

THE NEED FOR REMEDIAL RESENTENCING FOR SURVIVORS OF
DOMESTIC VIOLENCE: A TRAUMA-INFORMED ASSESSMENT OF NEW
YORK'S DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT

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INTRODUCTION

This Essay will discuss the need for resentencing for incarcerated people who have experienced domestic violence and provide an assessment of the Domestic Violence Survivors Justice Act (“DVSJA”). Part I will briefly discuss the need and reasoning for resentencing for incarcerated survivors of domestic violence. Part II will provide a brief overview of the legislative history and elements of the DVSJA. Part III will examine § 60.12(1)(a), a requirement of the DVSJA which states, “*at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant...*”¹ Although this Article will not exhaustively critique the DVSJA, § 60.12(1)(a) deserves discussion because it brings to light the many misunderstandings the legal system has about the nature of domestic violence. The central point of Part III is that courts should refuse to narrowly interpret § 60.12(1)(a) as requiring a temporal nexus between the abuse suffered and the instant offense. Instead, courts should embrace a liberal interpretation that focuses on the long-term effects of domestic violence and the impact of residual trauma on behavior. The text of the statute, legislative intent, statutory interpretation doctrine, and social science research support this progressive interpretation of § 60.12(1)(a).

Refusing to impose a temporal nexus between the abuse suffered

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¹ N.Y. Penal Law § 60.12 (McKinney 2022) (emphasis added).

and the instant offense will allow for a broader application of the DVSJA as a remedial statute and better effectuate legislative intent. This Essay is not intended to diminish the laudable work of the New York state legislature in adopting the DVSJA but to provide a trauma-informed,² survivor-centered perspective to assist legislators, judges, and lawyers in supporting survivors of domestic violence caught in the criminal legal system.

I. THE NEED AND RATIONALE FOR THE RESENTENCING OF INCARCERATED PEOPLE WHO HAVE EXPERIENCED DOMESTIC VIOLENCE

Domestic violence is a global public health issue that takes on many forms and pervades communities regardless of socioeconomic class, gender, race, or sexual orientation.³ However, women of color and members of the LGBTQ community are disproportionately represented among domestic violence survivors.⁴ The National Intimate Partner and Sexual Violence Survey, conducted by the Centers for Disease Control and Prevention, reported that about forty-one percent of women and twenty-six percent of men have experienced sexual violence, physical violence, and or stalking by an intimate partner and have reported an intimate partner violence-related impact during their lifetimes.⁵ Injury, post-traumatic stress disorder (“PTSD”) symptoms, concern for safety,

² SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, SAMHSA’S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 9 (2014), <https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4884.pdf> (“A program, organization, or system that is trauma-informed realizes the widespread impact of trauma and understands potential paths for recovery; recognizes the signs and symptoms of trauma in clients, families, staff, and others involved with the system; and responds by fully integrating knowledge about trauma into policies, procedures, and practices, and seeks to actively resist re-traumatization.”).

³ See *Violence Prevention Fast Facts*, CTR. FOR DISEASE CONTROL AND PREVENTION (Nov. 25, 2022), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html>.

⁴ See *Domestic Violence Statistics & Facts*, SAFE HORIZON, <https://www.safehorizon.org/get-informed/domestic-violence-statistics-facts/#statistics-and-facts/> (last visited Nov. 17, 2022).

⁵ *Violence Prevention Fast Facts*, *supra* note 3.

and missing at least one day of work were commonly reported impacts.⁶

Despite this massive personal and societal crisis, people experiencing domestic violence are often left without resources or help from the law.⁷ A study by the National Clearinghouse for the Defense of Battered Women reported that sixty-seven percent of survivors of domestic violence who called the police for help after experiencing abuse were “somewhat or extremely afraid” to call the police in the future.⁸ One in four people had been arrested or threatened with arrest by the police after reporting domestic violence.⁹ More than half of all participants said that calling the police would make things worse, and two-thirds or more said that they were afraid the police would not believe them or would do nothing.¹⁰ Anti-carceral feminists and prison abolitionists at the forefront of advocacy have argued against the involvement of law enforcement and mandatory criminalization of domestic violence, citing many survivors’ stories of re-traumatization and brutalization after involving the law in matters of interpersonal abuse.¹¹

With nowhere to turn, survivors are often emotionally, psychologically, physically, and financially at the mercy of their abusers. This perpetuates a cycle of abuse and dependency that often entraps or coerces survivors into crime, which can result in additional trauma at the hands of the state after arrest, conviction, and/or

⁶ *Id.*

⁷ See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760–62 (2005) (dissenting from the Court’s holding that law enforcement may exercise discretion in enforcing protective orders, Justice Stevens wrote that, “the process [Ms. Gonzalez] was afforded by the police constituted nothing more than a ‘sham or a pretense.’”).

⁸ Jane Sadusky, *The Criminal Legal System Response to Domestic Violence: Questions and Debate*, NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN (Feb. 2020), <https://www.ncdbw.org/copy-of-pubs-criminalization>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See generally MIMI KIM, *DANCING THE CARCERAL CREEP: THE ANTI-DOMESTIC VIOLENCE MOVEMENT AND THE PARADOXICAL PURSUIT OF CRIMINALIZATION, 1973 – 1986* (2015), <https://escholarship.org/uc/item/804227k6>; see also Victoria Law, *Against Carceral Feminism, Against Using State Violence to Curb Domestic Violence*, SAN FRANCISCO BAY VIEW (Nov. 28, 2017), <https://sfbayview.com/2017/11/against-carceral-feminism-against-using-state-violence-to-curb-domestic-violence/>.

incarceration.¹² Other survivors, who live in constant fear and see no way out of their circumstances, have murdered their abusers as a last resort.¹³ In fact, ninety-three percent of women convicted of killing an intimate partner were abused by an intimate partner in the past.¹⁴ People who commit crimes under the influence of their abusers or compelled by trauma resulting from domestic violence are often incarcerated for just trying to survive.

Sex trafficking provides a clear example of the role that domestic violence plays in coercing someone into committing an offense.¹⁵ These situations involve “victim-offenders,” who are simultaneously abused by a trafficker while also forced to commit trafficking offenses against others.¹⁶ Leaders of sex trafficking rings often avoid culpability by designating “bottom-girls,” or women they control through domestic violence, to manage the day-to-day operations as a second-in-command.¹⁷ As domestic violence is among the well-known, demonstrated “push factors” in sex trafficking, survivors are more likely to experience double victimization through “intimate-partner trafficking,” where they are both sexually exploited and trafficked by their own intimate partners.¹⁸ While this phenomenon is not new, the term “intimate-partner trafficking” has only recently gained

¹² See Mary E. Gilfus, *Women’s Experiences of Abuse as a Risk Factor for Incarceration*, VAWNET APPLIED RESEARCH FORUM (Dec. 2002), https://vawnet.org/sites/default/files/assets/files/2017-08/AR_Incarceration.pdf.

¹³ See generally Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75 (2008).

¹⁴ N.Y. Bill Jacket, 2019 A.B. 3974, Ch. 31.

