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## Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?

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# PROBLEMS IN DOMESTIC VIOLENCE: SHOULD VICTIMS BE FORCED TO PARTICIPATE IN THE PROSECUTION OF THEIR ABUSERS?

THOMAS L. KIRSCH II\*

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\* Associate, Jenner & Block; B.A., Indiana University, 1996; J.D., Harvard Law School, 1999. I am grateful to the judges, attorneys and victim-witness advocates who took precious time from their busy schedules to share with me their insights and opinions on this very important topic. I also thank Professor Martha Minow, Harvard Law School, for her comments and suggestions.

The views and opinions of the author as expressed in this Article are solely that of the author and do not in any way reflect the views or opinions of, nor are they endorsed by, Jenner & Block.

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## I. INTRODUCTION

Recently, an article titled *Hobart Woman Slain in Apartment* appeared in a local newspaper.<sup>1</sup> The woman described, a twenty-six-year-old nurse named Christine Arceo, was stabbed multiple times with a kitchen knife by her boyfriend.<sup>2</sup> She was pronounced dead shortly after the stabbing.<sup>3</sup>

Police confirmed that the victim's one-year-old daughter was present when the stabbing occurred.<sup>4</sup> Information concerning the whereabouts of the victim's eight-year-old son was not disclosed.<sup>5</sup>

Police also confirmed that they believed the incident to be a domestic situation.<sup>6</sup> A neighbor stated that the couple had

1. Clifton Brown, *Hobart Woman Slain in Apartment*, TIMES (Munster, Ind.), Feb. 11, 2000, <http://www.thetimesonline.com>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

problems in the past.<sup>7</sup> Reverend Ronald Deck, a family friend, spoke for many when he said, "It's terribly tragic to see a life cut short so young."<sup>8</sup>

Stories just like this appear in newspapers across the country almost every day. This story, and countless others like it, illustrate where domestic violence can lead and how many people it can affect.<sup>9</sup>

Domestic violence is an ongoing problem in this country, or as former United States Department of Health and Human Services Secretary Donna Shalala described it, "an unacknowledged epidemic in our society."<sup>10</sup> Husbands, boyfriends, lovers and partners abuse women of all races, classes, occupations, ethnic groups and ages.<sup>11</sup> A woman is abused every fifteen seconds.<sup>12</sup> Every year, over two million women report being abused.<sup>13</sup> One in five women abused by her husband or ex-husband reports that she has been victimized over and over by that same person.<sup>14</sup> One out of four pregnant women has a history of domestic abuse.<sup>15</sup>

Domestic abuse is the leading cause of injury to women aged fifteen to forty-four.<sup>16</sup> It accounts for more injuries than accidents, muggings and rapes combined.<sup>17</sup> Twenty-two to thirty-five percent of women who visit medical emergency facilities are there for

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7. *Id.*

8. *Id.*

9. See Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 297 (1985) ("The abusive relationship not only affects its direct participants; it can also destroy the couple's children, who are innocent bystanders."); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 175 (1997) ("Each year, between three and ten million children are forced to witness the emotional devastation of one parent abusing or killing the other. . . . Some are born with birth defects because their mothers were battered during pregnancy.") (footnotes omitted). Some children are psychologically damaged as a result of witnessing the abuse. See *id.* Innocent third parties, including children, are placed in harm's way. See *id.*; Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 978 (1994) ("Domestic violence affects not only the parties involved in the dispute, but their children and the rest of society."); see also *Violence Begins at Home*, N.Y. TIMES, July 5, 1994, at A16 ("[V]iolent youths are four times more likely than nonviolent youths to come from homes where mothers were beaten by fathers.").

10. Jill Smolowe, *When Violence Hits Home*, TIME, July 4, 1994, at 20.

11. HARVARD CMTY. HEALTH PLAN FOUND., DOMESTIC VIOLENCE: THE FACTS 5 (1995).

12. *Id.* at 4.

13. *Id.*

14. *Id.*

15. *Id.* at 5.

16. Antonia C. Novello et al., *A Medical Response to Domestic Violence*, 267 JAMA 3132, 3132 (1992).

17. Evan Stark & Anne H. Flitcraft, *Spouse Abuse*, in VIOLENCE IN AMERICA: A PUBLIC HEALTH APPROACH 123, 139 (Mark L. Rosenberg & Mary Ann Fenley eds., 1991).

injuries related to domestic abuse.<sup>18</sup> One-third to one-half of female homicide victims were murdered by their male partners.<sup>19</sup>

Domestic violence is a serious problem and needs attention on many fronts.<sup>20</sup> Statistics indicate that few cases ever go to trial, police fail to arrest many offenders and, when prosecutors do decide to file charges, they often recommend dismissal.<sup>21</sup> This Article is concerned with addressing one of those fronts: prosecutors' responses to domestic violence victims who do not want to participate in the prosecution of their abusers.

Prosecutors' offices throughout the country have varied policies on how to handle offenses related to domestic violence.<sup>22</sup> These policies range from strict no-drop policies, which deny victims the opportunity to freely withdraw a complaint once charges have been filed, to routinely dropping charges to satisfy victims' wishes.<sup>23</sup> Some counties employ an intermediate policy or soft no-drop policy, wherein a victim is counseled and encouraged to cooperate.<sup>24</sup>

18. HARVARD CMTY. HEALTH PLAN FOUND., *supra* note 11, at 5.

19. UTAH TASK FORCE ON GENDER AND JUSTICE, REPORT TO THE UTAH JUDICIAL COUNCIL (MAR. 1990), in 16 J. CONTEMP. L. 135, 204 (1990).

20. "Problems with prosecution occur at every stage of the criminal process, from investigation to first appearance hearings, detention hearings, depositions, trial, and sentencing. Indeed, post-sentencing problems also exist, when dealing with the safety of a victim upon release of a violent partner from incarceration." Margaret A. Rosenbaum, *The Prosecution of Domestic Violence: An Overview*, FLA. B.J., Oct. 1994, at 52, 52.

21. Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 854-55 (1994); see also Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 116-17 (1991) (discussing a 1991 study conducted in Louisville, Kentucky, that found that seventy-nine percent of domestic violence cases resulted in dismissal) (citation omitted); Deborah Nelson & Rebecca Carr, *Some Frustrated Victims Talk of Taking up Arms*, CHI. SUN TIMES, July 24, 1994, at 18 (finding that at least sixty-nine percent of cases filed in Chicago's domestic violence court in 1993 had been dropped).

22. For an overview of the various policies implemented by prosecutors' offices, see Corsilles, *supra* note 21, at 859-62.

23. *Id.* at 857-60; see also Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 96 n.50 (1997) (listing jurisdictions that have adopted no-drop policies); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1520 n.52 (1998) (listing jurisdictions with "aggressive, vertical, or no-drop policies").

24. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1863 (1996) (noting that jurisdictions that focus special attention on domestic violence cases often have soft no-drop policies). The idea underlying soft no-drop policies is that "with enough understanding and encouragement, the battered woman will assess her situation realistically, start to unlearn her helplessness, and will agree to help the legal system as a witness against her husband." Waits, *supra* note 9, at 307. An example of a soft no-drop policy is the policy employed by the Marion County, Indiana Prosecutor's Office. Corsilles, *supra* note 21, at 861-62. Marion County typically follows a no-drop policy, but may make an exception depending on the circumstances. *Id.* at 861. No case will be dropped, however, if the defendant has a prior conviction, has been sent

Others have no policy at all, but deal with domestic violence on a case-by-case basis.<sup>25</sup>

This Article is an examination of the tactics employed by the Lake County, Indiana Prosecutor's Office to deal with victims of domestic abuse who do not want the prosecutor to proceed with the prosecution of their abusers. I interviewed current prosecutors, former prosecutors, defense attorneys, judges and victim-witness advocates.<sup>26</sup> The interviews all took place in January 1999. All of the interviewees work in Lake County, Indiana, which is one of the largest and most populous counties in Indiana.<sup>27</sup> The criminal courts are comprised of a felony division and a misdemeanor division, both located in Crown Point, and three major city courts located in East Chicago, Hammond and Gary.

This Article first reviews the manner in which prosecutors handle domestic violence cases in this jurisdiction. Next, it addresses the reasons that victims are reluctant to cooperate, as expressed to prosecutors. It goes on to examine the techniques that prosecutors use in attempts to convince victims to cooperate. It then addresses the issue of whether victims should be forced to participate if they fail to cooperate willingly. Namely, this Article addresses the costs and benefits of forcing participation, the practicality of forcing participation given the limited resources of prosecutors' offices and explores the alternatives available to prosecutors' offices that may make victims more willing to cooperate, decreasing the need to force victim participation. This Article demonstrates the differences in opinions of prosecutors, judges and victim-witness advocates working in the same office on the issue of forced participation by revealing in detail interviewees' responses

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a warning letter, has another pending case involving violence against the same victim or is on probation and subject to violation for a new offense. *Id.* Additionally, no case will be dropped before the initial hearing. *Id.* If a victim requests that the case be dropped, she must be advised of the increased risk of revictimization if charges are dropped or she may be required to view a video program about domestic violence and attend a victims' support group meeting. *Id.* Next, the victim will be required to sign a drop form, which will be presented to the court on the next hearing date, stating that she wants the charges dropped. *Id.* The judge will take the matter under advisement for ninety days; if no further violence occurs during that time, the prosecutor will file a motion to dismiss subject to refiling within the statute of limitations period. *Id.* at 861-62.

25. Interview with D, Deputy Prosecutor, in Lake County, Ind. (Jan. 28, 1999) (notes on file with author).

26. To ensure honest and candid responses, I assured the interviewees complete confidentiality; therefore, I will not reveal the names of the interviewees in this paper, but refer to them as A, B, C, etc.

27. With 478,200 people as of January 1, 1999, and 497 square miles, Lake County is Indiana's second most populated and twelfth largest county. RAND McNALLY'S 2000 COMMERCIAL ATLAS & MARKETING GUIDE 326 (131st ed. 2000).

to a common domestic violence scenario. Finally, it concludes that no one approach is superior, as demonstrated by the varied responses; however, Lake County should develop and implement some guidelines to ensure uniform prosecution of domestic violence cases.

Throughout the Article, I make reference to domestic violence or domestic abuse. I use the terms interchangeably to mean acts of violence committed by men against their girlfriends, wives or intimate partners. This definition accurately reflects the fact that ninety to ninety-five percent of domestic violence victims are women.<sup>28</sup>

## II. LAKE COUNTY'S DOMESTIC VIOLENCE POLICY AND DISPOSITION

I began each interview with questions aimed at determining whether the Lake County Prosecutor's Office has a county-wide policy to deal with domestic violence cases. The consensus was that the office has some form of the soft no-drop policy,<sup>29</sup> but cases are still handled on an individual basis. One former prosecutor explained:

I don't know that it's a formal policy with a steadfast rule, but I think unofficially there's a no-drop policy. Is it applied in each and every case? No, because I don't think it can be. I think that people do what they can to try to protect the victim's interests.<sup>30</sup>

At least one interviewee believed that a no-drop policy that might have been enforced at some time in the past has eroded in recent years, making it easier for victims to get charges dropped.<sup>31</sup> Indeed, drop rates, not including deferred prosecution, for crimes involving domestic violence ranged from two to thirty percent, depending on the interviewee.<sup>32</sup>

Almost all interviewees agreed that most cases did not end in conviction, but rather the defendant was given a conditional discharge<sup>33</sup> or prosecution was deferred and ultimately resulted in

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28. Hanna, *supra* note 24, at 1854 n.20.

29. One prosecutor said, "There's really not a policy per se. It's handled on a case by case basis." Interview with D, *supra* note 25.

30. Interview with F, Misdemeanor Court Judge, in Lake County, Ind. (Jan. 27, 1999) (notes on file with author).

31. Interview with G, Misdemeanor Court Judge, in Lake County, Ind. (Jan. 27, 1999) (notes on file with author).

32. Interview with F, *supra* note 30; Interview with C, Deputy Prosecutor, in Lake County, Ind. (Jan. 27, 1999) (notes on file with author).

33. A conditional discharge requires the defendant to enter a conditional plea of guilty.

dismissal.<sup>34</sup> Deferred prosecution or conditional discharge occurred in as high as ninety-five percent of domestic violence cases according to some interviewees.<sup>35</sup> This seems to be the result of the victims' wishes.<sup>36</sup>

One prosecutor explained that victims request the charges be dropped in approximately seventy percent of the cases,<sup>37</sup> but often the victim's wishes are not immediately granted.<sup>38</sup>

A lot of them are not dropped because I as a prosecutor will not permit them to be dropped. What I will do is put them on hold for a year or six months. Or for some period of time I'll keep the case open and tell her that if she comes back in six months, or whatever the time period is, and she still wants me to drop the case, I'll drop it then.<sup>39</sup>

A former prosecutor said that he would often agree to defer prosecution on the condition that the defendant seek domestic violence counseling and ask the court to enter a no adverse contact

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The defendant is not immediately sentenced, but rather mandated to meet certain conditions, such as counseling, which will result in the charge being dismissed upon completion. If the defendant does not satisfy the conditions imposed upon him, the guilty plea is entered and the case moves immediately to sentencing. Of course, a conditional discharge is preferred to a deferral, but defendants often will not agree to a conditional discharge.

34. Dismissal is not an unusual result in domestic violence cases; in fact, the available data suggest that the vast majority of domestic violence cases end in dismissal. Hanna, *supra* note 23, at 1520-21 n.53; see also Janell Schmidt & Ellen Hochstedler Steury, *Prosecutorial Discretion in Filing Charges in Domestic Violence Cases*, 27 *CRIMINOLOGY* 487, 488-89 (1989) (suggesting that domestic violence cases often end with the prosecution voluntarily withdrawing charges); Corsilles, *supra* note 21, at 873 (noting that in jurisdictions without a no-drop policy, fifty to eighty percent of domestic violence cases end in dismissal).

35. Interview with H, Former Deputy Prosecutor, in Lake County, Ind. (Jan. 28, 1999) (notes on file with author); Interview with B, Deputy Prosecutor, in Lake County, Ind. (Jan. 26, 1999) (notes on file with author).

36. Corsilles, *supra* note 21, at 857 ("In many jurisdictions, prosecutors routinely drop domestic violence cases because the victim requests it, refuses to testify, recants, or fails to appear in court. In these situations, prosecutors dispose of approximately fifty to eighty percent of cases by dropping the charges.") (footnotes omitted).

37. *Id.*; see also Wills, *supra* note 9, at 177 ("[N]o matter how heinous the assault, the great majority of domestic violence victims have one characteristic in common: after making the initial report, they have neither the will nor the courage to assist prosecutors in holding the abusers criminally responsible.").

38. Interview with A, Deputy Prosecutor, in Lake County, Ind. (Jan. 26, 1999) (notes on file with author).

39. *Id.*; see Waits, *supra* note 9, at 324 (arguing that if a victim refuses to testify and the case cannot be successfully prosecuted without her testimony, the case should be delayed for some period of time before charges are dropped). "During this period, the [honeymoon] phase may (unfortunately) pass, and the victim may again be prepared to cooperate." *Id.*



order.<sup>40</sup> "I'd defer for 6 months and give the defendant a chance to get counseling. If he completed the counseling and there were no reports of abuse during the 6 month period, then I'd dismiss the case."<sup>41</sup> If the defendant failed to satisfy these conditions, then this prosecutor would go forward with the case.<sup>42</sup>

Although most cases in which prosecution was deferred for some period ultimately ended in dismissal, interviewees agreed that deferring prosecution in a case was better than dropping a case upon a victim's initial request.<sup>43</sup> Deferred prosecution extends the period in which the defendant has criminal charges hanging over his head. At a minimum, this may extend the period of reconciliation;<sup>44</sup> and at a maximum, the length of the period that charges are pending may bring the violence to an end. The defendant will have a longer time to reflect on his behavior and may seek help. He may agree to enter a counseling program for drugs, alcohol or anger management.<sup>45</sup> Moreover, the defendant will know that the charges are serious and will not be dropped. That, in itself, may give the defendant a reason to attempt to change his behavior.

A major drawback to deferring prosecution, however, is that there is no way to track subsequent incidents of abuse unless the defendant is arrested on new charges, or the victim changes her mind about requesting that the charges be dropped and states that the reason for the change was subsequent abuse.<sup>46</sup> Another is that a court cannot enforce the agreed upon conditions.

