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Jacquelyn Sicilia

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**PRETRIAL RELEASE IN DOMESTIC VIOLENCE CASES: HOW STATES HANDLE THE NOTORIOUSLY PRIVATE CRIME**

ABSTRACT

*Domestic violence has plagued society for years. However, until 1994, domestic violence was not federally criminalized. Today, domestic violence affects over ten million Americans per year. Because of the criminal justice system's slow reaction to domestic violence, how the criminal justice system handles domestic violence cases is far from ideal. Pretrial release in domestic violence cases is one area of domestic violence that is ripe for research, guidance, and change. Pretrial release brings to light a unique balance; defendants are presumed to be innocent, but at the same time, the fact of arrest may point to an ongoing risk of harm to victims if defendants are released pretrial. With little known about which pretrial conditions are successful in non-domestic violence cases, the answer of how to strike the necessary balance is even more challenging. This Note examines the different approaches states use to assign pretrial release conditions to domestic-violence defendants who are granted pretrial release and proposes a model statute to address—and effectively account for—the risk of re-abuse and the rights of criminal defendants in pretrial release.*

## INTRODUCTION

In a single year, more than ten million adults experience domestic violence (“DV”) in the United States.<sup>1</sup> Assuming each of those ten million adults has only one such experience in that year, an incident of DV occurs every three seconds.<sup>2</sup> Yet, because domestic abusers tend to repeat the violence, these horrifying numbers likely downplay the true extent of the problem.<sup>3</sup> The criminal justice system has been relatively slow in addressing the problem and is only now waking up to the real harms of DV. Now that the criminal justice system is taking an active role in what was historically thought of as a private matter, more individuals are arrested for DV. Once an arrest is made, states are forced to confront a reoccurring issue of what to do with those charged with DV *before* trial. The defendant may be held in pretrial detention or released with conditions. Pretrial release brings to light a unique balance; defendants are presumed to be innocent, but at the same time, the fact of arrest may point to an ongoing risk of harm to victims if defendants are released. States have taken a less-than-uniform approach on how to strike this balance. This Note examines the different approaches states use to assign conditions to DV defendants who are granted pretrial release and proposes a model statute to address—and effectively account for—the risk of re-abuse and the rights of criminal defendants in pretrial release.

Part I of this Note will give a brief historical background of DV and how the history has led to our current pretrial release system for DV cases. Part II will discuss the difficulties in assigning pretrial release conditions. Further, it will assess the balance a judge has to strike in protecting a victim while also respecting a defendant’s constitutional rights. Part III will examine how states currently attempt to strike that balance. States employ a variety of pretrial release statutes. Some states rely on mandatory conditions while others use discretionary conditions. Part IV analyzes the empirical success and legal challenges of pretrial release conditions in DV. Taking into consideration the statistical and legal success of the conditions, a proposed model statute to address pretrial release in DV cases is given. The recommended model statute will allow for the best protection for victims, lowest rates of recidivism, and highest rate of appearance for the defendants.

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1. *Domestic Violence*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE (2020), [https://assets.speakcdn.com/assets/2497/domestic\\_violence-2020080709350855.pdf?1596828650457](https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457).

2. *Id.*

3. *Id.*; NAT’L INST. OF JUST., PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS, AND JUDGES 5 (2009), <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf> [hereinafter PRACTICAL IMPLICATIONS].

### I. THE DARK HISTORY OF DOMESTIC VIOLENCE IN THE UNITED STATES & HOW IT INFORMS OUR VIEW OF VICTIMS' INTERESTS

Historically, DV was handled as a private matter.<sup>4</sup> This school of thought stemmed from the idea of romantic paternalism; men were the protectors of the home and family while women were to remain the domestic caretakers.<sup>5</sup> Men were considered the head of the household and maintained it through control.<sup>6</sup> Judge Powhattan Ellis of the Mississippi Supreme Court illustrated the then-widespread position on DV:

Family broils and dissensions cannot be investigated before tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy. To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right to moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.<sup>7</sup>

Unsurprisingly, many women fought tirelessly against these antiquated ideals inspiring several states to enact legislation criminalizing DV.<sup>8</sup> Congress furthered this progress by federally criminalizing DV through the passage of the Violence Against Women Act in 1994.<sup>9</sup>

Even with more resources available to victims, local law enforcement remained hesitant to interfere with these matters.<sup>10</sup> Private citizens were even suing law enforcement for not getting involved in private matters within the home.<sup>11</sup> The hesitancy to interfere, however, is slowly dissipating due to policies such as mandatory arrest and no-drop prosecution.<sup>12</sup> Mandatory arrest policies require police to arrest a suspect if there is probable cause the suspect committed

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4. Suraji R. Wagage, *When Consequences are Life and Death: Pretrial Detention for Domestic Violence Offenders*, 7 DREXEL L. REV. 195, 203 (2014).

5. Jennifer L. Brinkley, *The Failure of Amanda's Law in Kentucky: Creating Best Practices for Legislatures Passing Domestic Violence Statutes*, 38 QUINNIPIAC L. REV. 41, 52 (2019).

6. *Id.* at 53.

7. *Bradley v. State*, 1 Miss. 156, 158 (1824); *see also Joyner v. Joyner*, 59 N.C. 322, 324 (1862) (acquitting a husband on charges of domestic violence for wife's failure to show the violence was not caused by her own behavior).

8. Brinkley, *supra* note 5, at 57–58.

9. *See generally* Violence Against Women Act (“VAWA”), Pub. L. No. 103-322, 42 U.S.C. §§ 13925–14045d (1994) (granting added protections and resources to women affected by violence).

10. Brinkley, *supra* note 5, at 59.

11. Wagage, *supra* note 4, at 204.

12. *Id.* at 203–04.

DV.<sup>13</sup> While there is still some criticism about mandatory arrest policies,<sup>14</sup> they are still widely used and have helped shift the public's perception of DV from a private matter to a crime.<sup>15</sup> Like mandatory arrest policies, no-drop prosecutions have helped the public understand the state's interest in protecting victims of DV.<sup>16</sup> No-drop prosecution policies require prosecutors to pursue DV cases regardless of the victim's wishes.<sup>17</sup> Like mandatory arrest policies, no-drop prosecution policies come with pros and cons but continue to transform the public's perception of DV.<sup>18</sup> The picture today is a far cry from the traditional perception of seeing DV as a private matter. But there are still gaps in the legal response to the problem, which are the focus of this Note. One of the major gaps is the issue of pretrial release.

In general, the defendant in a DV case may be released on conditional bail or held in pretrial detention.<sup>19</sup> Bail statutes in most states allow for pretrial detention if "no condition or combination of conditions will reasonably assure the appearance of the [defendant] as required and the safety of any other person and the community."<sup>20</sup> These statutes inevitably apply to DV offenders because they are arrested for, at the very least, putting people in fear for their safety.<sup>21</sup> These statutes, consequently, lead to a high pretrial detention population.<sup>22</sup> The pretrial detention rate in the U.S., in general, is higher than any European or Asian country.<sup>23</sup> In fact, pretrial detainees account for an astounding ninety-five percent of the increase in jail population in the past twenty years.<sup>24</sup> These high pretrial detention rates are not cheap.<sup>25</sup> The total annual cost of pretrial detention is estimated to be fourteen billion dollars.<sup>26</sup>

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13. *Id.* at 204.

14. *Id.* at 205–06 (explaining drawbacks of mandatory arrest policies such as an increase victim arrest in due to the initial event or a false complaint by the abuser and limited police discretion).

15. *Id.* at 206.

16. *See* Wagage, *supra* note 4, at 206–08.

17. *Id.* at 206.

18. *See id.* at 206–08.

19. *Id.* at 211.

20. *Id.* at 212 (citing DAVID N. ADAIR, JR., FED. JUD. CTR., *THE BAIL REFORM ACT OF 1984* 1 (1993)).

21. *See* Wagage, *supra* note 4, at 212.

22. *See id.*

23. Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, PENN LAW: LEGAL SCHOLARSHIP REPOSITORY 2 (2017), [https://scholarship.law.upenn.edu/faculty\\_scholarship/1745](https://scholarship.law.upenn.edu/faculty_scholarship/1745).

24. *Id.* at 2.

25. *Id.*

26. *Id.*

Despite this enormous cost, tax payers are still required to foot the bill for, what some have called, a racist and discriminatory bail system.<sup>27</sup> The majority of those detained have been, and continue to be, individuals from racial minorities and low-income communities.<sup>28</sup> Black Americans are more likely to be detained for a larger part of their sentence than white Americans.<sup>29</sup> Because DV historically impacts Black communities at a higher rate than white communities, Black defendants charged with DV have even more of a reason to push for reform than white defendants charged with DV.<sup>30</sup> Moreover, the cash bail system keeps those from low-income communities from being released.<sup>31</sup> The “\$2 billion-per-year-for-profit bond industry” keeps those who cannot afford bail detained and releases those who can.<sup>32</sup> Those who cannot afford bail account for about half a million pretrial detainees.<sup>33</sup> For those who are detained, they suffer considerable negative effects: increased rates of conviction, disruptions in personal relationships, enhanced propensity for future crime, loss of housing, and forfeiture of income.<sup>34</sup> Further, detainees are subject to insufficient medical care and dangerous living conditions.<sup>35</sup> Especially in the era of Covid-19, needlessly subjecting detainees to less-than-safe health conditions is less than optimal.<sup>36</sup> The current issues with pretrial detention do not suggest an abolishment of pretrial detention, but rather, some much-needed reform.

