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# NO-DROP POLICIES IN THE PROSECUTION OF DOMESTIC VIOLENCE CASES: GUARANTEE TO ACTION OR DANGEROUS SOLUTION?

ANGELA CORSILLES

## INTRODUCTION

During the past fifteen years, the nation has witnessed a veritable explosion in the number of laws enacted to combat the problem of woman battering.<sup>1</sup> In the field of criminal law, in particular, warrantless misdemeanor arrest statutes,<sup>2</sup> antistalking legislation,<sup>3</sup> and specialized domestic abuse laws<sup>4</sup> have provided criminal justice personnel

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1. See Eve S. Buzawa & Carl G. Buzawa, *Introduction to Domestic Violence: The Changing Criminal Justice Response* vii, x (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (referring to "wholesale changes in state statutes dealing with domestic violence"); Kathleen J. Ferraro & Lucille Pope, *Irreconcilable Differences, in Legal Responses to Wife Assault* 96, 98 (N. Zoe Hilton ed., 1993) (discussing "tremendous shifts, reforms, and expansions in domestic violence laws during the last 15 years"). This Note defines "woman battering" as that pattern of violent and coercive acts perpetrated by a person against a current or former partner, the calculated purpose of which is to control the thoughts, beliefs, or conduct of the partner or to punish the partner for resisting the perpetrator's control. Cf. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 33 & n.131 (1991) (citing Barbara Hart, *Lesbian Battering: An Examination, in Naming the Violence: Speaking Out About Lesbian Battering* 173 (Kerry Lobel ed., 1986)) (citing with approval a control-based definition of woman battering that focuses on the victim's experience of the violence); Frederic B. Rodgers, *Develop an Accelerated Docket for Domestic Violence Cases*, Judges' J., Summer 1992, at 2, 3 (defining battering as purposeful behavior aimed at acquiring power and control). To reflect the reality that women are most often the victims of domestic violence, the pronoun "she" will be used to refer to the abused individuals, and the term "woman battering" will be used interchangeably with "domestic violence" and "domestic abuse." See Bureau of Justice Statistics, U.S. Dept. of Justice, Report to the Nation on Crime and Justice: The Data 21 (1983) (stating that 95% of all assaults on partners or ex-partners are committed by men); *Developments in the Law—Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1498, 1501 n.1 (1993) [hereinafter *Developments*] (stating that women are the victims in the vast majority of cases).

2. Forty-nine states have enacted warrantless arrest statutes that create an exception to the in-presence requirement if the police officer "has probable cause to believe that a misdemeanor has been committed or that a restraining order has been violated." *Developments, supra* note 1, at 1537 (noting that every state has enacted warrantless misdemeanor arrest statutes except for Alabama and West Virginia); see Ala. Code § 15-10-3 (Supp. 1993) (creating an exception to the in-presence requirement in certain misdemeanor situations involving domestic abuse).

3. At least 43 states have passed antistalking statutes. Robert P. Faulkner & Douglas H. Hsiao, *And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation*, 31 Harv. J. on Legis. 1, 2 & n.3 (1993).

4. For a sampling of specialized domestic abuse statutes, see e.g., N.J. Stat. Ann. §§ 2C:25-17 to -33 (West Supp. 1994) (defining domestic violence crimes and specifying procedures for handling such cases); R.I. Gen. Laws §§ 12-29-1 to -11 (1994) (same); S.C. Code Ann. §§ 16-25-10 to -80 (Law. Co-op. 1985 & Supp. 1993) (same); Wash. Rev. Code Ann. §§ 10.99.010 - .900 (West 1990 & Supp. 1994) (specifying criminal procedures for responding to domestic violence); W. Va. Code § 61-2-28 (Supp. 1994) (defining criminal domestic violence).

with the tools to aggressively pursue batterers.<sup>5</sup> Despite this development, however, and despite the ever growing body of evidence establishing woman battering as a problem of systemic proportions,<sup>6</sup> statistics indicate that few cases are formally adjudicated.<sup>7</sup> In many cases, police still fail to arrest offenders,<sup>8</sup> prosecutors still decline to

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5. See Buzawa & Buzawa, *supra* note 1, at x-xi.

6. Woman battering is the leading cause of injury to women ages 15 to 44, Antonia C. Novello, *From the Surgeon General, U.S. Public Health Service*, 267 JAMA 3132, 3132 (1992), and accounts for more injury episodes than auto accidents, muggings, and rape combined, Evan Stark and Anne H. Flitcraft, *Spouse Abuse, in Violence in America: A Public Health Approach* 123, 139 (Mark L. Rosenberg & Mary Ann Fenley eds., 1991). According to some estimates, one-third to one-half of female homicide victims are murdered by their male partners. Utah Task Force on Gender and Justice, Report to the Utah Judicial Council (March 1990), *reprinted in* 16 J. Contemporary L. 135, 204 (1990). Woman battering transcends all barriers of wealth, class, and race as it is "prevalent among every economic, racial and ethnic group" in the country. *Developments, supra* note 1, at 1501. Although accurate estimates are difficult to come by, due in part to the likelihood of underreporting, conservative sources estimate that women are physically abused in 12% of all marriages, with some scholars estimating that as many as 50% or more of women will be battering victims at some point in their lives. Mahoney, *supra* note 1, at 10-11. In all, family violence costs United States businesses \$3.5 billion in absenteeism and \$100 million in medical expenses annually. Andrew Greene, *Combat Domestic Violence, Burris Urges AGs*, Chi. Daily Bull., July 8, 1993, at 1 (citing speech by Illinois Attorney General Roland Burris at a conference of the National Association of Attorneys General).

7. This Note uses the term "formal adjudication" to refer to the determination of a criminal charge on the merits either by guilty plea or by trial.

Compare Bureau of Justice Statistics Sourcebook 536 (1992) (32% of all offenses dismissed) with Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 58 (1990) (50%-80% of domestic violence cases dropped). A comparison of attrition rates for domestic violence cases, many of which are filed as misdemeanors, *infra* note 198, with attrition rates for violent misdemeanors suffers from the paucity of statistics on misdemeanor case processing in general, Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 1.4(g), at 22 n.4 (2d ed. 1992). Nevertheless, under any standard, available data indicates a pervasive practice of dismissing domestic abuse cases prior to trial. See, e.g. Rhea Mandulo, *Programs Aim at Keeping Abuse Cases Alive*, N.Y.L.J., Jan. 6, 1993, at 2 (reporting that 50%-80% of domestic violence cases are dropped in Manhattan and the Bronx, New York); Deborah Nelson & Rebecca Carr, *Some Frustrated Victims Talk of Taking Up Arms*, Chi. Sun-Times, July 24, 1994, at 18 (finding that of 10,700 cases filed in Chicago's domestic violence court last year, 7400 have been dropped so far); Mary O'Doherty, *New Jefferson Wife-Abuse Unit to Make Cases Tough to Drop*, Courier-Journal, April 26, 1991, at 1A (citing 70% dismissal rate as common to jurisdictions that make no special effort to prosecute domestic violence). A six-jurisdiction study conducted by the Minnesota Supreme Court Task Force for Gender Fairness in the Courts found that of 224 cases reviewed, none went to trial. Prosecutors disposed of every case either by guilty plea or dismissal before trial, with no defendant who pled "not guilty" ever proceeding to trial. Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (Sept. 1989), *reprinted in* 15 Wm. Mitchell L. Rev. 825, 884 (1989). See also Buzawa & Buzawa, *supra*, at 58 (noting "extraordinarily high" attrition rates in domestic violence cases); Maureen McLeod, *Victim Noncooperation in the Prosecution of Domestic Assault*, 21 Criminology 395, 408 (1983) (finding that only 2.6% of cases brought to the attention of law enforcement in Detroit resulted in adjudication).