¹⁵ Incarcerated survivors convicted of sex offenses are not eligible for sentencing or resentencing under the DVSJA. N.Y. Penal Law § 60.12 (McKinney 2022). Despite the legislature’s exclusion of sex offenses, survivors of domestic violence who are convicted of these offenses are also in need of compassion and assistance. While the argument is beyond the scope of this Essay, resentencing statutes for survivors of domestic violence should extend to this often-misunderstood group of people.

¹⁶ Angie C. Henderson & Shea M. Rhodes, “*Got Sold a Dream and It Turned Into a Nightmare*”: *The Victim Offender Overlap in Commercial Sexual Exploitation*, 8 J. OF HUMAN TRAFFICKING 1 (2022).

¹⁷ *Id.*

¹⁸ LIVIA WAGNER & THI HOANG, AGGRAVATING CIRCUMSTANCES: HOW CORONAVIRUS IMPACTS HUMAN TRAFFICKING 5 (2020), <https://globalinitiative.net/wp-content/uploads/2020/06/Aggravating-circumstances-How-coronavirus-impacts-human-trafficking-GITOC-1.pdf>.

recognition.¹⁹ The newness of this term suggests how little we know about this practice and how it affects “victim-offenders.”

A case from Baxar County, Texas, about a woman named Yvette who was convicted of trafficking a minor, best illustrates how intimate-partner trafficking works in practice.²⁰ As a child, Yvette was sexually abused by a relative, ran away from home when she was fifteen, and suffered from substance abuse.²¹ Yvette was eventually recruited into sex work by her intimate partner, “Red Nose,” who was the leader of a trafficking operation.²² Red Nose made Yvette a “bottom-girl,” while forcing her to see clients herself.²³ When Yvette told Red Nose she wanted to leave, he bit her all over her body, punched her in the face, and threatened to kill her family.²⁴ Yvette reported this incident to the police, who recorded it as a case of domestic violence.²⁵ Eventually, Red Nose coerced Yvette into participating in a robbery—the original charge for which she was arrested until prosecutors linked her to sex trafficking.²⁶

At trial, prosecutors blocked testimony about Red Nose’s abuse and extensive criminal record.²⁷ The prosecutor in the case acknowledged that “[Yvette] was victimized, but she graduated from victim to oppressor and exploiter . . . [h]er loyalty to him was too strong to even protect herself.”²⁸ In the prosecutor’s eyes, Yvette was not the leader of the “prostitution enterprise,” but she was still an adult who showed a teenager the ropes; she was just as guilty as the leader.²⁹ Yvette was sentenced to fifteen years for trafficking a minor and another eight years for the robbery.³⁰ Red Nose, who took a plea, was sentenced to ten years

¹⁹ See *id.*; HENDERSON & RHODES, *supra* note 16.

²⁰ Morgan Smith, Edgar Walters & Neena Satija, *She Was A Sex-Trafficking Victim, But Texas Law Labeled Her A Pimp*, THE TEXAS TRIBUNE (Feb. 16, 2017), <https://www.texastribune.org/2017/02/16/she-was-sex-trafficking-victim-texas-law-labeled-her-pimp/>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

for trafficking a minor and twenty-five years for a separate child endangerment case—but was never charged with the robbery.³¹ Yvette’s story demonstrates the sentencing injustice imposed on “victim-offenders” and presents an opportunity for a resentencing statute to remedy the wrong.

The kind of vindication Yvette deserves is not unrealistic. In *People v. S.M.*, a defendant, S.M., was resentenced under the DVSJA after a court found that she had been subjected to years of abuse by her partner, Mr. S (who was also her co-defendant), and that this abuse was a significant contributing factor to her actions during a robbery.³² The court acknowledged that “[t]he abuse S.M. suffered cannot be separated from her actions on the day in question as that trauma affected S.M.’s functioning and behavior and is therefore a significant contributing factor to her criminal behavior.”³³ *S.M.* is not the only case where courts recognized the need to remedy sentencing injustices for survivors of domestic violence. In *People v. D.M.*, another DVSJA resentencing case, a judge wrote that the defendant “did as [her abuser] instructed because she was traumatized and afraid” and that “[s]he was in a situation of diminished will. Diminished autonomy. Diminished independence at the time of the crime and it was as a result[,] to a reasonable degree of psychiatric certainty[,] from the intimate partner violence”³⁴ *S.M.* and *D.M.* demonstrate that it is not only right that “victim-offenders” be given new sentences, but that it is feasible. The language from these decisions could easily apply not only to Yvette, but countless others around the nation.

Importantly, under a resentencing law, no defendant would be arguing for exoneration because of their experiences with domestic violence or would be attempting to diminish the pain that their underlying offenses caused any of the victims. A resentencing statute, like the DVSJA, is not meant for that purpose.³⁵ The resentencing statute’s purpose is to “simply [permit] a court to impose, or in cases where a defendant has already been sentenced, to reduce a sentence in consideration of that defendant’s status as a domestic violence

³¹ *Id.*

³² See *People v. S.M.*, 72 Misc. 3d. 809, 810–16 (Erie Cty. Ct. 2021).

³³ *Id.* at 815.

³⁴ *People v. D.M.*, 72 Misc. 3d. 960, 967 (Queens Cty. Ct. 2021).

³⁵ See N.Y. Bill Jacket, 2019 A.B. 3974, Ch. 31; *People v. Smith*, 69 Misc. 3d 1030, 1032 (Erie Cty. Ct. 2020).

victim.”³⁶ As the court in *People v. Smith*, another DVSJA resentencing case, stated, “our system of justice requires that someone convicted of such a crime be held accountable and punished for her actions. But our system also allows for mercy—mercy where defendant herself is a victim, and where her victimization fueled the crime for which she was convicted.”³⁷ Stories like Yvette’s or S.M.’s, of a “victim-offender,” are common among domestic violence survivors, but are often misunderstood.³⁸ Even where a survivor is before a sympathetic judge, strict mandatory sentencing guidelines often eliminate discretion despite overwhelming evidence of past abuse.³⁹ Resentencing statutes can change that.

After decades of struggle and activism by advocates, state legislatures have woken up to the injustice of these sentences and the need for non-carceral responses to “victim-offenders.” In 2012, California passed the “Sin by Silence” laws which allow incarcerated survivors to file motions challenging their incarceration if their original trial had limited expert testimony about abuse.⁴⁰ The Illinois state legislature amended their sentence mitigation statute in 2016 to make histories of domestic violence a mitigating factor in sentencing and created an avenue for incarcerated survivors to petition for new sentencing hearings.⁴¹ In 2019, New York passed the DVSJA which allows for judicial discretion in sentencing survivors of domestic violence and resentencing for already incarcerated survivors.⁴² However, Illinois and New York remain the only two states where incarcerated people may petition for resentencing based on a history of domestic violence.⁴³

³⁶ *Id.*

³⁷ *Id.* at 1040.

³⁸ See HENDERSON & RHODES, *supra* note 16.

³⁹ See Victoria Law, *When Abuse Victims Commit Crimes*, THE ATLANTIC (May 21, 2019), <https://www.theatlantic.com/politics/archive/2019/05/new-york-domestic-violence-sentencing/589507/>.