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27. The social concerns of the bail system regarding racism and discriminatory practice plague the entire system, and while this Note will not discuss those implications in detail, they are a relevant part of any discussion on the topic of bail and pretrial detention. For a more comprehensive understanding of these issues, see Michael L. Benson, *The Correlation between Race and Domestic Violence is Confounded with Community Context*, 51 OXFORD J. 326, 327 (2004); Wendy Sawyer, *How Race Impacts Who is Detained*, PRISON POL’Y INITIATIVE (Oct. 9, 2019), [https://www.prisonpolicy.org/blog/2019/10/09/pretrial\\_race/](https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/); Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (June 2, 2020), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

28. Justin Sherman, *The Bail System is Racist and Unjust. It Needs to Be Reformed*, REALCLEAR POL’Y (2018), [https://www.realclearpolicy.com/articles/2018/08/17/the\\_bail\\_system\\_is\\_racist\\_and\\_unjust\\_it\\_needs\\_to\\_be\\_reformed\\_110764.html](https://www.realclearpolicy.com/articles/2018/08/17/the_bail_system_is_racist_and_unjust_it_needs_to_be_reformed_110764.html).

29. *Id.*

30. See Benson, *supra* note 27, at 327.

31. Sherman, *supra* note 28.

32. Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality>.

33. *Id.*

34. Paul Heaton et al., *The Downstream Consequence of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 741, 760; Wykstra, *supra* note 32.

35. Wykstra, *supra* note 32.

36. *Id.*; see also Brie A. Williams et al., *Correction Facilities in the Shadow of Covid-19: Unique Challenges and Proposed Solutions*, HEALTH AFF., <https://www.healthaffairs.org/doi/10.1377/hblog20200324.784502/full/> (last visited Feb. 15, 2021).

While not a perfect solution to the issues of pretrial detention, conditional pretrial release is an alternative option. Those arrested for DV may be released with a “combination of conditions [which] will reasonably assure the appearance of the [defendant] as required and the safety of any other person and the community.”<sup>37</sup> Though states have made an effort to implement reasonable conditions, states have struggled to find a uniform approach on how to handle competing interests: the risk of re-abuse, on one hand, and the defendant’s constitutional rights on the other.<sup>38</sup>

## II. THE BALANCING ACT IN DOMESTIC VIOLENCE CASES

Assigning pretrial release conditions requires a balancing act between protection of victims and constitutional rights of the defendant.<sup>39</sup> The Eighth Amendment of the U.S. Constitution prohibits excessive bail.<sup>40</sup> Moreover, pretrial release conditions have to be developed around the presumptions of innocence to protect the basic principles of due process.<sup>41</sup> The American Bar Association and the National Association of Pretrial Services Agencies implemented standards for setting pretrial conditions which are echoed in many state statutes and rules: “the least restrictive condition(s) of release that will reasonably ensure a defendant’s attendance at court proceedings and protect the community, victims, witnesses, or any other person.”<sup>42</sup>

Protecting the community—especially the victim—from repeat DV abuse is the state’s main interest in pretrial release. Victims are often scared to report incidents of DV because of the fear of re-abuse.<sup>43</sup> In addition to the fear of re-abuse, a lack of reporting comes from a belief that DV is a private matter, a desire to protect the abuser, and a fear law enforcement would not help the situation.<sup>44</sup> Victims’ fears are well-founded. Forty-four percent of abusers re-abuse before they are even convicted.<sup>45</sup> In states where no-contact orders are automatically imposed as a pretrial release condition for DV, rearrests for order violations often occur immediately after the defendant’s release.<sup>46</sup> Studies have

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37. See ADAIR, *supra* note 20, at 1.

38. See Stevenson & Mayson, *supra* note 23, at 3.

39. Jane M. Sandusky, BATTERED WOMEN’S JUST. PROJ., PRETRIAL RELEASE CONDITIONS IN DOMESTIC VIOLENCE CASES: ISSUES AND CONTEXT 5 (2006) [hereinafter BATTERED WOMEN’S JUST. PROJ.].

40. *Id.*

41. *Id.* (citing NAT’L ASS’N OF PRETRIAL SERVS. AGENCIES, STANDARDS ON PRETRIAL RELEASE 33 (2020) [hereinafter NAT’L ASS’N OF PRETRIAL SERVS.]).

42. NAT’L ASS’N OF PRETRIAL SERVS., *supra* note 41, at 19; STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-1.2 (AM. BAR. ASS’N 2007).

43. PRACTICAL IMPLICATIONS, *supra* note 3, at 39.

44. *Id.* at 5.

45. *Id.* at 40.

46. *Id.* at 21.

found that between twenty-seven and fifty percent of defendants live with their victims at the time of a DV incident, so access to victims for re-abuse is ample.<sup>47</sup>

The risk of re-abuse is real in part because victims are often economically dependent on those who abuse them. Theoretically, limiting contact to the defendant would prevent re-abuse; however, limiting contact could also interfere with any economic reliance the victim had on the defendant. In one study focusing on the relationship between dependency and women-DV victims, psychologists suggested a woman's economic and emotional dependency increases the risk of abuse.<sup>48</sup> A woman who relies on her abuser for economic stability is also less likely to terminate an abusive relationship, thereby making re-abuse and abuser intimidation more likely.<sup>49</sup> Risk of re-abuse is even higher in victims who are unemployed, economically disadvantaged, and living in poorly-resourced neighborhoods.<sup>50</sup> A National Institute of Justice study found one third of DV victims feared reporting because they relied on the defendant for housing.<sup>51</sup> A victim who relies on a defendant to help with bills, parenting, and housing seemingly cannot escape the pattern of abuse without added resources. Thus, to properly address the state's interests in pretrial release of DV defendants, there needs to be conditions that address both the actual abuse and the underlying causes of re-abuse.

While protecting a victim and the community is extremely important, protecting a DV defendant's right to due process is also necessary—and required by the Constitution. The cornerstone of our criminal justice system is that one is presumed innocent until proven guilty.<sup>52</sup> This framework protects a defendant from undue burden until sufficient evidence demonstrates guilt beyond a reasonable doubt. However, common conditions of pretrial release or probation, such as living restrictions and no-contact orders, place a significant burden on defendants. While it makes sense to restrict a defendant from the place and person where DV occurs, it raises serious due process issues.<sup>53</sup> The Fifth and Fourteenth Amendments expressly protect defendants from punishment before being convicted, but defendants argue pretrial release conditions appear to expressly ignore that right.<sup>54</sup> Furthermore, the Eighth Amendment protects from

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47. *Id.* at 56.

48. Robert F. Bornstein, *The Complex Relationship Between Dependency and Domestic Violence: Converging Psychological Factors and Social Forces*, 61 AM. PSYCH. ASS'N 595, 601 (2006).

49. *Id.* at 599.

50. Megan L. Evans et al., *A Pandemic within a Pandemic—Intimate Partner Violence during COVID-19*, 383 NEW ENG. J. MED. 2302, 2302 (2020).

51. PRACTICAL IMPLICATIONS, *supra* note 3, at 39.

52. See U.S. CONST. amends. V, XIV.

53. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”); see *infra* Part IV.B.

54. U.S. CONST. amends. V, XIV; see *infra* Part IV.B.

excessive bail, but many low-income individuals are forced to find alternative housing or pay for electronic monitoring, which might be considered “excessive.”<sup>55</sup> DV occurs more frequently in low-income communities.<sup>56</sup> Due to economic instability (and reduced shelter capacity during the pandemic), defendants (who may be subject to protection orders barring them from entering the homes they share with their purported victims) face challenges finding alternative housing arrangements.<sup>57</sup> Aside from the economic ramifications, restricting an individual from speaking to their own family, sleeping in their own home, or going where they want is certainly a restriction of freedom. The question is whether these restrictions can be justified under the law.

Without properly addressing these two competing interests, pretrial release falls short of being an alternative option to pretrial detention in DV cases because there is often a risk to the victim and an undue burden on the defendant. States attempt to balance those interests within their pretrial release statutes.

### III. HOW STATES CURRENTLY ADDRESS PRETRIAL RELEASE IN DOMESTIC VIOLENCE CASES

States attempt to strike the necessary balance between safety and due process in a variety of ways. Some states have specific statutes to handle DV; other states categorize DV as general assault for purposes of bail.<sup>58</sup> Aside from common conditions used in both non-DV and DV cases,<sup>59</sup> certain conditions are more readily assigned in DV cases than non-DV cases in an attempt to strike the DV balance. States use two different methods to assign these conditions: mandatory pretrial release conditions or discretionary pretrial release conditions. Statutes with mandatory conditions include a specific condition, which must be placed on a defendant when they are released pre-trial. Discretionary conditions, on the other hand, allow a judge to place conditions on the defendant after assessing what conditions will ensure safety of the community while not violating a defendant’s rights.<sup>60</sup> Most states employ a combination of these methods. Appendix I provides a summary of state statutes based on these conditions. Statutes with mandatory conditions are usually accompanied by a

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55. U.S. CONST. amend. VIII; *see infra* Part IV.A.

56. Evans, *supra* note 50, at 2302; Amy E. Bonomi et al., (2014) Intimate Partner Violence and Neighborhood Income: A Longitudinal Analysis. *Violence Against Women* 20:42-58.

57. Evans, *supra* note 50, at 2302.

58. Wagage, *supra* note 4, at 215.

59. *See* BATTERED WOMEN’S JUST. PROJ., *supra* note 39, at 7 (listing common pretrial release conditions for non-DV cases: not committing a crime, attendance at court proceedings, maintain employment or seeking employment, comply with curfew, no possession of a firearm, report to pretrial services regularly, obtain “medical, psychological, or psychiatric treatment,” and remain in custody of a third party).

60. *See id.* at 5–6 (detailing considerations for the court before pretrial release conditions are assigned).

provision allowing a judge to place additional conditions at her discretion. For states without mandatory conditions, the judge simply relies on discretionary conditions. Likewise, statutes with mandatory conditions are often accompanied by a provision allowing a victim to waive a mandatory condition. Conditions common to DV cases include temporary holds, restrictions on returning to shared residence or employment, no-contact orders, and enrollment of counseling.