8. See, e.g., Buzawa & Buzawa, *supra* note 7, at 99 (arrests made in less than 20% of the calls in Minneapolis, Minnesota, despite adoption of mandatory arrest policy); Ferraro & Pope, *supra* note 1, at 110 (arrests made in only 18% of calls in Phoenix,

file charges,<sup>9</sup> and, if they do file charges, they often undercharge,<sup>10</sup> and subsequently recommend dismissal.<sup>11</sup> In essence, although legislative enactments have removed many structural impediments to prosecuting batterers, operational practices remain unchanged.<sup>12</sup>

The criminal justice system's continued ineffectiveness in dealing with domestic violence should not be interpreted to mean, however, that the legislative victories of the past fifteen years are merely symbolic. In cities and states throughout the country, committed police commissioners, district attorneys, and attorneys general have seized the tools provided to them by their respective legislatures to vigorously enforce domestic violence laws.<sup>13</sup> These officials have worked together with advocacy groups and community service providers to deliver a coordinated response to domestic abuse incidents.<sup>14</sup> More-

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Arizona, despite adoption of presumptive arrest policy); Michele Ingrassia et al., *Patterns of Abuse*, Newsweek, July 4, 1994, at 27 (arrests made in only 7% of cases in New York City despite a mandatory arrest law); see also *Developments*, *supra* note 1, at 1537 ("Many police departments ma[k]e little use of . . . expanded arrest powers, however, and domestic violence laws continue[ ] to be underenforced."). In the state of Washington, the enactment of a mandatory arrest law resulted in a fourfold increase in arrest rates. Unfortunately, the law also resulted in an unprecedented increase in "dual arrests"—where both spouses were arrested. Buzawa & Buzawa, *supra* note 7, at 99.

9. See Report of the Florida Supreme Court Gender Bias Study Commission (March 1990), reprinted in 42 Fla. L. Rev. 803, 858 (1990) [hereinafter Florida Gender Bias Study]; Report of the Missouri Task Force on Gender and Justice (June 1993), reprinted in 58 Mo. L. Rev. 485, 507-08 (1993) [hereinafter Missouri Task Force Report]; Utah Task Force on Gender and Justice, *supra* note 6, at 210.

10. See *infra* notes 197-98.

11. See *infra* text accompanying note 20. See also Janell Schmidt & Ellen Hochstedler Steury, *Prosecutorial Discretion in Filing Charges in Domestic Violence Cases*, 27 *Criminology* 487, 489 (1989) (noting that a typical response to domestic abuse includes the entry of a *nolle prosequi* (voluntary withdrawal of charges) by the prosecutor).

12. Buzawa & Buzawa, *supra* note 7, at 136; see also Missouri Task Force Report, *supra* note 9, at 493 (finding that despite comprehensive statutory response to domestic violence, the actual administration falls short of expectations); *Vermont Task Force Report on Gender Bias in the Legal System: Introduction and Executive Summary*, 15 *Vt. L. Rev.* 395, 404 (1991) (finding that despite a strong domestic abuse prevention act, the laws are not being adequately implemented or enforced).

13. See Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 *W. St. U. L. Rev.* 1501, 1511-12 & n.36 (1993) (discussing police departments and prosecutors' offices throughout the country that have committed to aggressive enforcement of domestic abuse laws); see also Missouri Task Force Report, *supra* note 9, at 507 (noting increased willingness of prosecutors in Kansas City, Missouri, to file state charges (instead of municipal charges) and to charge violators with substantive offenses); Peter G. Jaffe et al., *The Impact of Police Laying Charges, in Legal Responses to Wife Assault*, *supra* note 1, at 62, 72 (noting pro-arrest procedures adopted by San Francisco Police Department that resulted in a 60% increase in arrests after only one year).

14. See *Developments*, *supra* note 1, at 1515-18 (highlighting local community programs that link the responses of police and prosecutors with shelters, advocates, and treatment programs in a coordinated fashion); Gwinn & O'Dell, *supra* note 13, at 1509-11 (discussing blended task forces and their work "in coordinating . . . shelters,

over, many chief prosecutors have instituted special policies and programs within their offices to encourage victim cooperation and to increase the number of successful prosecutions.<sup>15</sup>

Of the many innovative policies that have been employed, one that has drawn a fair amount of controversy is a prosecutorial policy called a no-drop policy.<sup>16</sup> Generally defined, a no-drop policy denies the victim of domestic violence the option of freely withdrawing a complaint once formal charges have been filed.<sup>17</sup> In turn, the policy limits the prosecutor's discretion to drop<sup>18</sup> a case solely because the victim is unwilling to cooperate.<sup>19</sup>

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law enforcement, therapists, medical service providers, advocates, family and criminal court staff and judges, educators, military, social services, and probation officers").

15. Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, in *Domestic Violence: The Changing Criminal Justice Response*, *supra* note 1, at 161, 164. Some examples of these new innovations include victim support projects, vertical prosecution policies, and domestic violence prosecution units. *Id.* at 169-71. Victim support projects consist of victim advocates who work closely with victims and prosecutors to ease a victim's experience within the criminal justice system and hopefully encourage cooperation. *Id.* at 169. These advocates explain the legal process to the victim, provide counseling if necessary, accompany the victim to court, and not coincidentally, aid prosecutors in the process by increasing victim cooperation and improving the quality of victim testimony. *Id.*; Gail A. Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies* 68 (1986). Vertical prosecution is a case processing strategy whereby a single prosecutor handles the case from arraignment to sentencing. *Id.* at 171; David A. Ford & Mary Jean Regoli, *Criminal Prosecution of Wife Assaulters*, in *Legal Responses to Wife Assault*, *supra* note 1, at 160 n.3. Prosecutors in special domestic violence units primarily handle domestic abuse cases and impliedly understand the special needs of battered victims. Goolkasian, *supra*, at 56.

16. See Buzawa & Buzawa, *supra* note 7, at 122-23 (describing no-drop policies as the "most extreme" change in prosecutorial response and arguing against their adoption); *Developments*, *supra* note 1, at 1541 (summarizing drawbacks of no-drop policies); N. Zoe Hilton, *Introduction to Legal Responses to Wife Assault*, *supra* note 1, at 3, 4 (summarizing controversial changes in legal responses to domestic violence, including no-drop policies); *see also infra* note 169 and accompanying text (discussing instances of victims being jailed for defying subpoenas issued pursuant to no-drop policies)

17. Buzawa & Buzawa, *supra* note 7, at 122 (policy "impos[ing] restrictions on victims that effectively prevents them from freely dropping charges"); Hilton, *supra* note 16, at 4 (policy "whereby the victim of wife assault does not have the option of withdrawing charges once the prosecution process is under way"); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 Wash. L. Rev. 267, 323 (1985).

18. The term "drop" is used synonymously and interchangeably, for purposes of this Note, with a recommendation to dismiss or an entry of *nolle prosequi*.

19. Buzawa & Buzawa, *supra* note 7, at 122 ("Simultaneously, there are usually strict limitations to prosecutorial discretion to drop charges except for demonstrated failure of evidentiary support."). Although its name may imply otherwise, a no-drop policy does not mandate continued prosecution in all cases. *See* Goolkasian, *supra* note 15, at 73 (stating that "[i]n most offices that . . . have 'no-drop' policies . . . prosecutors and victim advocates examine each case carefully, and will actually dismiss charges at a victim's request under certain kinds of circumstances (if, for example, the victim's safety is believed to be at stake)").

In many jurisdictions, prosecutors routinely drop domestic violence cases because the victim requests it, refuses to testify, recants, or fails to appear in court.<sup>20</sup> In these situations, prosecutors dispose of approximately fifty to eighty percent of cases by dropping the charges.<sup>21</sup> In contrast, where no-drop policies have been instituted, early reports reveal case attrition rates ranging from ten to thirty-four percent.<sup>22</sup>

The controversy surrounding no-drop policies, for the most part, revolves around both prosecutors' and victims' aversion to relinquishing control of the legal process.<sup>23</sup> Prosecutors fear that scarce prosecutorial resources will be stretched beyond limits and wasted in pursuit of unwinnable cases due to victim nonparticipation.<sup>24</sup> Victims' advocates, on the other hand, fear that no-drop policies will further victimize battered women<sup>25</sup> and undercut efforts at victim empowerment.<sup>26</sup> Moreover, some critics contend that no-drop policies may cause unwanted "side effects," such as increasing risks of retaliation and discouraging victim reporting.<sup>27</sup>

This Note examines no-drop policies, explores the impetus for their adoption, and evaluates the policies' claimed merits and drawbacks. Part I examines different types of no-drop policies and briefly surveys the jurisdictions that have instituted them or addressed their adoption.

