern of behavior which reasonably causes or has caused the petitioner to fear for his or her safety or well-being.<sup>213</sup>

(a) Assault or reckless conduct;<sup>214</sup>

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211. MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:04 cmt.

212. Adapted from N.H. REV. STAT. ANN. § 173-B:1 (Supp. 2014).

213. *Id.* § 173-B:1.

214. *Id.* **Includes first-degree assault, second-degree assault, simple assault, and reckless conduct.**

**First-degree assault:** “I. A person is guilty of a class A felony if he: (a) Purposely causes serious bodily injury to another; or (b) Purposely or knowingly causes bodily injury to another by means of a deadly weapon . . . or (c) Purposely or knowingly causes injury to another resulting in miscarriage or stillbirth; or (d) Knowingly or recklessly causes serious bodily injury to a person under 13 years of age.” *Id.* § 631:1.

**Second-degree assault:** “I. A person is guilty of a class B felony if he or she: (a) Knowingly or recklessly causes serious bodily injury to another; or (b) Recklessly causes bodily injury to another by means of a deadly weapon . . . or (c) Recklessly causes bodily injury to another under circumstances manifesting extreme indifference to the value of human life; or (d) Purposely or knowingly causes bodily injury to a child under 13 years of age; or (e) Recklessly or negligently causes injury to another resulting in miscarriage or stillbirth; or (f) Purposely or knowingly engages in the strangulation of another.” *Id.* § 631:2.

**Simple assault:** “I. A person is guilty of simple assault if he: (a) Purposely or knowingly causes bodily injury or unprivileged physical contact to another; or (b) Recklessly causes bodily injury to another; or (c) Negligently causes bodily injury to another by means of a deadly weapon.” *Id.* § 631:2-a.

**Reckless conduct:** “I. A person is guilty of reckless conduct if he recklessly engages in conduct which places or may place another in danger of serious bodily injury.” *Id.* § 631:3.

- (b) Criminal threatening;<sup>215</sup>
- (c) Sexual assault;<sup>216</sup>
- (d) Interference with freedom;<sup>217</sup>

215. *Id.* § 173-B:1.

**Criminal threatening:** "I. A person is guilty of criminal threatening when: (a) By physical conduct, the person purposely places or attempts to place another in fear of imminent bodily injury or physical contact; or (b) The person places any object or graffiti on the property of another with a purpose to coerce or terrorize any person; or (c) The person threatens to commit any crime against the property of another with a purpose to coerce or terrorize any person; or (d) The person threatens to commit any crime against the person of another with a purpose to terrorize any person; or (e) The person threatens to commit any crime of violence, or threatens the delivery or use of a biological or chemical substance, with a purpose to cause evacuation of a building, place of assembly, facility of public transportation or otherwise to cause serious public inconvenience, or in reckless disregard of causing such fear, terror or inconvenience; or (f) The person delivers, threatens to deliver, or causes the delivery of any substance the actor knows could be perceived as a biological or chemical substance, to another person with the purpose of causing fear or terror, or in reckless disregard of causing such fear or terror." *Id.* § 631:4.

216. *Id.* § 173-B:1. **Includes aggravated felonious sexual assault, felonious sexual assault, and sexual assault.**

**Aggravated felonious sexual assault:** "I. A person is guilty of the felony of aggravated felonious sexual assault if such person engages in sexual penetration with another person under any of the following circumstances: (a) When the actor overcomes the victim through the actual application of physical force, physical violence or superior physical strength. (b) When the victim is physically helpless to resist. (c) When the actor coerces the victim to submit by threatening to use physical violence or superior physical strength on the victim, and the victim believes that the actor has the present ability to execute these threats. (d) When the actor coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim believes that the actor has the ability to execute these threats in the future. (e) When the victim submits under circumstances involving false imprisonment, kidnapping or extortion . . ." *Id.* § 632-A:2.

**Felonious sexual assault:** "A person is guilty of a class B felony if such person: I. Subjects a person to sexual contact and causes serious personal injury to the victim under any of the circumstances named in [the statute for aggravated felonious assault] . . ." *Id.* § 632-A:3.