Despite these drawbacks, some interviewees believed that it was better to defer than to prosecute a case in which it was impossible to attain a conviction. A former prosecutor said, "It's better to defer [prosecution] and get the defendant to agree that he'll enter some kind of counseling program as a condition of the

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40. Interview with H, *supra* note 35.

41. *Id.*

42. *Id.*

43. It should be noted that deferring prosecution has been the subject of criticism. Critics argue that abusers whose cases are deferred are not required to acknowledge any wrongdoing and the cases are difficult to monitor. Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 316 (1993). Furthermore, if it is later decided that the case should be put back on the calendar for trial, a conviction will be difficult to achieve because the case is stale. *Id.*

44. See *infra* note 57 (discussing the "honeymoon phase").

45. Many interviewees stated that most domestic violence cases involve alcohol or drug abuse by either the defendant, the victim or both. One prosecutor stated that ninety percent of the domestic violence cases he has participated in involved alcohol. Interview with D, *supra* note 25. "Very rarely do you have a case where there's just anger and then abuse and no alcohol." *Id.*; see also Waits, *supra* note 9, at 290 (recognizing that "[m]any batterers have serious problems with alcohol and/or drug abuse") (footnote omitted).

46. Interview with A, *supra* note 38.

deferral than it is to take a case to trial without the victim and get a not guilty [verdict]."<sup>47</sup>

In cases that did end in conviction, either by plea or trial, interviewees responded that, in an overwhelming number of these cases, the sentence was probation coupled with counseling and almost never jail time.<sup>48</sup> "I'd say that a great majority of plea agreements are much more favorable to the defendant than to the state or the victim," said one prosecutor.<sup>49</sup>

All of the interviewees stated that it was the prosecutor's office and not the victim that made the decision to drop charges;<sup>50</sup> however, the interviewees also acknowledged that victims were aware of the difficulty in proceeding without their cooperation.<sup>51</sup> Therefore, most interviewees believed that the victim felt responsible for charges being dropped. According to one prosecutor, the victim initiates contact with the prosecutor's office when she wants to drop the charge.<sup>52</sup> For this reason the victim may feel responsible.<sup>53</sup> One judge said, "The victim is the one in the driver's seat. So I guess it's typically the victim that pulls the plug and says, 'I'm not going forward.'"<sup>54</sup> "[T]he prosecutor's office makes the decision to drop, but it is completely what the victim wants. The state is just kind of going along," said another judge.<sup>55</sup> Another prosecutor said, "[W]ith no witness there's no case and most victims know that."<sup>56</sup>

If victims do indeed feel responsible for making the decision to drop the charges, the pressure placed upon them by defendants to do so becomes dangerous and difficult for victims to ignore. Indeed, this feeling of responsibility and resulting pressure may be a large reason that such a high percentage of victims request that charges be dropped. A policy should be adopted that would result in victims feeling less responsible for cases being dropped or prosecuted.

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47. Interview with H, *supra* note 35.

48. *E.g.*, Interview with A, *supra* note 38; *see also* Hanna, *supra* note 23, at 1522-23 (noting that the final disposition in domestic violence cases "is often a period of probation, either pre- or post-conviction, contingent upon completion of a batterer treatment program . . . . [F]ew batterers ever see the inside of a jail cell, even when convicted of a serious offense.") (footnotes omitted).

49. Interview with C, *supra* note 32.

50. *E.g.*, Interview with G, *supra* note 31.

51. *E.g.*, Interview with C, *supra* note 32.

52. Interview with E, Deputy Prosecutor, in Lake County, Ind. (Jan. 28, 1999) (notes on file with author).

53. *Id.*

54. Interview with F, *supra* note 30.

55. Interview with G, *supra* note 31.

56. Interview with C, *supra* note 32.

### III. REASONS VICTIMS WILL NOT COOPERATE

All interviewees were asked what they believed to be the reasons for victims' reluctance to cooperate in the prosecution of their abusers. The overwhelming reason given was the limited financial resources of the victim and her financial dependence on the abuser. Other reasons mentioned included the power and control exerted by the defendant over the victim, fear of retaliation if the victim cooperated, low self-esteem, the "honeymoon phase"<sup>57</sup> and the status of the relationship between the abuser and the victim.<sup>58</sup>

#### A. Financial Concerns

One prosecutor estimated that in ninety-nine percent of the cases the victim gives some financial reason for wanting the charges dropped.<sup>59</sup> Another prosecutor said that in fifty percent of all cases the victim gives financial reasons for her desire to drop charges, "because the victim cannot financially support herself and needs the financial support of the defendant."<sup>60</sup> A victim-witness advocate agreed saying, "I think that a lot of it is financial."<sup>61</sup>

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57. The honeymoon phase is the third phase of what domestic violence experts commonly refer to as the cycle of abuse. See Paula Finley Mangum, Note, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. THIRD WORLD L.J. 593, 602 (1999). The first phase is the tension building phase, the second is the battering incident and the third phase is the loving-repentant phase. *Id.* In this phase "the batterer may apologize, show kindness and remorse, and offer gifts and promises. The batterer's behavior during this period reinforces a battered woman's hopes that he will change and encourages her to remain in the relationship. Thus, the stage is set for the cycle of violence to recur . . ." *Id.* at 603 (footnote omitted); see also Lamis Ali Safa, Note, *The Abuse Behind Closed Doors and the Screams That Are Never Heard*, 22 T. MARSHALL L. REV. 281, 292-96 (1997) (discussing the three phases of the cycle of violence).

58. See, e.g., Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 282 (1999) (discussing reasons victims are reluctant to discuss the abuse they suffer). Dalton's list of reasons is very similar to those the interviewees in this study gave for why victims are reluctant to cooperate with prosecutors. A few of the reasons she lists were not mentioned by the interviewees in this study and are worth mentioning. Those reasons include: "acceptance of at least some violence as the norm in intimate relationships; . . . determination to solve the problem without outside intervention; . . . unsuccessful prior attempts to enlist help; distrust of helping agencies; shame; and certainty that those listening do not want to hear the story . . ." *Id.*

59. Interview with E, *supra* note 52.

60. Interview with A, *supra* note 38.

61. Interview with I, Victim-Witness Advocate, in Lake County, Ind. (Jan. 28, 1999) (notes on file with author).

Some interviewees offered explanations for why financial concerns are often an underlying factor to victims' requests that charges be dismissed. One prosecutor said:

Sometimes these women don't have the best jobs and they don't have a lot of opportunities. If the man's working and supporting their children and then gets arrested and the paycheck stops coming in, these women have a very hard time financially. They are forced to get a some [sic] job waitressing tables, and then whose [sic] going to watch the kids? I've had victims come in that have been honest and say, "Look, he's paying the rent, I can't afford to not have him around."<sup>62</sup>

A judge commented:

If you have a victim that's married, has children, no job, no real family to turn to, what are the victim's options? What is she going to do if she doesn't have any education or job skills, get a job for \$5 an hour? How is she going to support herself?<sup>63</sup>

Another judge spoke of an instance in which a victim asked that charges be dismissed because "she needed the bond money back."<sup>64</sup> A prosecutor said:

Victims often tell me that their abuser is their families' only source of food and money. If they pursue the case, they realize that he may be going to jail and then he'll lose his job, and they need to make ends meet so they come to me and say they will not cooperate.<sup>65</sup>

### *B. Defendant's Control over the Victim*

A former prosecutor mentioned the defendant's control over the victim as a key reason that victims are reluctant to cooperate.<sup>66</sup>

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62. Interview with C, *supra* note 32. Often, women who leave their batterers end up homeless. See Asmus et al., *supra* note 21, at 120. One study concluded that "[o]ver fifty percent of homeless women are escaping domestic violence." *Id.* (citing CATHY DiFIGLIA, CONGRESSWOMEN ACT FOR WOMEN'S RIGHTS, FEMINIST MAJORITY REPORT 3, 6 (1991)).

63. Interview with F, *supra* note 30.

64. Interview with G, *supra* note 31.

65. Interview with B, *supra* note 35.

66. Interview with G, *supra* note 31; see also Dalton, *supra* note 58, at 275 ("Those who specialize in abuse . . . understand abusive relationships as being first and foremost about power and control."); Rosenbaum, *supra* note 20, at 52 ("Domestic violence cases are festering with issues of domination and control.").

"Control, it's control. [Victims are reluctant to cooperate] because of the power that the defendant has over them," she said.<sup>67</sup>

Moreover, the defendant knows that he can hit the woman and get away with it, either because he has gotten away with it before or he knows that she will not cooperate with the prosecutor's office.<sup>68</sup> Defendants that feel this way, and many of them do, are able to exert additional control over their victims because they are not in fear of the consequences of their actions.<sup>69</sup>

The defendant often attempts to exert his control over the victim through threats and by pressuring the victim not to cooperate with prosecution.<sup>70</sup> These threats are often weighty factors in victims' reluctance to cooperate. One former prosecutor said, "I think that in a good percentage of the cases the defendant threatens the victim. He says things like, 'Don't show up for court. You'll regret it if you do.'"<sup>71</sup> A prosecutor said, "I had one case where the woman came in to drop and had a hand written note from the defendant that said something like, 'My court dates are July 1 and 15. Go to the prosecutor and tell them that you want the case dismissed. They'll dismiss it.'"<sup>72</sup>

Often, defense counsel can be the instigator of this pressure.<sup>73</sup> "The defense attorney tells the defendant that without the victim's cooperation there is no case. The defendant then pressures the victim to drop."<sup>74</sup> Of course, the defense attorney's communication results in more defendants pressuring their victims to tell the prosecutor's office that they are unwilling to cooperate. It is often not necessary for the defense attorney to go through his client to get a message to the victim.<sup>75</sup> In a lot of cases, the defense counsel talks to the victim before ever talking to the defendant.<sup>76</sup> This is because, in many cases, the victim hires the defense attorney.<sup>77</sup>

Financial concerns and pressure to drop by the defendant are often overlapping factors jointly contributing to a victim's reluctance to cooperate. Victims are often under pressure to drop

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67. Interview with G, *supra* note 31.

68. Interview with C, *supra* note 32; *see also* Wills, *supra* note 9, at 179 ("Batterers are 'master manipulators.'") (citation omitted).

69. *See* Wills, *supra* note 9, at 179.

70. Interview with H, *supra* note 35.

71. *Id.*

72. Interview with B, *supra* note 35.

73. *See id.*

74. *Id.*

75. Interview with H, *supra* note 35.

76. *Id.*

77. *Id.* Note that in addition to hiring defense attorneys, victims sometimes bail their abusers out of jail. *See supra* text accompanying note 64.

because the money being spent for an attorney is not being spent in a manner desired by the abuser.<sup>78</sup> "Defendants say, 'Look at this budget, I can't pay this lawyer and you're doing this to me.' He's going to blame her because he couldn't make the car payment because he had to pay his lawyer."<sup>79</sup>

### C. Retaliation for Prosecution

I discuss fear of retaliation as a possible reason that victims are reluctant to cooperate because several interviewees mentioned it as a side factor. After mentioning retaliation, most interviewees went on to say why retaliation is not a factor. Only one interviewee, a prosecutor, indicated that he believed victims are reluctant to cooperate partially because they fear retaliation.<sup>80</sup> He said, "Fear is huge, but it's not the main thing. The main reasons are financial . . . ."<sup>81</sup>

Most interviewees spoke of retaliation as a side factor before reiterating their belief that victims are reluctant to cooperate mainly for financial reasons. One prosecutor said, "I don't think that [retaliation] happens all the time, but I think that it may happen sometimes. I'm not aware of any cases where it happened."<sup>82</sup> Still another prosecutor said, "It is my opinion that victims are not in fear of retaliation. Most of these women are getting beat up at home all of the time, so what's the difference to them if it's retaliation?"<sup>83</sup> A victim-witness advocate expressed the same view—once the prosecution begins, the honeymoon phase begins and the abuse stops.<sup>84</sup> After the honeymoon phase ends, the

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78. Interview with G, *supra* note 31.

79. *Id.*

80. Interview with D, *supra* note 25. Interestingly, no interviewees mentioned unsuccessful prior attempts to seek help or distrust of helping agencies as factors contributing to victims' reluctance to cooperate. See Dalton, *supra* note 58, at 282 (listing these among the reasons for victims' silence about their abuse).

81. Interview with D, *supra* note 25.

82. Interview with B, *supra* note 35; see also Barbara Hart, *Battered Women and the Criminal Justice System*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 98, 99 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (citing a 1982 National Crime Survey that found that thirty-two percent of intimate victims were subsequently abused, on average, three times in the six months following the initial battery).

83. Interview with C, *supra* note 32; see also Waits, *supra* note 9, at 302 (arguing that although prosecutors should be sensitive to the problem of retaliation, it should not be used as an excuse for inaction because the "[a]buse continues and probably increases if intervention does not occur").

84. Interview with J, Victim-Witness Advocate, in Lake County, Ind. (Jan. 28, 1999) (notes on file with author).

beatings begin again, regardless of whether there was prosecution.<sup>85</sup> There really is no distinction between the abuses, so there is no fear of retaliation for going forward and cooperating.<sup>86</sup>

#### *D. Low Self-Esteem*

Victims' low self-esteem is another important factor in their reluctance to cooperate<sup>87</sup> because it often leads victims to blame themselves for the abuse.<sup>88</sup> One judge said:

Often times when victims want the charges dropped they come into the prosecutor's office saying, "It's my fault, I hit him first or I threw something at him, I started the whole thing." Then they call the police just because they want the man out of the house, and the police come and arrest the guy. So they blame themselves for the abuse and for his arrest.<sup>89</sup>

A former prosecutor opined, "I think that a major factor is a feeling of helplessness. Victims feel like they can't get out of the situation that they're in, and they'd rather not have to deal with a court case."<sup>90</sup>

#### *E. Honeymoon Phase*

Victims are often reluctant to cooperate because they are misled by the honeymoon phase.<sup>91</sup> One prosecutor explained that it takes a long time for a case to reach final disposition, and often times the victim changes her mind about prosecution a couple months after the incident.<sup>92</sup> She says the defendant has been really nice lately, doing the dishes and cleaning the house, that he has not been drinking as much and that she wants the charges dropped.<sup>93</sup> The prosecutor commented that the victim does not understand that the relationship is in the honeymoon stage, and the defendant

85. *Id.*

86. *Id.*

87. *See, e.g.,* Waits, *supra* note 9, at 282 ("By the time the battered woman has been through the battering cycle a number of times, she suffers from low self-esteem.") (footnote omitted).

88. Interview with C, *supra* note 32; *see also* Waits, *supra* note 9, at 279 (noting that the victim, as well as the batterer, places blame for the abuse on the victim).

89. Interview with G, *supra* note 31.

90. Interview with H, *supra* note 35.

91. *See* discussion and sources cited *supra* note 57.