⁴⁰ Law, *supra* note 39.

⁴¹ 730 ILL. COMP. STAT. ANN. 5/5-5-3.1

⁴² N.Y. Penal Law § 60.12 (McKinney 2022); N.Y. Criminal Procedure § 440.47 (McKinney 2022).

⁴³ See Jean Lee, *Abuse Survivors Can Get Shorter Sentences in 2 States, but Courts Are Saying No*, THE 19TH (July 12, 2021), <https://19thnews.org/2021/07/domestic-violence-survivors-reduced-sentences-in-2-states/>; see also H.B. 1218, 2019 Leg.,

II. THE LEGISLATIVE HISTORY AND ELEMENTS OF THE DVSJA

The beginnings of DVSJA trace back to Bedford Hills Correctional Facility, a women’s maximum-security prison in the Hudson Valley, where the legislature held its first public legislative hearing on domestic violence within a prison facility in 1985.⁴⁴ The hearing centered around the results of a Bedford Hills survey that gathered data about battered women who committed crimes that led to incarceration.⁴⁵ Fifty-eight percent of surveyed women reported that they had experienced abuse from intimate partners, family members, friends, acquaintances, strangers, or others.⁴⁶ Women at the prison also testified before the legislature about their lived experience with domestic violence and the role it played in their incarceration.⁴⁷

During the hearing, Sister Mary Nerney, who ran an organization called Project Green Hope that provided services to battered women in New York City, testified that she felt hope after reading an article about a battered woman who successfully avoided incarceration by negotiating with the District Attorney to reindict her for a charge that did not trigger mandatory sentencing.⁴⁸ However, when Sister Nerney approached the District Attorney’s office to advocate for the same kind of reindictment for one of her patients, she was told that the woman in the article paid \$80,000 in legal fees for her attorney to negotiate the reindictment.⁴⁹ While at the time Sister Nerney did not know if her patient’s public defender would succeed in getting such a reindictment, she remarked that it could be the “beginning of changing some of the mandatory laws that say that a battered woman is a violent person” and that “even though whatever she has done [sic] is hurtful and harmful

1st Sess. (Ok. 2019) (Oklahoma was considering a bill like the DVSJA, but it was pronounced dead in committee.)

⁴⁴ See *DVSJA History*, THE SURVIVORS JUSTICE PROJECT, <https://www.sjpnny.org/dvsja/history#:~:text=DVSJA%20HISTORY%201985%20In%201985%2C%20incarcerated%20women%20at,domestic%20violence%20charged%20with%20and%20convicted%20of%20crimes> (last visited Nov. 17, 2022).

⁴⁵ See Bedford Hills Project, *1985 Bedford Hills Hearings*, YOUTUBE (May 3, 2021), <https://www.youtube.com/watch?v=cG2f9bkIu28>.

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

and terrible,” she can “get help, instead of incarceration.”⁵⁰ The hearing at Bedford Hills marked the beginning of thirty-four years of advocacy to pass the kind of legislation that might lead to meaningful sentencing reform for survivors.⁵¹

When the current form of the DVSJA was introduced as a bill, the legislature cited the “unjust ways in which the criminal justice system responds to and punishes domestic violence survivors who act to protect themselves from an abuser’s violence.”⁵² The bill was intended to correct the shortcomings of § 60.12, which was the existing sentencing law in the state that included a mitigation provision for survivors of domestic violence.⁵³ The existing provision authorized a court to impose an indeterminate sentence if, after a hearing, it concluded that:

(a) the defendant was the victim of physical, sexual or psychological abuse by the victim or intended victim of the instant offense; (b) such abuse was a factor in causing the defendant to commit the instant offense; and, (c) the victim or intended victim was a member of the same family or household as the defendant (as that term is defined in Criminal Procedure Law, section 530.11).⁵⁴

However, the provision failed to produce the more compassionate, discretionary sentencing for which the legislature hoped.⁵⁵ Only one person had been sentenced under the exception in twelve years after the provision went into effect.⁵⁶ The legislature, seeing the need for a change, justified the DVSJA amendments because survivors of domestic violence, especially women, were often first-time offenders

⁵⁰ *Id.*

⁵¹ See *DVSJA History*, *supra* note 44. Although it is not within the scope of this Essay to discuss all of the organizations that fought to pass the DVSJA, the New York Coalition for Women Prisoners, a group of currently and previously incarcerated women and allies, worked tirelessly to pass the legislation.

⁵² New York Bill Jacket, 2019 A.B. 3974, Ch. 31.

⁵³ See *id.*

⁵⁴ N.Y. Penal Law § 60.12 (L. 1998, Ch. 1 § 1).

⁵⁵ See New York Bill Jacket, 2019 A.B. 3974, Ch. 31.

⁵⁶ NEW YORK STATE COMMISSION ON SENTENCING REFORM, *THE FUTURE OF SENTENCING IN NEW YORK STATE: A PRELIMINARY PROPOSAL FOR REFORM* 18 (2007).

and presented extremely low recidivism rates.⁵⁷ The sentiment behind the DVSJA was to address the fundamental unfairness of the existing sentencing regime and to emphasize the importance of compassion instead of punishment for survivors.⁵⁸ The New York state legislature passed the DVSJA on May 14, 2019.

The enactment of the DVSJA led to two monumental changes to § 60.12 as a sentencing law. First, the DVSJA “revised and expanded the authorization of Penal Law § 60.12 for a court to impose an alternative, less severe, sentence for a victim of domestic violence who is convicted of certain felonies.”⁵⁹ This amendment to § 60.12 allows a judge to exercise discretion when imposing sentences based on a three-pronged analysis:

(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in subdivision one of section 530.11 of the criminal procedure law; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to section 70.00, 70.02, 70.06 or subdivision two or three of section 70.71 of this title would be unduly harsh may instead impose a sentence in accordance with this section.⁶⁰

The DVSJA also enacted a new statute, § 440.47, which allowed already incarcerated survivors to petition for resentencing.⁶¹ To receive permission from the court to apply for resentencing pursuant to

⁵⁷ See New York Bill Jacket, 2019 A.B. 3974, Ch. 31.

⁵⁸ See *id.*

⁵⁹ N.Y. Penal Law § 60.12 (McKinney 2022).

⁶⁰ *Id.* (N.Y. Penal Law § 70.00 governs sentencing for felonies, N.Y. Penal Law § 70.02 governs sentencing for violent felonies, N.Y. Penal Law § 70.06 governs sentencing for second-time felony offenders, and N.Y. Penal Law § 70.71(2) and (3) governs sentencing for class A felony drug offenses).

⁶¹ N.Y. Criminal Procedure § 440.47 (McKinney 2022).