**Sexual assault:** "I. A person is guilty of a class A misdemeanor under any of the following circumstances: (a) When the actor subjects another person who is 13 years of age or older to sexual contact under any of the circumstances named in [the statute for aggravated felonious assault] . . ." *Id.* § 632-A:4.

217. *Id.* § 173-B:1. **Includes kidnapping, criminal restraint, false imprisonment, and stalking.**

**Kidnapping:** "I. A person is guilty of kidnapping if he knowingly confines another under his control with a purpose to: (a) Hold him for ransom or as a hostage; or (b) Avoid apprehension by a law enforcement official; or (c) Terrorize him or some other person; or (d) Commit an offense against him . . ." *Id.* § 633:1.

**Criminal restraint:** "I. A person is guilty . . . if he knowingly confines another unlawfully in circumstances exposing him to risk of serious bodily injury. II. The meaning of 'confines another unlawfully', as used in this section and [the statute for false imprisonment], includes but is not limited to confinement accomplished by force, threat or deception or, in the case of a person who is under the age of 16 or incompetent, if it is accomplished without the consent of his parent or guardian." *Id.* § 633:2.

**False imprisonment:** "A person is guilty of a misdemeanor if he knowingly confines another unlawfully . . . so as to interfere substantially with his physical movement." *Id.* § 633:3.

- (e) Destruction of property;<sup>218</sup>
- (f) Unauthorized entry;<sup>219</sup>
- (g) Harassment.<sup>220</sup>

## § 2. Motion for detention hearing.<sup>221</sup>

The [People/Commonwealth] may move, based on dangerousness, for an order of pretrial detention or release on conditions for an offense enumerated in § 1 that has as an element of the use, attempted use or threatened use of physical force against the person of another or any other offense that, by its nature, involves a substantial risk that physical force against the person of another may result.

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**Stalking:** "I. A person commits the offense of stalking if such person: (a) Purposely, knowingly, or recklessly engages in a course of conduct targeted at a specific person which would cause a reasonable person to fear for his or her personal safety or the safety of a member of that person's immediate family, and the person is actually placed in such fear . . . ." *Id.* § 633:3-a.

218. *Id.* § 173-B:1. **Includes arson and criminal mischief.**

**Arson:** "A person is guilty of arson if he knowingly starts a fire or causes an explosion which unlawfully damages the property of another." *Id.* § 634:1.

**Criminal mischief:** "I. A person is guilty of criminal mischief who, having no right to do so nor any reasonable basis for belief of having such a right, purposely or recklessly damages property of another." *Id.* § 634:2.

219. *Id.* § 173-B:1. **Includes burglary and criminal trespass.**

**Burglary:** "I. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied section thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned." *Id.* § 635:1.

**Criminal trespass:** "I. A person is guilty of criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place." *Id.* § 635:2.

220. *Id.* § 173-B:1.

**Harassment:** "I. A person is guilty of a misdemeanor, and subject to prosecution in the jurisdiction where the communication originated or was received, if such person: (a) Makes a telephone call, whether or not a conversation ensues, with no legitimate communicative purpose or without disclosing his or her identity and with a purpose to annoy, abuse, threaten, or alarm another; or (b) Makes repeated communications at extremely inconvenient hours or in offensively coarse language with a purpose to annoy or alarm another; or (c) Insults, taunts, or challenges another in a manner likely to provoke a violent or disorderly response; or (d) Knowingly communicates any matter of a character tending to incite murder, assault, or arson; or (e) With the purpose to annoy or alarm another, communicates any matter containing any threat to kidnap any person or to commit a violation of RSA 633:4; or a threat to the life or safety of another; or (f) With the purpose to annoy or alarm another, having been previously notified that the recipient does not desire further communication, communicates with such person, when the communication is not for a lawful purpose or constitutionally protected." *Id.* § 644:4, *held unconstitutional by* State v. Pierce, 887 A.2d 132 (N.H. 2005) (invalidating § I(f)).