92. Interview with E, *supra* note 52.

93. *Id.*

is acting that way only because he has criminal charges hanging over his head.<sup>94</sup> The prosecutor further expressed that the victim also does not understand that as soon as the charges are dropped the defendant will go back to his old ways and the violence will begin again.<sup>95</sup>

Another prosecutor also mentioned the honeymoon phase as a reason that victims want charges dropped.<sup>96</sup> During the time between the abuse and disposition of the case, the victim and the abuser are back together and the honeymoon phase has begun.<sup>97</sup> People want to make their relationships work, so the victims give their abusers a second chance.<sup>98</sup> A victim-witness advocate said,

A couple of days after the incident, the defendant starts calling the victim, that is if he's in jail or if she left him, and telling her how sorry he is and that it will never happen again. That's the beginning of the honeymoon phase. A couple of days later the victim will come in and say that she has had time to reflect and that she wants to drop charges so it will all just go away.<sup>99</sup>

#### *F. Status of the Relationship*

Yet another reason victims fail to cooperate is because they love the defendants and do not want their relationships with the defendants to end. One prosecutor said, "One of the main things is that they love the person. They're afraid that going forward will break up their relationship, and most of the time they don't want to break up."<sup>100</sup> Another experienced prosecutor said, "In twenty-five percent of the cases the people legitimately get back together and they want it over with. They want to start over, and they don't want this cloud hanging over their head."<sup>101</sup>

Often the victim and her abuser are back together before the prosecutor is able to get involved in the case. One prosecutor received a case on a Wednesday in which the victim was hospitalized.<sup>102</sup> The victim was going to be in the hospital for a few days.<sup>103</sup> She went to see the prosecutor one week after getting out of the

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94. *Id.*

95. *Id.*

96. Interview with C, *supra* note 32.

97. Interview with E, *supra* note 52.

98. *Id.*

99. Interview with I, *supra* note 61.

100. Interview with B, *supra* note 35.

101. Interview with A, *supra* note 38.

102. Interview with E, *supra* note 52.

103. *Id.*



hospital and said she wanted the charges dropped. She had talked to her husband; he had apologized and said he was going to get counseling.<sup>104</sup> She decided to give him another chance because she loved him.<sup>105</sup> Another prosecutor said, "I'll guarantee you, in seventy-five percent of the cases the victim will be back within a week of the charges being filed saying that she wants to drop the charges because [the victim and defendant] are back together. It happens all the time."<sup>106</sup>

Victims are also reluctant to cooperate when the victim and the defendant have completely broken off their relationship. An experienced prosecutor said, "If there's a battery committed during a marriage and the parties subsequently divorce, then she's satisfied that the relationship is over and that there is not going to be any further contact."<sup>107</sup>

Although the interviewees gave several reasons for a victim's reluctance to cooperate in the prosecution of her abuser, the most important factor was financial. Usually the abuser earns all of the income and controls the family's finances. The victim still needs her abuser's financial support. Additional reasons included the defendant's power and control over the victim, the victim's low self-esteem, a desire to save her relationship with the abuser, and the victim's belief in the honeymoon phase of the abuse cycle lasting. Although some interviewees mentioned the victim's fear of retaliation, this did not seem to be a significant factor.

Victims have many reasons for not wanting to cooperate in the prosecution of their abusers. In response thereto, the interviewees employed many techniques to convince victims to assist with prosecution.

#### IV. TECHNIQUES USED TO CONVINCE VICTIMS TO COOPERATE

Every interviewee said that he/she had been involved in a case in which the victim says that she does not want to proceed with prosecution, but the interviewee believed that the victim would cooperate with a little convincing. I asked each interviewee how he/she believed such a situation should be handled. The responses

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104. *Id.*

105. *Id.*

106. Interview with D, *supra* note 25.

107. Interview with A, *supra* note 38.

were quite different, ranging from being very sympathetic to victims' concerns<sup>108</sup> to threatening victims by using fear tactics.<sup>109</sup>

### A. Sympathy

Most interviewees indicated that being sympathetic to victims' concerns was the most effective way to convince reluctant victims to cooperate.<sup>110</sup> Being sympathetic to victims' concerns often means spending time with the victims and convincing them that it is in their best interest to cooperate.<sup>111</sup> Significantly, however, prosecutors are finding that they do not always have the time necessary to be sympathetic.

One prosecutor said:

I take the victim aside, talk to her, tell her that the defendant is not going to retaliate, explain to her that the defendant is not going to change, if he hit her once, he is going to hit her again. I explain to her that the only way that she is going to get any independence and if she's going to be able to control her life, she's going to have to take a stand and accept the benefits of our assistance, the assistance that's available to her.<sup>112</sup>

Another prosecutor expressed this view:

I think it's best when you meet with the victim right away, explain the whole situation to her, what's going to happen with her case, and then try and find out the history of their relation-

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108. Interview with C, *supra* note 32.

109. Interview with B, *supra* note 35.

110. At least one scholar agreed with this approach. "If [trained] staff members sympathize with the abused woman's dilemma, and take time to explain to her the advantages of testifying, they can greatly enhance the chances of her cooperation and the abuser's conviction." Waits, *supra* note 9, at 322-23. "Prosecutors can also increase the likelihood of victim cooperation by tailoring their recommendations to the victim's needs and desires. Thus, if she wants the abuser to receive counseling, the state's attorney can help her realize that her testimony against her husband is a means to that end." *Id.* at 323 n.315.

111. Although not discussed in these interviews, spending too much time attempting to convince a victim to cooperate could ultimately be fatal to a case if a victim will not cooperate in the end. The more time a prosecutor spends with the victim, the less time she has to investigate the case, interview other witnesses and prepare a trial strategy. See Hanna, *supra* note 23, at 1553. If the victim refuses to cooperate and no other case preparation has been done, most likely a very weak case for prosecution will result. See *id.* at 1555. Of course, if the entire case rests on the cooperation of the victim, all energy must be focused on the victim's participation. See *id.*

112. Interview with A, *supra* note 38.

ship by asking things such as, has this happened before, have you ever called the police?<sup>113</sup>

Another prosecutor responded:

[I]f the victim and defendant are no longer together and the victim wants to drop the case to move on with her life, I'll ask her what about the next victim? What about the next girl he goes out with and beats up? "You don't want that to happen. Look, you dismiss this case, and what's that tell him? It tells him that he can go ahead and beat women up and get away with it." The next time he's charged he's going to think that he beat the law one time so he can do it again. He's going to think that the law can't get him. I don't know if it always works, but I try and it has worked before.<sup>114</sup>

Attempting to convince a victim to cooperate by using her children as a motivating factor could be effective. "I'll try to tell her that if he is hitting her it's just a matter of time until he gets to the kids. I found that to be very effective. Most of these victims will put their children over their abuser more times than not."<sup>115</sup>

A former prosecutor gave this example of how he convinced a reluctant victim to cooperate:

Victims will flip flop back and forth. They want to dismiss, then they want jail time, then they want to dismiss, then no, he should have counseling, and so on. Victims have to have time for reflection and be made fully aware of all their options. I had a case where an ex-boyfriend broke into his ex-girlfriend's apartment and forced her to have sex with him. He held a chrome lock that she thought was a gun to her head. I spent three months with her explaining why she should cooperate. I wouldn't leave her alone. I told her that this was a serious case and that the defendant had a serious felony conviction on his record, and it was time for him to do some time. I showed her that someone was willing to go the extra mile for her. We were successful, and the guy spent a year in jail. Afterwards she thanked me and said, "I'm glad that you didn't give up because I just needed the extra push to do what I needed to do." Prosecutors should not be too quick to give up on a teetering victim. Often such a victim can be used to do such things as force a condition on the defendant's bond that he attend counseling.

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113. Interview with C, *supra* note 32.

114. Interview with B, *supra* note 35.

115. Interview with C, *supra* note 32.

Then, if the victim's satisfied that the violence is going to stop, we can get a non-trial disposition or non-conviction disposition so that he doesn't lose his job and can still pay for the victim and her kids to eat. There are often many ways to accomplish the same goal if somebody takes the time.<sup>116</sup>

A judge, who is a former prosecutor, expressed serious concern that it is no longer possible to spend the necessary time with a victim that it takes to convince her to cooperate.<sup>117</sup>

When I was in [the misdemeanor] courts, I think we had between 10,000 and 12,000 cases a year. Now they have between 15,000 and 18,000 cases a year. When I was there we had two [deputy prosecutors] per courtroom and that's what they have now. I think they have a lot less time to focus on things. When I was there I would sit down with the victim and explain the domestic violence cycle to her. I would tell her, look, see where it says honeymoon, that's where you are when he's doing the dishes and cleaning the house. But when that stops, the storm is getting close and the next time I see you you're going to have a black eye and you're here where the violence has occurred.<sup>118</sup>

A young prosecutor agreed that there is not enough time to spend with victims.<sup>119</sup> The size of her caseload makes it impossible to spend appropriate amounts of time.<sup>120</sup> Also, because some battery cases can last up to two years, it is just impossible to keep in contact with all the victims.<sup>121</sup> Months go by with no contact between the prosecutor's office and the victim.<sup>122</sup> Consequently, the victim thinks that the case just went away; when the trial date finally arrives, prosecutors cannot find the victim.<sup>123</sup>

Most interviewees felt that being sympathetic to the victim and spending time with her are the most effective ways to convince her to cooperate in the prosecution of her abuser. The heavy caseload that most prosecutors handle, however, makes it difficult to spend the time with the victim necessary to convince her to cooperate. At

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116. Interview with F, *supra* note 30; see also Asmus et al., *supra* note 21, at 136-37 (noting that in Duluth, Minnesota, "some victims who originally resisted prosecution of their partners eventually were willing to testify at the time of trial").

117. Interview with G, *supra* note 31.

118. *Id.*

119. Interview with E, *supra* note 52.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

times, prosecutors agree that stronger measures are needed to ensure victims' cooperation.

### *B. Fear Tactics*

Prosecutors believed that although expressing sympathy is important in domestic abuse cases, some victims were more likely to cooperate when fear tactics were employed. Fear tactics ranged from threatening to send victims to jail<sup>124</sup> to telling them that it would be harder on them to not cooperate than it would be to cooperate.<sup>125</sup>

One prosecutor said:

I tried as much as possible to put on a face that relayed that I was going to go forward. I would tell them that it's not their choice to drop charges, it's our choice and if they didn't want to cooperate I would tell them what was going to happen. That I was going to subpoena her and if she didn't show up I was going to have her thrown in jail with a body attachment. I tried to make them believe that it would be more painful for them to not cooperate than it would be to cooperate.<sup>126</sup>

This prosecutor added that the tone he used on the victim depended on how the victim approached him, but the message was always the same—a hard line approach to forcing participation.<sup>127</sup>

He also emphasized the importance of following through with the threats if necessary.<sup>128</sup>

[E]very victim that I dealt with, whether it was being nice, using humor, or using threats, knew that I meant what I said. I would have had no problem putting a victim in jail because she refused to cooperate. I have a legal obligation to the people of this state to prosecute crimes of this nature. To me, these are serious offenses that affect other people in the community. If

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124. Interview with C, *supra* note 32.

125. Interview with E, *supra* note 52.

126. Interview with C, *supra* note 32. One study concluded that ninety-two percent of prosecutorial agencies use subpoenas to require victims to testify. Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 176, 186 (Eve S. Buzawa & Carl G. Buzawa eds., 1996); see also Corsilles, *supra* note 21, at 860 (noting that it is the policy, although not followed in every case, of the San Diego, California City Attorney's office to subpoena victims to testify in court and to issue arrest warrants if the subpoenaed victims fail to appear and the case cannot proceed without the victim's cooperation).

127. Interview with C, *supra* note 32.

128. *Id.*

he's beating her up, it's not too long before he's beating up the kids. I have to do what I can to stop the abuse and I think prosecution is the best way. I at least want to get the guy into counseling. They don't always go to jail, but I always do the most that I can to get some sort of favorable outcome.<sup>129</sup>

Another prosecutor said that she would also resort to threatening the victim if necessary.<sup>130</sup> This prosecutor would not be mean, just direct.<sup>131</sup> She did explain, however, that if a victim became hostile she would point out to the victim that the police made the arrest and the victim does not have the power to decide whether to proceed with the case.<sup>132</sup> This prosecutor also said that if the victim changes her story and says she made the whole thing up, the prosecutor tells her that she will have to tell the judge that she lied, and if she lies under oath to the judge she could be charged with perjury.<sup>133</sup>

Other prosecutors take similar approaches.

I try to be a little hard on a victim that will not cooperate by telling her that she can be subpoenaed and forced to testify. If she doesn't show up for court, she can be held in contempt and thrown in jail. But, I don't really want to throw a victim in jail. She's already been victimized once; I don't want to victimize her again. So if the hard line doesn't work, rather than following through with the threat, I take a softer approach and tell them that this is the right thing to do, it will stop the violence, etc.<sup>134</sup>

Another prosecutor said, "I try to be friendly with everyone, but if I'm not getting to them I'll take a more stern approach and go more into the consequences of their actions if they refuse to go forward."<sup>135</sup>

Prosecutors in the same office did not share the same feelings about how to respond when a victim is reluctant to cooperate;

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129. *Id.*; see also Gwinn & O'Dell, *supra* note 43, at 313 (arguing that prosecutors must have effective policies for handling "domestic violence victims who refuse to appear in court to testify" to avoid control of the case reverting back to the abuser, but noting that a hard-line approach of jailing victims for their refusal to testify "is the purest form of re-victimization").

130. Interview with E, *supra* note 52.

131. *Id.*

132. *Id.*

133. *Id.*

134. Interview with D, *supra* note 25. But see Hanna, *supra* note 24, at 1892 (defending the use of subpoenas by arguing that such use may be helpful in conveying to the victim the seriousness of the crime committed against her).

135. Interview with B, *supra* note 35.

consequently, there does not seem to be a systematic method in place for dealing with reluctant victims. As a result, victims in similar situations were met with different approaches from the same prosecutor's office depending on which prosecutor was assigned to the case. Moreover, prosecutors made decisions on what tactics work best to convince a reluctant victim to cooperate based primarily on their own experiences. Not only did some of the interviewees have limited experience in dealing with domestic violence cases, but often what they believed to be the most effective method for convincing cooperation may not have been. In fact, because of the great variety of responses—some directly at odds with others—some prosecutors are likely to be handling reluctant victims poorly.

### *C. Forcing Victims to Appear Before a Judge*

I asked the interviewees if they thought that threatening to force victims to appear before a judge and explain their reasons for not wanting to proceed with the case would convince more victims to cooperate.<sup>136</sup> Every interviewee but one did not believe that this tactic would be effective. However, all the prosecutors interviewed stated that they employed it at times. The prosecutor that believed the tactic to be effective said she had one victim on the stand and, when she asked the victim if she really wanted to drop the charges, the victim broke down and said no.<sup>137</sup> This prosecutor believes that forcing victims to face questions from both the prosecutor and the judge makes the victim realize the seriousness of what she is asking the court to do.<sup>138</sup>

The methods that prosecutors employed when a victim was on the stand were similar. One prosecutor explained that he would go in front of the judge with the victim, explain the situation and then ask the victim, "Is that your understanding? Is that what you desire?" . . . I try not to put the victim in an embarrassing situation."<sup>139</sup> Another prosecutor said, "I put the victim on the stand, under oath and ask them questions like, 'Do you want this case

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136. The Rhode Island Attorney General's Office employs this technique and refuses to drop charges until the victim testifies in court that she is unwilling to testify. See Corsilles, *supra* note 21, at 864-65. However, this practice has been criticized for punishing the victim. See Hanna, *supra* note 23, at 1553 n.194.

137. Interview with E, *supra* note 52.

138. *Id.*

139. Interview with A, *supra* note 38.

dismissed? Why?" That way the prosecutor's office is somewhat protected if the defendant goes out and kills the victim."<sup>140</sup>

Almost every interviewee stated that the reason for forcing victims to appear before the judge was not to convince victims to cooperate, but rather to protect themselves and their office from being blamed for dropping prior charges when a victim suffers subsequent abuse. Requiring a victim to say under oath that she wants the case dropped is primarily for the office's political liability.<sup>141</sup> The prosecutor's office wants to ensure that victims cannot deny that deferral or dismissal was in compliance with their wishes at a later date.<sup>142</sup>

One prosecutor explained that his supervisor requires that a victim requesting a case be dropped, come to the office and sign an affidavit saying she is the victim in the case and is requesting that the charges be dropped.<sup>143</sup> The reason for this policy was the same reason given for forcing a victim to appear in front of a judge.<sup>144</sup> "We have to cover for ourselves. If violence occurs again and the victim comes in and says, 'Hey, why did you guys dismiss this case?' We can say, 'You came in and said you wanted the charges dropped. Here's [your] signature.'"<sup>145</sup>

In explaining one court's policy, a judge said:

For a dismissal on a battery case, it is the court's policy that the victim come in front of the judge. I don't know how effective that is though. You've got the offender in court, as well as the victim and how do you know that he hasn't said to her right before they walk through the courtroom door, "Dismiss or I'll kick the shit out of you." I think doing it in court is extremely ineffective.<sup>146</sup>

One prosecutor said that he believes judges force victims to come before them to protect themselves and ensure that they are doing all they can to prevent repeated acts of violence.<sup>147</sup> He provided the following example:

There was a case in here not too long ago where the judge gave the defendant probation for beating up his wife. The woman

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140. Interview with D, *supra* note 25.