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20. Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System, *reprinted in* 8 Ga. St. L. Rev. 539, 566 (1992) [hereinafter Georgia Gender Bias Report] (finding that "[p]rosecutors often dismiss domestic violence cases when victims show any reluctance to cooperate"); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *supra* note 7, at 882-83 (discussing pervasive practice of discretionary dismissals due to "the 'victim cooperation' question"); Penelope D. Clute, *How Prosecutors Can Make a Difference Pro-Actively Handling Domestic Violence Cases*, N.Y. St. B.J., July/Aug. 1994, at 44 (stating that prosecutors traditionally follow the victim's expressed wishes in the dismissal of cases); Nelson & Carr, *supra* note 7, at 18 (State's Attorney estimating that "vast majority of cases dismissed without any disposition are situations where the victim fails to show up, refuses to testify or requests to drop a case").

21. Ford & Regoli, *supra* note 15, at 141; *see also supra* note 7 (discussing high case dismissal rates in domestic abuse cases).

22. Lisa G. Lerman, Prosecution of Spouse Abuse: Innovations in Criminal Justice Response 34-35 (1981) (citations omitted); *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, 136 n.95 (1991) (describing reduction in dismissal rate from 47.1% in 1987 to 23% in 1989 after the Duluth City Attorney's office adopted a "hard" no-drop policy); O'Doherty, *supra* note 7, at 1A (comparing 40% dismissal rate in Fayette County, Kentucky, which has a no-drop policy, with the 70% dismissal rate of two neighboring counties without the policy); Kim Wessel, *Court Led to Aggressive Prosecution in Indiana*, Courier-Journal, June 9, 1993, at 5B (comparing 20% dismissal rate in Marion County, Indiana, which now has a no-drop policy and a domestic abuse court, with that same county's 1977 dismissal rate of 75% when there were no special programs).

23. *See* discussion *infra* part II.A. & part II.B.

24. *See* discussion *infra* part II.A.

25. *See infra* note 169 and accompanying text.

26. *See* discussion *infra* part II.B.

27. *See* discussion *infra* part II.B.

Part II explores the reasons underlying the adoption of no-drop policies, and part III evaluates the policies' claimed benefits and risks. Finally, part IV argues that the merits of no-drop policies outweigh their drawbacks and calls for states to enact measures promoting their adoption. This Note concludes that no-drop policies can play an important role in combatting domestic violence because they account for victims' realities, counteract longstanding justifications for inaction, and transform the statutory promise of justice for battered women into a credible threat of prosecution for their batterers.

## I. AN OVERVIEW OF NO-DROP POLICIES

This part further defines no-drop policies and, in particular, explores how they are enforced in five city and county prosecutors' offices from around the country. This part also examines state and federal responses to domestic violence that address the use of no-drop policies.

### A. *No-Drop Policies Defined*

A no-drop prosecution policy may be defined both as a statement declaring that the state will not drop a domestic violence case due to victim nonparticipation and as a practice and protocol for enforcing that statement.

As a statement of intent to continue prosecution in spite of the victim's wishes, a no-drop policy clarifies the nature of the relationship between the prosecutor and the victim.<sup>28</sup> First, the policy underscores the fact that once charges are filed, the state, and not the victim, becomes the party.<sup>29</sup> Likewise, the policy emphasizes, somewhat redundantly, that the prosecutor controls the direction of the prosecution; the victim cannot, for instance, *decide* to drop a case.<sup>30</sup> On another level, the policy represents official acknowledgment of the fear and ambivalence victims often feel when asked to testify against their batterers.<sup>31</sup> Lastly, a no-drop policy conveys an institutional commitment

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28. See Clute, *supra* note 20, at 45.

29. See *id.*; Cahn, *supra* note 15, at 168.

30. Cahn, *supra* note 15, at 167-68; see Goolkasian, *supra* note 15, at 72 (stating that victims who express a desire to "drop charges" are told that the "prosecutor has a duty to decide whether the court should be asked to dismiss a complaint"); see, e.g., Salt Lake County Attorney's Office, Salt Lake County, Utah, Domestic Violence Policy and Protocol for the Salt Lake County Attorney's Office 1 (1993) (on file with author) [hereinafter Salt Lake County Protocol] (stating that a "victim cannot 'drop' charges or 'press' charges once the case is submitted to the County Attorney's office").

31. Gwinn & O'Dell, *supra* note 13, at 1514; see Florida Gender Bias Study, *supra* note 9, at 861; Attorney General's Task Force on Domestic Violence Crime, Commonwealth of Kentucky, Prosecutor's Manual on Domestic Violence Crime 13 (1991) (on file with author) [hereinafter Kentucky Prosecutor's Manual].

on the part of the criminal justice system to treat domestic violence as a serious crime.<sup>32</sup>

In practice, a no-drop policy regulates the use of prosecutorial discretion in instances where the victim declines to participate.<sup>33</sup> The policy often comes into play after formal charges have been filed and the victim has indicated that she will not support the prosecution.<sup>34</sup> Under a no-drop policy, prosecutors often are directed to: 1) pursue most cases notwithstanding the reluctance of the victim;<sup>35</sup> 2) stress prosecutorial control of the case to the victim;<sup>36</sup> and 3) facilitate victim cooperation with state efforts.<sup>37</sup>

Strategies for effectuating these directives vary among jurisdictions. In terms of formality, policies range from unwritten rules that are followed as matters of office custom,<sup>38</sup> to elaborate written protocols

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32. Goolkasian, *supra* note 15, at 73; see Waits, *supra* note 17, at 323 (stating that no-drop policies convey a strong sense of societal responsibility for deterring the batterer).

33. See City Attorney's Office, Duluth, Minnesota, Domestic Violence Prosecution Plan 1 (1990) (on file with author) [hereinafter Duluth Prosecution Plan] (stating that the City Attorney's prosecution plan, which includes a no-drop policy, "provides a framework upon which to base decisions" and "does not make up a specific set of absolute procedures to fit the myriad possibilities [the] cases present"); see also *supra* note 20.

34. Criminal domestic violence cases generally enter the legal system through on-scene arrests or victim-initiated complaints. Cahn, *supra* note 15, at 165; Ford & Regoli, *supra* note 15, at 132. At the police officer's option, on-scene arrest cases may be referred to the prosecutor's office for formal charge screening. In cases involving victim-initiated complaints, the prosecutor's office itself screens the case before requesting an arrest warrant or summons. Ideally, if the prosecutor has probable cause to believe that the defendant is guilty of the crime alleged, the prosecutor formally lodges a complaint or information at the initial presentment. For less serious offenses, such as low level misdemeanors, the screening and formal charging may occur simultaneously. At the initial presentment, the judge informs the defendant of his rights, sets bail and other conditions for release, and assigns counsel if one is requested. In the case of a misdemeanor, the defendant is arraigned on the complaint, and if needed, a trial date is set. If the case involves a felony, a preliminary hearing date will be scheduled. The accused felon will be arraigned at that time and a trial date will be set. Some time in between arrest and trial, the process of trial preparation and plea bargaining begins. See LaFave & Israel, *supra* note 7, § 1.4, at 20-26.

35. Goolkasian, *supra* note 15, at 72-73; see *supra* text accompanying notes 18-20.

36. Cahn, *supra* note 15, at 168 (stating that the "prosecuting attorney's office explains to victims that they are witnesses for the state and that, even if they reconcile with the defendant, the state will not drop charges"); Telephone Interview with Sandra Panico, Investigating Law Clerk, Citizens' Rights Division, Office of the Attorney General, North Carolina (Aug. 17, 1994) (explaining that under an informal no-drop policy, the prosecutor communicates to the parties that "it's the state's case").

37. See *infra* note 66 and accompanying text (discussing use of victim advocate); see, e.g., Salt Lake County Protocol, *supra* note 30, at 1 (if the victim fails to appear or testify, an investigator or counselor will make an appointment with the victim for the purpose of persuading her to testify).