§ 440.47, a petitioner must first meet three criteria in an initial eligibility petition. This petition for permission must demonstrate that the defendant is a) incarcerated “by the department of corrections and community supervision serving a sentence with a minimum or determinate term of eight years,”⁶² was b) convicted of an offense committed before August 12, 2019,⁶³ and that c) the offense is “eligible for an alternative sentence pursuant to section 60.12 of the penal law.”⁶⁴

It is only after the defendant receives approval of their eligibility petition that they are given the opportunity to *actually apply* for resentencing. If a defendant gets past the first stage, it is only then that they may present evidence to a judge to determine if they should receive a new sentence based on the three-pronged analysis set forth in § 60.12. This two-step process of requiring permission from a judge to be able to file the actual motion is highly unusual and unlike any other motions or requests to the court.⁶⁵

Moreover, while the three-pronged analysis that guides judicial discretion is the same for new sentences under § 60.12 as it is for resentencing under § 440.47, the burden on the petitioner under § 440.47 is much heavier because of the amount of time that passed between the instant offense and the time of resentencing. To apply for DVSJA resentencing pursuant to § 440.47, the defendant must produce two pieces of corroborating evidence, where at least one piece of evidence is a court record, presentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of

⁶² *Id.*

⁶³ *Domestic Violence Survivors Justice Act*, NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES, <https://www.ils.ny.gov/node/201/domestic-violence-survivors-justice-act> (last visited Nov. 17, 2022) (§ 440.47 went into effect on August 12, 2019).

⁶⁴ N.Y. Criminal Procedure § 440.47 (McKinney 2022).

⁶⁵ See Tamara Kamis & Emma Rose, *The Domestic Violence Survivors Justice Act Gets A Slow Start*, N.Y. FOCUS (May 7, 2021), <https://www.nysfocus.com/2021/05/07/domestic-violence-survivors-justice-act-gets-a-slow-start/> (Alan Rosenthal, a co-chair of the DVSJA Defender Task Force, stated that in “no other motions or requests to the court that anybody would make do you have to get permission from the judge to actually file a motion. If you don’t read it carefully, you get confused. . .[c]ases were getting thrown out.”); see also WILLIAM C. DONNINO, PRACTICE COMMENTARIES, MCKINNEY’S CONS. LAWS OF NY, PENAL LAW ARTICLE 60.12 (2022) (describing the two-step procedure as “unusual”).

protection.⁶⁶ This presents a great challenge for the defendant and counsel to locate these records from decades past—that is if there is any record to be found at all.⁶⁷

As it stands, the DVSJA is a massive accomplishment and reflects some of the ideas that the women at Bedford Hills proposed, but it was not passed without immense compromise and pushback.⁶⁸ To appease prosecutors and opponents of the DVSJA, who feared that it would open the floodgates for applications and overwhelm the courts, the amendments were drafted to include hurdles for “a careful and exacting process.”⁶⁹ However, almost four years after its enactment, the compromised design is now a major obstacle to its implementation, especially for indigent petitioners.⁷⁰

III. THE DVSJA DOES NOT REQUIRE A TEMPORAL NEXUS BETWEEN THE ABUSE SUFFERED AND THE INSTANT OFFENSE

An incarcerated person applying for resentencing pursuant to § 440.47 must fulfill the requirement of § 60.12(1)(a) that “*at the time of the instant offense*, the defendant was a victim of domestic violence subjected to substantial physical, sexual, or psychological abuse inflicted by a member of the same family or household . . . ”⁷¹ While the word “time” appears in this provision, what it means to be a victim at a certain point in time is not as straight forward as one may think, given the empirical and conceptual gap in available knowledge about

⁶⁶ N.Y. Criminal Procedure § 440.47 (McKinney 2022).

⁶⁷ See *supra* Part I discussing victims’ reluctance to contact the police or report abuse.

⁶⁸ See *DVSJA History*, *supra* note 44 (In response to the first version of the DVSJA that was introduced in the state legislature in 2011, the New York District Attorneys Association strongly opposed the DVSJA, arguing that it failed to consider “innocent victims” and that domestic violence survivors who faced criminal charges already had “numerous avenues of redress.”); Kamis & Rose, *supra* note 65 (In 2019, prosecutors argued that the DVSJA would overwhelm the courts with requests for resentencing).

⁶⁹ See *id.*

⁷⁰ See *id.* (discussing how the unprecedented design of the DVSJA, meant to appease prosecutors, is now an obstacle to widespread implementation and has “left public defenders and criminal justice reform advocates concerned about how many survivors” will benefit).

⁷¹ N.Y. Penal Law § 60.12 (McKinney 2022) (emphasis added).

how domestic violence affects survivors long after physical and verbal contact with the abuser ceases.⁷² However, what we do know is that abuse resulting from domestic violence tends to have a continuous, long-term impact.⁷³

In one study that surveyed survivors of domestic violence, the author wrote, “[t]he evolving and expanding nature of such long-term effects led to many participants either criticising, or consciously rejecting, associated ‘recovery’ terminology.”⁷⁴ One participant in the same study put it plainly when she said, “I do not use the term ‘recovery’ as, for me, it implies that being abused or its consequences constitute an illness from which I can be cured.”⁷⁵ The study concluded that, “[a]n abusive relationship will reverberate, in a variety of ways and degrees, for the remainder of the lives of most survivors.”⁷⁶ Moreover, psychological disorders resulting from domestic violence, like PTSD and substance abuse, can make survivors prone to repeat violence in a vicious cycle because they are more likely to be drawn into unsafe environments and relationships.⁷⁷ The data suggest that whether the violence be physical, psychological, or emotional, an abuser’s actions will continue to “subject” a survivor to substantial abuse long past the last point of contact.

The *effects* from the abuse a victim suffers is not something that switches off once contact ends; it creates a life-long *status* of victimhood and survivorship.⁷⁸ Thus, while the language of § 60.12(1)(a) discusses “time,” it does not refer to a literal temporal nexus between any on-going abuse and the instant offense. § 60.12(1)(a) is about the effects of trauma that the defendant was subjected to as a victim and how that influenced the defendant’s

⁷² See generally ILSA EVANS, BATTLE-SCARS: LONG-TERM EFFECTS OF PRIOR DOMESTIC VIOLENCE (2007), https://bridges.monash.edu/articles/thesis/Battle-scars_long-term_effects_of_prior_domestic_violence/14874336/1.

⁷³ *Id.* at 4.

⁷⁴ *Id.* at 6.

⁷⁵ *Id.*

⁷⁶ *Id.* at 52.

⁷⁷ KAVITA ALEJO, LONG-TERM PHYSICAL AND MENTAL HEALTH EFFECTS OF DOMESTIC VIOLENCE 90–92 (2014), <https://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=1016&context=themis>.

⁷⁸ Status, as described by Black’s Law Dictionary, is “[a] person’s legal condition regarding personal rights but excluding proprietary relations.” *Status*, BLACK’S LAW DICTIONARY (11th ed. 2019).

behavior at the time of the instant offense.