141. Interview with E, *supra* note 52.

142. *Id.*

143. Interview with B, *supra* note 35.

144. *See id.*

145. *Id.*

146. Interview with G, *supra* note 31.

147. Interview with B, *supra* note 35.



was beaten up pretty badly. The guy held a knife to her throat and sexually assaulted her. Then he beat her with a golf club. She had bruises on her face and both of her eyes were blackened. At sentencing the defendant was very well versed, very articulate in front of the judge, had a good job at the steel mill, promised to never do it again, looked like a gentleman. The victim never testified. Six weeks later he killed her. [The judge] told me that that case kept him up at night. Now, the judge forces victims to come in front of him and wants to hear from her why she agrees to a dismissal. Sometimes I think that he tries to frighten them into not agreeing. He told one victim, "Do you realize I sat in this same place a year ago and the defendant was given a break and now the victim is dead?"<sup>148</sup>

This prosecutor concluded that judges want to hear from the victims of domestic violence.<sup>149</sup> "[The judge] wants to hear that she's going along with the dismissal and . . . why . . . . He wants to make sure that she understands. All judges have taken a more active role I think because domestic violence affects them too."<sup>150</sup>

Prosecutors and judges have adopted many techniques to convince victims to cooperate in the prosecution of her abuser. One of these methods is the controversial practice of forced participation.

## V. REASONS FOR FORCED PARTICIPATION

Whether a victim is forced to participate in the prosecution of her abuser is determined on an individual basis in Lake County.<sup>151</sup> Forcing participation, in this context, means refusing to drop the case and forcing the victim to take the stand if the case goes to trial.<sup>152</sup> Although all victims are not treated alike, generally all prosecutors use the same factors to determine whether a particular victim should be forced to participate. Some interviewees think that no victim should ever be forced to participate. Those interviewees gave various reasons for their opinions including wasted resources and victim autonomy. I asked those interviewees what factors they considered when deciding how far to push a victim in an effort to get her to cooperate. Remarkably, their answers and the factors they used were very similar to the answers given by the

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148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*; Interview with C, *supra* note 32; Interview with D, *supra* note 25.

152. *E.g.*, Interview with A, *supra* note 38.

interviewees who did believe that victims should be forced to participate.

### A. *Strong Evidence Against the Defendant*

Prosecutors seemed most willing to force a victim to participate when the evidence against the defendant was strong.<sup>153</sup> As one prosecutor said, "If there is any type of serious injury and we have pictures and documentation and particularly when there is a cooperating witness, I'm going to force the victim to cooperate because I believe that this defendant is guilty."<sup>154</sup>

This prosecutor believed that in such circumstances the victim testifies truthfully,<sup>155</sup> although reluctantly, but conceded that sometimes the victim would tell inconsistent versions of what happened.<sup>156</sup> For example, he said:

I can recall one case where the defendant went into the house, grabbed the victim, punched the victim two or three times in the face, drug her down the stairs and then outside, and then left. The victim was bleeding from her face and had a broken nose when the police showed up. The victim told the police what had happened and that the defendant had left and went down the street. The police arrested the defendant. I forced the victim in that case to testify because of the seriousness of her injuries. She was in the hospital for two or three days. She testified that the person who beat her up was not the defendant, that she had made the whole story up. Because the victim's testimony was the only evidence, the judge had to find the defendant not guilty.<sup>157</sup>

Despite this incident, the evidence gathered from the interviewees appears to support the belief that victims testify truthfully in the majority of cases when forced to take the stand. This information could be very valuable in formulating no-drop policies. If

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153. *E.g.*, Interview with B, *supra* note 35 (stating that the "[s]trength of the case is important" when deciding to prosecute without the victim's cooperation); *see also* Hanna, *supra* note 24, at 1908 (arguing that sufficiency of the evidence is an important criterion that prosecutors should consider in deciding whether to pursue a case).

154. Interview with A, *supra* note 38.

155. *Id.* But *see* Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 197 n.50 ("The Los Angeles County District and City Attorney's offices estimate that over 50% of their victims 'recant,' which means that once they are forced to take the stand against their batterers, the victims deny ever being battered.") (citation omitted).

156. Interview with A, *supra* note 38.

157. *Id.*

victims will testify truthfully—even if reluctantly—when forced to take the stand, then more victims should be forced to testify if a conviction would end the abuse.

### *B. Seriousness of the Injuries*

The seriousness of the injuries is also a very important factor<sup>158</sup> affecting prosecutors' decisions to pursue cases, mainly because of the limited resources of prosecutors' offices and, consequently, the need to prioritize.<sup>159</sup> One prosecutor said, "I consider the seriousness of the injury. . . . If the defendant slapped her in the face versus punched her with his fist[, it] makes a big difference."<sup>160</sup> A judge said:

It's one case if it's an argument where the woman was raising her voice, getting very close to the defendant in terms of physical proximity and the perpetrator slapping the person, but it's quite another case for a person that constantly hits with closed-fists and kicks people on a repetitive basis.<sup>161</sup>

Another prosecutor commented:

[I]t's only human if you see pictures and this woman is beaten up badly it's going to affect you, it's going to make you more angry about it especially if the guy's a repeat offender with either the same victim or a different victim. Those conditions would make it more of a case where we had to step in and do something about it.<sup>162</sup>

According to another prosecutor, "We have so many cases coming in that we have to prioritize which defendants we are really going to go after. If there's serious bodily injury and it's a repeat offender, I would probably try to work harder for a conviction."<sup>163</sup>

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158. See Hanna, *supra* note 24, at 1908.

159. See, e.g., Interview with D, *supra* note 25. I found it very interesting that the interviewees who did mention prioritization because of limited resources would prioritize cases based on the seriousness of the violence rather than the likelihood that prosecution would stop the abuse.

160. Interview with A, *supra* note 38.

161. Interview with F, *supra* note 30.

162. Interview with C, *supra* note 32.

163. Interview with D, *supra* note 25.

### C. Defendant's Criminal Record

The defendant's record was also an important factor in deciding whether a victim should be forced to participate.<sup>164</sup> If the defendant has been convicted of other violence-related offenses, then the chances of the case being dropped are very low.<sup>165</sup>

A judge, who is a former prosecutor, explained that she is most concerned with repeat players. In those situations, the case against the defendant should not be dropped and the victim should be forced to participate.<sup>166</sup> "If you've been in court before, you're not getting your case dropped."<sup>167</sup>

### D. Type of Relationship Between Defendant and Victim

Prosecutors considered the type of relationship between the victim and defendant to be another important factor. They mentioned that knowing what type of relationship they were dealing with was important in making their determinations.<sup>168</sup> One pro-secutor said, "I need to get a feel for the type of relationship that the victim is in before I decide how I'm going to go about convincing her to cooperate."<sup>169</sup> Another prosecutor expressed the same sentiment: "I need to get a feel for what the victim is going through and the most effective way to do that is to understand the relationship she's in."<sup>170</sup> Another prosecutor said:

I want to know is this the first time he hit her? If it's not the first time, how many times has he hit her? Has she gone back

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164. See, e.g., *supra* text accompanying notes 162-63.

165. Interview with B, *supra* note 35.

166. Interview with G, *supra* note 31.

167. *Id.*

168. Scholars agree that considering the relationship between victim and abuser is important. Linda Mills noted that "[a]n approach [to prosecution] which takes into account the relationship between the two parties, perpetrator and victim, batterer and battered woman, is the only system likely to engage the parties long enough to have any long-lasting and significant effect." Mills, *supra* note 155, at 195; see also Dalton, *supra* note 58, at 274.

The professional needs an understanding of the victim's ambivalence toward her abuser, the low self-esteem and self-blame that lead her to take responsibility for the abuse, or her reluctance to acknowledge the toll it is taking on her children, in order to arrive at a balanced understanding of the incidents the victim is describing.

*Id.*

169. Interview with B, *supra* note 35.

170. Interview with C, *supra* note 32.

to him? Why did she go back to him? And, what's going to stop her from going back to him again after the case is over?<sup>171</sup>

In short, "You need to get every detail that you can from [the victim] about their relationship."<sup>172</sup>

One judge echoed these prosecutors' strategies:

I guess you've got to look at the facts, you've got to look at the injuries, you've got to look at the past abuse, and you have to look at the position that the victim is in from a financial perspective and a psychological perspective. I want to know if the victim feels that the defendant is a threat to her. I ask how long has this been going on? Have you ever been injured in the past? To what extent have you been injured in the past? What do you feel is the main cause of this person's anger? If we can identify that anger, how do we solve it? Will anger management classes help? Is there a drug problem that maybe we can get the person help for? Is there an alcohol problem that maybe we can get the person help for? Or is it just the relationship that's ending? Some people have gone their separate ways which means that that victim in a lot of cases is no longer in harm's way.<sup>173</sup>

One prosecutor indicated that he rarely forces a victim to cooperate if he believes that doing so will end a relationship the victim does not want ended.<sup>174</sup>

As a prosecutor, I'm not going to destroy the relationship between the victim and the defendant. That's not my function. To go through a whole trial and the judge finds the defendant guilty and fines him \$100, but the relationship is destroyed,

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171. Interview with A, *supra* note 38; see also Asmus et al., *supra* note 21, at 154 (noting that the prosecution's knowledge of the history of the relationship is important for many reasons); Rosenbaum, *supra* note 20, at 53 ("[T]he prosecutor should determine the full history of the battering relationship. Because it is common for victims of intimate victimization not to report violence in the early stages, many cases have a history by the time an arrest is made.").

172. Interview with C, *supra* note 32; see also Waits, *supra* note 9, at 295 ("[T]he law and legal officials must be flexible enough to respond to individual cases.").

173. Interview with F, *supra* note 30. Although efforts should be made to help the batterer control his alcohol or drug problem, it is important not to allow him to place the blame for his behavior on those problems. See, e.g., Waits, *supra* note 9, at 290-91 (arguing that placing the blame for the batterer's behavior on alcohol makes it easier for the batterer to continue his abusive behavior).

174. Interview with A, *supra* note 38.

whom have I benefited? That's not my function to destroy what they have.<sup>175</sup>

Another prosecutor reiterated this view saying:

If a husband and wife come in, wife comes up to me and says, "I want the case dismissed. Things are going okay. I've been married to him 5 years. He might not be the perfect husband, but for the most part, he's pretty good." Down in [the misdemeanor] courts, I'm 26 or 27 years old, who am I to say no, he's a bad guy? What he did was so wrong that there's no way I'm going to dismiss it. Who am I to judge how other people should live their lives? I'm not a psychologist. I don't really know what's going to happen. I don't know these people that well. Who am I to say that this case shouldn't be dropped if the wife wants it dropped?<sup>176</sup>

This prosecutor continued, saying, "[W]e have to think about their relationship. After this case is over, I go onto my next case. These people go home and live together. If they are truly back together and you're forcing someone to testify, you're going to make things in the relationship a whole lot worse."<sup>177</sup>

Some experienced prosecutors rely heavily on their experience—experience younger prosecutors lack—when determining whether to force a victim to cooperate. One such prosecutor said that he

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175. *Id.*

176. Interview with B, *supra* note 35.

177. *Id.* There seems to be at least some judicial agreement with the view expressed by these two prosecutors. In *State v. Busch*, the court held that the trial court did not abuse its discretion when, over the prosecutor's objections, it dismissed charges stemming from incidents of domestic violence because the victim did not want to proceed. *State v. Busch*, 669 N.E.2d 1125, 1127-28 (Ohio 1996), *superseded by statute as stated in State v. Shelton*, No. 98CA007165, 2000 Ohio App. LEXIS 1688, at \*\*4-5 (Ohio Ct. App. Apr. 19, 2000) (citing OHIO REV. CODE ANN. § 2903.06(A) (Anderson 2000)). The trial court opined:

I want the record to reflect that the prosecuting witness has been down here on a number of occasions now; she has appeared when she was subpoenaed to be here; and on a number of occasions, she has come in stating that this is her desire. The prosecutor's office has made it very clear, both to the Court and to the prosecuting witness, their position on this matter. However, these are two adults. These parties think they can work their problems out. And this branch of the Court doesn't think it should stand in their way of doing that.

*Id.* at 1127. At least one author would likely disagree: "The criminal justice system is not for [the victim's] benefit but for the community's. Its purposes are to deter crime, rehabilitate criminals, punish criminals, and do justice, but not to restore victims to their wholeness or to vindicate them." William F. McDonald, *The Role of the Victim in America*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 295, 296 (Randy E. Barnett & John Hagel III eds., 1977); *see also* Hanna, *supra* note 24, at 1889-90 (arguing that one goal of prosecution should be to send the message to society that criminal behavior will be penalized).

could tell if a victim could be convinced to cooperate by talking to her to determine the nature or type of relationship shared by the victim and the abuser.<sup>178</sup> I asked, "Is your valuation of the victim's reasons based on your experience?" to which he replied, "Yes, based on my experience."<sup>179</sup>

Another experienced prosecutor also said that he could tell immediately whether a victim could be convinced to cooperate.<sup>180</sup>

If the victim's going to take the defendant back then I can tell immediately that she's not going to cooperate. Once he makes bond, he'll go back to her and tell her that he's sorry, that he drank too much, and that it will never happen again. Then the honeymoon phase starts and there's no way that the victim is going to cooperate.<sup>181</sup>

Another prosecutor concurred: "If the parties are back together, then I know for sure that the victim's not going to cooperate. Otherwise, I will attempt to do my best to convince the victim to cooperate."<sup>182</sup>

A seasoned judge also emphasized the importance of the prosecutor's experience.<sup>183</sup> He asserted:

[Younger prosecutors] may not have figured everything out yet. Whenever you are prosecuting a case you've got to look at the person's overall lifestyle, and I think younger prosecutors just look at it and think, "You know what, he stabbed her with a knife and that's bad and now I'm prosecuting and I want him to go to jail." But, there's always two sides to a story.<sup>184</sup>

From the range of responses I received on this topic, it is evident that Lake County does not have a systematic way for deciding which victims can and should be convinced to cooperate or forced to participate. This is problematic for a number of reasons. Perhaps the most important reason is that without any system to guide prosecutors, especially young and inexperienced prosecutors, decisions will be arbitrary. Moreover, defendants and defense attorneys will know this and exploit it to their advantage.

178. Interview with A, *supra* note 38.

179. *Id.*

180. Interview with D, *supra* note 25.

181. *Id.*

182. Interview with A, *supra* note 38.

183. Interview with F, *supra* note 30.

184. *Id.*

## VI. COST/BENEFIT ANALYSIS OF FORCED PARTICIPATION

I asked all the interviewees what they believed were the systematic costs and benefits of a policy that forced all victims to participate. I then asked whether he/she thought that systematic costs and benefits should be considered in deciding whether an individual victim should be forced to participate. My purpose in asking these questions was to engage the interviewees in analyzing systematic costs versus systematic benefits. Specifically, I wanted the interviewees to share their views about whether following a policy of forced participation is more beneficial and should be given greater weight than the individual concerns of the victim.

### A. *Systematic Costs of Forced Participation*

#### 1. *No Consideration of Individual Victim's Concerns*

If every victim is forced to participate, then every case and every victim cannot be dealt with on an individual basis.<sup>185</sup> Forced participation requires that all victims be treated alike, with the individual circumstances and needs of each victim ignored.<sup>186</sup> Under such a policy, there is no safeguard to ensure that prosecution is the proper response in an individual case.<sup>187</sup> This lack of individualization is the greatest systematic cost to forced participation.<sup>188</sup> Almost every interviewee I spoke with echoed in some form or another what one prosecutor said: "Every case is different and all cases must be dealt with on a case by case basis."<sup>189</sup>

One prosecutor said:

Forcing participation in every case may not always be what's best for the victim and that's definitely a cost. By having a policy that says [the prosecutor's office is] not going to drop charges and every victim is going to be forced to participate, a prosecutor is prohibited from considering every case on a case by case basis which, in my opinion, is how it needs to be done. Every case is different. Some victims are college educated and have great jobs. They don't need the defendant to support them. But, other situations are very different. Some victims have three kids by this guy and they need him around to put

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185. See Mills, *supra* note 155, at 193-94.