38. Telephone Interview with Betsy Griffing, Assistant Attorney General, Office of the Attorney General, Montana (Aug. 5, 1994) (stating that although there is no formal statewide policy, "as a practical matter," prosecutors do not drop charges based on the victim's request); Telephone Interview with Sandra Panico, *supra* note 36.



that specify whether and under what circumstances prosecutors may drop a case.<sup>39</sup> Some policies, for example, simply state that the prosecutors should not move to dismiss charges because of a victim's reluctance to proceed.<sup>40</sup> Other policies further specify the steps that should be taken, or conditions that should be fulfilled, before the prosecutor can recommend dismissal.<sup>41</sup> In conjunction with or as part of such policies, some jurisdictions also address the issue of compelling victims to testify in court through the use of subpoenas.<sup>42</sup> The different approaches taken by five jurisdictions are examined below.

Under the no-drop policy in Jefferson County, Kentucky, if a victim fails to appear in court or changes her mind, the charges will not be automatically dismissed.<sup>43</sup> The policy recommends that the prosecutor request a postponement and obtain a sworn statement from the victim as to why she wants to withdraw and whether she was pressured to do so.<sup>44</sup> Ultimately, the county's domestic violence unit—a panel made up of a chief prosecutor, paralegals, and a victim advocate—must give its consent before the prosecutor can plea-bargain or recommend dismissal of charges.<sup>45</sup>

In San Diego, California, the City Attorney's official policy states that the prosecutor will request an arrest warrant if a subpoenaed victim fails to show up in court.<sup>46</sup> In practice, however, no warrant actually issues until a specially-trained domestic violence prosecutor determines that the case cannot proceed without the victim's cooperation.<sup>47</sup> In cases where other corroborating evidence, such as 911 tapes, photographs, medical records, and neighbors' or relatives' testimony, is available and deemed sufficient to prove the case, the prosecutor will not request a warrant.<sup>48</sup> In cases that cannot be proven

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39. See Goolkasian, *supra* note 15, at 72-73; *infra* notes 53-60 and accompanying text (discussing protocol for Marion County, Indiana).

40. Telephone Interview with Terri Clarke, Deputy County Attorney, Maricopa County District Attorney's Office, Phoenix, Arizona (Aug. 15, 1994) (explaining the office's informal policy that charges will not be dropped solely because the victim requests it); Telephone Interview with Mark Sandon, Domestic Abuse Prosecutor, Polk County, Iowa (Aug. 5, 1994) (explaining the office's informal policy that prosecutor will not dismiss by reason of the victim's wishes).

41. See, e.g., St. Louis County Attorney's Office, Duluth, Minnesota, St. Louis County Attorney's Domestic Abuse Policy 6-7 (Feb. 5, 1990) (on file with author) (specifying steps and conditions prosecutors should take when victims recant, refuse to testify, or fail to appear); *infra* notes 46-60 and accompanying text (discussing protocols and procedures for Marion County, Indiana, and San Diego, California).

42. See *infra* notes 46-52, 61-68, and accompanying text.

43. See Kim Wessel, *Support Is Sought for a Special Court on Family Violence*, The Courier-Journal, June 9, 1993, at 1B.

44. O'Doherty, *supra* note 7, at 1A.

45. *Id.*; Wessel, *supra* note 43, at 1B.

46. Office of the City Attorney, City of San Diego, Domestic Violence Prosecution Protocol 13 (April 1993) (on file with author); Gwinn & O'Dell, *supra* note 13, at 1517.

47. *Id.*

48. *Id.*

without the victim's cooperation, the prosecutor's office will often request a continuance along with a bench warrant<sup>49</sup> and, in most cases, simultaneously attempt to locate the victim.<sup>50</sup> Alternatively, the prosecutor may conclude that the victim is not likely to change her mind about testifying and that the seriousness of the case does not merit her possible incarceration.<sup>51</sup> Under these circumstances, the prosecutor may make a motion to dismiss, subject to refileing within six months if the victim becomes cooperative.<sup>52</sup>

Pursuant to the no-drop policy in Marion County, Indiana, a victim is informed initially that the prosecutor's office usually follows a no-drop policy and that the prosecutor may make an exception depending on the circumstances of the case.<sup>53</sup> The victim is subsequently informed that if she wishes to withdraw the charges, she must first contact either her legal advocate or a prosecutor.<sup>54</sup> Depending upon the circumstances of the case, the victim may also be informed that certain categories of crimes or offenders are summarily removed from consideration for dismissals. No case will be dropped, for example, if the defendant: (1) has a prior conviction; (2) has been sent a warning letter; (3) has another case pending for an act of violence against the same victim; or (4) is on probation and is subject to a violation for a new offense.<sup>55</sup> Moreover, no case will be dropped before the initial hearing.<sup>56</sup> In situations where the victim requests a drop, the policy dictates that she must be advised of the increased risk of being revictimized if charges are dropped.<sup>57</sup> The victim may also be asked to view a video program about domestic violence and to attend a victims' support group meeting.<sup>58</sup> Eventually, if the victim continues to insist on dropping the charges, she will be allowed to sign a "drop form."<sup>59</sup> The form will then be submitted to the court at the next hearing, after which the judge will take it under advisement for ninety days. If no

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49. *Id.*

50. *Id.* In some cases, the prosecutor may ask the judge to hold the warrant and continue the case for a week while the prosecutor attempts to notify the victim of the pending risk of arrest. *Id.* at 1518. Once the victim discovers that she may be arrested, she often agrees to appear in court. *Id.*

51. *Id.* at 1517.

52. *Id.*

53. Office of the Prosecuting Attorney, Marion County, Indiana, Domestic Violence Protocol 3 (Feb. 1994) (on file with author) [hereinafter Marion County Protocol].

54. *Id.* Marion County's domestic violence unit has three legal advocates and victim assistance volunteers who work alongside four full-time deputy prosecutors. *Id.* at 1. For a discussion on the role of victim advocates, see *supra* note 15.

55. Marion County Protocol, *supra* note 53, at 3.

56. *Id.*

57. *Id.* Specifically, the victim is told that statistics demonstrate that "it is 41% more likely that she will be the victim of repeat violence if she drops charges [versus] 7% if she doesn't drop charges." *Id.*

58. *Id.*

59. *Id.*

further violence occurs during this period, the prosecutor will file a motion to dismiss subject to refiling during the statute of limitations period.<sup>60</sup>

Prosecutors in Duluth, Minnesota, use what is termed a "hard" no-drop policy,<sup>61</sup> in which prosecutors will almost always pursue the case regardless of a victim's wishes.<sup>62</sup> Under the Duluth policy, prosecutors will regularly subpoena all victims regardless of their willingness to testify in an effort to shield the victim from the appearance of responsibility.<sup>63</sup> Because many cases involve hostile or reluctant victims, Duluth's City Attorney's office has developed procedures for the examination of hostile witnesses and alternative means to introduce evidence.<sup>64</sup> Prosecutors try to present juries with the "whole story" of what occurred between the victim and defendant by introducing excited utterances, present sense impressions, evidence of other conduct, and asking leading questions of the victim.<sup>65</sup>

Lastly, the San Francisco District Attorney's Office encourages victims to confer with victim advocates when the victim appears reluctant to testify.<sup>66</sup> If the victim still refuses to testify after having met with an advocate, the prosecutor may question the victim under oath in a manner that simultaneously elicits reasons for her reluctance and informs her (and the batterer) that she is not responsible for the case going forward.<sup>67</sup> If the victim is found in contempt, the prosecutor will request that the disposition address the victim's needs, such as participation in a battered women's support group or counseling.<sup>68</sup>

60. *Id.*

61. Cahn, *supra* note 15, at 168.

62. See Jan Hoffman, *When Men Hit Women*, N.Y. Times, Feb. 16, 1992, § 6 (Magazine), at 26-27.

63. Duluth Prosecution Plan, *supra* note 33, at 2; Asmus, *supra* note 22, at 135-36; see also *Developments*, *supra* note 1, at 1540-41 ("[A]pppearance of compulsion shields a woman from blame and pressure.").

64. Asmus, *supra* note 22, at 136.

65. *Id.* at 139-49 (discussing applicability of Minnesota Rules of Evidence 803(2), 801(d)(1)(D), 404(b), and 611(c), and Minnesota Statutes section 634.20 to domestic abuse cases); see Duluth Prosecution Plan, *supra* note 33, at 3-4 (stating that the City Attorney's Office will work with Duluth police to develop methods for gathering and preserving evidence such as statements of victims and perpetrators at or near the time of the incident, statements by other witnesses, physical evidence of any injuries, and evidence regarding prior conduct or history of abuse).