#### A. *Temporary Holds*

One common condition is a temporary hold prior to releasing the defendant after arrest.<sup>61</sup> These temporary holds are often called “cooling-off” periods.<sup>62</sup> Some states write temporary holds into their statutes as an added condition that a judge may impose, whereas in other states, temporary holds are required before pretrial release is even considered. Because forty-four percent of DV defendants re-abuse prior to their conviction,<sup>63</sup> the period following the initial arrest for DV can be particularly sensitive.<sup>64</sup> The cooling-off period allows delayed release of defendants whom may be dangerous to their victims.<sup>65</sup> The period also gives a victim time to collect belongings from their home, secure a place to stay, or find DV resources if the defendant will be returning to a home shared with the victim.<sup>66</sup> Currently, Alabama, Indiana, Massachusetts, Nevada, and Tennessee have statutes that implement a mandatory cooling-off period.<sup>67</sup> In Indiana, the DV defendant cannot be released until at least eight hours after the arrest.<sup>68</sup> In Massachusetts, an individual arrested for DV “shall not be allowed to post bail within six hours” of arrest.<sup>69</sup> In Nevada, an individual arrested for domestic battery must not be released sooner than twelve hours.<sup>70</sup>

Some states take a slightly more lenient approach, allowing the judge to first consider the threat level to the victim before enforcing a temporary hold. In Alabama, an individual arrested for DV may not be released until twenty-four

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61. CONN. COAL. AGAINST DOMESTIC VIOLENCE, TEMPORARY HOLDS FOLLOWING AN ARREST: GIVING VICTIMS TIME TO FIND SAFETY 2 (2015) [hereinafter CONN. COAL. AGAINST DOMESTIC VIOLENCE].

62. *Id.*

63. PRACTICAL IMPLICATIONS, *supra* note 3, at 40.

64. CONN. COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 61, at 2.

65. *Id.*

66. *Id.*

67. ALA. CODE § 15-13-190(a) (2019); IND. CODE § 35-33-8-6.5 (2021); CONN. COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 61, at 2.

68. IND. CODE § 35-33-8-6.5 (2021).

69. CONN. COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 61, at 2.

70. NEV. REV. STAT. § 178.484(7) (2020).

hours after an arrest or an appearance in front of a judge, whichever is sooner.<sup>71</sup> During the hold, the judge is instructed to assess if the defendant is a threat to the victim or the public and if the defendant will appear in court.<sup>72</sup> The same is true in North Carolina, except a forty-eight hour hold is allowed.<sup>73</sup> Notably, Tennessee enforces a mandatory twelve-hour hold only after the defendant is deemed to be a threat to the victim.<sup>74</sup> These special provisions allow a judge slight discretion to make a case-specific analysis, rather than blindly assigning conditions without regard to the defendant.<sup>75</sup> On the other hand, states without a mandatory temporary hold often implement a hold as a discretionary condition.<sup>76</sup> The more liberal use of discretion allows a judge to consider a defendant's employment, financial status, family, criminal history, and the victim's desire for the hold to continue.

*B. Restricted from Returning to Shared Residence or Employment*

Another condition commonly imposed is a restriction on returning to one's residence or place of employment if shared with the victim. States presumably use this condition as an attempt to mitigate the danger of re-abuse. One state in particular, Alaska, places a mandatory twenty-day restriction on DV defendants after pretrial release.<sup>77</sup> In Alaska, if there is a protective order against the defendant, the judge is required to prohibit return to the "residence or place of employment of the victim" unless:

- (1) 20 days have elapsed following the date the person was arrested;
- (2) the victim or petitioner consents to the person's return to the residence or place of employment;
- (3) the person does not have a prior conviction for an offense under AS 11.41 that is a crime involving domestic violence; and
- (4) the court finds by clear and convincing evidence that the return to the residence or place of employment does not pose a danger to the victim or petitioner.<sup>78</sup>

Louisiana and West Virginia place a similar restriction on defendants—although with no set timeframe given.<sup>79</sup> If the court determines the defendant poses a risk

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71. ALA. CODE § 15-13-190(a) (2019); *see also* MISS. CODE ANN. § 99-5-37(2) (2021) (allowing a judge to "impose on the arrested person a holding period not to exceed twenty-four (24) hours from the time of the initial appearance or setting of bail").

72. ALA. CODE § 15-13-190(b) (2019).

73. N.C. GEN. STAT. § 15A-534.1(a)(1), (b) (2020).

74. TENN. CODE ANN. § 40-11-150(h)(1) (2020).

75. *See id.*

76. ARK. CODE ANN. § 16-81-113(e) (2020); KY. REV. STAT. ANN. § 403.740(1) (West 2021); N.H. REV. STAT. ANN. § 597:2 (VIII) (2018); N.J. STAT. ANN. § 2C:25-26(d) (2013); N.C. GEN. STAT. § 15A-534.1(a)(1) (2020); N.D. R. CRIM. P. 46(a)(5) (2021); UTAH CODE ANN. § 78B-7-802(2)(a) (LexisNexis 2020).

77. ALASKA STAT. § 12.30.027(b) (2020).

78. *Id.*

79. LA. CODE CRIM. PROC. ANN. art. 320(G) (2020); W. VA. CODE § 62-1C-17c (2020).

to the victim, the court is mandated to prohibit the defendant from going to the victim's residence.<sup>80</sup> Pennsylvania has this same restriction; however, this condition expires at commencement of a pretrial hearing or upon entry or denial of a protection of abuse order, whichever is sooner.<sup>81</sup> Moreover, Wisconsin is one state that does not first require a threat assessment; the state automatically places a seventy-two-hour prohibition on returning to the shared residence.<sup>82</sup> However, Wisconsin does allow the victim to waive this condition.<sup>83</sup>

While this condition is useful in protecting the victim, a mandatory condition of this nature severely burdens the defendant. Most states attempt to reconcile the potential legal ramifications of this burden by making this condition wholly discretionary;<sup>84</sup> some states allow a limited discretionary component: a threat assessment by the judge or a waiver by the victim.<sup>85</sup> Other states take a more generalized approach and include restrictions on employment or residence as "conditions reasonably necessary for the protection" of the victims.<sup>86</sup> But the judge's discretion does not change the fact that an individual is being displaced from their home or employment after this condition is applied.

### C. No-Contact Orders

No-contact orders are another tool states use to protect against further conflict.<sup>87</sup> The no-contact order restricts the defendant's contact with the victim in the case.<sup>88</sup> Often times, these restrictions can include contact with children, family, and friends.<sup>89</sup> Multiple states have implemented mandatory no-contact orders in their DV statutes: Colorado, Georgia, Louisiana, Rhode Island, South Dakota, and West Virginia. In Colorado, a mandatory protective order is placed in all DV cases.<sup>90</sup> In Georgia, the judge "shall include" a no-contact order as a release condition for offenses involving DV; the defendant cannot have any

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80. LA. CODE CRIM. PROC. ANN. art. 320(G) (2020); W. VA. CODE § 62-1C-17c (2020).

81. 18 PA. CONS. STAT. § 2711(c)(2) (2020).

82. WIS. STAT. § 968.075(5)(a)(1) (2021).

83. *Id.* § 968.075(5)(c).

84. ARK. CODE ANN. § 16-81-113(e) (2020); CONN. GEN. STAT. § 54-63c (2021); KY. REV. STAT. ANN. § 403.740 (West 2021); MONT. CODE ANN. § 46-9-109 (2021); N.J. STAT. ANN. § 2C:25-26a (2013); N.Y. CRIM. PROC. LAW § 530.12(1) (McKinney 2021); N.C. GEN. STAT. § 15A-534.1(a)(2) (2020); OR. REV. STAT. § 135.260(1)(b) (2019); S.C. CODE ANN. § 16-25-120(C), (D)(2) (2021).

85. LA. CODE CRIM. PROC. ANN. art. 320(G) (2020); W. VA. CODE § 62-1C-17c (2020).

86. MICH. COMP. LAWS ANN. § 765.6b (2018).

87. Robert Rhodes, *Criminal No Contact Orders—What Are They?*, RHODES LEGAL GRP., <https://rhodeslegallgroup.com/criminal-law/criminal-contact-orders/> (last visited Feb. 16, 2021) [hereinafter RHODES LEGAL GRP.].

88. WASH. REV. CODE. § 10.99.040 (2021).

89. RHODES LEGAL GRP., *supra* note 87.

90. COLO. REV. STAT. § 18-1-1001(1) (2020).

contact “of any kind or character with the victim.”<sup>91</sup> In Louisiana and West Virginia, if there is a finding of threat or danger to the victim, the judge shall issue a no-contact order.<sup>92</sup> In Rhode Island, there is a mandatory no-contact order placed on the DV defendant prior to the arraignment.<sup>93</sup> In South Dakota, a mandatory no-contact order is put in place *in the event* of pretrial release.<sup>94</sup> Furthermore, in Wisconsin’s seventy-two-hour cooling-off period, the defendant is not permitted to contact any victim or person involved in the DV incident.<sup>95</sup> Unique to Louisiana and Wisconsin, the victim can waive a mandatory no-contact order.<sup>96</sup> Most states, however, allow a no-contact order to be added as a pretrial release condition. Those statutes that take the discretionary approach either include no-contact orders explicitly or implicitly. If explicitly stated, the condition includes language saying the defendant should “avoid contacting . . . the alleged victim.”<sup>97</sup> If implied, the statute includes a condition that gives the judge the right to issue “any other order or modification of orders required . . . to protect the safety of the alleged victim or to ensure the appearance of the person in court.”<sup>98</sup>

Discretionary or mandatory, no-contact orders place a tremendous burden on defendants and victims. Defendants are not only restricted from the victims, but also from their children.<sup>99</sup> The defendants are deprived from parenting their own children which ultimately places a greater burden on the other parent. With a higher risk of abuse in economically and emotionally dependent relationships, the fear of not being able to speak to your significant other might also drive victims to waive a no-contact order when contact is not otherwise safe.<sup>100</sup>

#### D. Enrollment in Counseling or Treatment

Another common condition of pretrial release is counseling. Similar to those arrested on drug charges undergoing drug treatment, those arrested for DV

91. GA. CODE ANN. § 17-6-1(f)(2) (2020).

92. LA. CODE CRIM. PROC. ANN. art. 320(G) (2020); W. VA. CODE § 62-1C-17c (2020).

93. 12 R.I. GEN. LAWS § 12-29-4(a)(1) (2021).