186. See Hanna, *supra* note 24, at 1867, 1877.

187. See Mills, *supra* note 155, at 190-91.

188. See Corsilles, *supra* note 21, at 875-76.

189. Interview with D, *supra* note 25.



food on the table. Those are totally different situations that should be handled differently.<sup>190</sup>

Another prosecutor expressed the same concerns:

If you have a set policy and a robot-like response to every case, then there's going to be a problem because there is no way to analyze a victim's needs in a particular case. Individualization is very important because you're dealing with different victims who have different needs and a set policy doesn't allow you to address those needs.<sup>191</sup>

This prosecutor continued:

I think that you have to consider the relationship between the abuser and the victim. Every victim has different circumstances and every relationship a different background. Every victim is unique and [a prosecutor] must look at the case from the victim's perspective to determine how best to serve this particular victim in a manner that will hopefully end the abuse.<sup>192</sup>

One prosecutor believed that individual concerns were much more important than systematic concerns. Consequently, he believed that the systematic benefits of a forced participation policy should not be considered when deciding whether to proceed against the victim's wishes and force the victim to participate.<sup>193</sup> He asserted:

You need to look at the particular situation and you need to interview the particular victim. You can talk to the victim and determine if the victim is a person that's intelligent enough to know that she is making her own decision to drop the case or if someone is pushing her. I think that people need to realize that the victim lives the case every single day. The prosecutor has the case for one hour. For the victim, this is going to affect the victim's entire life. Are they going to stay together or are they going to get divorced or separate? Will they get back together? Do they have children? Will she be able to feed the children?

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190. Interview with B, *supra* note 35.

191. Interview with C, *supra* note 32.

192. *Id.*

193. Interview with A, *supra* note 38.

These are things that the victim thinks about every single day in deciding whether she wants to drop the case or proceed.<sup>194</sup>

## 2. Revictimization

Although most interviewees thought that forcing a victim to participate did not result in revictimization, some thought that revictimization was a cost of forcing participation. I was surprised at the number of interviewees that did not believe that forced participation revictimizes the victim at any level.<sup>195</sup>

One prosecutor said, "No, [forcing participation does not revictimize victims] because forcing them makes them confront something and establishes at least a little level of self-respect and self-esteem."<sup>196</sup> A victim-witness advocate said:

For the most part I don't think victims are revictimized by participating in the case, but I guess that it can depend on the individual victim. As long as you keep in contact with them to keep them informed every step of the way and give and help them find the support they need, then going through with the case doesn't cause revictimization.<sup>197</sup>

"I basically do not force victims to cooperate," said one prosecutor.<sup>198</sup> "But, there have been times that I've put a victim on the stand and told her that she is going to testify no matter what she said. I do not think that that revictimizes the victim."<sup>199</sup>

Interviewees who did believe that forced participation revictimizes a victim had firm beliefs. "I think that forcing a victim who is scared to death of the defendant to testify does revictimize

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194. *Id.*

195. The opinions of these interviewees differed from those of some battered women advocates who argue that forcing victims to testify revictimizes them "by forcing [them] into a process over which [they have] no control." Hanna, *supra* note 24, at 1865; *see also* Gwinn & O'Dell, *supra* note 43, at 312 (noting that some aggressive prosecution policies can lead to the revictimization of the victim). Moreover, some of these same interviewees stated that they require a victim who requests that charges be dismissed testify to that in front of a judge. This practice could very well be a form of revictimization. *See id.* at 312 n.42 ("The process of judges asking women . . . to stand up in front of a courtroom full of people to talk about bail, new offenses, or disposition policies surely re-victimizes women when not done with appropriate safeguards and sensitivities.").

196. Interview with C, *supra* note 32.

197. Interview with I, *supra* note 61.

198. Interview with A, *supra* note 38.

199. *Id.*

the victim, but that happens very rarely," said one prosecutor.<sup>200</sup> Another prosecutor said:

Forcing a victim to testify when they fear retaliation from the defendant can really revictimize the victim. When a victim is in fear, there's not too much I can do. I can give her a list of shelters but that's about it. As a witness, I can't offer her protection.<sup>201</sup>

Another prosecutor told me he believed putting a witness in an embarrassing situation does revictimize the victim, but that he goes out of his way to avoid this.<sup>202</sup> One judge also believed that forcing a victim to cooperate does revictimize her, but still believed that the prosecutor's office should pursue a strict no-drop policy because societal and individual benefits outweigh the costs.<sup>203</sup>

One prosecutor explained that he felt that forcing a victim to participate resulted in revictimization.<sup>204</sup> That prosecutor told the story of a sixteen-year-old girl raped by her sister's ex-boyfriend.<sup>205</sup> The defendant was willing to plead to a lesser charge, a Class D felony rather than a Class C felony, but the trial supervisor was unwilling to accept such a plea.<sup>206</sup> The case then went to trial and the victim was forced to testify.<sup>207</sup> The prosecutor said:

I had her on direct for about an hour. She was under cross-examination for three and a half hours crying, shaking, all upset. It was probably the worst day of her life. This girl was 16 years old. She was being called a liar in a courtroom full of people. There's no way that we should have gone to trial.

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200. Interview with B, *supra* note 35.

201. Interview with D, *supra* note 25. Victims are often reluctant to testify because they realize that the criminal justice system cannot keep them safe, as this prosecutor confirmed; therefore, they fear retaliation from their abusers if they testify. Cochran, *supra* note 23, at 100; see also Corsilles, *supra* note 21, at 875 ("Because prosecutors cannot guarantee victims' safety, no-drop policies that use subpoenas to compel victims to testify could potentially subject the victims to further victimization.") (footnote omitted); Safa, *supra* note 57, at 298 ("Battered women do not attempt to leave the battering situation, even when it may seem to outsiders that escape is possible, because they cannot predict their safety; they believe that nothing they or anyone else does will alter their terrible circumstances.") (citing LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 50 (1989)).

202. Interview with A, *supra* note 38.

203. Interview with G, *supra* note 31.

204. Interview with B, *supra* note 35.

205. See *id.* Although this scenario does not fit my earlier definition of domestic violence, it is analogous enough to illustrate an important aspect of how forcing participation can revictimize a victim.

206. *Id.*

207. *Id.*

This girl was victimized all over again. I think that those [who do not try cases] can lose sight of how traumatic it is to actually be forced to testify and say, "He did this to me." It's not the easiest thing in the world to do. I think that [those who do not try cases] see the defendant's criminal record and say no way is this guy getting any kind of break. But in reality, they lose sight of what's really going to have to happen. They don't have to deal with the victim crying before she testifies, shaking uncontrollably. Not only does that happen before she testifies in court, but it happens every time you meet with her to prepare.

I feel very bad every time I talk to these victims. It could be rape or some other form of domestic violence. Every time they see me they are reminded of what happened and they have to talk about it. Sometimes they don't want to go forward because they want to put it in the back of their minds. They want to get over it. Let's say the violence occurs in January and they have a rough time with it. They're trying to move on with their life and, boom, there's a trial in August. They're starting to do okay and guess what? They have to relive everything, maybe the worst experience of their life. They've got to relive it over and over and over again.

And what happens when the jury comes back with a not guilty verdict? What are they going to think then? "Those people didn't believe me." I can try to explain the beyond a reasonable doubt standard to them, but they don't believe that. These victims think that the jury believed me, or they didn't believe me, [the defendant] either did it or he didn't. I think that [those who do not try cases] lose focus of the human element, of how traumatic it can be to be forced to testify in a courtroom. What effect does that have on victims?<sup>208</sup>

### 3. *Wasted Resources*

Another cost of forced participation is the waste of resources. Tremendous resources of the prosecutor's office, the courts and the police are wasted when a prosecutor is forced to prosecute cases that cannot possibly result in convictions. One judge said, "With a no-drop policy, more resources, more time and energy get put into cases that ultimately cannot be prosecuted. That's definitely a cost."<sup>209</sup>

Arguably, the efforts and resources of prosecutors, courts and police are best spent on cases that result in some benefit to the

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208. *Id.*

209. Interview with F, *supra* note 30.

victim or community. In terms of a resource standpoint, it is often better to grant the victim's wishes and drop the case, thereby ensuring that as few resources as possible are wasted.

#### 4. *Reduced Victim Autonomy*

Some consider reduced victim autonomy to be another cost of forced participation. Essentially, taking decision-making power away from a victim reduces the victim's autonomy.<sup>210</sup> Paternalistic, excessive state intervention could undermine any attempt the victim has made to empower herself.<sup>211</sup> Moreover, forcing a victim to participate could add to the victim's low self-esteem and further disintegrate her perception of having no control.<sup>212</sup>

Although generally considered a cost of forced participation, one judge said that reducing a victim's decision-making autonomy might not be as big a cost as some people think.<sup>213</sup> "Sometimes [victims] are so far into the [domestic violence] cycle that they can't see the forest through the trees. Even though the victim may think she'll be better off if the case is dropped, I know that on so many other levels that that's just not true."<sup>214</sup> A prosecutor expressed a similar view, stating that it is often truly in the woman's best interest for the prosecutor's office to go forward without her cooperation, even if she may not think so.<sup>215</sup>

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210. "Mandatory prosecution . . . disempowers women by forcing a decision upon them without taking into account their individual needs." Mills, *supra* note 155, at 185; *see also* David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 157 (N. Zoe Hilton ed., 1993) (concluding that allowing victims to drop charges promotes victim autonomy and empowerment).

211. *See* Corsilles, *supra* note 21, at 876 ("Some critics contend that no-drop policies serve to undermine battered women's attempts at empowerment."). *But see id.* at 879 ("Despite the coercive nature of no-drop policies, victims may be empowered simply by witnessing a place where the batterer's control does not extend.") "I believe that the victim is empowered by seeing the defendant prosecuted. . . . Seeing the abuser in a position of social disapproval may be the first step toward realizing that there is help available . . . ." Angela West, *Prosecutorial Activism: Confronting Heterosexism in a Lesbian Battering Case*, 15 HARV. WOMEN'S L.J. 249, 255-56 (1992).

212. *See* Hanna, *supra* note 24, at 1866 n.74 ("Susan Schechter, a well-known and respected advocate and author, contends that no-drop policies can 'erode a battered woman's sense of self-esteem and control.'") (quoting Jan Hoffman, *When Men Hit Women*, N.Y. TIMES, Feb. 16, 1992, § 6 (Magazine), at 23); Corsilles, *supra* note 21, at 876 ("By denying a victim the ability to assess the danger and to make choices for herself and her children, no-drop policies may serve to further erode a victim's self-esteem and sense of control.").

213. Interview with G, *supra* note 31; *see also* Wills, *supra* note 9, at 173 (arguing that taking decision-making power away from the victim is a benefit to a no-drop policy because it takes the weight of the decision off the victim's shoulders).

214. Interview with G, *supra* note 31.

215. Interview with E, *supra* note 52.

## B. Systematic Benefits of Forced Participation

### 1. Removes Power and Control from the Defendant

One benefit to forcing victim participation in every case is that it takes power and control from the defendant.<sup>216</sup> One judge explained that if forced participation is the prosecutor's office policy, the defendant no longer has any control over whether the victim cooperates with the prosecutor.<sup>217</sup> The defendant cannot use his power over her to convince her to drop the charges.<sup>218</sup> This may free the victim from unwanted pressure from her abuser.<sup>219</sup> Moreover, this keeps the focus of the prosecution on the defendant and not on the victim.<sup>220</sup>

A prosecutor said that forced participation is a benefit because it sends the defendant a message that his behavior is not acceptable and will not be tolerated, despite the victim's wishes.<sup>221</sup> It underscores the idea that the state, not the victim, is controlling the direction of the prosecution.<sup>222</sup>

One judge mentioned that taking control away from the victim is important for political reasons.<sup>223</sup> Clients of politically connected defense attorneys are not going to get special treatment: "A benefit to not dropping cases is being solid in your stance and being able to say to every defense attorney across the board, 'We will not drop the

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216. Hanna, *supra* note 24, at 1865 (stating that pro-prosecution advocates "contend that the batterer has less incentive to try to control or intimidate his victim once he realizes that she no longer controls the process"); see also Cochran, *supra* note 23, at 100 ("[I]f the prosecutor defers to the expressed desires of the victim, the batterer quickly learns that he can control the decision to prosecute and thus escape punishment.") (footnote omitted).

217. Interview with G, *supra* note 31.

218. See *id.*

219. There is at least some evidence to suggest that "some batterers cease harassing their victims after they discover that the victim no longer controls the case." Corsilles, *supra* note 21, at 874 (footnote omitted).

220. See Hanna, *supra* note 24, at 1879 ("[B]y focusing on the battered woman, the legal system does not examine the batterer and his criminal acts.").

221. Interview with C, *supra* note 32; see also Corsilles, *supra* note 21, at 874 (stating that no-drop policies convey to batterers that "their behavior is no longer tolerated by the state and is punishable by law").

222. Interview with C, *supra* note 32. Aggressive prosecution "tells batterers that violence against intimate partners is *criminal*, that offenders can and will go to jail, and that their victim's refusal to press charges is not a 'get out of jail free' card." Wills, *supra* note 9, at 182. "By dismissing cases simply because a victim requests it, prosecutors allow batterers to extend their power and control into the courtroom." Corsilles, *supra* note 21, at 881.

223. Interview with G, *supra* note 31.

case.' That means being able to say 'No' to Mr. XYZ who gave you X amount in your campaign."<sup>224</sup>

## 2. *Reduces Subsequent Incidents of Violence*

Most interviewees believed that prosecution stopped rather than escalated violence in the relationship.<sup>225</sup> "I think that prosecution stops the violence," said one prosecutor.<sup>226</sup> Another prosecutor had the same opinion.<sup>227</sup> A judge said, "I think that prosecution, if it is clear that the prosecutor has made the decision to proceed, causes some non-violent strife such as arguments but reduces violence because the defendant knows that the victim does not have the power or control to drop."<sup>228</sup>

One prosecutor had a unique opinion on this topic:

I think that dropping charges may escalate violence in the home. When a victim wants to prosecute a case she's really saying that she's had enough. That she's not going to put up with the abuse anymore and that something has to be done. But, when the victim wants the charges dropped a different message is being sent. The defendant thinks that he beat the system and that he can get away with beating his wife because nobody can get him for it. Then, when the case is dismissed he is mad at his wife and blames her for having to go to jail, bond out, and spend money on an attorney. In those situations, in my opinion, the abuse may escalate because the defendant has turned the blame onto his wife.<sup>229</sup>

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224. *Id.*

225. Some evidence exists to support this view. "[S]tudies suggest that prosecution does not increase the victim's risk of being subject to repeat violence. In fact, prosecutorial action up through an initial hearing in court has been found to significantly reduce the chance of further violence within the six months after the case is disposed." Corsilles, *supra* note 21, at 877 (citing David A. Ford & Mary Jean Regoli, *Preventative Impacts of Policies for Prosecuting Wife Batters*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 181, 193 (Eve S. Buzawa & Carl G. Buzawa eds., 1992)). At least one study has found that victims have a greater risk of subsequent abuse if they are given a choice and choose not to prosecute. Ford & Regoli, *supra* note 210, at 156; see also Hanna, *supra* note 24, at 1891 ("Basing prosecutorial decisionmaking [sic] on witness cooperation in domestic violence cases ultimately places the victim in more danger.") (footnote omitted).

226. Interview with A, *supra* note 38.

227. Interview with E, *supra* note 52.

228. Interview with G, *supra* note 31.

229. Interview with C, *supra* note 32; see also Ford & Regoli, *supra* note 210, at 150-51 (finding that women who can choose between dropping and proceeding and choose to proceed are subject to a decreased risk of subsequent abuse because they have made an expression of power).

On a related point, interviewees did not believe that a victim was more reluctant to call the police a second time after her first case was pursued against her wishes.<sup>230</sup> Most interviewees believed that a victim only calls the police when the situation is so bad that she feels as if there is no other option. Therefore, despite the fact that she may feel that she made a mistake calling the police the first time, she will do it again because she has no choice and no other way to stop the abuse.<sup>231</sup> One judge commented, "Do you think that someone would really say [during an episode of violence], 'Oh I better not [call the police], remember what happened last time?'"<sup>232</sup> Additionally, some interviewees pointed out that often it is not the victim who calls the police, but rather a neighbor, child or some other third party who overhears or witnesses the abuse.<sup>233</sup>

As prosecutors feel differently about whether prosecution escalates or stops violence in the home, each prosecutor will handle domestic violence cases differently. Presumably, a prosecutor who believes that prosecution stops the violence will be less likely to drop a case than one who believes that prosecution escalates the violence. Again, it is evident that with no systematic policy, guidelines or educational programs on domestic violence in place, decisions are made arbitrarily and without complete information.