66. District Attorney's Office, San Francisco, California, Domestic Violence Prosecution Protocol 19 (Feb. 1, 1992) (on file with author). Victim advocates educate victims about their legal options and sometimes engage in crisis counseling. As specified by law, communications between a victim and a domestic violence victim advocate are confidential. *Id.* at 21.

67. *Id.* at 19-20. Prosecutors ask questions such as: "You don't want to be here, do you?" "Are you aware that the People of the State of California are bringing these charges, and that the decision to prosecute the defendant is up to the prosecutor rather than you?" "When did you become reluctant to testify?" "How did you receive the injuries?" *Id.*

68. *Id.* at 20. California law provides such sentencing alternatives for victims of domestic abuse. See *infra* notes 75-77 and accompanying text.

### B. Survey of No-Drop Policies

Currently, four states have passed legislation encouraging the use of no-drop policies.<sup>69</sup> Pursuant to a joint house resolution and as a matter of state policy, prosecutors and judges in Utah are encouraged to adopt no-drop policies and to refrain from dropping charges based solely on a victim's request.<sup>70</sup> Similarly, Wisconsin law directs all district attorneys' offices to "develop, adopt and implement written policies" which, among other things, indicate "that a prosecutor's decision not to prosecute . . . should not be based . . . [u]pon the victim's consent to any subsequent prosecution of the other person."<sup>71</sup> Florida law recommends the adoption of "pro-prosecution" policies in general and highlights the reluctance of the victim as a factor that may be disregarded in deciding whether to file or divert<sup>72</sup> cases.<sup>73</sup> Using a somewhat different approach, Minnesota law requires all county and city attorneys to develop prosecution plans that address methods for gathering evidence exclusive of the victim's in-court testimony and identify procedures for use of victim subpoenas.<sup>74</sup>

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69. See Fla. Stat. Ann. § 741.2901 (West Supp. 1994); Minn. Stat. Ann. § 611A.0311 (West 1991 & Supp. 1994); H.R.J. Res. 3, 48th Leg., 1990 Gen. Sess., 1990 Utah Laws 1543; Wis. Stat. Ann. § 968.075(7) (Supp. 1994). Although domestic abuse statutes in other states contain "legislative intent" provisions encouraging proactive prosecution of domestic violence crimes, only the four states mentioned above specifically address the impact of victim nonparticipation and discretionary dismissals in the disposition of domestic violence cases. See, e.g., Cal. Penal Code § 273.8 (West Supp. 1994) (stating that legislature "intends to support increased efforts by district attorneys' and city attorneys' offices to prosecute spousal abusers," but not mentioning issue of victim reluctance); Idaho Code § 39-6302 (Michie 1993) (finding that domestic violence can be "deterred, prevented or reduced" through vigorous prosecution by prosecutors, but not addressing the impact of victim nonparticipation); N.J. Code 2C:25-18 (West Supp. 1994) (encouraging broad application of remedies in criminal courts but not addressing impact of victim nonparticipation).

70. The legislation is entitled "A Joint Resolution of the Legislature Urging Prosecutors to Develop and Implement a 'No-Drop' Policy," and states:

BE IT RESOLVED that the Legislature encourages prosecution of domestic violence perpetrators to the fullest extent of the law, encourages prosecutors and courts not to drop domestic violence charges at the request of the victim, and urges the state, whenever necessary, to act as complainant instead of the victim in a domestic violence case.

H.R.J. Res. 3, 48th Leg., 1990 Gen. Sess., 1990 Utah Laws 1543.

71. Wis. Stat. Ann. § 968.075(7)(a)(2) (Supp. 1994).

72. Diversion is an alternative to formal criminal proceedings. "Typically the prosecutor suspends prosecution in exchange for the defendant's agreement to make restitution for an offense or to submit to rehabilitative counseling." Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure: Cases and Commentary* 662 (4th ed. 1992).

73. Florida laws provide that :

The state attorney in each circuit shall adopt a pro-prosecution policy for acts of domestic violence, as defined in § 741.28. The filing, nonfiling, or diversion of criminal charges shall be determined by these specialized prosecutors over the objection of the victim, if necessary.

Fla. Stat. Ann. § 741.2901(2) (West Supp. 1994).

74. Minn. Stat. Ann. § 611A.0311(b)(5), (b)(7) (West 1991 & Supp. 1994).

Although California lawmakers have not passed legislation specifically advocating no-drop policies, California law implicitly recognizes local use of such policies by according special treatment to victims who refuse to testify. Under section 1219 of California's Civil Procedure Code, judges are prohibited from jailing a domestic violence victim on the first contempt finding for refusal to testify.<sup>75</sup> Instead of jail, the judge may order the victim to attend a domestic violence program for victims, or to perform up to seventy-two hours of community service.<sup>76</sup> The judge may sentence a victim to jail only after a second finding of contempt.<sup>77</sup>

At the federal level, the adoption of no-drop policies is encouraged by the Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992.<sup>78</sup> Section 10415 authorizes Model State leadership grants to be given to states that have statewide prosecution policies that include either a no-drop policy or a vertical prosecution policy.<sup>79</sup>

In some states that do not have specific legislation relating to no-drop policies, the attorney general's office has set forth such a policy or has officially endorsed its adoption.<sup>80</sup> In Rhode Island, for example, the attorney general's office enforces an unwritten policy stating

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75. Cal. Civ. Proc. Code § 1219 (West Supp. 1994). It is possible, however, that the victim may still be jailed on an arrest warrant prior to the first contempt finding. Gwinn & O'Dell, *supra* note 13, at 1518 n.43.

76. Cal. Civ. Proc. Code § 1219(c). The victim may be sentenced to attend a victims' support group meeting. Gwinn & O'Dell, *supra* note 13, at 1518 n.43.

77. Cal. Civ. Proc. Code § 1219(c).

78. Pub. L. No. 102-295, 106 Stat. 187 (1992).

79. 42 U.S.C. § 10415 (Supp. 1993). In order to be eligible for a grant, a state must have:

- (2) statewide prosecution policies that—
  - (A) authorize and encourage prosecutors to pursue cases where a criminal case can be proved, including proceeding without the active involvement of the victim if necessary; and
  - (B) implement model projects that include either—
    - (i) a "no-drop" prosecution policy; or
    - (ii) a vertical prosecution policy . . .

42 U.S.C. 10415(b) (Supp. 1993).

80. An informal telephone survey of states that had no legislation relating to no-drop policies revealed several attorneys general's offices that used a no-drop policy or encouraged their adoption statewide. *See, e.g.,* Kentucky Prosecutor's Manual, *supra* note 31, at 15 (recommending emergency implementation of no-drop policies on a statewide level); Telephone Interview with Betsy Griffing, *supra* note 38 (explaining the informal policy at Montana Attorney General's Office); Telephone Interview with Sandra Panico, *supra* note 36 (describing the informal no-drop policy at the North Carolina Attorney General's Office); Telephone Interview with David Prior, Assistant Attorney General, Criminal Division, Rhode Island (Aug. 15, 1994) (describing the unwritten no-drop policy at the Rhode Island Attorney General's Office); *see also* Telephone Interview with William J. Zaorski, Deputy Attorney General, Division of Criminal Justice, Department of Law & Public Safety, Office of the Attorney General, New Jersey (Aug. 18, 1994) (stating that the Attorney General's office is currently developing a course on proving cases without victim assistance).

Because the office of the attorney general in most of the states surveyed exercised no direct jurisdiction over the class of crimes often filed in domestic violence cases,

that charges will not be dropped until the victim has gone to court and testifies that she is unwilling to testify.<sup>81</sup> In Kentucky, the Attorney General's Task Force on Domestic Violence recommends the "emergency" implementation of no-drop policies at both the state and local levels.<sup>82</sup>

## II. THE IMPETUS FOR A NO-DROP SOLUTION

The legal literature on domestic violence has identified two factors that account for the high attrition rates of such cases.<sup>83</sup> Under the general rubric of "legal noncooperation," some critics contend that criminal justice personnel, including prosecutors, lack the commitment to enforce domestic violence laws, and therefore, tacitly and overtly discourage victims.<sup>84</sup> Under the rubric of "victim noncooperation," some observers assert that victims often forgive or accede to batterers' demands, thereby frustrating and sometimes abusing state efforts at prosecution.<sup>85</sup>

Clearly, the interplay of these two factors serves to perpetuate the problem of aborted prosecutions.<sup>86</sup> The nature of the interaction between victims and prosecutors, for example, serves to reinforce each side's beliefs and behaviors and ultimately impacts their view of the role prosecution can play in ending the violence.<sup>87</sup> Moreover, in this atmosphere of mutual distrust, the batterer's role in affecting the ulti-

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many offices perceived no need or cause for the attorney general to implement or issue a policy statement relating to no-drop policies.