94. S.D. CODIFIED LAWS § 25-10-23 (2021).

95. WIS. STAT. § 968.075(5) (2021).

96. LA. CODE CRIM. PROC. ANN. art. 320(G) (2020); WIS. STAT. § 968.075(5) (2021).

97. WIS. STAT. § 968.075(5) (2021); accord MISS. CODE. ANN. § 99-5-37(2) (2021); N.J. STAT. ANN. § 2C:25-26 10(a) (2021); N.Y. CRIM. PROC. LAW § 530.12 (McKinney 2021); N.C. GEN. STAT. § 15A-534.1(a)(2) (2020); OR. REV. STAT. § 135.260(1)(b) (2019); W. VA. CODE § 62-1C-17c (2020).

98. ALA. CODE § 15-13-190(b) (2019); accord ALASKA STAT. § 12.30.027 (2020); COLO. REV. STAT. § 18-1-1001(3)(f) (2020); KY. REV. STAT. ANN. § 403.740 (West 2021); MICH. COMP. LAWS ANN. § 765.6b (2018); MISS. CODE. ANN. § 99-5-37 (2021).

99. RHODES LEGAL GRP., *supra* note 87.

100. See Bornstein, *supra* note 48, at 601.

undergo counseling as a pretrial release condition.<sup>101</sup> Counseling for those arrested for DV can include anger management treatment, DV treatment, or victim-oriented treatment.<sup>102</sup> A special pretrial services agency often provides the intervention programs for the defendant.<sup>103</sup> Georgia is the only state to impose a mandatory condition of counseling; the state requires enrollment in “[DV] counseling, substance abuse therapy, or other therapeutic” counseling as a pretrial release condition.<sup>104</sup> Most states, however, impose this condition on a discretionary basis. States that use the discretionary approach do so by assigning conditions relevant to the DV case.<sup>105</sup> For example, a defendant with a pattern of DV under the influence of drugs could be instructed to attend a substance abuse program in addition to DV treatment.<sup>106</sup> Even though states allow counseling or treatment as a pretrial condition, most judges limit its use because the condition raises issues with the presumption of innocence.<sup>107</sup>

Temporary holds, restrictions on residence and employment, no-contact orders, and counseling are not an exclusive list of conditions judges impose on DV defendants. There are other conditions a court often imposes in DV cases: electronic monitoring, drug testing, prohibiting drinking, curfews, and prohibiting possession of a firearm.<sup>108</sup> While the conditions themselves are a necessary consideration in finding a balance between victims’ and defendants’ interests, how the conditions are implemented is equally important. Among the inconsistent conditions and statutes relating to pretrial release conditions in DV cases, one thing is consistent: discretion is necessary.

#### IV. HOW SHOULD STATES ADDRESS PRETRIAL RELEASE IN DOMESTIC VIOLENCE CASES

According to the American Bar Association, the goal of bail is to (1) ensure defendants’ appearance, (2) prevent obstruction of justice, and (3) prevent other pretrial crime, all while minimizing intrusions to defendants’ liberty.<sup>109</sup> The best possible scenario for pretrial release is one where the conditions placed are

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101. U.S. CTS., AUTHORITY TO IMPOSE SUBSTANCE USE TESTING AND SUBSTANCE USE DISORDER TREATMENT (updated March 2020), <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/supervision/authority-impose-substance-use-testing-substance-use-disorder-treatment> [hereinafter SUBSTANCE USE DISORDER TREATMENT].

102. Thomas P. George, *Domestic Violence Sentencing Conditions and Recidivism*, WASH. CTR. FOR CT. RSCH., ADMIN. OFF. OF THE CTS. 12 tbl.3 (2010).

103. *Pretrial Services—Supervision Unit*, SUPERIOR CT. OF FULTON CNTY., <https://www.fultoncourt.org/pretrial/supervision.php> (last visited Feb. 17, 2021).

104. GA. CODE ANN. § 17-6-1(f)(2) (2020).

105. *See State v. Mahoney*, No. 2010-104, 2010 WL 7798871, at \*3 (Vt. Mar. 25, 2010).

106. *Id.*

107. BATTERED WOMEN’S JUST. PROJ., *supra* note 39, at n.21; *see infra* Part IV.B.

108. *See* BATTERED WOMEN’S JUST. PROJ., *supra* note 39, at 7.

109. STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-1.2; *see also* Stevenson & Mayson, *supra* note 23, at 4.

specific to the defendant's personal situation and the least restrictive means to protect the general public.<sup>110</sup> But what is "best"?

A. *Success in Non-DV Pretrial Release*

Empirical data evaluating what works best in DV pretrial release conditions is extremely limited. The data is limited, in part, because DV is a newer crime and jurisdictions are still working to understand it. With a newer crime comes newer conditions—and only recent, aggressively-prosecuted conditions that have not been studied enough are available for analysis. On the other hand, it is difficult to know how to quantify success of pretrial release conditions in such a new crime. Should success be measured by rates of re-abuse, rates of condition violations, or rates of conviction? All of those things, presumably, should be taken into account, but more research is necessary to conclusively say what is successful. Moreover, empirical studies for success in non-DV cases do not provide judges any extra guidance in DV cases. The limited data available highlights that we truly do not know what is successful when it comes to pretrial release conditions.

1. Meetings with Pretrial Officers

Meetings with pretrial officers are one of the most frequently utilized conditions of pretrial release; however, they are generally shown to have no effect on defendants' future criminal activity.<sup>111</sup> While one study did find a positive effect on reappearance, the study did not find any reduction in new criminal activity.<sup>112</sup> For DV cases, these statistics are concerning; a reduction in new criminal activity is a necessity to protect victims. Moreover, defendants who are under supervision of a pretrial officer show increased re-incarceration rates because defendants are more likely to be arrested for a violation of their pretrial release conditions.<sup>113</sup> For instance, a common pretrial condition is employment; ironically, requiring a defendant to continuously take off work for meetings with a pretrial officer puts the defendant at risk for losing their job. Also, the meetings which are typically held with a pretrial services officer are expensive and time-consuming.<sup>114</sup> The meetings provide almost no deterrent effect and do little to assist in providing the officer with "information necessary to intervene if troubles arrive."<sup>115</sup>

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110. Stevenson & Mayson, *supra* note 23, at 20.

111. *Id.* at 17.

112. *Id.* at 18.

113. *Id.*

114. *Id.* at 17.

115. Stevenson & Mayson, *supra* note 23, at 18.

## 2. Drug Testing

Similarly, drug testing is another condition with little empirical data to back up its use. Defendants who have a pattern of DV while under the influence of illegal drugs or who have a pattern of substance abuse are often required to perform regular drug testing while released.<sup>116</sup> Even though substance abuse has been linked to an increased risk of re-abuse, the limited data available on drug testing as a pretrial release condition shows drug testing is ineffective in reducing failure to appear (“FTA”) or rearrest.<sup>117</sup> One study did find reduced drug usage and rearrest when drug testing was paired with “swift, certain, and fair” punishments, but its results have yet to be replicated.<sup>118</sup> Drug testing places a sizable burden on a DV defendant to report for testing at any time.<sup>119</sup> The defendant may have to find transportation and childcare to report for testing.<sup>120</sup> Further, the state takes on the financial burden to pay for testing and salaries for those reviewing the results.<sup>121</sup> Reduced drug use in DV cases post-release is important, but drug testing as a pretrial release condition is ineffective to accomplish this goal.

## 3. Electronic Monitoring (“EM”)

Conversely, EM has shown to be more promising as an effective pretrial release condition.<sup>122</sup> For DV cases, there are two types of EM.<sup>123</sup> One type of EM equips the victim and the police with a transmitter, while the other type equips only the police with a transmitter.<sup>124</sup> EM alone does not physically protect a victim; the monitoring serves as a warning that the defendant is nearby. So, providing a transmitter to both the victim and the police raises EM’s effectiveness.<sup>125</sup> Like other pretrial conditions, the research is limited.<sup>126</sup> However, the continued research does show a positive effect on criminal activity.<sup>127</sup> In a California study, EM was found to reduce criminal activity after

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116. See BATTERED WOMEN’S JUST. PROJ., *supra* note 39, at 13, 16.

117. Stevenson & Mayson, *supra* note 23, at 19; see Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 655 tbl.1 (2009).

118. Stevenson & Mayson, *supra* note 23, at 19.

119. *Id.*

120. *See id.*

121. *Id.*

122. *Id.*

123. Edna Erez et al., *Electronic Monitoring of Domestic Violence Cases—A Study of Two Bilateral Programs*, 68 FED. PROB. 1 (2004), [https://www.uscourts.gov/sites/default/files/68\\_1\\_3\\_0.pdf](https://www.uscourts.gov/sites/default/files/68_1_3_0.pdf).

124. *Id.*

125. *Electronic Monitoring of Abusers*, RESEARCHNET, <http://criminal-justice.iresearchnet.com/crime/domestic-violence/electronic-monitoring-of-abusers/> (last visited Feb. 12, 2021).

126. Stevenson & Mayson, *supra* note 23, at 19.

127. *Id.*

release among gang members and sex offenders.<sup>128</sup> In multiple Florida studies, EM aided in the reduction of rearrest on technical violations, reoffending, and voluntary FTA.<sup>129</sup> While EM is the condition with the most positive statistics, it also happens to be one of the most intrusive and burdensome conditions on the defendant.<sup>130</sup> A study of incarcerated individuals considered EM “only slightly less onerous than incarceration.”<sup>131</sup> The defendant’s every move is monitored and often times restricted to certain areas. EM interferes with family relationships and employment.<sup>132</sup> It places “shame and stigma” on a defendant for a crime not yet proven beyond a reasonable doubt. While the state pays for the equipment and the monitoring, the defendant is often charged a fee to be monitored.<sup>133</sup> The success rates of EM has led to its overuse on individuals who are not a threat to the community.<sup>134</sup> So while successful, EM cannot be used pervasively.