### 3. *Protects Prosecutors, the Prosecutor's Office and Police*

Forcing victims to participate in every case would protect prosecutors and the prosecutor's office from victims who suffer subsequent incidents of abuse by not allowing victims the opportunity to blame the prosecutor's office for dropping charges in a prior case at the victim's request. Most prosecutors with whom I spoke

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230. Some battered women's advocates disagree with this view and are concerned that victims will be less likely to call the police if they know that mandatory prosecution will follow. Hanna, *supra* note 24, at 1865, 1897. No studies, however, have lent support to this concern. *Id.* at 1865 n.72. In fact, one study concluded that pro-prosecution policies have led to an increased number of calls to police. Bettina Boxall & Frederick M. Muir, *Prosecutors Taking Harder Line Toward Spouse Abuse*, L.A. TIMES, July 11, 1994, at B1 (noting that increased law enforcement efforts have led to a twenty-seven percent rise in domestic violence calls to police in California between 1989 and 1993).

231. At least one domestic violence scholar agrees with this position. Cheryl Hanna argues that domestic violence victims call the police because "they are in crisis and need protection." Hanna, *supra* note 24, at 1897. The call is an "act of survival," not the result of reasoned forethought. *Id.* Another scholar takes this argument one step further, opining that victims will be more likely to call the police if they know that the batterers will be arrested, thus ensuring their safety at least for the moment. Waits, *supra* note 9, at 318.

232. Interview with G, *supra* note 31.

233. *E.g.*, Interview with F, *supra* note 30; Interview with B, *supra* note 35.



were very concerned about protecting themselves and their offices in such situations. One prosecutor stated:

After the Nicole Simpson thing you always hear about the person that the prosecutor lets go and then goes out and commits another act of violence. I think that that is one of the biggest challenges facing prosecution. The victim doesn't want to proceed, but if we don't proceed we're the ones that are blamed for subsequent incidents of abuse because we didn't do anything the first time around. That makes it very difficult to grant the victim's wishes and drop the case.<sup>234</sup>

Prosecutors are not only concerned with protecting themselves and their offices. They are also worried about supporting the actions of police officers in the field. One prosecutor told me he was worried about protecting the police department in a particular case.<sup>235</sup> The police arrested a particular defendant based upon statements made by the victim.<sup>236</sup> The prosecutor forced the victim to testify, not only because of the seriousness of the injuries, but also to justify the arrest.<sup>237</sup>

The defendant was held in jail for about a week before he could put up bond, so I had to put the victim under oath to testify that she told police that it was this defendant that had beat her up, even though she now claimed that that story was false.<sup>238</sup>

#### 4. *Improves Police Responsiveness to Domestic Violence Situations*

A policy that forces victims to participate in every case would improve police response to domestic situations.<sup>239</sup> Proper police response to domestic incidents is very important from an evidentiary standpoint because, absent proper response, victim testimony is the only available evidence and must be used at trial in order to

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234. Interview with C, *supra* note 32.

235. Interview with A, *supra* note 38.

236. *Id.*

237. *Id.*

238. *Id.*

239. "Prosecutors influence police practices by sending formal or informal messages regarding priorities accorded to law enforcement issues . . . ." Mangum, *supra* note 57, at 598 n.28.

attain a conviction.<sup>240</sup> Deficient police response and collection of evidence are current concerns in Lake County.<sup>241</sup>

A domestic violence situation is far and away the most dangerous situation that a police officer can respond to. Too often when the police officer shows up, the officer becomes the victim of an attack from both the defendant and the domestic violence victim. Police officers don't want to respond to a call, fill out the paperwork, take the pictures, arrest the defendant, file charges all for a woman that they know is not going to cooperate. [The prosecutor's office] must convince the police that these crimes are very serious and that they are going to be taken very seriously . . . . [T]hat the police are not wasting their time because in a couple of weeks the victim is going to go to the prosecutor's office and say she wants the charges dropped and the prosecutor is going to say okay.<sup>242</sup>

A victim-witness advocate said:

I think that police would do a better job responding to domestic situations if they knew that cases weren't always going to be dropped. They get frustrated. Domestic situations are very dangerous situations for them to respond to and they think why should we go out here and bust our you know what when these cases are constantly dropped.<sup>243</sup>

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240. "Some observers assert that [proper police response] . . . prepares the prosecution so well for trial that perhaps abusers would be more likely to plea bargain or admit their guilt." Cochran, *supra* note 23, at 109. Moreover, if good police work results in the collection of sufficient evidence to convict without the victim's testimony, the victim's cooperation is not essential for the prosecution to proceed with the case. *Id.* This, in turn, could lead to a reduction in the amount of pressure being placed on the victim by the batterer to persuade the prosecutor to drop charges. *Id.*

241. Interview with F, *supra* note 30; see also Safa, *supra* note 57, at 307 ("Law enforcement's dedication to the elimination of the [domestic violence] problem is half-hearted, and its reaction remains misguided."); Waits, *supra* note 9, at 272 (noting that, historically, police action in domestic violence cases has been deficient).

242. Interview with C, *supra* note 32; see Waits, *supra* note 9, at 321 n.308 (arguing that prosecutors can encourage police to improve their evidence collecting by "communicating their commitment to vigorous enforcement of anti-domestic violence laws"); see also *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1501-02 (1993) (discussing severity of the problem given that domestic violence calls require more police time than all other felonies); Mills, *supra* note 155, at 191 n.33 ("History tells us that without mandatory arrest and prosecution, the police . . . are reluctant to take domestic violence seriously."); Safa, *supra* note 57, at 295, 307 (stating that police officers consider domestic violence calls to be dangerous and feel discouragement at responding to domestic calls because nothing seems to change).

243. Interview with I, *supra* note 61; see also Hanna, *supra* note 24, at 1893.

When police do make an appropriate arrest, only to see the case dismissed at trial because the victim did not want to proceed, their decreased confidence in

### 5. Improves Plea Dispositions

A policy forcing all victims to participate could lead to better pleas.<sup>244</sup> One prosecutor said:

I've had cases where the defendant would never have pled to the charge he did if we hadn't forced the victim to cooperate. The victim will go to the defendant and tell him that the prosecutor's office will not drop the case and that the prosecutor is going to force her to cooperate. Then I'll get a call from the defendant saying, "Okay I'll plead to a lesser charge." Now, that may not be exactly what we want, but it's better than a dismissal. The defendant would never have pled guilty to anything if he didn't think that we were going to force the victim to cooperate.<sup>245</sup>

If the forced participation policy is not applied in every case, better pleas will not be achieved. This is because defense attorneys will know that the prosecutor's office may elect not to enforce the policy and will, therefore, counsel their clients not to plead.<sup>246</sup> This is the case in Lake County; defense attorneys, repeat players themselves, know that the prosecutor's office will not force the victims to testify. They simply advise their clients to wait it out.<sup>247</sup> No defense attorney would let his client enter into a plea if the threats inducing the client's willingness to plead are empty.<sup>248</sup>

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the value of arrest can undermine their diligence when policing domestic violence. Furthermore, if police and prosecutors understand that the victim cannot prevent the case from being prosecuted, they will more likely take greater care in their investigations.

*Id.* (footnote omitted).

244. Waits, *supra* note 9, at 323 n.315 ("Once the batterer realizes that the prosecutor 'means business,' he will often plead guilty.") (citation omitted).

245. Interview with B, *supra* note 35. This prosecutor does not stand alone in his belief. "Some prosecutors contend that batterers more readily plead guilty to the charges once they realize that the case will not be dismissed." Corsilles, *supra* note 21, at 874 (citation omitted). Moreover, it appears that simply refusing to dismiss cases before the initial hearing can increase the number of plea agreements. *Id.* at 877; see also Hanna, *supra* note 24, at 1892 ("[D]efense attorneys will be much more willing to enter into plea agreements if they know that the state is serious about pursuing its domestic violence cases.").

246. Interview with H, *supra* note 35; cf. Hanna, *supra* note 24, at 1890 ("Inconsistent treatment diminishes the strong message that the state is trying to send and gives batterers even more incentive to intimidate their partners into not cooperating.").

247. Interview with H, *supra* note 35.

248. *Id.*; see also Hanna, *supra* note 24, at 1891 ("When a batterer and his defense attorney know that a victim's failure to cooperate may result in case dismissal, they control the judicial process.").

*C. Systematic Costs and Benefits of Forced Participation Considered*

Separating systematic costs from systematic benefits and vice versa is a very difficult task, largely because many of the benefits could also be costs and some of the costs could be classified as benefits. It was even more difficult to discern the weight to be given each factor. Although some interviewees believed that some factors should be given great weight, others believed that those same factors should be given hardly any weight at all.

Wasted resources are a good example of a factor that was difficult to classify based on the responses I received. I decided to classify wasted resources as a cost because that is how most interviewees referred to it, but one interviewee pointed out that wasted resources are also a cost when there is no policy of forced participation.<sup>249</sup> If that were true then decreasing wasted resources would be a benefit of having a systematic policy. The prosecutor gave the following example to demonstrate that resources are wasted if there is no policy:

I had a case where a boyfriend was stalking his girlfriend. The boyfriend was arrested and the girlfriend comes into our office frantic. She said to me, "I'm afraid he's going to bond out of jail and kill me." I called the police working the case and got squad cars out to her house. I had them patrolling around the neighborhood to make sure nothing happened. I went the whole nine yards, even helped her get a civil protective order. A week later she called me and said that she wanted the case dropped. She said, "Oh I just wanted to scare him and he's fine now, so I'd just like to forget the whole thing." So in that case there was a tremendous waste of resources. The police officers, the court systems, and I all wasted our time on this case.<sup>250</sup>

Of course, it would seem that if the action taken in this case had ended the abuse in the relationship then no resources would have been wasted. It is interesting, however, that the prosecutor did not see it that way. The prosecutor's perception raises a question of whether the prosecutor was focused on stopping the abuse or attaining a conviction. If prosecutors have different perceptions of what their goal should be in handling domestic violence cases, then it follows that the way prosecutors handle these

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249. Interview with D, *supra* note 25.

250. *Id.*

types of cases will differ. This may help explain their varied opinions.

It is very difficult to determine the weight many factors should be given. For instance, most interviewees believed that forcing participation in every case would lead to fewer incidents of subsequent abuse, but the judges interviewed believed the opposite.<sup>251</sup> Some interviewees believed that forced participation reduced a victim's decision-making autonomy. Some interviewees believed revictimization to be a significant cost of any forced participation policy. One factor that almost every interviewee believed to be a significant cost to a system of forced participation was the lack of consideration of the individual circumstances of victims.

Most interviewees believed that benefits achieved in an individual case were more important than the systematic benefits achieved by a policy of forced participation. A victim-witness advocate, who felt very strongly on this issue, said:

I can't think of any systematic benefits to such a policy because I think that every case must be dealt with on a case by case basis. There are so many different factors that go into each case. Guidelines would be okay but there still must be the freedom to work on a case by case basis.<sup>252</sup>

I conclude that the systematic benefits to a policy of forced participation cannot outweigh the costs, especially the significant cost of ignoring individual concerns and circumstances. Although interviewees disagreed on the weight to be given many of the factors listed above, almost every interviewee stated that individual concerns of the victim should always be considered. Moreover, every interviewee felt very strongly about this position. The collective weight given to all the factors classified as benefits cannot

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251. See, e.g., Interview with C, *supra* note 32; Interview with G, *supra* note 31. Note that no studies have focused on the impact aggressive prosecution policies have on the rate of recidivism. Wills, *supra* note 9, at 176. Any studies that might be done, however, would most likely be extremely inaccurate due to the fact that very few incidents of domestic violence are ever reported to authorities. See, e.g., Mills, *supra* note 155, at 187 ("[O]ne study revealed that less than 15% of battered women report severe incidents of violence.") (footnote omitted).

252. Interview with I, *supra* note 61; see also Mills, *supra* note 155, at 184 ("Domestic abuse affects each person differently."). Cheryl Hanna notes that victims' advocates focus primarily on the individual victim and tend to disapprove of any policy that disempowers victims. Hanna, *supra* note 23, at 1514-15; see also Corsilles, *supra* note 21, at 857 ("Victims' advocates . . . fear that no-drop policies will further victimize battered women and undercut efforts at victim empowerment.") (footnotes omitted).

outweigh the considerable cost of the lost opportunity to consider the individual circumstances of each victim. The fact that the costs of a policy of forced participation outweigh its benefits does not detract from my belief that some version of a policy/guidelines should be enacted to redress the issues concerning victims' reluctance to cooperate.

## VII. BEST USE OF LIMITED RESOURCES

Merely recognizing that a policy and guidelines are necessary to redress problems prosecutors face convincing reluctant victims to testify is not enough. A careful consideration of how to best use the limited resources of the prosecutor's office and the court system will aid recognition of how to design and implement such a policy.

All prosecutors' offices have limited resources. I asked a range of questions designed to elicit information on how the interviewees thought the limited resources could best serve both victims of domestic violence and society.<sup>253</sup> It should be noted that the Lake County Prosecutor's Office has considerable resources, many more resources than smaller prosecutors' offices around the country. Some of the answers reflect that point.

All interviewees believed that considerable resources should be spent on domestic violence cases and that domestic violence should be dealt with very seriously by the prosecutor's office.<sup>254</sup> One judge emphasized that considerable resources should be spent prosecuting domestic violence cases to counteract longstanding inaction.<sup>255</sup> "I

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253. One judge made the interesting point that resource allocation should not be placed totally on the prosecutor's office.

Twelve, thirteen, fourteen different police departments gather evidence in different fashions, and their evidence collection has a lot to be desired in many instances. The violence could be severe but nobody has a camera to take any pictures. My position is that there must be some uniformity, some county-wide training. Is it the prosecutor's job to do that? I don't know that it is.

Interview with F, *supra* note 30; see also Cochran, *supra* note 23, at 102 (noting that several jurisdictions have created task forces to coordinate the efforts of police, emergency medical personnel, battered women's advocates and prosecutors in an effort to preserve sufficient evidence to convict a batterer without the victim's testimony).

254. See Cochran, *supra* note 23, at 94-95 (arguing that ignoring domestic violence problems "leads to future crime, . . . places great stress on police departments, medical personnel, and mental health providers[,] . . . decreases employee productivity . . . in the workplace," and increases the number of homeless people) (footnotes omitted).

255. Interview with G, *supra* note 31; see also Hanna, *supra* note 24, at 1857 ("[O]nly within the last fifteen years has the criminal justice system begun to treat domestic violence as a serious crime."); Mangum, *supra* note 57, at 594, 596 (noting the historic trend to neglect prosecution in domestic violence cases); Rosenbaum, *supra* note 20, at 52 ("Traditionally, domestic violence cases were viewed as private matters of a family nature."); Waits, *supra* note 9, at 267-68 ("Women have been battered for centuries, but only recently has America

think that it should be taken very seriously, especially because for so long in our history it was acceptable. We need to spend time and resources to combat that way of thinking."<sup>256</sup>

*A. Proceeding Without the Victim's Cooperation: Good Use of Resources?*

When a victim states that she does not want to cooperate with the prosecutor's office and wants the charges dropped, interviewees expressed different opinions about how a prosecutor should respond. As discussed above, some prosecutors believed that victims should be forced to participate, but others indicated that forced participation is not always profitable or practical given the limited resources of the office.<sup>257</sup> One prosecutor stated:

We have on occasion gone forward without the victim's cooperation, but most of the time when the victim will not cooperate, the victim and the defendant are back together. What purpose is being served by forcing the victim to pursue a conviction or destroy the relationship that they have reestablished?<sup>258</sup>

Another prosecutor said:

I think that it would be a waste of everyone's time if we push and push a victim to cooperate and she just won't, and we take the case to trial anyway. We have no other case besides her testimony and if she won't testify or denied [the abuse] under oath, the case will be dropped. That's just a waste of time for everyone.<sup>259</sup>

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been willing to acknowledge and address the plight of abuse victims.").

256. Interview with G, *supra* note 31.

257. See *supra* Part VI.A.3; see also Mills, *supra* note 155, at 194 (acknowledging that because prosecutors have limited resources they are often disinterested in victims who will not cooperate).