221. Adapted from MASS. GEN. LAWS ch. 276, § 58A(1) (Supp. 2014).

If three or more of the risk factors enumerated in § 4 are met, as determined by the [People/Commonwealth], the [People/Commonwealth] shall move for an order of pretrial detention or release on conditions. Regardless of the determination of the [People/Commonwealth], the judge issuing bail shall consider whether sufficient risk factors are present as to warrant a detention hearing. The court must make a determination that there is probable cause to believe that the defendant has committed a qualifying crime.

If the court finds probable cause, the defendant must be detained pending the hearing.

### § 3. Procedure of detention hearing.<sup>222</sup>

If the prosecution moves for a detention hearing pursuant to § 2, the court must hold such a hearing immediately upon the person's first appearance before the court.<sup>223</sup> At the hearing, the defendant has the right to counsel—and, if financially unable to retain adequate representation, to have counsel appointed—to testify, to present witnesses, to cross-examine witnesses who appear, and to present information.<sup>224</sup> The rules concerning admissibility of evidence in a criminal case shall not apply to the presentation and consideration of information at the hearing.

If the court determines at such a hearing that personal recognizance “will endanger the safety of any other person or the community,” the court may order pretrial custody of the defendant or may

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222. Adapted from *id.* § 58A(4).

223. The following is adapted from MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06 cmt. (2014):

Unless the court allows a continuance of no more than three business days for the [People/Commonwealth] or seven days for the defendant. A continuance of three business days may be granted to the [People/Commonwealth] only upon a showing of good cause. During a continuance, the individual shall be detained upon a showing that there existed probable cause to arrest the person. If the defendant is charged with violating a protection order issued by another jurisdiction, the [People/Commonwealth] moves for a pretrial detention hearing, and the defendant is before the court, the court should conduct the hearing as it would if the defendant were charged with violating an order issued by the [People/Commonwealth].

224. The following is adapted from MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06 cmt. (2014):

When the defendant seeks to call a particular witness, however, the court may request an offer of proof as to the relevance of the proposed testimony. If the testimony, even if accepted in its entirety, would be irrelevant to the issue of dangerousness, it may be possible for the court to exclude the witness's testimony or to accept a stipulation between the [People/Commonwealth] and the defendant for purposes of the detention hearing only.

order the defendant released upon conditions.<sup>225</sup> If, after the hearing, the judge finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community, the judge must order the defendant detained for a period not exceeding ninety days.

**§ 4. Risk factors to consider in determining whether no conditions will reasonably assure the safety of any other person or the community.**<sup>226</sup>

The court or justice may consider, but shall not be limited to considering, any of the following conduct as evidence of posing a danger:<sup>227</sup>

- (a) Threats of suicide;
- (b) Acute depression;
- (c) History of violating protective orders;
- (d) Possessing or attempting to possess a deadly weapon in violation of an order;
- (e) Death threats or threats of possessiveness toward another;

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225. The statute describes the conditions as follows:

Such conditions must include the requirement that the person not commit a federal, state, or local crime during the period of release and may include other conditions that the court finds necessary to assure the defendant's appearance at trial or the safety of a particular person or of the community. In abuse cases, such conditions should always include an order to have no contact with the victim, if the victim requests such an order.

MASS. GEN. LAWS ch. 276, § 58A(2)(A)-(B).

226. Adapted from N.H. REV. STAT. ANN. § 597:2(III-a) (Supp. 2014) and N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-4 cmt. (2014).

227. The statute provides the following discussion of judicial danger assessment:

In his determination as to whether there are conditions of release that will reasonably assure the safety of any other individual or the community, said justice, shall, on the basis of any information which he can reasonably obtain, take into account the nature and seriousness of the danger posed to any person or the community that would result by the person's release, the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, his reputation, the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, his record of convictions, if any, any illegal drug distribution or present drug dependency, whether the person is on bail pending adjudication of a prior charge, whether the acts alleged involve abuse, or violation of a temporary or permanent protection order, whether the person has any history of orders issued against him pursuant to the aforesaid sections, whether he is on probation, parole or other release pending completion of sentence for any conviction and whether he is on release pending sentence or appeal for any conviction.