The recent progress in our societal understanding of domestic violence was reflected in *People v. Smith*, where a county court granted a resentencing motion pursuant to the DVSJA brought by a defendant who had been convicted at the age of sixteen of second-degree murder and had been sentenced to twenty-five years to life.⁷⁹ In granting the motion, the court acknowledged the harm caused by the gap in our knowledge of domestic violence and the necessity for a remedy. The court wrote,

In the intervening decades since defendant’s conviction, tremendous progress has been made with respect to our collective understanding of the impact domestic violence has on its victims and the way in which we view victims’ conduct in the context of a criminal prosecution. What we know now, but did not in 1999, is how profoundly the trauma of sexual abuse and exploitation affects a victim’s behavior and choices, and how that trauma informs us and provides us with a new lens through which to view and assess a defendant’s criminal conduct.⁸⁰

While the *Smith* court’s trauma-informed understanding of the DVSJA appears most natural, it is not the only interpretation circulating through the courts in New York. The court in *People v. Williams* strayed toward a narrow interpretation that requires “on-going” abuse near or at the time of the instant offense. The *Williams* court affirmed a lower court’s decision to deny Erica Williams’s § 440.47 DVSJA resentencing motion for failing to “demonstrate that she was a victim of ‘substantial’ abuse ‘at the time of the offense.’”⁸¹ The *Williams* court determined that there was not sufficient evidence to support that the “victim’s behavior toward the defendant rose to the level of substantial psychological abuse” and that it was “not enough that defendant was indisputably subjected to substantial physical and psychological abuse

⁷⁹ *Smith*, 69 Misc. 3d at 1031.

⁸⁰ *Id.* at 1037–38.

⁸¹ *People v. Williams*, 198 A.D.3d 466, 466 (App. Div. 2021).

in the past.”⁸²

Although the *Williams* court conceded that the DVSJA “does not require that the abuse occur simultaneously with the offense or that the abuser be the target of the offense,” the court nonetheless decided that § 60.12(1)(a) “must create some requirement of a *temporal nexus* between the abuse and the offense or else it is meaningless.”⁸³ The court concluded that “the *temporal limitation* proposed by the People—that the abuse or abusive relationship be ongoing—is most consistent with the language of the statute.”⁸⁴ Having made a determination on § 60.12(1)(a), the court declined to opine on the other two prongs of analysis, such as whether the past abuse was nonetheless a significant contributing factor to the crime.⁸⁵

The *Williams* court’s interpretation of § 60.12(1)(a), that there must be a temporal nexus to give the DVSJA “meaning,” is wrong not only because it fails to consider a trauma-informed understanding of domestic violence as having a life-long impact, but also because it is inconsistent with the text of the statute and legislative intent. First, the textual amendments that the DVSJA made to the existing domestic violence sentencing provision in § 60.12 demonstrates that a temporal proximity is not a necessary condition for abuse to have significantly affected a defendant’s behavior. Second, given the DVSJA’s remedial statutory nature, which traditionally carries a presumption of liberality, an interpretation without a temporal nexus would maximize the utility of the statute as per the legislature’s intent. While *Williams* is a single, intermediate appellate court decision, it nonetheless provides precedent for other courts to consider. Given that the DVSJA is still nascent, individual decisions carry considerable weight where the New York Court of Appeals has yet to opine.⁸⁶

⁸² *Id.* at 467.

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.* (emphasis added).

⁸⁵ *Id.*

⁸⁶ *People v. Williams*, 37 N.Y.3d 1165 (N.Y. 2022) (leave to appeal denied).

Although *Williams* is a single decision, various treatises have already begun to cite the opinion to explain the “at the time of” language. *See e.g.*, GARY MULDOON, *HANDLING A CRIMINAL CASE IN NEW YORK* § 22:206 (22nd ed. 2022) (“The moving party must show that the violence occurred ‘at the time of’ the offense. This does not mean that they occur simultaneously, but there must be a temporal nexus between abuse and offense”); RICHARD A. GREENBERG ET AL. *NEW YORK CRIMINAL LAW*

*A. The DVSJA Amendments Support an Interpretation of
§ 60.12(1)(a) That Focuses on The Long-Term Effects of Trauma
on a Victim of Domestic Violence*

The starting point of interpretation must always be the language of the text itself, as the statutory text is the clearest indicator of legislative intent.⁸⁷ As discussed in *supra* Part II, § 60.12 was amended precisely because the existing provision that provided mitigation for survivors of domestic violence was ineffective and outdated.⁸⁸ The first major amendment by the DVSJA was that the legislature changed the language from “the defendant was *the* victim” of abuse to “the defendant was *a* victim” of abuse.⁸⁹ Switching out one word changed the meaning of the statute because it moved the focus away from being “the” specific victim of domestic violence at a precise moment in time, to a general *status* of having been, at some time prior to the instant offense, “a” victim of domestic violence. This generalizing shift in language supports the understanding that abuse, or an abusive relationship, need not be on-going at the time of an offense for someone to be considered *a* victim in that moment.

Providing survivors of domestic violence with a status, valid even after contact with an abuser ends, is not a novel concept. An example in the housing context provides an illustration of what it means to be *a* victim of domestic violence and how the long-term effects of that experience require unique consideration. Under N.Y. Executive Law § 296, it is an unlawful discriminatory practice for a landlord “[t]o refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodations because of

§ 3:33 (4th ed. 2022) (“Although N.Y. Penal Law § 60.12 does not require the abuse to occur with the offense or the abuser to be the target of the offense, the ‘at the time of’ language requires a temporal nexus between the abuse and the offense.”).

⁸⁷ See *Majewski v. Broadalbin–Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (N.Y. 1998) (“As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.”); see also *Patrolmen’s Benevolent Ass’n v. City of New York*, 41 N.Y.2d 205, 208 (N.Y. 1976) (“It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature.”).

⁸⁸ New York Bill Jacket, 2019 A.B. 3974, Ch. 31.

⁸⁹ Compare former N.Y. Penal Law § 60.12 (L. 1998, Ch. 1 § 1), with current N.Y. Penal Law § 60.12 (L. 2019, Ch. 31, § 1).

the [person’s] . . . *status* as a victim of domestic violence.”⁹⁰ In response to an inquiry from a landlord about the provision, the Office of the Attorney General acknowledged that a victim of domestic violence is “likely to be a target of further abuse even after she moves into her own apartment,”⁹¹ which implies that even after any ongoing abuse has stopped, the consequences of the abuse still linger. In interpreting this provision, the Attorney General rejected the landlord’s argument for a categorical refusal to rent to “former” victims of domestic violence because “[a] policy barring all former victims of domestic violence . . . would appear broader than necessary to further the landlord’s legitimate goals.”⁹² Similarly, in the DVSJA context, a categorical refusal for resentencing based on an arbitrary temporal nexus is broader than necessary.

Continuing to liberalize the statute, the next key DVSJA amendments were to the provision that had required the defendant to be “the victim of physical, sexual or psychological abuse by the victim or intended victim of [the instant] offense.”⁹³ This meant that to qualify for resentencing under the old provision of § 60.12, a defendant would have had to perpetrate the crime specifically against their abuser. Moreover, under the old provision, the offense had to have been a *violent* felony under § 70.02.⁹⁴ The physically harmful nature of this category of offenses implies that the old provision largely applied to defendants who had attempted a form of self-defense in the moment.⁹⁵ However, the DVSJA formally removed the requirement that the victim of the offense also be the defendant’s abuser *and* widened the category

⁹⁰ N.Y. Executive Law § 296 (McKinney 2022).

⁹¹ Categorical Refusal to Rent to Victims of Domestic Violence, 1985 N.Y. Op. Att’y. Gen. 45 (1985).