258. Interview with A, *supra* note 38.

259. Interview with B, *supra* note 35. The Ohio Supreme Court seems to agree with this opinion. *State v. Busch*, 669 N.E.2d 1125, 1128 (Ohio 1996), *superseded by statute as stated in State v. Shelton*, No. 98CA007165, 2000 Ohio App. LEXIS 1688, at \*\*4-5 (Ohio Ct. App. Apr. 19, 2000) (citing OHIO REV. CODE ANN. § 2930.06(A) (Anderson 2000)). "Certainly a court's resources in a domestic violence case are better used by encouraging a couple to receive counseling and ultimately issuing a dismissal than by going forward with a trial and impaneling [sic] a jury in a case where the only witness refuses to testify." *Id.* at 1128; see also Corssilles, *supra* note 21, at 867, 875 (recognizing that trying cases without favorable victim testimony may result in wasting limited prosecutorial resources).

A former prosecutor agreed that cases are too difficult to prove without the victim's participation.<sup>260</sup> One victim-witness advocate who is very familiar with domestic violence indicated that unless there is a trained police force knowledgeable about gathering evidence in domestic violence cases, it is virtually impossible to successfully prosecute the abuser.<sup>261</sup> Thus, it is not practical to go forward without victim cooperation.<sup>262</sup> A young prosecutor noted that the jails are too crowded; if a woman will not cooperate, the abuser will not get any jail time.<sup>263</sup> Therefore, not much is accomplished by prosecuting a case without the victim's cooperation.<sup>264</sup>

In contrast, one judge felt that it is practical to go forward without the victim's cooperation if the evidence is strong.<sup>265</sup> "I've made it very clear to the prosecutors that if the conditions of excited utterances are met, I will admit that evidence and on that evidence alone or with the police officer's observation I will convict."<sup>266</sup> However, the strength of the evidence does not always ensure conviction when the victim refuses to cooperate. A former prosecutor spoke of such a case.<sup>267</sup>

I had a case where a woman's husband picked up a water glass, the kind that is weighted on the bottom, and threw it at her. The base of the glass hit her on the head and she had a perfect circle on her forehead. Half of the circle was stitches because it broke her head open. She called the police and her husband was arrested for battery. She came into the prosecutor's office

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260. Interview with H, *supra* note 35; see also Corsilles, *supra* note 21, at 867 (recognizing that cases in which the victim is the only witness and refuses to testify are "extremely difficult to prove").

261. Interview with J, *supra* note 84.

262. *Id.*

263. Interview with E, *supra* note 52.

264. *Id.* Another prosecutor agreed that the problem of overcrowded jails affected the outcome of domestic violence cases. "If there is no room in the jails, [batterers] aren't going to get any jail time." Interview with C, *supra* note 32. "The jail calls judges and tells them that there just isn't room for these defendants. Under that circumstance, and it happens a lot, the prosecutor's hands are tied." *Id.*; see also Mills, *supra* note 155, at 193 ("[M]ost batterers receive, on average, only a few days or a few weeks in jail.") (footnotes omitted). Scholars also focus on jail time when advocating that no-drop policies be implemented and lose sight of the fact that most defendants convicted of misdemeanor domestic violence-related crimes will not face any jail time at all. See, e.g., Wills, *supra* note 9, at 179 ("[T]he only thing worth negotiating is how much incarceration . . . is necessary . . ."). Moreover, this raises the concern that prosecutors are more worried about sending batterers to jail than they are about ending the abuse.

265. Interview with F, *supra* note 30. More times than not, however, the evidence is not strong and may even be nonexistent. See *supra* Part VI.B.4.

266. *Id.* This judge's opinion is significant largely because many judges are still hesitant to convict batterers. See, e.g., Safa, *supra* note 57, at 287.

267. Interview with G, *supra* note 31.



saying, "You've got to drop this case. It was all just a misunderstanding." How do you have a misunderstanding when a glass hits you in the head? It was no misunderstanding, it was intentional. We ended up taking the case to trial. The officer testified that he arrived on the scene and the woman and the defendant were both there, the woman had blood all over her, and there was a broken glass on the ground covered in blood. The woman made statements to the officer that were in the police report that said her husband threw the glass at her. Yet the woman took the stand and testified that it was a misunderstanding. She was impeached like crazy, but we still got a not guilty.<sup>268</sup>

Another prosecutor also expressed the view that strong evidence is not always enough when the victim will not cooperate and there is no third party witness.<sup>269</sup>

If a victim takes the stand and says "I forgot" or "I fell down the stairs," and there are no other witnesses, I'm not going to win the case. I don't care if it's in front of a judge or jury, I don't think that there could be enough evidence to meet the burden to sustain a conviction if there's no third party witness and the victim will not testify.<sup>270</sup>

When the victim refuses to cooperate, the strongest evidence a prosecutor can have is an independent witness who saw the violence. One prosecutor said, "[G]iven the size of our caseload and the limited resources of the prosecutor's office, it's not practical to go forward without the victim unless you have a good independent witness."<sup>271</sup>

Some prosecutors said that it is not only important that there be an independent witness, but who the witness is can become a factor.

Often the witness will be a child. Is it good to put a six-year-old kid on the witness stand to testify that she saw Daddy hit Mommy? I don't know. If someone ever said, "You put your daddy in jail," think about what that would do to a six-year-old.<sup>272</sup>

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268. *Id.*

269. Interview with C, *supra* note 32.

270. *Id.*

271. *Id.*

272. Interview with B, *supra* note 35; see also Hanna, *supra* note 23, at 1558 (recognizing that the punishment of incarcerating the abuser may not best serve the children of an abusive relationship).

Another prosecutor expressed the same opinion:

It's not practical to go to trial without the victim's testimony or a third party eye witness. But even with a third party witness there may be problems. The witness may be a kid and then you have the problem of whether it's better to have the kid testify or let the defendant off. Some kids can do it and some kids can't. But again, juries want to see and hear from the victim and without the victim it's very tough to get a conviction absent very unusual circumstances.<sup>273</sup>

One judge believed that not only is it practical to go forward without the victim's cooperation, but it is exactly what the prosecutor's office should do.<sup>274</sup> Furthermore, the judge believed that cases involving a victim unwilling to cooperate should be set for trial; if the victim does not appear, and there is no other evidence supporting a conviction, then the court should dismiss the case.<sup>275</sup>

In proposing this policy, the judge emphasized the importance of sending a message to defendants and defense attorneys that nobody is going to get a deal in domestic violence cases.<sup>276</sup> The judge also emphasized the importance of protecting the victim from pressure by the defendant to not cooperate with the prosecutor.<sup>277</sup> According to this judge, if the defendant knows that the victim has no control over the case, then the defendant will be less likely to pressure the victim to drop.<sup>278</sup> "[T]he victim can go back to the defendant and say, 'Look, I went to the prosecutor's office like you said. They are not going to dismiss the case. They are going forward. They told me that even without my testimony they have enough evidence to convict you.'"<sup>279</sup> If the defendant knows that the victim has no control over the case once prosecution has begun, he

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273. Interview with D, *supra* note 25.

274. Interview with G, *supra* note 31.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

Supporters of "no drop" domestic violence policies realize that empowering victims by giving them the discretion to prosecute . . . in actuality only empowers batterers to further manipulate and endanger . . . lives . . . . By proceeding with the prosecution with or without victim cooperation, the prosecutor minimizes the victim's value to the batterer as an ally to defeat criminal prosecution . . . [by] control[ling] the system of justice through their victims.

Wills, *supra* note 9, at 180 (footnote omitted); see discussion *supra* Part VI.B.1.

279. Interview with G, *supra* note 31.

may be less likely to blame her for the case not being dropped; however, he may still blame her for the case being initiated.

*B. Using Victim-Witness Advocates Most Efficiently*

The prosecutor's office employs victim-witness advocates to assist crime victims. Most interviewees believed that the victim-witness advocate is most useful in counseling the victim and providing information to the victim. One prosecutor said:

The advocate can go over the defendant's criminal record with the victim, can examine the medical bills, can go over the seriousness of the offense, can answer questions, and can explain to the victim what will happen after the case is resolved. The advocate can provide the victim with a comfort zone.<sup>280</sup>

A judge said:

The victim advocate's job is to let the victim know how to contact them, give them all the resources available, and delve deep into the situation, to try and determine the cause of the problem. The advocate should try to determine what can be done to stop the recurrence of the problem.<sup>281</sup>

One judge expressed the importance of quick action by the advocate, stating that the advocate must reach out to the victim as soon as possible, but at least within forty-eight hours.<sup>282</sup> During that time the victim is most in need of counseling and comforting. If the advocate can develop a trusting relationship with the victim at that point, then the advocate may be more successful in convincing a victim to cooperate at a later date.<sup>283</sup> A victim-witness advocate also mentioned that "immediate contact with victims is very important. I've gone so far as to go to the shelters myself in some cases so as to have immediate contact with victims."<sup>284</sup>

One former prosecutor said that the dramatic increase in the number of cases over the last five years has had a negative effect on

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280. Interview with A, *supra* note 38.

281. Interview with F, *supra* note 30.

282. Interview with G, *supra* note 31.

283. *Id.*

284. Interview with I, *supra* note 61; see also Gwinn & O'Dell, *supra* note 43, at 307 ("Criminal justice system professionals are quickly discovering that the involvement of advocates at the first sign of conflict in the home can be crucial to preventing future injury.").

the advocate's role.<sup>285</sup> The advocate no longer has the time to spend with victims that is necessary in domestic violence cases:

About five years ago in the [misdemeanor] courts we had a victim-witness advocate who called reluctant victims, talked to them, and convinced them to go forward. Now the personal level has just been flushed down the toilet. Letters have replaced phone calls. Letters that the defendant may be intercepting. The advocate just doesn't have the time to spend anymore.<sup>286</sup>

Another prosecutor said the same things.<sup>287</sup> "We don't really use the [misdemeanor] victim-witness advocate very much except for getting the victim information about shelters, phone numbers to call, that sort of thing. It's very limited what the advocate has time to do. As far as talking to the victim, we usually do that ourselves."<sup>288</sup> Still another prosecutor said that if a relationship was going to be established between the prosecutor's office and the victim, the prosecutors have to establish it themselves.<sup>289</sup> This prosecutor stated that it is easier for them to find the time to contact the victim than it is for the advocate to do so.<sup>290</sup>

Two prosecutors mentioned that victims often are more willing to cooperate with and open up to victim-witness advocates if the advocates and victims are of the same sex.<sup>291</sup> In Lake County, most, if not all, of the advocates are female; the two prosecutors who expressed this opinion were male. One of these prosecutors said:

[A]s a male I may not always relate to a victim as well as a female can. I think that victims sometimes don't think that I understand because I'm a male. They feel more comfortable around a female. So, I like to have the advocate present when I meet with a victim, especially for the first time.<sup>292</sup>

Most prosecutors believed that the advocate's opinions on whether and how to proceed were important, but not the determining factor.

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285. Interview with G, *supra* note 31.

286. *Id.*

287. Interview with C, *supra* note 32.

288. *Id.*

289. Interview with E, *supra* note 52.

290. *Id.*

291. Interview with B, *supra* note 35; Interview with D, *supra* note 25.

292. Interview with B, *supra* note 35.

As far as deciding whether to proceed or not, I'll maybe ask the [advocates] their general feelings on whether they think the victim is going to want to proceed or not, just to get some general ideas. As far as the ultimate decision as to what to do with the case, it's going to be the prosecutor's decision, largely because it often comes down to legal issues. Do you have enough evidence to proceed, etc.<sup>293</sup>

Other interviewees reached the same conclusion, but for slightly different reasons. A prosecutor stated that advocates do not always understand the legal standard for conviction; therefore, their opinions may not be valid.<sup>294</sup> "[A]ll they see is the problem, whereas how the prosecutor's going to get a conviction . . . never occurs to them, because they . . . don't look at it that way," said one judge.<sup>295</sup>

One prosecutor did not think the advocate should play any role at all in deciding whether to proceed.<sup>296</sup>

I think that the ultimate decision about prosecution should be left up to the attorney and that the advocate should not play a role. The advocate should be someone in our office that the victim feels comfortable talking to, feels that [the advocate] is on her side, and feels that the advocate can help them get a favorable resolution. I would be the bad guy in front of the victim, but I wanted the victim to know that there was someone whom she could talk to and someone that understood her plight and that was the role for the advocate.<sup>297</sup>

One advocate agreed that the role of an advocate is to help the victim, not to make a recommendation about whether the prosecutor should proceed.<sup>298</sup> "My role is to help the victim and report to my supervisor what I did and what I came up with. The ultimate decision of whether or not to proceed is that of the prosecutors and I don't think that it's my role to be making a recommendation."<sup>299</sup>

One prosecutor felt that advocates are often too aggressive in their approaches and thought that too many of the cases should be pursued.<sup>300</sup> He implied that too often advocates do not approach

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293. Interview with D, *supra* note 25.

294. Interview with E, *supra* note 52.

295. Interview with F, *supra* note 30.

296. Interview with C, *supra* note 32.

297. *Id.*

298. Interview with I, *supra* note 61.

299. *Id.*

300. Interview with A, *supra* note 38.

cases with open minds or the purpose of serving the victims, but with the mind set that "they were going to get this guy," regardless of what may be best for the victims.<sup>301</sup>

A prosecutor illustrated the importance of an advocate's role in convincing victims to cooperate:

The advocate that I work with . . . is in constant contact with victims. She answers their questions and always keeps them informed about their cases. [This advocate] makes victims feel comfortable around her and as a result I think that victims are more willing to open up to her. They're more willing to trust her. As a result, they feel a sense of security about going forward with the case.<sup>302</sup>

This evidence shows the potential of advocates to convince reluctant victims to proceed. Through hiring practices and training exercises, all advocates can achieve their potential and be effective. As the comments above illustrate, a good advocate can be very helpful in providing victims with the support they need to cooperate with the prosecutor and get out of abusive relationships.

### *C. Creating a Domestic Violence Unit*

Currently the Lake County Prosecutor's Office does not have a unit that specializes in domestic violence cases.<sup>303</sup> I asked each interviewee whether he/she believed that the prosecutor's office should establish a special unit for handling domestic violence related cases. If the response was yes, I then asked if such a unit was practical. This topic drew interesting comments including some suggestions that fall between establishing a special unit and having no unit at all.

#### *1. Necessity*

Interviewees that believe a domestic violence unit is necessary expressed strong opinions to that effect. One prosecutor said that a domestic violence unit should definitely be established.<sup>304</sup>

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301. *Id.*

302. Interview with B, *supra* note 35.

303. A number of jurisdictions throughout the country have such units. Hanna, *supra* note 24, at 1861.

304. Interview with C, *supra* note 32.

I'm down in the [misdemeanor] courts dealing with domestic violence cases for three to four months, then somebody new comes in that may have a whole different attitude and a whole different idea about how those cases should be handled. Somebody needs to put everybody on the same page. You need someone who goes to the conferences, understands the issues, and knows the players. There needs to be some consistency and cohesiveness as to what's going to happen in those sorts of cases.<sup>305</sup>

A judge believed that:

A domestic violence unit with one central decision-maker, a policy-maker, supervising the people doing the work, is very helpful. I can name five prosecutors right now that with the same fact situation, you're likely to get five different results because each has his own style of prosecution and each believes that he or she is doing what . . . is best for the situation. Currently, there is no set way of handling these cases.<sup>306</sup>

A victim-witness advocate agreed that a domestic violence unit would be very helpful, even if the unit only consisted of one prosecutor and one advocate.<sup>307</sup> That advocate and prosecutor would be specially trained to handle domestic violence cases.<sup>308</sup> They could set policy and train other prosecutors, advocates and police officers on techniques to serve the special needs of domestic violence victims.<sup>309</sup> Also, if the advocate only dealt with domestic violence cases, she would have the necessary time to spend with victims.<sup>310</sup> A prosecutor and advocate with specialized training would benefit the entire office by better enabling it to deal with domestic violence cases.<sup>311</sup>

Another victim-witness advocate had particularly good insight into whether a domestic violence unit is necessary.<sup>312</sup>

Too many prosecutors in the [misdemeanor] courts don't know what they're doing. They're too young. They don't understand why women keep going back to their abuser [sic]. I've heard

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305. *Id.*

306. Interview with F, *supra* note 30.

307. Interview with J, *supra* note 84.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. Interview with I, *supra* note 61.

them ask, "These women seem intelligent. Why do they keep going back?" They don't understand what's going on in these victims' minds. When I first started as an advocate I didn't understand why women kept going back to their abusers especially when they were financially independent. So I went to classes. I got myself educated on domestic violence. I tried to learn as much as possible about domestic violence, but I still don't think that I know enough about the topic. These young prosecutors aren't learning about domestic violence when they're down in the [misdemeanor] courts, but they're handling these types of cases and developing their own style of dealing with victims. Their styles may not always be right. Then they come down to the felony courts and their minds are set on how to deal with these cases and it's very difficult to change that. So, we need to train prosecutors early on how to deal with victims and how to deal with domestic violence situations.<sup>313</sup>

Some interviewees believe that a special domestic violence unit is unnecessary if the current actors do their jobs correctly. For instance, "I don't think that there's a need for a special task force because of the input of the victim assistance advocates," replied one prosecutor.<sup>314</sup> He believed that the advocates served as a special domestic violence unit in and of themselves.<sup>315</sup> Another prosecutor responded that: "A lot of the cases that we get involve some sort of domestic violence. I think that all prosecutors can handle these types of cases, or at least they should be able to."<sup>316</sup>

## 2. Practicality

Opinions about the economic practicality of such a unit also differed significantly.<sup>317</sup> "If every domestic violence case was a

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313. *Id.*; see Corsilles, *supra* note 21, at 867 ("For the most part, prosecutors fail to understand the harms and dynamics of woman battering.") (footnote omitted); see also Dalton, *supra* note 58, at 274 (arguing that training sessions are often ineffective because "as long as competing literatures and bodies of research advocate competing norms and practices, [prosecutors] can still adhere to the set that was more thoroughly and deeply embedded in their earlier professional training"); Mangum, *supra* note 57, at 616 ("Numerous studies document findings that most people are misinformed about domestic violence and hold misconceptions about battered women.") (footnote omitted).