MASS. GEN. LAWS ch. 276, § 58A(5).

- (f) Stalking, as defined in § 1; and
- (g) Cruelty to or violence directed toward pets.

Additional risk factors that the court may consider, and that the [People/Commonwealth] should consider in determining whether to move for a detention hearing, are:

- (a) Escalation of physical violence;
- (b) Escalation of other forms of abuse;
- (c) Sexual abuse of the victim;
- (d) Recent acquisition or change in use of weapons;
- (e) Suicidal ideation, threats or attempts;
- (f) Homicidal ideation, threats or attempts;
- (g) Change in alcohol or other drug use/abuse;
- (h) Stalking or other surveillance/monitoring behavior;
- (i) Centrality of the victim to the perpetrator (“he/she’s all I have”);
- (j) Jealousy/obsessiveness about, or preoccupation with, the victim;
- (k) Mental health concerns connected with violent behavior;
- (l) Other criminal behavior or injunctions (e.g., resisting arrest);
- (m) Increase in personal risk taking (e.g., violation of restraining orders);
- (n) Interference with the victim’s help-seeking attempts (e.g., pulling a phone jack out of the wall);
- (o) Imprisonment of the victim in the home;
- (p) Symbolic violence including destruction of the victim’s property or harming pets;
- (q) The victim’s attempt to flee the batterer or to terminate the relationship;
- (r) Batterer’s access to the victim or the victim’s family;
- (s) Pending separation, divorce or custody proceedings; and
- (t) Recent termination from employment.

#### § 5. Detention order.<sup>228</sup>

In a detention order issued pursuant to the provisions of § 3 the judge shall (a) include written findings of fact and a written statement of the reasons for the detention; (b) direct that the person be committed to custody or confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentence or being held in custody pending appeal; and (c) direct that the person be afforded reasonable opportunity for private consulta-

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228. Adapted from *id.* § 58A(4).

tion with his counsel. The person may be detained pending completion of the hearing. The hearing may be reopened before or after a determination by the judge, at any time before trial, if the judge finds that information exists that was not known at the time of the hearing and that has a material bearing on the issue and whether there are conditions of release that will reasonably assure the safety of any other person and the community.

**§ 6. Presumption of innocence.**<sup>229</sup>

Nothing in this chapter shall be construed as modifying or limiting the presumption of innocence.

**§ 7. Review process.**<sup>230</sup>

A person aggrieved by the denial of a district court judge to admit him to bail on his personal recognizance with or without surety may petition the superior court for a review of the order of the recognizance, and the judge of the district court shall thereupon immediately notify such person of his right to file a petition for review in the superior court.<sup>231</sup> The district court or the detaining authority, as the case may be, shall cause any petitioner in its custody to be brought before the said superior court within two business days of the peti-

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229. *Id.* § 58A(6).

230. Adapted from *id.* § 58A(7).

231. The petition process is described elsewhere as follows:

When a petition for review is filed in the district court or with the detaining authority subsequent to petitioner's district court appearance, [either] the clerk of the district court or the detaining authority, . . . shall immediately notify by telephone, the clerk and probation officer of the district court, the district attorney for the district in which the district court is located, the prosecuting officer, the petitioner's counsel, if any, and the clerk of courts of the county to which the petition is to be transmitted. The clerk of the district court, upon the filing of a petition for review, either in the district court or with the detaining authority, shall forthwith transmit the petition for review, a copy of the complaint and of the record of the court, including the appearance of the attorney, if any is entered, and a summary of the court's reasons for denying the release of the defendant on his personal recognizance without surety to the superior court for the county in which the district court is located, if a justice thereof is then sitting, or to the superior court of the nearest county in which a justice is then sitting; the probation officer of the district court shall transmit forthwith to the probation officer of the superior court, copies of all records of the probation office of said district court pertaining to the petitioner, including the petitioner's record of prior convictions, if any, as currently verified by inquiry of the commissioner of probation.