⁹² *Id.*

⁹³ Compare former N.Y. Penal Law § 60.12 (L. 1998, Ch. 1 § 1), with current N.Y. Penal Law § 60.12 (L. 2019, Ch. 31, § 1).

⁹⁴ N.Y. Penal Law § 60.12 (L. 1998, Ch. 1 § 1).

⁹⁵ See Alaina Richert, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 MICH. L. REV. 316, 336 (2021), <https://michiganlawreview.org/journal/failed-interventions-domestic-violence-human-trafficking-and-the-criminalization-of-survival/> (“New York’s DVSJA is not limited to the self-defense context, which means that it has the potential to provide more just sentences to domestic-violence survivor-defendants who are forced to commit crimes by their abusers or who turn to substances as a way of coping with abuse.”).

of eligible offenses to non-violent felonies, like possession and sale of controlled substances.⁹⁶

By removing the requirement that the victim of the offense also be the abuser, and expanding the eligible offenses, the amendments extended the reach of mitigation to cases where the abuser was not present at the time of the instant offense and perhaps instances where contact with the abuser had long ceased. The amendments emphasized that what matters is only the *status* of the defendant as a victim and the *effect* of the abuse on their behavior at the time of the offense.

The last and third major amendment by the DVSJA to § 60.12 was removing the requirement that the abuse *cause* the defendant to commit the offense.⁹⁷ Instead, the DVSJA only requires that the abuse be a “significant contributing factor” to the defendant’s offense.⁹⁸ The court in *People v. D.L.*, a DVSJA resentencing case, acknowledged that the “trauma need not be the causal factor of the crime,” and that only a contributing factor standard—a much less burdensome standard for the applicant—was necessary.⁹⁹ The elimination of a causal standard adds further support for a liberal interpretation because although a temporal proximity may lead to an inference of causation or contribution to an event, it is not required.¹⁰⁰

The legislature has supported the idea that temporal proximity is unnecessary for a contributory effect. Senator Roxanne Persaud, who sponsored the DVSJA in the state senate, addressed the legislature about how survivors of domestic violence are triggered by past abuse to commit offenses, even years later. During a Senate session about the DVSJA, she said, “[m]any of us here, we’ve reacted to things because of something that we’ve gone through. And some of you may have flashbacks because of something that you encountered *years* ago. But

⁹⁶ Compare former N.Y. Penal Law § 60.12 (L. 1998, Ch. 1 § 1), with current N.Y. Penal Law § 60.12 (L. 2019, Ch. 31, § 1).

⁹⁷ *Id.*

⁹⁸ N.Y. Penal Law § 60.12 (McKinney 2022).

⁹⁹ See *People v. D.L.*, 72 Misc. 3d 257, 264 (Columbia Cty. Ct. 2021)

¹⁰⁰ See *Kachmar v. SunGard Data Sys.*, 109 F.3d 173, 178 (N.Y. 1997) (In a tort case about employer retaliation and sex discrimination, the New York Court of Appeals recognized that “[i]t is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff’s prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference *can* be drawn.”) (emphasis added).

we’re not punishing you for that. We’re asking that the people who have committed their crimes because of domestic violence be offered the same consideration.”¹⁰¹ Senator Persaud’s discussion about trauma suggests that the primary inquiry is not about time—but is about whether past abuse *affected* the behavior of the defendant, who had the *status* of a victim of domestic violence, at the time of the instant offense.

The status and effect interpretation of § 60.12(1)(a) also finds support in *People v. Smith*. The *Smith* court’s justification in providing a new sentence to a defendant was because “a court must evaluate a defendant’s conduct in light of the *cumulative effect* of her abuse. A plain reading of the statute and consideration of its legislative history permits no other interpretation.”¹⁰² The court elaborated on its meaning of a “cumulative effect” by concluding that “victims of domestic violence should be viewed . . . in a manner that recognize[s] not only their *status* as offenders but also their *status* as survivors.”¹⁰³ The *Smith* court emphasized the non-mutually exclusive statuses of offender and victim and that DVSJA resentencing cases should receive a cumulative evaluation.

Another case that demonstrates the status and effect interpretation is *People v. D.L.* A little over a year after *Smith*, in *D.L.*, a county court in Columbia County, New York granted Mr. L’s resentencing application pursuant to § 440.47 for a 2008 burglary conviction where he was sentenced to 9.5 years in prison and five years of post-release supervision.¹⁰⁴ In confronting what it meant to be a victim “at the time of the offense” and how to administer the three-pronged analysis from § 60.12, the court identified three guiding questions: “(1) Did the defendant experience domestic abuse? (2) Did the defendant suffer trauma as a result of that abuse? (3) Has that trauma affected the defendant’s functioning and behavior so as to be a ‘significant contributing factor’ to the defendant’s criminal behavior?”¹⁰⁵ This roadmap from *D.L.* allowed the court to properly administer the three-pronged analysis without a temporal nexus in § 60.12(1)(a).

By considering the three questions, the *D.L.* court found that (1) Mr.

¹⁰¹ N.Y. Senate, Regular Session, March 12, 2019, at 1569–1572 (emphasis added).

¹⁰² *Smith*, 69 Misc. 3d at 1037 (emphasis added).

¹⁰³ *See id.* at 1040 (emphasis added).

¹⁰⁴ *D.L.*, 72 Misc. 3d at 265–66.

¹⁰⁵ *See id.* at 263.

L was sexually abused by his uncle for several years when he was a child which (2) resulted in psychological trauma that persisted into adulthood and (3) ultimately led to drug abuse and dependence which formed the motivation for the burglary.¹⁰⁶ The *D.L.* court reasoned that the “NY Legislature authorized and directed Courts to consider the *full picture* of a defendant to include the impacts from domestic violence on the defendant, and provides for lighter sentences than traditional sentences for crimes in recognition that the defendant is a victim.”¹⁰⁷ Given how life-altering the abuse was for Mr. L, the fact that the initial abuse was decades before the burglary was not an automatic bar to resentencing under the DVSJA.¹⁰⁸

The reasoning in *Smith* and *D.L.* exemplify the improvement that the DVSJA amendments made by countering the misconception that to significantly affect a defendant’s behavior at the time of an instant offense, the abuse had to have been contemporaneous. The legislature’s purpose in adopting these amendments was to encourage the proliferation of more compassionate sentences for survivors based on a better-informed understanding of domestic violence.¹⁰⁹ An arbitrary temporal nexus is inconsistent with this intention.

B. The Remedial Nature of the DVSJA Necessitates a Holistic View of the Three-Pronged Analysis

In addition to textual interpretation favoring a broad reading of the DVSJA, the remedial nature of the statute also supports this proposition. The *Williams* court cited *Matter of Mestecky v. City of N.Y.*, where the New York Court of Appeals held that in statutory interpretation cases, a court’s primary consideration is to ascertain and give effect to the intention of the legislature.¹¹⁰ The *Williams* court was right to cite *Mestecky* to support that legislative intent is central to statutory

¹⁰⁶ *See id.* at 261.

¹⁰⁷ *Id.* at 263.

¹⁰⁸ *See id.* at 265.