#### 4. The Disproportionate Effect of Pretrial Release Conditions

Not only do pretrial release conditions in non-DV cases have limited success rates, many of them unequivocally burden low-income communities.<sup>135</sup> The disproportionate effect on low-income communities is supposed to be a driving factor in criminal justice reform, but these pretrial conditions do not seem to be helping. For example, a requirement to meet a pretrial release officer or pass a drug test imposes a significant time burden on the defendant.<sup>136</sup> The defendant might have to take time off from work or school to attend these meetings and pay for transportation or a babysitter. Lower-income defendants, which make up the majority of DV defendants,<sup>137</sup> cannot afford to continually take time off work to get drug tested or meet with an officer. Further, requiring the defendant to pay a fee to be electronically monitored strains lower-income defendants more than middle-class or upper-class defendants.

In conclusion, with limited empirical data and a continued disproportionate effect on lower-income communities, what is successful in non-DV pretrial release conditions remains largely unanswered—and thereby provides limited

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128. *Id.*

129. *Id.* at 20.

130. *Id.*

131. Stevenson & Mayson, *supra* note 23, 20.

132. *Id.* See *infra* APPENDIX I for proposed legislation.

133. Stevenson & Mayson, *supra* note 23, at 20.

134. *Id.*

135. *Id.*; See Ethan Corey & Puck Lo, *The ‘Failure to Appear’ Fallacy*, APPEAL (Jan. 9, 2019), <https://theappeal.org/the-failure-to-appear-fallacy/>.

136. Stevenson & Mayson, *supra* note 23, at 17.

137. Callie M. Rennison & Sarah Welchans, Special Report, *Intimate Partner Violence*, U.S. DEP’T OF JUST. (Jan. 2002) at 4. Deborah M. Capaldi et al., *A Systematic Review of Risk Factors for Intimate Partner Violence*, 3 PARTNER ABUSE 231, 242–43 (Nov. 2, 2012).

guidance to DV cases. But from what we do know, the best practice for pretrial release is a system “tailored to the specific risk a defendant presents and . . . the least restrictive means available to reasonably reduce the risk.”<sup>138</sup> To that end, the best practice for pretrial release in DV cases would also be one that is tailored to each defendant with the “least restrictive” conditions sufficient to protect the victim.

### B. *Legal Challenges to Pretrial Release Conditions*

In addition to statistical success in pretrial release conditions, legality of those conditions is relevant to what is “best” in pretrial release for DV cases. Pretrial release conditions constantly give rise to litigation—too many to be covered in the course of this Note. The conditions in DV cases most notably give rise to litigation arguing whether the defendant’s rights were violated in the interest of protecting the victim.<sup>139</sup> The arguments that fail often do so because most statutes give overarching discretion to the court to use any combination of conditions to ensure safety of the victim, leaving little room for an abuse of discretion.<sup>140</sup> Defendants released pretrial with conditions argue the conditions are a deprivation of their rights prior to conviction.<sup>141</sup> Specifically, legal challenges center around the prohibition of excessive bail, the Equal Protection Clause, the presumption of innocence, and the right to due process.

#### 1. Challenges Based on Excessive Bail Arguments

In a Sixth Circuit case, a defendant challenged the Tennessee law allowing a DV defendant to be held for twelve hours if the defendant is deemed a threat to the victim.<sup>142</sup> The defendant in *Fields* allegedly choked and hit his wife, resulting in cuts and bruises on the wife’s body.<sup>143</sup> Subsequently, the defendant was held for twelve hours without bail and was released with conditions.<sup>144</sup> Prosecutors dropped the charges against the defendant ten months after arrest, and the defendant then filed suit in federal court; he alleged the law, which allowed a twelve-hour hold, violated his rights of excessive bail and due process.<sup>145</sup> The court unequivocally shut down the defendant’s argument

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138. *Id.* at 20.

139. *Williams v. State*, 151 P.3d 460, 463–64 (Alaska Ct. App. 2006).

140. *See* ALA. CODE § 15-13-190(b) (2019); ALASKA STAT. § 12.30.027 (2020); COLO. REV. STAT. § 18-1-1001(3)(c) (2020); KY. REV. STAT. ANN. § 403.740 (West 2021); MICH. COMP. LAWS ANN. § 765.6b (2018); MISS. CODE ANN. § 99-5-37 (2021).

141. *Fields v. Henry*, 701 F.3d 180, 186 (6th. Cir. 2012).

142. *Id.* at 183; TENN. CODE ANN. § 40-11-150(h)(1) (2020).

143. *Fields*, 701 F.3d at 182.

144. *Id.* at 182–83.

145. *Id.* at 183.

regarding a violation of the Eighth Amendment, stating the Amendment does not address timing of bail, but rather only the amount.<sup>146</sup>

In regards to the defendant's due process rights, he alleged a temporary hold violated his "constitutionally protected liberty interest in the right of bail" granted to him by Tennessee law.<sup>147</sup> The court states the three necessary requirements of a procedural due process claim: "(1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process."<sup>148</sup> Defendant failed to prove the first requirement.<sup>149</sup> Under state law, a protected liberty interest exists where a state places "substantive limitations on official conduct" which afford mandatory conditions and where the state law mandates a specific outcome in the "official conduct."<sup>150</sup> The court reasoned the Tennessee law only requires a defendant not be released for twelve hours after arrest if deemed to be a threat; it does not mandate repercussions if there was no finding of threat.<sup>151</sup> Therefore, the Tennessee state law did not create a liberty interest to meet the requirements of a procedural due process claim.<sup>152</sup>

## 2. Challenges Based on Equal Protection

Statutes that impose a mandatory condition on a defendant without taking into consideration case-specific facts have been struck down as unconstitutional.<sup>153</sup> Currently in Alaska, if there is a protective order filed against the defendant, a defendant released on bail following a DV arrest cannot return to their residence for twenty days provided the residence is shared with the victim.<sup>154</sup> If the victim consents, the defendant does not have a prior conviction, or the court finds "clear and convincing evidence" the return to the residence will not endanger the victim, then this condition may be waived.<sup>155</sup> Prior to the current version of the statute, a condition of release from a DV arrest prohibited the defendant from returning to the shared residence.<sup>156</sup> There was no discretion afforded to the court.<sup>157</sup>

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146. *Fields*, 701 F.3d at 185; *see also* *Westerman v. Carey*, 892 P.2d 1067, 1075 (Wash. 1994) (finding the right to bail does not attach until after the preliminary appearance).

147. *Fields*, 701 F.3d at 185.

148. *Id.* (citing *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006)).

149. *Id.*

150. *Id.* at 186 (citing *Gibson v. McMurray*, 159 F.3d 230, 233 (6th Cir. 1998)).

151. *Id.* at 187.

152. *Fields*, 701 F.3d at 186 (citing *Sweeton v. Brown*, 27 F.3d 1162, 1164-65 (6th Cir. 1994); *Procopio v. Johnson*, 994 F.2d 325,332 (7th Cir. 1993); *Shango v. Jurich*, 681 F.2d 1091, 1107 (7th Cir. 1982)).

153. *Williams v. State*, 151 P.3d 460, 471 (Alaska Ct. App. 2006).

154. ALASKA STAT. § 12.30.027 (b) (2020).

155. *Id.*

156. ALASKA STAT. § 12.30.027 (b) (1996) (repealed 2010).

157. *Id.*

In a 2006 Alaska case, a DV defendant challenged the previous version of the statute when he was forbidden to return to his shared residence with his wife and daughter as a pretrial release condition.<sup>158</sup> The defendant was arrested for strangling his wife and pushing her to the ground during an argument in their home.<sup>159</sup> Both the defendant and the victim asked the district court multiple times for a modification of the pretrial release condition.<sup>160</sup> Eventually, contact was allowed between victim and the defendant but no change was made to prohibition on residency.<sup>161</sup> The victim argued the condition placed a costly burden on the family to find a place to spend holidays together outside the home, the defendant was no longer a threat to her, and the incident had simply been overexaggerated by the police.<sup>162</sup> The defendant argued the condition violated the Equal Protection Clause because the condition limited his liberty where he posed no danger to the victim.<sup>163</sup> Furthermore, the defendant argued the condition violated due process by restricting the right to live in his family home without an opportunity for a hearing.<sup>164</sup> The state, in turn, argued the defendant may have “psychological or emotional forces” over a victim rendering it impossible to determine if it is safe for the defendant to return, and so the state has a strong interest in the law.<sup>165</sup> Before ultimately finding the statute unconstitutional, the court acknowledged the difficult balancing act in a DV case.

The State undoubtedly has a legitimate and compelling interest in preventing domestic violence—and in preventing a person accused of domestic violence from tampering with the alleged victim’s testimony. On the other hand, the government has no legitimate interest in barring a person who poses no appreciable risk of harming or intimidating the victim from returning to a shared residence. Given the importance of the right to live with a member of one’s family, we will invalidate the classification if we find an insufficiently tight fit between the purposes of the statute and the means used to accomplish those purposes and if less restrictive alternatives are available.<sup>166</sup>

The state’s argument overlooked less restrictive solutions from other jurisdictions where return to the residence is not guaranteed to be safe.<sup>167</sup> Notably, less restrictive solutions allow the victim to request the defendant return to the residence or allow the judge to review the case before an automatic

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158. *Williams v. State*, 151 P.3d 460, 462 (Alaska Ct. App. 2006).

159. *Id.*

160. *Id.*

161. *Id.* at 468.

162. *Id.* at 462–63.

163. *Williams v. State*, 151 P.3d 460, 462 (Alaska Ct. App. 2006).

164. *Id.*

165. *Id.* at 466.

166. *Id.* at 465–66.