81. See Telephone Interview with David Prior, *supra* note 80.

82. Kentucky Prosecutor's Manual, *supra* note 31, at 15.

83. See Buzawa & Buzawa, *supra* note 7, at 58; Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *supra* note 7, 882-84; Missouri Task Force Report, *supra* note 9, at 493.

84. Barbara Hart, *Battered Women and the Criminal Justice System*, 36 Am. Behavioral Sci. 624, 626-27 (1993); McLeod, *supra* note 7, at 394; Wisconsin Equal Justice Task Force, *Final Report: Gender Bias Task Force*, 6 Wis. Women's L.J. 173, 183-88 (1991).

85. See Goolkasian, *supra* note 15, at 55; Missouri Task Force Report, *supra* note 9, at 493 ("Officials working in the system view the shortfalls in effectiveness [of the administration of domestic violence laws] as the result of victims' perplexing and self-perpetuating unwillingness to pursue criminal prosecution and court-ordered protection."); cf. Kerry G. Wangberg, *Reducing Case Attrition in Domestic Violence Cases: A Prosecutor's Perspective*, The Prosecutor, Winter 1991, at 8 ("High case attrition rates in domestic violence can generally be classified under the general rubric of "victim reluctance.").

86. Goolkasian, *supra* note 15, at 56 (stating that battered women often are reluctant to follow through with prosecution and that prosecutors' traditional approach to handling domestic violence cases serves to increase, rather than minimize their reluctance); cf. Buzawa & Buzawa, *supra* note 1, at xvii (discussing cycle of nonprosecution due to victims' failure to cooperate and prosecutors' lack of support or apparent indifference).

87. Buzawa & Buzawa, *supra* note 1, at xvii; Cahn, *supra* note 15, at 163.

mate outcome of his case receives limited consideration.<sup>88</sup> As one city prosecutor described this cycle of aborted prosecutions:

[I]t was a self-fulfilling prophesy. We'd file if she really wanted us to, but we knew that she'd want us to drop charges later . . . we may have even told her so. Then we sent her back home, often back to her abuser, without any support or protection at all. Sure enough, she wouldn't follow through and we'd think, "It's always the same with these cases."<sup>89</sup>

Part II explores the reasons and constraints underlying prosecutors' reluctance to pursue domestic violence cases and the ways in which prosecutors have dissuaded victims from seeking full criminal justice relief. This part also examines the reasons and motivations behind victims' reluctance to cooperate.

### A. *Prosecutorial Noncooperation*

A prosecutor's power to forgo or to proceed with prosecution in domestic violence cases has been described as a power that involves "great latitude and little accountability."<sup>90</sup> Although statutes or judicial review set some outside limits on this power,<sup>91</sup> a prosecutor's decision to terminate prosecution is seldom challenged.<sup>92</sup> In general, society allows prosecutors to set priorities and enforce the law with discretion because of limited justice resources, legislative "over-criminalization," and society's belief in individualized justice.<sup>93</sup> In the

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88. See Sarah Eaton & Ariella Hyman, *The Domestic Violence Component of the New York Task Force Report on Women in the Courts: An Evaluation and Assessment of New York City Courts*, 19 Ford. Urban L.J. 391, 425-26 (1992) (discussing lack of awareness among judges and prosecutors as to why battered women wish to drop charges and, in particular, the role batterer intimidation plays in deterring their victims); cf. Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 23 U. Chi. Legal F. 23, 38 (1989) (noting in a discussion of battered women's syndrome that: "[T]he law in its present cast is . . . able to maintain an absolute focus on whether the battered woman 'chose' correctly between the risk of leaving and the risk of staying and away from whether men should be able to impose either set of risks on us."); Mahoney, *supra* note 1, at 53-54 (stating that legal literature often focuses on the psychology of the victim and often ignores the "interplay of power and control, domination and subordination in the battering relationship").

89. Goolkasian, *supra* note 15, at 55.

90. Cahn, *supra* note 15, at 162.

91. *Id.*; see, e.g., S.D. Codified Laws Ann. § 23A-3-22 (Supp. 1994) (requiring prosecutors to specify reasons for not continuing prosecution); Wis. Stat. Ann. § 968.075(7) (1993) (same).

92. See Abraham S. Goldstein, *The Passive Judiciary* 14 (1980) (noting that judges seldom deny a prosecutor's motion to withdraw prosecution); LaFave & Israel, *supra* note 7, § 13.3(c) (noting perfunctory nature of judicial approval in state motions to terminate prosecutions).

93. LaFave & Israel, *supra* note 7, § 13.2(a); Salzberg & Capra, *supra* note 72, at 653-54.

area of domestic violence cases, however, prosecutors often choose to exercise discretion by not proceeding or later dismissing charges.<sup>94</sup>

A complex set of motivations and constraints underlie prosecutors' reluctance to prosecute domestic violence cases. For the most part, prosecutors fail to understand the harms and dynamics of woman battering.<sup>95</sup> Some prosecutors believe, for instance, that the violence is trivial, that victims are somehow to blame,<sup>96</sup> and that the public order is not affected.<sup>97</sup> Still others question the wisdom of state intervention in familial relationships.<sup>98</sup>

Some prosecutors choose to drop cases because of expectations, often based on experience, that the victim will ultimately change her mind about prosecution.<sup>99</sup> Because the victim is often the only witness to the violence, such cases can be extremely difficult to prove without the victim's testimony.<sup>100</sup> Likewise, the general tendency of juries to try the victim instead of the defendant in a nonstranger case<sup>101</sup> also taints the prosecutor's view of the likelihood of conviction.<sup>102</sup>

Organizational goals and incentives also influence decisions to forgo or terminate prosecutions. Trying domestic violence cases without favorable victim testimony hardly coincides, for instance, with the bureaucratic goals of achieving higher conviction rates<sup>103</sup> and conserving limited prosecutorial resources.<sup>104</sup> Moreover, because other jus-

94. Buzawa & Buzawa, *supra* note 1, at xvi; Cahn, *supra* note 15, at 162; McLeod, *supra* note 7, at 398.

95. Eaton & Hyman, *supra* note 88, at 481-82; Florida Gender Bias Study, *supra* note 9, at 861; Georgia Gender Bias Report, *supra* note 20, at 552; Missouri Task Force Report, *supra* note 9, at 506; Utah Task Force on Gender and Justice, *supra* note 6, at 211; Wisconsin Equal Justice Task Force, *supra* note 84, at 186.

96. Cahn, *supra* note 15, at 162-63.

97. Buzawa & Buzawa, *supra* note 7, at 58; see Cahn, *supra* note 15, at 162 (quoting a former supervisor at a prosecutor's office who stated that "[i]nteraction between people who know each other is really different in kind than violent behavior directed towards strangers") (alterations in original) (citations omitted); Eaton & Hyman, *supra* note 88, at 456 (noting assessment by victim advocates that assistant district attorneys do not think of domestic violence as "real" crimes, like murder or drug trafficking).

98. Buzawa & Buzawa, *supra* note 7, at 58; Schmidt & Steury, *supra* note 11, at 488.

99. Asmus et. al, *supra* note 22, at 135; Cahn, *supra* note 15, at 163; Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *supra* note 7, at 883.

100. Cahn, *supra* note 15, at 163; Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *supra* note 7, at 884; cf. Asmus et al., *supra* note 22, at 135 ("Traditionally, [the victim's willingness to cooperate] has been viewed as central to the likelihood of obtaining a conviction.").