¹⁰⁹ New York Bill Jacket, 2019 A.B. 3974, Ch. 31 (“The Act would address shortcomings in New York’s current domestic violence sentencing exception, enacted as part of the state’s 1995 Sentencing Reform Act; commonly known as Jenna’s Law.”).

¹¹⁰ *See Williams*, 198 A.D.3d at 466–67 (quoting *Matter of Mestecky v. City of N.Y.*, 30 N.Y.3d 239, 243 (N.Y. 2017)).

interpretation but should have also considered that a “remedial rule overlaps naturally in some ways with the idea that a law’s ‘purpose’ can be a useful interpretive guide.”¹¹¹ The point of the DVSJA is to “allow judges discretion to *fully* consider the impact of domestic violence when determining sentence lengths.”¹¹² The justification for the DVSJA reads, “[a]ll too often, when a survivor defends herself and her children, our criminal justice system responds with harsh punishment instead of with *compassion*...”¹¹³ Even if a temporal nexus is required, a *full* and *compassionate* understanding of the impact of domestic violence would suggest that residual psychological and emotional trauma resulting from domestic violence counts as “on-going” abuse under the DVSJA. A more faithful adherence to the purpose of the DVSJA would yield an interpretation that rejects the three-pronged analysis as a siloed, chronological list. Instead, consistent with its remedial nature, courts should take a holistic view when applying the three-pronged analysis.

The DVSJA is a remedial statute because it was designed to correct the imperfections in the existing sentencing structure of § 60.12.¹¹⁴ Additionally, by enacting § 440.47 to allow for resentencing, the New York legislature acknowledged the injustices done in the past.¹¹⁵ The

¹¹¹ See SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 60:1 (8th ed. 2021) (“Indeed, categorizing a statute as ‘remedial’ often is a springboard to ‘more refined analysis’ of its purpose.”).

¹¹² New York Bill Jacket, 2019 A.B. 3974, Ch. 31 (emphasis added).

¹¹³ *Id.*

¹¹⁴ See *id.* (“With no compromise to public safety, the DV Survivors Justice Act will help New York address the years of injustice faced by survivors whose lives have been shattered by domestic abuse and decrease the likelihood of survivors being victimized by the very system that should help protect them.”); *Asman v. Ambach*, 64 N.Y.2d 989, 991 (N.Y. 1985) (describing remedial statutes as “designed to correct imperfections in prior law, by giving relief to [an] aggrieved party.”); *Fumarelli v. Marsam Dev.* 92 N.Y.2d 298, 306 (N.Y. 1998) (holding that a “[a] ‘remedial’ statute provides a remedy where the common law either provides no remedy or provides an imperfect or ineffective remedy.”) (citing *Matter of Mlodozeniec v. Worthington Corp.*, 9 A.D.2d 21, 23 (App. Div. 1958)); THOMAS M. FLEMING ET AL., 97 N.Y. JUR. 2D STATUTES § 10 (2nd ed. 2022) (“A statute is ‘remedial’ if it gives a party a new or different remedy.”).

¹¹⁵ See New York Bill Jacket, 2019 A.B. 3974, Ch. 31 (“Much of this punishment is a result of our state’s current sentencing structure which does not allow judges discretion to fully consider the impact of domestic violence when determining sentence lengths. This leads to long, unfair prison sentences for many survivors. The

DVSJA’s remedial nature has great bearing on the interpretation of § 60.12(1)(a) because remedial statutes carry a long legacy of liberal interpretation that continues today.¹¹⁶ Following centuries-old doctrine, courts typically embrace a liberal construction of remedial statutes precisely because doing so helps remedy the defects in the law that prompted their enactment in the first place.¹¹⁷

A comparison to another remedial sentencing statute, the Drug Law Reform Act (“DLRA”),¹¹⁸ may best demonstrate how naturally a liberal construction applies to the DVSJA. Practitioners appropriately referenced the DLRA when drafting and implementing the DVSJA.¹¹⁹

Domestic Violence Survivors Justice Act would address this problem for both male and female survivors of domestic violence.”).

¹¹⁶ See SINGER *supra*, note 111 (“Courts liberally, or broadly, construe remedial statutes in order to help remedy the defects in the law that prompted their enactment. The remedial rule’s modern contours were clear by the late 16th century and appeared two-hundred years later in Blackstone’s well-known Commentaries on the Laws of England.”); N.Y. Stat. § 321 (McKinney 2022) (“Generally speaking remedial statutes meet with judicial approval and are liberally construed, to spread their beneficial result as widely as possible. Such statutes should be so construed as to give effect to the intention of the lawmakers, that is, to effect or carry out the reforms intended and to promote justice, particularly where the statutes are designed to correct imperfections in a prior law. A liberal construction of such statutes is one which is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the statute, though actually it is not within the letter of the law. While a remedial statute is construed with greater liberality than is allowed with reference to a penal statute, it is nevertheless to receive a reasonable interpretation with a view of accomplishing the purpose intended.”).

¹¹⁷ See SINGER *supra*, note 111.

¹¹⁸ See *People v. Sosa*, 18 N.Y.3d 436, 438 (N.Y. 2012) ([The] purpose of this remedial legislation is to afford relief to low-level, non-violent drug offenders originally sentenced under a scheme that often mandated ‘inordinately harsh punishment.’); *People v. Brown*, 25 N.Y.3d 247, 251 (N.Y. 2015) (“[R]emedial statutes such as the DLRA should be interpreted broadly to accomplish their goals.”); *People v. Coleman*, 24 N.Y.3d 114, 122 (N.Y. 2014) (“We adopt defendant’s interpretation of the relevant resentencing exclusion under the 2009 DLRA because it is more consistent with the statute’s remedial purpose than the People’s interpretation.”).

¹¹⁹ See Cynthia Feathers, *Domestic Violence Survivor Defendants: New Hope For Humane And Just Outcomes*, 92 N.Y. ST. B.J. 15, 16–17 (2020) (discussing how practitioners drew from their experiences with the DLRA to draft and implement the DVSJA); see also KAREN MORRIS & NICOLE L. BLACK, CRIMINAL LAW IN NEW

The DLRA was passed to ameliorate one of the most draconian mandatory sentencing policies in the nation, which was enacted as part of the “Rockefeller Drug Laws” in 1973.¹²⁰ The DLRA ended mandatory imprisonment for many drug charges, expanded judicial discretion to offer drug court alternatives to non-violent offenders, and allowed for resentencing of past unjust sentences.¹²¹ Just as the DVSJA was enacted in response to senselessly harsh sentences imposed on survivors of domestic violence,¹²² the DLRA was similarly borne from an outrage over disproportionate, ineffective sentencing for minor drug offenses.¹²³ Both remedial statutes were spurred by a need for change based on a societal reckoning that the existing system was unjust.