167. *Id.* at 468–69 (citing UTAH CODE ANN. § 77-36-2.5; WIS. STAT. § 968.075).

prohibition of return to residence.<sup>168</sup> The court reasoned not granting discretion within the statute creates an overly broad statute; the statute could be applied to both cases where the state's interest is outweighed by the constitutional rights of the defendant and cases where the constitutional rights of the defendant outweighed the state's interests.<sup>169</sup> A DV defendant pretrial "retains an important liberty interest in choosing their family living arrangements."<sup>170</sup> Interestingly, while the prohibition of returning to the residence was legal, the court argued the condition was potentially "no longer serving its intended purpose" once contact outside the residence was no longer restricted.<sup>171</sup> This perhaps raises the consideration that pretrial release conditions need to be reviewed regularly during each defendant's pretrial period to see if they are still serving the state's interests.

### 3. Challenges Based on Presumption of Innocence

Additionally, defendants argue pretrial conditions violate the bedrock principle of the criminal justice system: an individual is innocent until proven guilty. In a Colorado state case, a DV defendant succeeded with that argument.<sup>172</sup> In *Martell v. County Court of County of Summit*, a defendant arrested on DV charges challenged his pretrial release condition of counseling on that principle.<sup>173</sup> The trial court ordered the defendant to complete counseling subject to a now-repealed Colorado law that gave judges discretion to impose conditions which "may include submission of the defendant to the *supervision* of some qualified person or organization."<sup>174</sup> Not only did the court reason "supervision" under the statute did not include counseling, but the court further reasoned counseling as a pretrial release condition raises issues with a defendant's right against self-incrimination and presumed innocence under the Fifth Amendment.<sup>175</sup>

Conversely, in *People v. Bongiovanni*, a court found counseling to be a constitutional reminder to the DV defendant that his release pretrial could be revoked—instead of a tool that implies guilt.<sup>176</sup> The defendant in that case was arrested for DV and released with a condition to attend "alternative to violence"

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168. *Williams v. State*, 151 P.3d 460, 468–69 (Alaska Ct. App. 2006).

169. *Id.* at 467.

170. *Id.* at 470.

171. *Id.* at 468.

172. *Martell v. Cnty. Ct. of Cnty. of Summit*, 854 P.2d 1327, 1330 (Colo. App. 1992).

173. *Id.*

174. *Id.* at 1331; COLO. REV. STAT. § 16-4-103(2) (repealed 2013).

175. *Martell*, 854 P.2d at 1330.

176. *People v. Bongiovanni*, 183 Misc. 2d 104, 106 (N.Y. Sup. Ct. 1999) ("Rather than implying guilt, attendance at the [counseling] program, in tandem with its educational benefits, remind the defendant, . . . that although at liberty, he is still bound by the dictates of the court, which can rescind his liberty on his failure to abide by those dictates.").

counseling subject to a New York state law allowing a judge to include any additional conditions to pretrial release that are reasonable.<sup>177</sup> In the court's opinion, counseling is no different than no-contact orders or restrictions of living; it is simply "a tool for the court" to protect the victim.<sup>178</sup> Moreover, the court reasoned an order of protection in conjunction with counseling is more likely to prevent violations of the order of protection.<sup>179</sup>

#### 4. Challenges Based on Due Process

Another constitutional concern of defendants is their right to be heard before being deprived of their rights. In a Supreme Court of Connecticut case, the defendant, who was arrested for DV, appealed the denial of an evidentiary hearing before the issuance of a criminal protective order.<sup>180</sup> The state, in turn, argued the law does not require an "evidentiary hearing."<sup>181</sup> Because the law did not specify how the "hearing shall be conducted, or what the defendant's rights" were during the hearing, the court turned to statutory interpretation to make its decision.<sup>182</sup> The court interpreted the statute to mean that a full evidentiary hearing was not needed because it was not expressly stated in the statute.<sup>183</sup> The statute only requires the trial court to consider oral argument and recommendation by a family violence unit at the hearing.<sup>184</sup> In addition to the lack of explicit instruction, the court highlights "the need for expeditious assumptions of judicial control" at the preliminary phase to prevent unnecessary delay in the court system.<sup>185</sup> The court reasoned, however, a defendant is entitled to be heard on the issue of the protective order at a subsequent hearing.<sup>186</sup> The defendant is given the right to seek modification of their conditions or a more extensive hearing, whereupon, the state is required to show by preponderance of the evidence that the criminal protective order is still satisfying the state's interest.<sup>187</sup> In summary, the court reasoned the defendant was not entitled to be fully heard prior to the issuance of a criminal protective order for the sake of preventing a backlog of cases in the criminal justice system, but is entitled to a

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177. *Id.* at 105–06.

178. *Id.* at 106.

179. *Id.*

180. *State v. Fernando A.*, 981 A.2d 427, 432 (Conn. 2009); McManis Faulkner, *Criminal Protective Orders and Domestic Violence Restraining Orders—Nine Essential Things to Know*, JDSUPRA (Aug. 4, 2020), <https://www.jdsupra.com/legalnews/criminal-protective-orders-and-domestic-44407/> (detailing provisions of a criminal protective order which include no-contact orders, move-out orders, and personal conduct orders).

181. *Fernando*, 981 A.2d at 434 (emphasis added); CONN. GEN. STAT. § 54-63c (2008).

182. *Fernando*, 981 A.2d at 437.

183. *Id.* at 440–41.

184. *Id.* at 445.

185. *Id.* at 439 (citing *State v. Doe*, 675 A.2d 518, 609 (Conn. Super. Ct. 2000)).

186. *State v. Fernando A.*, 981 A.2d 427, 442–43 (Conn. 2009).

187. *Id.* at 439–40.

full hearing after the protective order is already in place.<sup>188</sup> The backlog of cases is a serious and growing issue in criminal court,<sup>189</sup> but is a backlog of cases a sufficient reason to prohibit a defendant from being heard until after his freedoms have already been restricted?

While most legal challenges are overcome by the state's interest in protecting the victim, they do give rise to important considerations when assigning pretrial release conditions. The case law above seems to suggest as long as the condition serves the state's interest, is applied considering case-specific facts, and does not violate statutory or constitutional rights, then the condition can be used. But when does a condition stop serving the state's interest? Who should get to present case-specific facts to the judge? Even if the condition does not violate a defendant's legal rights, can a condition be so morally wrong to prohibit its use? All of these considerations are crucial to setting up a successful pretrial release system for DV cases.

### C. *Recommendations for a Successful Pretrial Release Practice in DV Cases*

Unsurprisingly, limited empirical data and numerous legal challenges have led to a less-than-uniform approach to pretrial release in DV cases among states. Statutes must address two competing interests: the state's interest in protecting the victim and the defendant's interest in protecting his constitutional rights. A statute where both interests converge is ideal; arguably, that is easier said than done. However, a statute that allows case-specific facts to play a role in the decision would assure both interests are at least being considered—and hopefully successfully met.<sup>190</sup>

#### 1. Training

Before a judge or a third party analyzes case-specific facts, they should be trained on why those facts matter. In most states, the party assigning conditions is a judge. The judge should be well-informed on the causes and risks associated with DV. However, according to a program by the National Judicial Education Program, only thirty-five percent of judges felt they had enough knowledge about DV to make effective decisions.<sup>191</sup> Despite this, only eighteen states

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188. *Id.* at 445.

189. See Robert Lewis, *Justice Delayed: Courts Overwhelmed by Pandemic Backlog*, CAPRADIO (Jan. 20, 2021), <https://www.capradio.org/articles/2021/01/20/justice-delayed-courts-overwhelmed-by-pandemic-backlog/>.

190. See *infra* APPENDIX II for a proposed model statute.

191. PETER JAFFE, CTR. FOR RSCH. & EDUC. ON VIOLENCE AGAINST WOMEN & CHILDREN, ENHANCING JUDICIAL SKILLS IN DOMESTIC VIOLENCE CASES 26 (Nov. 12, 2010), <https://www.futureswithoutviolence.org/wp-content/uploads/ejs-report-nov-12.pdf> [hereinafter ENHANCING JUDICIAL SKILLS].

required mandatory DV training for judges.<sup>192</sup> Judges should be mandated to receive specialized DV training on success of pretrial release conditions, victim retraction, danger assessment, recidivism, and impact on children.<sup>193</sup>

## 2. Case-Specific Facts

Once the judge is well-trained in DV to analyze causes and risks, the judge should receive case-specific facts through pretrial services. Pretrial services programs have played a large role in the bail reform movement.<sup>194</sup> One of the largest roles they have played is helping the bail system move from cash bail to conditional bail by assessing conditions that would be suitable.<sup>195</sup> Pretrial services can assess the risk a defendant poses to the victim before release.<sup>196</sup> One county in North Carolina has piloted a specialized pretrial services program for DV cases.<sup>197</sup> The pretrial staff underwent extensive training to identify aggressors, crisis intervention, and the effects of DV.<sup>198</sup> Prior to release or bail consideration, pretrial services assess the risk of the defendant by pulling criminal history, interviewing applicable parties, and preparing a report for the judge.<sup>199</sup> Ideally, pretrial services would utilize Jacquelyn Campbell's Danger Assessment tool.<sup>200</sup> The Danger Assessment tool is a formalized data-driven tool used to assess "the likelihood of lethality or near lethality occurring in a case of intimate partner violence."<sup>201</sup> Incorporating a risk assessment tool, like this one, allows a victim to have an active role in the case without being forced to confront their abuser in court. If the defendant does not see the victim actively engaged in the case, it may potentially lower the risks of retaliation or recantation. Campbell's tool requires a victim to answer the following yes-or-no questions:

1. Has the physical violence increased in severity or frequency over the past year?
2. Does he<sup>202</sup> own a gun?

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192. *The Verdict Is In: Mandate Domestic Violence Training for Judges*, MARY BYRON PROJ. (July 8, 2015), <https://www.marybyronproject.org/2015/07/08/the-verdict-is-in-mandate-domestic-violence-training-for-judges/>.

193. See ENHANCING JUDICIAL SKILLS, *supra* note 191, at 8.

194. *Pretrial Services & Supervision*, PRETRIAL JUST. CTR. FOR CTS., <https://www.nsc.org/pjcc/topics/pretrial-services> (last visited Feb. 18, 2021).