*Id.* § 58.

tion having been filed.<sup>232</sup> The superior court shall, in accordance with the standards set forth herein, hear the petition for review as speedily as practicable or within five business days of the filing of the petition. The judge of the superior court hearing the review may consider the record below, which the [People/Commonwealth] and the petitioner may supplement. The judge of the superior court may, after a hearing on the petition for review, order that the petitioner be released on bail on his personal recognizance without surety, or, at his discretion, to reasonably assure the effective administration of justice, make any other order of bail or recognizance, or remand the petitioner in accordance with the terms of the process by which he was ordered committed by the district court.

#### *D. Minimizing Infringement of the Defendant's Rights*

Infringements of the defendant's constitutional rights are minimized by the specific protections furnished by the model legislation. The defendant's interest in liberty and justice is substantial, protected by the Eighth Amendment's ban on cruel and unusual punishment, the presumption of innocence, and procedural and substantive due process.<sup>233</sup>

Before a detention hearing may take place, the court must determine that there is probable cause to believe the defendant has committed a predicate crime.<sup>234</sup> The predicate crime or crimes must constitute a "credible present threat" to the petitioner's safety, and must reflect an "ongoing pattern of behavior" which "reasonably causes . . . the petitioner to fear for his or her safety," and "involves a substantial risk that physical force . . . may result."<sup>235</sup> These limitations ensure that a detention hearing will only be sought, and granted, when the threat to the petitioner is severe and well founded. The de-

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232. The statute offers further description of the petition process:

The district court is authorized to order any officer authorized to execute criminal process to transfer the petitioner and any papers herein above described from the district court or the detaining authority to the superior court, and to coordinate the transfer of the petitioner and the papers by such officer. The petition for review shall constitute authority in the person or officer having custody of the petitioner to transport the petitioner to said superior court without the issuance of any writ or other legal process; provided, however, that any district or superior court is authorized to issue a writ of habeas corpus for the appearance forthwith of the petitioner before the superior court.

*Id.*

233. See *supra* Part I.B.5.

234. See *supra* Part III.C § 2.

235. See *supra* Part III.C § 1-2.

tion hearing must be held “immediately upon the person’s first appearance before the court,” to minimize the duration of the defendant’s detention prior to an evidentiary hearing.<sup>236</sup>

During the detention hearing, the defendant’s right to procedural due process is safeguarded by the provision of a “full-blown adversary hearing,” as endorsed by the Court in *Salerno*, with counsel, testimony, witnesses, and admission of evidence.<sup>237</sup> The requirement that the judge find that “no conditions of release will reasonably assure” the petitioner’s safety by a clear and convincing evidentiary standard further protects the defendant from improper detention.<sup>238</sup> Finally, the judge must provide written findings of fact and a statement of the reasons for the detention, and the defendant may promptly petition the superior court for review.<sup>239</sup> The statute stipulates that such procedures shall not abridge the presumption of innocence, a determination supported by the Supreme Court in *Salerno*.<sup>240</sup> These protections and procedures safeguard the defendant’s constitutional rights throughout the process to the extent possible.

#### *E. Means of Encouraging Enactment of Statutes*

Domestic violence pretrial detention statutes could be federally encouraged via the Violence Against Women Act (“VAWA”).<sup>241</sup> VAWA, as passed in 1994 and reauthorized in 2013, comprehensively reformed legal strategies surrounding crimes of gendered violence.<sup>242</sup> It strengthened federal penalties for certain offenses and, through extensive grants, supported training of police officers, prosecutors, and judges to increase understanding of gendered offenses.<sup>243</sup> VAWA grants could be used to incentivize statutes that enable pretrial detention of domestic violence offenders and to educate legal actors as to the importance of such policies.

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236. *See supra* Part III.C § 3.

237. *See* *United States v. Salerno*, 481 U.S. 739, 750 (1987); *see supra* Part III.C § 3.

238. *See supra* Part III.C § 3.

239. *See supra* Part III.C §§ 5, 7.

240. *See* 481 U.S. at 746–51; *supra* Part I.B.5; *supra* Part III.C § 6.

241. *E.g.*, 42 U.S.C. § 13991 (2012).