101. See Asmus et al., *supra* note 22, at 131; Clute, *supra* note 20, at 44.

102. Goolkasian, *supra* note 15, at 55; Asmus et al., *supra* note 22, at 131.

103. See Buzawa & Buzawa, *supra* note 7, at 61; Schmidt & Steury, *supra* note 11, at 488.

104. As one prosecutor admits: "It must be acknowledged that it has been easier to let victims 'drop charges' than to create a resource intensive system which takes over responsibility for the criminal prosecution. Effective criminal prosecution without the



tice personnel, including chief prosecutors and judges, fail to treat domestic abuse cases with the same level of seriousness as other crimes, deputy prosecutors receive no incentive to vigorously pursue these types of cases.<sup>105</sup>

Prosecutors have contributed to victims' ambivalence about the criminal justice process by behaving in ways that reflect their underlying resistance to pursue domestic violence cases.<sup>106</sup> In contrast with other kinds of crimes, for instance, many prosecutors abdicate control for dismissing cases to victims.<sup>107</sup> In doing so, prosecutors not only make the victim feel responsible for any action taken against the batterer,<sup>108</sup> but also force the victim to constantly reaffirm what was a traumatic decision to prosecute in the first place.<sup>109</sup> Moreover, this arrangement virtually invites batterers to intimidate victims into withdrawing the charges.<sup>110</sup>

Prosecutors also influence battered women's decision to drop charges by urging reconciliation or otherwise discouraging pursuit of

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victim's involvement costs money." Gwinn & O'Dell, *supra* note 13, at 1514 n.38. See also Buzawa & Buzawa, *supra* note 7, at 57 (discussing the crisis of excessive caseloads and attempts by prosecutors to informally reduce caseloads through diversion or outright dismissal).

105. See Goolkasian, *supra* note 15, at 55 (noting that practices and policies within the justice system reinforce the message that "handling domestic violence case [will] do little to advance a prosecutor's career"); *Developments*, *supra* note 1, at 1555.

106. See Buzawa & Buzawa, *supra* note 7, at 58; Cahn, *supra* note 15, at 162.

107. Clute, *supra* note 20, at 44; see Georgia Gender Bias Report, *supra* note 20, at 567 ("In many other nondomestic cases involving violent injury, the State usually does not shift the burden of deciding whether to prosecute to the victim. . . . However, . . . the State often shifts the burden of deciding whether or not to prosecute onto the victim in domestic violence cases."); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *supra* note 7, at 885 (noting a "*de facto* delegation of the prosecutorial responsibility to enforce the domestic violence laws to the victims of the crime"). Notably, the prosecutor's abdication of control relates only to the decision to drop. Thus, where victims insist on pursuing criminal relief, prosecutors retain control of the decisionmaking. See Schmidt & Steury, *supra* note 11, at 499 (finding that leniency was shown to defendants in more than half the cases through *nolle prosequi*, hold-open, or diversion dispositions despite victim wishes to the contrary).

108. Buzawa & Buzawa, *supra* note 7, at 58; Gwinn & O'Dell, *supra* note 13, at 1514; cf. Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *supra* note 7, at 885 (stating that it "is contrary to the principles of [the legal] system to even indirectly hold victims of domestic violence responsible for law enforcement").

109. See Buzawa & Buzawa, *supra* note 7, at 61; cf. Ford & Regoli, *supra* note 15, at 141 ("Prosecutors test victims' commitment to 'following through' by asking if they really want to prosecute.").

110. Gwinn & O'Dell, *supra* note 13, at 1514. As the Florida Supreme Court Gender Bias Commission explained by way of quoting one attorney's testimony:

[If] the defendant knows that the woman has the capability of dropping the charge, he's going to beat her, he's gonna make her eat the restraining order . . . he'll make her crawl on the ground and eat cigarettes[,] and every other kind of abuse you can imagine as long as she has the potential to drop it, that's going to happen.

Florida Gender Bias Study, *supra* note 9, at 861 (alterations in original) (citations omitted).

criminal relief.<sup>111</sup> Some prosecutors discourage victims tacitly by questioning the victim in a manner that conveys blame or disbelief,<sup>112</sup> or by actively outlining the disadvantages of prosecution.<sup>113</sup> A few give victims distorted or incomplete legal information that thwart them from seeking the state's assistance.<sup>114</sup>

Finally, prosecutors dissuade battered women indirectly by downplaying the seriousness of the crimes. Some prosecutors, for instance, undercharge domestic abuse cases by filing them as misdemeanors when circumstances warrant felony charges.<sup>115</sup> In some jurisdictions, prosecutors delay charging or following up on the victim.<sup>116</sup> Some prosecutors have gone so far as to impose mandatory waiting or "cooling off" periods.<sup>117</sup> Still, in other jurisdictions, prosecutors attempt to mediate cases or recommend counseling.<sup>118</sup> This policy sends a

111. See Ford & Regoli, *supra* note 15, at 141; Georgia Gender Bias Report, *supra* note 20, at 566 ("Some witnesses indicated that prosecutors frequently encourage the victim not to go forward, but to seek counseling or mediation . . ."); Utah Task Force on Gender and Justice, *supra* note 6, at 211 (indicating that 27% of prosecutors report that they "sometimes" or "often" urge reconciliation even when the abuse is severe).

112. Ford & Regoli, *supra* note 15, at 130 (Women often are made to feel responsible for their own victimization through screening questions: "Are you still living with this man?" "Are you married to him?" "Have you filed for divorce?" "Why do you stay with him?").

113. Ford & Regoli, *supra* note 15, at 141. Some prosecutors seemingly list all the possible reasons why a victim should *not* support the prosecution: "that it will cost the defendant money that might better be spent on the family's support; that it will create more stress and conflict in the relationship; that it will anger the defendant to the point of his retaliating; [and] that prosecution cannot guarantee security." *Id.*

114. Hearings conducted by the Utah Task Force on Gender and Justice highlighted instances where prosecutors told victims that: 1) protective orders are not available if the offense occurred at the couple's residence; 2) a victim may get only one protective order during her lifetime; and 3) protective orders are not available if the victim is already divorced and did not obtain a permanent restraining order in her divorce decree. Utah Task Force on Gender and Justice, *supra* note 6, at 211. One victim who testified recounted a story of a prosecutor who simply told her that a restraining order was not available. Not knowing the difference between a protective and a restraining order, the victim was never informed of the difference or the procedures for obtaining a restraining order in civil court. *Id.* See also Eaton & Hyman, *supra* note 88, at 427 (stating that some battered women are dissuaded due to unclear or incorrect information).

115. See *infra* notes 197-99 and accompanying text.

116. Eaton & Hyman, *supra* note 88, at 462 ("[T]oo much time passes before ADAs make contact with battered women."); Hart, *supra* note 84, at 627; Missouri Task Force Report, *supra* note 9, at 508.

117. See Ford & Regoli, *supra* note 15, at 131. Prosecutors generally delay the charging decision in the hope that the victim will "cool down" and withdraw charges. Prosecutors attribute their reluctance to charge to: 1) the minor nature of the disputes; 2) the strain on judicial resources; and 3) strain that formal proceedings place on a continuing relationship. Salzberg & Capra, *supra* note 72, at 663.

118. Salzberg & Capra, *supra* note 81, at 663; Georgia Gender Bias Report, *supra* note 21, at 566; see Florida Gender Bias Study, *supra* note 6, at 861 (stating that some counties have a policy of sending domestic assault cases to mediation). Prosecutors, for example, refer the case to a social agency or present it to a member of the prosecutor's office for an informal hearing. Salzberg & Capra, *supra* note 81, at 663. If neither party appears at the hearing, the prosecutor assumes the dispute has been

message to the victim that the system does not view the batterer's conduct as a crime and that she may be partly responsible for the incident.<sup>119</sup> Not surprisingly, many victims become discouraged with the legal process and decide that the costs of prosecution outweigh any potential benefits.<sup>120</sup>

### B. *Victim Noncooperation*

Much like other victims of violent crimes, battered women enter the justice system unaware of the realities of the modern criminal justice process.<sup>121</sup> Like other victims, battered women are unprepared for the number of court appearances,<sup>122</sup> the lack of input they have about plea negotiations and sentencing,<sup>123</sup> and the amount of protection the defendant receives for his constitutional rights.<sup>124</sup> Victims who expect that the process will be predictable and straightforward often are left feeling dissatisfied with the justice system.<sup>125</sup>

Unlike other victims of violent crimes, a woman battered by a current or former intimate partner encounters increased barriers to participation. In many instances, battered women face an increased risk of intimidation and reprisal.<sup>126</sup> The common phenomenon of "recapture"—women being assaulted and coerced back into relationships that they had previously chosen to leave—reveals most convincingly the limited avenues of escape available to battered women.<sup>127</sup> As a

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resolved and drops the case. If only one of the parties appears, the prosecutor schedules another meeting rather than charge the suspect. Where both parties appear, the dispute is usually "talked out" and no prosecution ensues. *Id.*

119. See Georgia Gender Bias Report, *supra* note 20, at 570; cf. Florida Gender Bias Study, *supra* note 9, at 862 ("[In mediation, t]he criminal aspects of the assault are brushed aside, implying that the victim had some culpability.").