195. *Id.*

196. *Id.*

197. MARINA DUANE & CARLA VASQUEZ-NORIEGA, URBAN INST., PRETRIAL STRATEGY FOR HANDLING INTIMATE PARTNER VIOLENCE CASES 1 (Oct. 2018).

198. *Id.* at 8.

199. *Id.*

200. Wagage, *supra* note 4, at 198–99.

201. *Id.* at 198; Campbell, *supra* note 117, at 653.

202. Campbell, *supra* note 117, at 655 tbl.1 (“‘He’ refers to your husband, partner, ex-husband, ex-partner, or whoever is currently physically hurting you”).

3. Have you left him after living together during the past year?  
3a.(If have never lived with him, check here \_\_\_)
4. Is he unemployed?
5. Has he ever used a weapon against you or threatened you with a lethal weapon?  
5a.(If yes, was the weapon a gun? \_\_\_)
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, when you can see your family, how much money you can use, or when you can take the car?  
13a.(If he tries, but you do not let him, check here: \_\_\_)
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?  
(If you have never been pregnant by him, check here: \_\_\_)
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, destroy your property, or call you when you don’t want him to?
20. Have you ever threatened or tried to commit suicide?<sup>203</sup>

While pretrial services are collecting data, the defendant should be held for up to seventy-two hours or until a report is completed—whichever is sooner. During the temporary hold, the defendant shall not be allowed to contact the victim. The temporary no-contact order will protect the victim from being persuaded to fill out the Danger Assessment in a particular way. The temporary no-contact order should be waivable for emergency situations; however, contact shall be supervised by pretrial services. These answers to the Danger Assessment

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203. *Id.*

along with other information collected by pretrial services would then be compiled into a report and given to the judge to review prior to a bail hearing.

### 3. Bail Hearing

A thorough, extensive review of each case should be required at the bail hearing in all DV cases. While it is well-recognized that criminal courts are burdened by a backlog of cases, pretrial release and the conditions therein are usually decisive of a defendant's future abuse.<sup>204</sup> In DV cases, the defendant has "greater access" to the victim than in any other criminal case.<sup>205</sup> If the defendant is angered by the arrest and loss of control in the relationship, the defendant will potentially use their access to the victim as an opportunity to avenge the loss of control.<sup>206</sup> In addition, a defendant should have a right to be heard before their freedoms are restricted. At the bail hearing, there should be a rebuttable presumption that the defendant is a continued threat to the victim. If the defendant is able to prove with clear and convincing evidence that they no longer pose a threat to the victim, then the defendant should be released only with conditions common to pretrial release of non-DV cases.<sup>207</sup> If, however, the judge is not able to make such finding after taking into account the Danger Assessment and the defendant's evidence, then the judge shall consider pretrial release conditions common to DV cases.

### 4. Pretrial Release Conditions for Defendants

Using the training she received, the judge should consider what conditions are necessary to protect the victim. Naturally, only conditions which are constitutional in the judge's jurisdiction should be applied. For most jurisdictions, this means any condition that was applied using case-specific facts and that serves the state's interest without violating an explicit right.<sup>208</sup> Factors shown to increase the risk of DV should be considered, including: economic stability, emotional dependency, familial relationships, residency, employment, and prior criminal history.<sup>209</sup> Ideally, these would be detailed in pretrial services' report.

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204. Michael Brigner, *Amy's Law: New Ohio Domestic Violence Bail Statute Adds Safety Precautions for Crime Victims and the Public*, OHIO DOM. REL. J., March/April 2006, at 9.

205. *Id.*

206. *Id.*

207. BATTERED WOMEN'S JUST. PROJ., *supra* note 39, at 7 (listing common pretrial release conditions for non-domestic violence cases: not committing a crime, attending court proceedings, maintaining employment or seeking employment, complying with curfew, not possessing a firearm, reporting to pretrial services regularly, obtaining "medical, psychological, or psychiatric treatment", and remaining in custody of third party).

208. *See supra* Part IV.B.

209. Bornstein, *supra* note 48, at 601; PRACTICAL IMPLICATIONS, *supra* note 3, at 25, 40.

Conditions such as EM, no-contact orders, restrictions on residency or employment, and any other prohibition directly related to the DV incident should be considered. Even if the condition is constitutional, however, the judge should consider whether the burden on the defendant is completely overshadowed by the necessity to protect the victim. If, for example, the incidents of DV did not occur under the influence of drugs and the victim does not report any drug use on the Danger Assessment, then a condition restricting drug use might be appropriate, but mandatory drug testing likely would not be useful. Since drug testing has not been proven to reduce future crime,<sup>210</sup> mandatory drug testing as a condition of release would not serve the state's interests in this case—but it would certainly burden the defendant. Moreover, in a case where the defendant is not given any restrictions on residency or any other condition prohibiting movement, placing the defendant under EM likely would be overburdensome and not serve the state's interests. EM, because it is so burdensome and expensive, should be considered a tool to enforce residence restrictions or movement restrictions rather than a tool to simply advance the state's interests on its own.

In an ideal world, the defendant would not pay for conditions placed upon them, such as payment for the lab to run a drug test or payment to be electronically monitored. The defendant is already subject to the aforementioned inadvertent, negative financial effects of some pretrial conditions, so requiring further payment to comply with those conditions seems borderline unconstitutional. Obviously, this is not an “ideal world;” resources are limited. Consequently, conditions that require further payment should be limited to cases where there is no way to ensure the victim's safety without them. What conditions are absolutely necessary to protect the victim would be determined by the judge with the help of pretrial services' report.

##### 5. Support for the Victim

In conjunction with the conditions applied to the defendant, applicable support should also be given to the victim. The added support and services for a victim will help a state not only address actual abuse but also the underlying causes of re-abuse. Added support for the victim should come in two forms: support tied to the defendant's conditions and support that requires the state to provide additional resources to victims. Any condition on the defendant that is tied to the activity of the victim should allow for the victim to play a role in that condition. For example, if the defendant is placed on EM, then the victim should be given the option to receive alerts if the defendant is in a prohibited location.<sup>211</sup>

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210. *See supra* Part IV.A.2.

211. *See* ARK. CODE ANN. § 9-15-217(c) (2020) (allowing the victim with a protection order to be notified if a defendant, who is equipped with EM, is close); 730 ILL. COMP. STAT. 5/5-8A-7 (2018) (alerting a victim with a protection order to be notified when the defendant, who is equipped

If the defendant has a no-contact order with the victim, the victim should be allowed to waive the no-contact order but have pretrial services present for any future contact. Furthermore, the state should be required to inform the victim of all conditions the defendant is required to follow and provide the victim with resources to help with alternative housing, childcare, and economic stability.<sup>212</sup> Research suggests reducing dependency in abused victims may reduce continued DV.<sup>213</sup> Though it might require more resources, added support for the victim creates an added layer of protection for the victim.

#### 6. Further Review of the Conditions

As suggested in *Williams v. State*, the conditions set at the first bail hearing may no longer serve the state's interests after a while.<sup>214</sup> While defendants are entitled to ask the court for a bail modification,<sup>215</sup> pretrial services should also be monitoring relevant facts that led to the initial pretrial release conditions. Pretrial services should monitor any changes in employment, financial status, and mental health. Putting the responsibility on a third party like pretrial services—rather than just the defendant—would give the judge unbiased information on whether the conditions are still useful. A periodic review would ensure the defendant, who has yet to be convicted, is not being restricted without a legitimate state interest.

Being such a new crime, DV is difficult to address. Pretrial release in DV cases present an even more difficult issue to address: protecting the victim from future harm while not violating the defendant's rights. The judges who are forced to address this issue should be well-educated on the risks and harms of DV. Though there is limited data on what conditions can prevent those risks, there is data to identify those risks. States should design a DV-specific statute that allows a judge to take into account those risks and only apply those conditions necessary to prevent the risks.

#### CONCLUSION

DV cases raise unique considerations when assigning pretrial release conditions. The targeted victim is not random, but rather shares an emotional connection with the defendant. The defendant and victim often share a home, children, and several other parts of their life. The arrest can cause a lack of

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with EM, has entered prohibited areas); MICH. COMP. LAWS ANN. § 765.6b(6) (2018) (granting the right of a victim in a domestic violence case to have an additional EM receptor to monitor the defendant's location).

212. See MONT. CODE ANN. § 46-6-602 (2021) (requiring the state to inform the victim of alternative housing).

213. Bornstein, *supra* note 48, at 603.

214. 151 P.3d 460, 471 (Alaska Ct. App. 2006).

215. See KY. R. CRIM. PROC. R. 4.40 (2020); LA. CODE CRIM. PROC. ANN. art. 319 (2020); PA. R. CRIM. PROC. R. 529 (2021).

economic stability and a disruption in family life. This intermingled relationship may cause a victim to ask prosecution to drop the charges for fear of retaliation or may actually cause re-abuse. But to prevent the re-abuse, the court has to impose burdensome and intrusive conditions on the defendant resulting in a potential violation of the defendant's rights. How are states supposed to balance these competing interests? Is conditional pretrial release really solving any issues if rates of re-abuse and re-arrest are so high? Are burdensome pretrial release conditions constitutional?

In part, these questions are difficult to answer because DV is so new to the criminal justice system. Congress stepped in to help victims only thirty years ago.<sup>216</sup> Even with the added protections from VAWA, incidents of DV are still underreported. As a practical matter, more data is necessary to truly know what is successful.

Another explanation is the sheer variability in DV cases. DV cases affect family units on a greater scale than non-DV cases. There are endless considerations when assigning conditions in a DV case that cannot be properly addressed in a generic bail statute with mandatory conditions for DV defendants. From a policy standpoint, creating a specialized DV statute is necessary. From a practical standpoint, creating a specialized DV statute with no judicial discretion is not only impracticable, but ineffective.

Accordingly, states should implement specialized DV statutes that allow a judge to consider each case individually but provide parameters of how and when judges should assign pretrial release conditions in DV cases. After receiving specialized training, the judge should review a risk assessment for each defendant before the bail hearing and assign conditions accordingly. Conditions should be tailored to each case to address the risk factors present in that case. Moreover, once conditions are set, a risk assessment review should happen periodically throughout the pretrial phase to ensure the conditions are not only still serving the state's interests but also have not infringed on the defendant's rights. With these modifications, states could successfully balance the competing interests in pretrial release in a DV case.