242. *See* Leila Abolfazli, *Violence Against Women Act (VAWA)*, 7 *GEO. J. GENDER & L.* 863, 868–75 (2006).

243. *Id.*

## CONCLUSION

Domestic violence and intimate partner homicide continue to be serious concerns that are insufficiently addressed by current policies of mandatory arrest, no-drop prosecution, and mandatory medical reporting. Pretrial detention of domestic violence offenders could serve as a potent intervention that protects victims during the period of separation from an abusive partner when such protection is most needed. Pretrial detention on the basis of dangerousness was federally authorized by the Bail Reform Act and upheld by the Supreme Court in *United States v. Salerno*.<sup>244</sup> Pretrial detention in the domestic violence context could be effectuated by combining Massachusetts's and New Hampshire's already-existing models. Combined, New Hampshire's list of predicate offenses that can qualify a defendant for a dangerousness hearing, Massachusetts's detailed procedures for a hearing, and New Hampshire's list of risk factors that can be used to determine whether detention is required, can create a robust system for pretrial detention for domestic violence offenses. Such a system would minimize infringement of the defendant's constitutional rights with multiple safeguards. If pretrial detention hearings are mandatory when a certain number of risk factors are met, tragedies like Jennifer Martel's case could be prevented. The outlook for men and women like Jennifer is optimistic: legislators are taking note of the need to reform domestic violence laws, suggesting overhauls of existing systems.<sup>245</sup> The proposals made herein warrant consideration as legislators move forward with domestic violence law reform, as pretrial detention and mandatory detention hearings could provide protection that domestic violence victims lack under current policies.

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244. 18 U.S.C. § 3142 (2012); 481 U.S. 739, 741 (1987).

245. See *supra* note 35 and accompanying text.

APPENDIX A: DANGER ASSESSMENT<sup>246</sup>

The Danger Assessment has two portions. In the first, the participant is given a calendar and asked to:

[M]ark the approximate dates during the past year when [she/he] was abused by [her/his] partner or ex partner. Write on that date how bad the incident was according to the following scale:

1. Slapping, pushing; no injuries and/or lasting pain[;]
2. Punching, kicking; bruises, cuts, and/or continuing pain[;]
3. "Beating up"; severe contusions, burns, broken bones, miscarriage[;]
4. Threat to use weapon; head injury, internal injury, permanent injury, miscarriage[;]
5. Use of weapon; wounds from weapon[.]

In the second portion, the participant marks "yes" or "no" for each of twenty items:

1. Has the physical violence increased in severity or frequency over the past year?
2. Does he own a gun?
3. Have you left him after living together during the past year? . . .
4. Is he unemployed?
5. Has he ever used a weapon against you or threatened you with a lethal weapon? . . .
6. Does he threaten to kill you?
7. Has he avoided being arrested for domestic violence?
8. Do you have a child that is not his?
9. Has he ever forced you to have sex when you did not wish to do so?
10. Does he ever try to choke you?
11. Does he use illegal drugs? By drugs, I mean "uppers" or amphetamines, "meth", speed, angel dust, cocaine, "crack", street drugs or mixtures.
12. Is he an alcoholic or problem drinker?
13. Does he control most or all of your daily activities?  
(For instance: does he tell you who you can be friends with,

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246. Campbell et al., *supra* note 25, at 655.

when you can see your family, how much money you can use, or when you can take the car? . . .

14. Is he violently and constantly jealous of you? (For instance, does he say "If I can't have you, no one can.")

15. Have you ever been beaten by him while you were pregnant? . . .

16. Has he ever threatened or tried to commit suicide?

17. Does he threaten to harm your children?

18. Do you believe he is capable of killing you?

19. Does he follow or spy on you, leave threatening notes or messages on answering machine [sic], destroy your property, or call you when you don't want him to?

20. Have you ever threatened or tried to commit suicide?

Scores are rated as follows: less than 8 answers of "yes" – *variable* danger category; 8-13 answers of "yes" – *increased* danger category; 14-17 answers of "yes" – *severe* danger category; 18+ answers of "yes" – *extreme* danger category.