314. Interview with A, *supra* note 38.

315. *Id.*

316. Interview with B, *supra* note 35.

317. Many jurisdictions have found that a domestic violence unit is economically practical. Gwinn & O'Dell, *supra* note 43, at 307. In San Diego, California, the City Attorney's Office has a Domestic Violence Unit with a staff of thirty, including twenty-one full-time members, and a budget of \$825,000 per year. *Id.* at 297, 304, 310 n.38. This appears to be the largest Domestic Violence Unit in the country. *Id.* at 297.



felony, I would say yes [that it is practical], but since they're also misdemeanors and there are numerous misdemeanor courts all over the county, it's almost impossible," was one response.<sup>318</sup>

Other interviewees reached the opposite conclusion. A judge reasoned that:

Cases can be scheduled in such a way that even if prosecutors had to make appearances in all the courts in the county it could be done with a little cooperation and organization. Set those cases on a particular day and the victim advocate and the prosecutor can travel around.<sup>319</sup>

A prosecutor said that a special unit might be a good idea but, to be practical, it would have to include more than just domestic violence cases.<sup>320</sup> He suggested combining all family related crimes, such as domestic violence, child abuse and child molestation, into a family crimes unit.<sup>321</sup>

A prosecutor, who thought that a domestic violence unit would be impractical, suggested that an internal psychological testing facility be established or a psychologist be hired to counsel victims.<sup>322</sup> The victims would be required to complete counseling on

318. Interview with A, *supra* note 38.

319. Interview with F, *supra* note 30.

320. Interview with D, *supra* note 25.

321. *Id.*

322. Interview with A, *supra* note 38; *see also* Mills, *supra* note 155, at 198 n.56 (advocating the employment of a therapist to assist the victim in deciding whether to testify).

Another important reason for providing the services of a psychologist is to have someone available as an expert witness if the victim recants or refuses to testify. Mangum, *supra* note 57, *passim* (advocating the use of expert testimony from a battered women's counselor in cases in which the victim recants or minimizes her previous statements, to make the victim's testimony admissible when an attack is made on the victim's credibility); *see also* Rosenbaum, *supra* note 20, at 54 ("[T]he subject matter of the expert opinion must be so related to some science as to be beyond the understanding of the average layman."). The expert could then testify, most likely in response to hypothetical questions, about battering and its effects, thereby explaining why a victim gave differing versions of the events surrounding the arrest of her batterer. Mangum, *supra* note 57, at 618-19.

Courts have held that expert testimony is admissible to explain the behavior of domestic violence victims. *See, e.g.,* Commonwealth v. Goetzendanner, 679 N.E.2d 240, 246 (Mass. App. Ct. 1997) (holding that, "where relevant, evidence of [Battered Woman's Syndrome] may be admitted through a qualified expert to enlighten jurors about behavioral or emotional characteristics common to most victims of battering and to show that the individual victim or victim witness has exhibited similar characteristics").

Significantly, the Goetzendanner court held that a witness seeking to be qualified as an expert need not be a trained clinician to be capable of diagnosing particular cases of Battered Woman's Syndrome. *Id.* at 244. A witness with "sufficient education, training, experience, and familiarity with the subject matter of [her] testimony" can be qualified as an expert. *Id.* (quoting Letch v. Daniels, 514 N.E.2d 675, 677 (Mass. 1987)). Therefore, it is possible for victim-witness advocates to qualify as experts and testify as such. *See id.*

the effects of domestic violence, the domestic violence cycle and options available to them before the prosecutor's office would entertain any request that a case be deferred or dropped.<sup>323</sup> Currently, in Lake County, victims are not required to seek any counseling before a domestic violence case is dropped or deferred.<sup>324</sup> A former prosecutor thought that psychologists would help, but are not a practical option.<sup>325</sup>

Interviewees in Lake County differed in their opinions on the necessity and practicality of a special domestic violence unit. These differences may be explained by the inability of current victim-witness advocates to convince victims to testify.<sup>326</sup> Another explanation is that without the program in place, prosecutors may be unable to envision how it would operate on a day-to-day basis.<sup>327</sup> A third possibility is that prosecutors are unaware of the positive results that some jurisdictions with special units have achieved.<sup>328</sup>

### VIII. SCENARIO

The last topic of the interview involved a scenario presented to all the interviewees.<sup>329</sup> I asked each what he/she would do if faced with this scenario. The responses indicated that prosecutors in the same office would handle the exact same situation in very different

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Moreover, if it is clear to the advocate that the prosecutor will attempt to have her qualified as an expert, the advocate may become more involved than usual in the case and with the victim.

Similarly, in *People v. Ellis*, 650 N.Y.S.2d 503 (1996), the court allowed the prosecutor to present expert testimony on battering and its effects, after the victim recanted her grand jury testimony, to aid the jury in understanding the victim's conduct. *Id.* at 504. The *Ellis* court noted that the Eighth Circuit, the Connecticut Supreme Court and the Wisconsin Appellate Court also allow expert testimony to assist the jury in understanding victims' recantation. *Id.* at 506-07; *see also* Rosenbaum, *supra* note 20, at 54.

[A]n expert may help a juror to understand what otherwise appears as bizarre behavior by the victim in court or . . . after the incident in question or following prior incidents. Behavior includes returning to the batterer, bonding him out of jail, having contact visits with the abuser, bringing the parties' children to the jail for visits, signing . . . requests to drop charges, . . . etc.

*Id.*

323. Interview with A, *supra* note 38. In Brooklyn, New York, victims are required to see a counselor before the prosecutor will drop charges. Hanna, *supra* note 24, at 1878. The San Francisco, California District Attorney's Office employs a similar policy encouraging "victims to confer with the victim advocates when the victim appears reluctant to testify." Corsilles, *supra* note 21, at 862.

324. Interview with A, *supra* note 38.

325. Interview with H, *supra* note 35.

326. *See supra* notes 314-15 and accompanying text.

327. *See supra* note 318 and accompanying text.

328. *See* discussion *supra* note 322.

329. *E.g.*, Interview with A, *supra* note 38.

ways. Each interviewee had different feelings about this scenario, and no doubt other domestic violence scenarios. Given the range of responses on previous questions, this was not a surprise. What follows is the scenario presented and the responses received.<sup>330</sup>

#### A. *The Scenario*

You are familiar with the victim and the defendant from prior domestic violence cases. You know that the defendant has previously been convicted of domestic violence-related offenses involving this same victim. There is strong evidence against the defendant in this particular case (physical evidence, excited utterance made to responding officers, etc.). A conviction, even without the testimony of the victim, is likely. The victim wants the charges dropped. She and her son, who is not the defendant's son, currently reside with the defendant and his father in the defendant's father's apartment. The victim claims she and her son will be forced out of the apartment if the charges are not dropped. Because the victim's son is thirteen years old, no domestic violence shelter will allow them to stay. She says they have nowhere to go. What do you do?

#### B. *Prosecutors' Responses*

The first prosecutor responded:

I would force the victim to go to counseling first in an attempt to convince the victim that other sources are available for her financial benefit and that she needs to proceed with the prosecution. I would postpone the case until the victim spoke to a counselor. Ultimately, it would be the prosecutor's decision whether to go forward, but I would do everything possible to get her to see that it's for her own benefit to proceed. If she still refuses, and the refusal is legitimate, then I would probably attempt to get her in some type of agreement whereby the case would be put on hold for at least a year and hope that after a year they will be totally apart and there will no longer be a problem.<sup>331</sup>

Another prosecutor said:

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330. Some interviewees' responses have been shortened because of their similarity to other responses.

331. Interview with A, *supra* note 38.

That's about the worse case scenario for a victim. But, especially since the defendant has had other cases involving the same victim, I would tell her that I'm sorry, but I'm going forward. Since he's beat up the victim before, he's going to keep doing it if this case is dismissed. Especially in a scenario in which I know the people and I know that he's beating her up, I'm not going to dismiss. What happens if I dismiss the case and two months later I find out that she's dead? Somebody is going to come in here and say, "Hey, why did you dismiss the case just because she wanted you to? You shouldn't have dismissed. Maybe if you wouldn't have dismissed, she wouldn't be dead." That's happened before. Also, the victim's situation may not be as desperate as she makes it sound. I would say that she could be exaggerating a bit. I would talk to [the victim-witness advocate] and tell her to do everything that can be done to help this victim. I think that somehow we could find a place for this victim to go.<sup>332</sup>

A third prosecutor said:

That's a common scenario. Often the victim wants the charges dropped for economic reasons. The problem may be that without the victim's cooperation the case may be too difficult to prove. If you're in front of a jury, the jury is going to be wondering where the victim is. And, even though you may think that you have excited utterances, the judge may disagree with you and not allow the evidence. In a case like this I would try to get some resolution whereby the defendant pleads guilty to some offense and gets some probation and counseling. If I don't think that I can get much more than that if I go to trial, I'm not going to force the victim to cooperate. I'm not going to cause a rift in her relationship and be the reason that her and her kid get kicked out into the street. I don't think it's my responsibility to ruin her life and to ruin the life of a child.<sup>333</sup>

A fourth prosecutor said:

The first thing I would do is work with the advocate and explore every option of finding a place for this woman to go whether it be a family member somewhere or a shelter that she could get into. If the reason that this woman doesn't want to testify is that she has no place to go, I would do anything I could to figure out somewhere for her to go. If I couldn't find anywhere for her to go it would be a very difficult situation for me. She's telling

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332. Interview with B, *supra* note 35.

333. Interview with C, *supra* note 32.

me that she'll be out in the streets with her child. I'll probably drop the case. I don't see what other choice I have at this point, unless I could get the defendant to plead to something just so I can hang probation over his head. That way I at least have a little leverage on him. Do I let this guy go and hope that he doesn't hit her anymore, or do I force her to go to trial and hope for the best? It would really be a tragedy if we lost at trial.<sup>334</sup>

A young prosecutor suggested that this scenario occurs fairly frequently.<sup>335</sup> This prosecutor stated that the first priority would be to discuss with the victim every option for removing both her and her son from the house, making her realize that more is at stake than money—her and her son's safety.<sup>336</sup> To convince her, the prosecutor would talk about the effects of growing up around abusive relationships; however, this argument is unconvincing for a shocking number of women.<sup>337</sup> Victims grow up in abusive environments and think their children can too.<sup>338</sup> These women are concerned about survival, not the future, and survival for the victim in this scenario is staying under that roof.<sup>339</sup> If there was no alternative living arrangement available, this young prosecutor would ask for a deferral, because going forward is probably not in the victim's best interest.<sup>340</sup> Without the victim's cooperation, even with the other evidence available, attaining a conviction is unlikely.<sup>341</sup> If the prosecutor lost the case at trial, too many resources would have been wasted.<sup>342</sup> Prosecutors have to consider their caseloads.<sup>343</sup>

A former prosecutor strongly expressed the need to proceed. "If he's hitting her, he's hitting the kid too, or he will be soon. If he's got prior convictions on his record for beating up the same victim, . . . I can't think of any other option than to proceed or she's going to end up dead."<sup>344</sup>

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334. Interview with D, *supra* note 25.

335. Interview with E, *supra* note 52.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. Interview with H, *supra* note 35.

### C. Judges' Responses

One judge indicated that he would pay particular attention to the seriousness of the injuries.<sup>345</sup>

I would have to look at each and every cycle of abuse or charge and see the extent of the injuries and know each of the circumstances. Was it a slap or was it a punch to a cheek or face? If there was severe violence and I can convict, maybe society's interests outweigh the victim's, maybe it's time to go forward and let the guy know that enough is enough. If the circumstances are not that severe, maybe a couple pushes, shouting matches, red marks on the face when the police arrived, then maybe the victim's wishes in that she'll be put out on the streets, have nowhere to live with her son should outweigh society's interests. Maybe he's not as violent as the charges imply.<sup>346</sup>

Another judge believed that cases in which it is appropriate to drop are extremely rare.<sup>347</sup> "[A] no-drop policy should be strictly enforced. In my seven years in this business, I can think of only one case where it was appropriate to drop the charges. This case should be prosecuted."<sup>348</sup>

### D. Victim-Witness Advocate's Response

The victim-witness advocate's response focused on her area of specialty, the individual needs of the victim.<sup>349</sup>

I would sit down and try to find someplace for this woman to go. I would contact the shelters myself and ask them for some help as far as placing her somewhere so that she would have the option to leave. I would contact the housing authorities to see if she could qualify for government housing, I would contact welfare to see if she qualifies. I would do everything I could to work with her to find somewhere she could go. I would sit down with her and explain to her that the decision to drop was not hers, but the prosecutor's office [sic]. I would do all that I could to make her understand that.<sup>350</sup>

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345. Interview with F, *supra* note 30.

346. *Id.*

347. Interview with G, *supra* note 31.

348. *Id.*

349. Interview with I, *supra* note 61.

350. *Id.*

The wide variety of responses to the scenario reflected the variety of answers to interview questions. This scenario further illustrates that the manner in which a domestic violence case is handled depends in large part on how the individual prosecutor or judge perceives domestic violence cases.

### IX. CONCLUSION

It is difficult to draw broad conclusions from this research. Domestic violence is a serious problem even after the case is in the hands of the prosecutor. Frequently there is no systematic way of handling the dilemmas inherent in these cases. These dilemmas range from whether, or even how, a victim should be convinced to cooperate to whether charges should be dropped. As a result, decisions are arbitrary and often left in the hands of inexperienced prosecutors.

Every person interviewed cared deeply about the issue of domestic violence and no doubt did what he/she thought best under the circumstances, although he/she might not have been using the most successful tactics. Indeed, every prosecutor could not have been employing the most successful tactics because of the likelihood that another prosecutor, sitting in the same office, was using the exact opposite approach in a very similar case to achieve the same result. Common sense dictates that it is highly unlikely that opposite approaches will always achieve the same success.

What can be done to educate all prosecutors of the best tactics and, therefore, which tactics should be employed, is a question I cannot answer. In fact, the diversity in the interviewees' responses has made it impossible for me to even conclude what tactics do indeed work best. I do conclude, however, that the same tactics should be employed throughout an office and that all prosecutors should be educated on those tactics, if for no other reason than to determine which tactics are successful in practice. To that end, at the very least, a written protocol establishing procedures for handling cases in which a victim is reluctant to cooperate or withdraws her cooperation should be adopted by Lake County, and every other prosecutor's office. Such a policy should include prosecution guidelines, including a protocol for discretionary exceptions from those guidelines in certain situations. A good starting point would be to examine data from jurisdictions that have a domestic abuse policy and adopt similar strategies. These

minimal criteria would suffice to ensure more uniform prosecution of domestic abuse cases.