JACQUELYN SICILIA\*

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216. *See generally* VAWA, Pub. L. No. 103-322, 42 U.S. §§ 13925–14045d (1994) (granting added protections and resources to women affected by violence).

\* J.D. Candidate, 2022, Saint Louis University School of Law. Special thank you to Professor Chad Flanders for his guidance on this Note.

APPENDIX I

	Mandatory Conditions				Discretionary Conditions
	Temporary Hold	Restriction on Residence or Employment	No-Contact Order	Enrollment in Counseling or Treatment	
<b>Alabama</b>	Ala. Code § 15-30-190(a) (2019)				Ala. Code § 15-30-190(b) (2019)
<b>Alaska</b>		ALASKA STAT. § 12.30.027(b) (2020)			ALASKA STAT. § 12.30.011 (2020)
<b>Arizona</b>					ARIZ. REV. STAT. ANN. § 13-3601 (2021)
<b>Arkansas</b>					ARK. CODE ANN. § 16-81-113(e) (2020)
<b>California</b>					Cal. Penal Code § 1270 (West 2021)
<b>Colorado</b>			COLO. REV. STAT. § 18-1-1001(3)(b) (2020)		COLO. REV. STAT. § 18-1-1001 (2020)
<b>Connecticut</b>					CONN. GEN. STAT. § 54-63c (2021)
<b>Delaware</b>					DEL. C.P.R. 5.2
<b>Florida</b>					FLA. CONST. art. I, § 14
<b>Georgia</b>			GA. CODE ANN. § 17-6-1(f)(2) (2020)	GA. CODE ANN. § 17-6-1(f)(2) (2020)	GA. CODE ANN. § 17-6-1 (2020)
<b>Hawaii</b>					HAW. REV. STAT. § 804-7.4 (2017)
<b>Idaho</b>					IDAHO C.P.R. 46

	<b>Mandatory Conditions</b>				<b>Discretionary Conditions</b>
<b>Illinois</b>					725 ILL. COMP. STAT. 5/110-5 (2018)
<b>Indiana</b>	IND. CODE § 35-33-8-6.5 (2021)		IND. CODE § 35-33-8-3.6 (2021)		IND. CODE § 35-33-8-3.2 (2021)
<b>Iowa</b>					IOWA CODE § 811.2 (2021)
<b>Kansas</b>			KAN. STAT. ANN. § 22-2802 (2021)		Kan. Stat. Ann. § 22-2802 (2021)
<b>Kentucky</b>					KY. REV. STAT. ANN. § 403.740 (West 2021); <i>Id.</i> § 431.520 (West 2021)
<b>Louisiana</b>	LA. CODE CRIM. PROC. ANN. art. 320(G) (2020)	LA. CODE CRIM. PROC. ANN. art. 320(G) (2020)	LA. CODE CRIM. PROC. ANN. art. 320(G) (2020)		LA. CODE CRIM. PROC. ANN. art. 320(G) (2020)
<b>Maine</b>					ME. STAT. tit. 15, § 1026 (2021)
<b>Maryland</b>					MD. C.P.R. 4-216.1
<b>Massachusetts</b>					MASS. GEN. LAWS. ch. 276, § 56 (2020)
<b>Michigan</b>					MICH. COMP. LAWS ANN. § 765.6b (2018)
<b>Minnesota</b>					MINN. C.P.R. 6.02
<b>Mississippi</b>	MISS. CODE. ANN. § 99-5-37(2) (2021)				MISS. CODE. ANN. § 99-5-37(2) (2021)
<b>Missouri</b>					MO. REV. STAT. § 544.457 (2020)

	Mandatory Conditions				Discretionary Conditions
<b>Montana</b>					Mont. Code Ann. 46-6-602 (2021); <sup>217</sup> <i>id.</i> § 46-9-108 (2021)
<b>Nebraska</b>					Neb. Rev. Stat. § 29-901.01 (2020)
<b>Nevada</b>					NEV. REV. STAT. § 178.484 (2020)
<b>New Hampshire</b>					N.H. REV. STAT. ANN. § 173-B:1 (2018)
<b>New Jersey</b>					N.J. STAT. ANN. § 2C:25-26(d) (2013)
<b>New Mexico</b>					N.M. Ct. C.P.R. 5-401 (amended by New Mexico Court Order 0028)
<b>New York</b>					N.Y. Crim. Proc. Law § 530.12 (McKinney 2020)
<b>North Carolina</b>					N.C. GEN. STAT. § 15A-534.1 (2020)
<b>North Dakota</b>					N.D. C.P.R. 46; N.D. CENT. CODE § 14-07.1-19 (2019)

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217. As a disclaimer, this statute includes a provision requiring the state to inform a victim of domestic violence of another place to live. The condition of requiring the state to inform a victim of DV of another place to live is a *mandatory* condition, but it does not fit under the categories for mandatory conditions in this Appendix.

	Mandatory Conditions				Discretionary Conditions
<b>Ohio</b>					OHIO C.P.R. 46; OHIO REV. CODE ANN. § 2937.33 (LexisNexis 2020)
<b>Oklahoma</b>	OKLA. STAT. tit. 22, § 60.16 (2016)				Okla. Stat. tit. 22, § 60.16 (2016)
<b>Oregon</b>			OR. REV. STAT. § 135.247 (2019)		OR. REV. STAT. § 135.250(2) (2019); <i>id.</i> § 135.260 (2019)
<b>Pennsylvania</b>		18 Pa. Stat. and Cons. Stat. Ann. § 2711(c) (West 2018)			18 Pa. Stat. and Cons. Stat. Ann. § 2711(c) (West 2018)
<b>Rhode Island</b>			12 R.I. GEN. LAWS § 12-29-4 (2020)		12 R.I. GEN. LAWS § 12-29-4 (2020)
<b>South Carolina</b>					S.C. CODE ANN. § 16-25-120 (2020); <i>id.</i> § 17-15-10 (2020)
<b>South Dakota</b>			S.D. CODIFIED LAWS § 25-10-23 (2020)		S.D. CODIFIED LAWS § 25-10-3.1 (2020)
<b>Tennessee</b>	TENN. CODE ANN. § 40-11-150(h)(1) (2020)				TENN. CODE ANN. § 40-11-150 (2020); <i>id.</i> § 40-11-116 (2020)
<b>Texas</b>					TEX. C.P.R., art. 17.40
<b>Utah</b>			UTAH CODE ANN. § 78B-7-802 (LexisNexis 2020)		Utah Code Ann. § 78B-7-802 (LexisNexis 2020)
<b>Vermont</b>					VT. STAT. ANN. tit. 13, § 7554 (2021)

	Mandatory Conditions				Discretionary Conditions
<b>Virginia</b>					VA. CODE ANN. § 19.2-120 (2020)
<b>Washington</b>					WASH. REV. CODE § 10.99 (2021)
<b>West Virginia</b>		W. VA. CODE § 6-2-1C-17c (2020)	W. VA. CODE § 6-2-1C-17c (2020)		W. VA. CODE § 6-2-1C-17c (2020)
<b>Wisconsin</b>	WIS. STAT. § 968.075(5)(b)(1) (2021)				WIS. STAT. § 968.075 (2021)
<b>Wyoming</b>					WYO. C.P.R. 46.1

## APPENDIX II

## Proposed Model Law on Pretrial Release in Domestic Violence Cases:

§ 1.1 In an arrest involving domestic violence, the defendant should be held for up to seventy-two hours after arrest. During the seventy-two hours, pretrial services should conduct a thorough investigation of the case to provide the judge with a risk assessment on the defendant.

(a) Pretrial services should collect the following data:

(i) a danger assessment tool filled out by the victim; and

(ii) any other data that is related to an increased risk level of re-abuse.

§ 1.2 Prior to the expiration of the seventy-two hours, pretrial services should inform the victim of his or her resources which shall include, but not be limited to: alternative housing, counseling services, support centers, and the contact information of law enforcement.

§ 1.3 The victim and defendant are prohibited from any form of contact during the temporary hold, unless there is an emergency situation. If an emergency situation arises, a pretrial services officer, or other unbiased third party, shall be present for the emergency contact.

§ 1.4 After reviewing the risk assessment, the defendant should appear before the judge at a bail hearing. The defendant has the burden of proof to show he or she is no longer a threat to the victim. If the judge finds the defendant is able to prove through clear and convincing evidence that he or she no longer poses a threat to the victim, then the defendant should be released only with conditions common to pretrial release in non-DV cases.

§ 1.5 If the judge finds the defendant is a continued threat, she should consider whether any condition or combination of conditions would protect the victim and the community but ensure reappearances by the defendant. Possible conditions may include:

- (a) GPS monitoring with the victim having the right to request transmission of the GPS location;
- (b) No aiding in the commission of a crime or committing a crime;
- (c) No attempting to threaten or persuade the victim in any way regarding matters of the case;
- (d) Refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (e) Refrain from excessive use of alcohol and any use of a narcotic drug or other controlled substance;
- (f) Maintain employment or actively seek employment;
- (g) Report up-to-date contact information to pretrial officer;
- (h) Remain in custody of a third party who agrees to supervise and report any condition violations;

- (i) Prohibition of returning to a shared residence with the victim;
- (j) No-contact order;
- (k) No-contact without a pretrial service officer supervising; and
- (l) Any other prohibition that was directly related to the domestic violence incident.

§ 1.6 If a condition or combination of conditions is sufficient to protect the victim and community and support reappearance, the defendant shall be released on those conditions. If there is no condition or combination of conditions to protect the victim and community from further harm and/or support reappearance, the defendant should be held in pretrial detention.

§ 1.7 If released subject to conditions in § 1.5, the defendant's risk assessment should be reevaluated quarterly during the pretrial phase. The defendant also has the right to seek a modification of those conditions.