In *People v. Brown*, a DLRA case, the New York Court of Appeals held that “any ambiguity in [the DLRA’s resentencing statute]’s eligibility section should be read in favor of the applicant because a finding of eligibility is simply the first step in the resentencing process” and that “the ultimate decision lies in the exercise of discretion of the reviewing judge as part of the court’s ‘substantial justice’

YORK § 29:32 (4th ed. 2021) (noting that the DLRA, like the DVSJA, provides the same two remedies of sentencing mitigation and retroactive resentencing); Press Release, Sheldon Silver, Assemblyman, New York State Assembly, Assembly Passes Landmark Drug Law Reforms Bill Eliminates Most Mandatory Minimums, Creates New Sentencing Options For Judges (Mar. 4, 2009), <https://assembly.state.ny.us/Press/20090304/> (Assemblyman Jeffrion Aubry who sponsored the DVSJA also sponsored the DLRA).

¹²⁰ See *Matzell v. Annucci*, 183 A.D.3d 1, 5 (App. Div. 2020) (“The 2009 Drug Law Reform Act... was passed to relieve the often draconian mandates of the Rockefeller Drug Laws of 1973. Specifically, the DLRA ‘grant[s] relief from what the Legislature perceived as the inordinately harsh punishment for low level non-violent drug offenders that the Rockefeller Drug Laws required.’”) (citing *Brown*, 25 N.Y.3d at 251); ROBERT RIGGS ET AL., FROM PUNISHMENT TO TREATMENT: A PROVIDERS’ PERSPECTIVE ON THE IMPLEMENTATION OF 2009 ROCKEFELLER DRUG LAW REFORMS IN NEW YORK 1 (2014) (“Perhaps no state policy change has more starkly evidenced an official move away from punishment and toward treatment than recent reforms to New York State’s ‘Rockefeller Drug Laws.’”) <https://link.springer.com/content/pdf/10.1186/2194-7899-2-10.pdf>.

¹²¹ See *id.* at 4; MORRIS & BLACK, *supra* note 119.

¹²² See New York Bill Jacket, 2019 A.B. 3974, Ch. 31.

¹²³ See Peter A. Mancuso, *Resentencing After The “Fall” Of Rockefeller: The Failure Of The Drug Law Reform Acts Of 2004 And 2005 To Remedy The Injustices Of New York’s Rockefeller Drug Laws And The Compromise Of 2009*, 73 ALB. L. REV. 1535, 1541–42 (2010) (discussing the criticisms of the Rockefeller Drug Laws).

determination.”¹²⁴ Although the DLRA and DVSJA are, of course, not identical, the question of how narrowly the court should read ambiguities in determining eligibility may be answered with similar logic given their shared remedial nature. As the *Brown* court explained, eligibility is only the first step in resentencing under a remedial statute, so a presumption in favor of the defendant is reasonable because the judge will exercise discretion in the ultimate decision after a “substantial justice” determination.¹²⁵ Similarly, § 60.12(1)(a) is only one of three prongs of the DVSJA analysis; it should not present a categorical bar to the court’s assessment of the remaining two prongs in making a final resentencing determination.

Requiring a temporal nexus in § 60.12(1)(a) based on the justification that it provides an appropriate limiting mechanism is flawed because it prematurely preempts the more meaningful limitation of the “significant contributing factor” prong of § 60.12(1)(b). In keeping with a remedial statutory interpretation, a court should consider the statute in context and view the three-pronged analysis holistically. What really gives meaning to the DVSJA is not a court-imposed timeframe because that would deprive a defendant of a full and fair opportunity to demonstrate the extent to which the abuse suffered contributed to their behavior at the time of the instant offense. § 60.12(1)(a) is the wrong place to put restrictions because time is not dispositive of whether one was *a* victim of domestic violence at some point in time. While abuse that occurs on the eve of the offense may be easier to prove in court as a contributing factor, that does not mean that abuse that occurred in childhood cannot be a contributing factor to an offense committed in adulthood.¹²⁶ Ease of proof is not a fair justification for a limitation of this magnitude. Thus, even if there is no temporal nexus, a judge has discretion under § 60.12(1)(b) to assess whether the effects of that abuse rose to the level of a “significant contributing factor.”

The Second Department took a holistic look in line with the

¹²⁴ *Brown*, 25 N.Y.3d at 251 (“To the extent that the Legislature’s definition of the eligible class in an individual case proves over-inclusive, the proper corrective is achieved by means of the statutorily required exercise of judicial discretion to determine whether relief to an eligible applicant is in the end consonant with the dictates of substantial justice.”) (citing *Sosa*, 18 N.Y.3d at 443).

¹²⁵ *See id.*

¹²⁶ *See D.L.*, 72 Misc. 3d at 264–65.

remedial statutory doctrine in *People v. Addimando*, where the court considered Nicole Addimando’s DVSJA resentencing motion on appeal.¹²⁷ The court below held that the indeterminate sentence of nineteen years to life was not “unduly harsh” for her conviction because “the defendant had numerous opportunities to avoid any further abuse and was capable of communicating ‘direct’ sentiments to . . . [her abuser.]”¹²⁸ The Second Department held that the court below erred in their decision by failing to *fully* take into account the evidence that clearly demonstrated that Ms. Addimando was subjected to graphically violent sexual and physical abuse for years leading up to the offense.¹²⁹ The *Addimando* court wrote,

[The county court’s] approach simply runs afoul of the spirit and intent of the statute. It is unacceptable that, in reflecting the views of a more enlightened society, the legislature saw fit to enact the DV Survivors Act, only to have the *court* frustrate that legislative intent by applying outdated notions regarding domestic violence issues.¹³⁰

The *Addimando* court’s strong admonishment of the lower court’s outdated presumption, that a victim could simply escape ongoing abuse by avoiding her abuser, sent a clear message about the liberal stance the courts, in line with remedial statutes, should take when interpreting the DVSJA. To impose a limiting factor like a temporal nexus flies in the face of the way a remedial statute should be interpreted.

¹²⁷ See *People v. Addimando*, 197 A.D.3d 106, 107 (App. Div. 2021). For more information about Ms. Addimando’s resentencing motion, see generally Christopher Hamilton, *Alive But Still Not Free* 100 B.U. L. REV. ONLINE 174 (2020), <https://www.bu.edu/bulawreview/files/2020/08/HAMILTON.pdf>.

¹²⁸ *Addimando*, 197 A.D.3d at 116.

¹²⁹ See *id.* at 107.

¹³⁰ *Id.* at 117 (emphasis added).

CONCLUSION

Domestic violence is an ever evolving¹³¹ epidemic of mammoth proportions, and it is not going away. While a world forever free of domestic violence is unrealistic, our response should not be to give up or look away. As our societal understanding of domestic violence improves, we are better able to recognize the long-lasting effects of trauma and how it influences behavior. A comprehensive discussion of § 60.12(1)(a), and what it really means to be a victim of domestic violence “at the time” of an instant offense, calls into question whether it is necessary to impose a temporal nexus requirement. The answer is that it is not; courts should resentence defendants under the DVSJA without a temporal nexus. Future legislation should consider that the effects of past abuse simply do not disappear because a court deems that enough time has passed. To create meaningful change in sentencing injustice for survivors of domestic violence, legislators, courts, and lawyers must be willing to accept the reality of what survivors live with every day and make a conscious choice to embrace progress.

¹³¹ See generally Andrew King-Ries, *Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?* 20 TEX. J. WOMEN & L. 131 (2011). As we enter a technology-dominated era, domestic violence is no longer limited to the physical realm.