120. Hart, *supra* note 84, at 627; see Ford & Regoli, *supra* note 15, at 130-31; cf. Cahn, *supra* note 15, at 163 ("Victims learn not to rely on the criminal justice system for help.").

121. See Goolkasian, *supra* note 15, at 55-56; Ford & Regoli, *supra* note 15, at 130; Hart, *supra* note 84, at 624.

122. Goolkasian, *supra* note 15, at 56; see Hart, *supra* note 84, at 624.

123. Cf. Hart, *supra* note 84, at 624 (stating that battered women want input in decisions whereas the judicial system precludes such participation). Despite recent legislative enactments giving victims the power to affect sentencing through victim impact statements, reports indicate that victims remain unaware, and prosecutors neglect to advise them, of these reforms. See generally Deborah P. Kelly, *Have Victim Reforms Gone Too Far—or Not Far Enough?*, 6 *Crim. Just.* 22, 22 (1991) (reviewing victims' rights reforms and concluding that such rights are often underutilized).

124. Buzawa & Buzawa, *supra* note 1, at xvii.

125. *Id.*

126. A domestic abuse victim is more than twice as likely as other victims of violent crimes to be revictimized within six months after the assault that gave rise to the legal intervention. Hart, *supra* note 84, at 625. Furthermore, when she is assaulted, she is likely to be assaulted an average of three times, compared with once for other victims of violent crimes. *Id.*

127. See Littleton, *supra* note 88, at 36; see also Hart, *supra* note 84, at 626 ("Although not all batterers engage in escalated violence during the pendency of prosecution, as many as half threaten retaliatory violence, and at least 30% of batter-

victim of violent crime who is often ignorant or distrustful of the legal system, the battered woman also encounters victim-blaming and trivializing behaviors by justice personnel.<sup>128</sup> Moreover, if children are involved, a woman's traditional role as caretaker exacerbates the frustrating experience of returning to court time and time again to prevent further contact.<sup>129</sup> Lastly, where the woman has no income independent of the batterer, the decision to continue prosecution may result in destitution for the entire family.<sup>130</sup>

Because of the victim's status as a woman, she is also vulnerable to a host of uniquely potent constraints and pressures that impact her ability to invoke and support prosecution.<sup>131</sup> As Professor Christine Littleton explains, the "solution" of separation—the law's most common response to conflict<sup>132</sup>—presents an especially problematic choice for women because separation conflicts with impulses to seek connection.<sup>133</sup> Whether such impulses are "authentic" or simply a "habit of compliance" with societal norms,<sup>134</sup> the legal framework under which women live disregards the lives of battered women in two ways. The law misinterprets or ignores the connection that *all* women value (by attributing the violence to some failure in the victim's psychology) and assumes that the choice between separation and continued abuse actually exists for most women.<sup>135</sup>

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ers may inflict further assaults during the *predisposition* phase of prosecution.") (citations omitted). See generally Mahoney, *supra* note 1, at 65-71 (naming the phenomenon of separation assault and reviewing cases where the victim's invocation of the criminal process resulted in violence escalation).

128. See Eaton & Hyman, *supra* note 88, at 423, 482; Hart, *supra* note 84, at 626-27; Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *supra* note 7, at 885. See also *supra* notes 108-09, 118-20, and accompanying text.

129. See Hart, *supra* note 84, at 628 (discussing the inconvenience of attending multiple court hearings due to the difficulty of securing reliable childcare); Mandulo, *supra* note 7, at 2.

130. Missouri Task Force Report, *supra* note 9, at 497. In State *ex rel* Williams v. Marsh, 626 S.W.2d 223, 229 (Mo. 1982), the Supreme Court of Missouri stated that "[t]he most compelling reason for an abused woman to remain in the home subject to more abuse is her financial dependency; this is particularly true for the women with children."

131. Cf. Littleton, *supra* note 88, at 47-49 (discussing the asymmetry of power between women and men and how that asymmetry has made women "intensely, intimately vulnerable to betrayal, abuse and murder" in their intimate relationships with men); Ferraro & Pope, *supra* note 1, at 106 (explaining the system of culture and law that reinforces the ideology of romantic love).

132. Littleton, *supra* note 88, at 50 (noting that the law's "most common response to conflict is to separate, to keep individuals from interfering with each other's ends").

133. *Id.* at 43-47 (explaining that "women may stay in relationships that are physically dangerous to them because they value connection"); cf. Ferraro & Pope, *supra* note 1, at 102 (noting that women live in a "culture of relations" where relationships and family are important, and that the criminal justice system's usual response is to overlay the "culture of power" on strategies for helping women).

134. Littleton, *supra* note 88, at 49.

135. *Id.* at 47-49; see *supra* notes 126-27 and accompanying text (discussing repetition and escalation of violence after victims press charges). The shortage of battered women's shelters makes separation even more problematic. Naomi R. Cahn, *Civil*

A battered woman's need for connection is perhaps most closely identified with instances of reconciliation with her batterer. This, however, is not the only or even the most usual case.<sup>136</sup> Often, a woman's connection to her children can keep her within an abusive relationship.<sup>137</sup> In addition, a batterer may threaten to challenge custody,<sup>138</sup> or make the victim feel guilty about depriving the children of their father's companionship.<sup>139</sup>

Some victims withdraw from prosecution because they have effectively wielded the threat of prosecution as a "power resource" in bargaining for their own safety.<sup>140</sup> By forging an alliance with criminal justice agents through the institution of criminal proceedings, the victim may have finally achieved her own goal of separation from the batterer in relative safety.<sup>141</sup> Alternatively, because the victim has attained some measure of power through the institution of criminal proceedings, she may feel assured in continuing the relationship.<sup>142</sup>

Finally, some battered women drop charges of abuse when the legal process fails to assure them that the decision to prosecute is safer than

*Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand. L. Rev. 1041, 1051 (1991). Lack of economic support and a place to go force many women to go back home to their abusers. S. Rep. No. 164, 102nd Cong., 2d Sess. 5 (1991), reprinted in 1992 U.S.C.C.A.N. 133, 137. According to statistics, their fear of destitution is well-founded. There is a high rate of homelessness for women who leave their batterers. As one study noted, "Over 50% of homeless women are escaping domestic violence." Asmus et al., *supra* note 22, at 120. In New York City, more than 40% of the women on the streets are thought to be victims of domestic violence. S. Rep. No. 164, *supra*, reprinted in 1992 U.S.C.C.A.N. 133, 137.

136. See Hart, *supra* note 84, at 628 ("Although it is commonly believed that battered women withdraw cooperation because of decisions to reconcile with defendants, research reveals that this is not typically the reason for the request to terminate prosecution.").

137. Littleton, *supra* note 88, at 54. There is an acute shortage of battered women's shelters, few of which will accept women with children. Cahn, *supra* note 135, at 1051.

138. See Mahoney, *supra* note 1, at 44; Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. Rev. 520, 555 (1992) ("[M]any battering men fight the issuance of restraining orders by initiating divorce and custody proceedings against battered women."). Women have good reason to fear men's threats. In contested custody cases, men receive custody 60% of the time. Littleton, *supra* note 88, at 54 (citing Lenore J. Weitzman, *The Divorce Revolution* 233 (1985)).

139. Cf. Littleton, *supra* note 88, at 54 ("[Batterers] typically know how to manipulate women's fear of losing [children]."); Mahoney, *supra* note 1, at 44-45.

140. Ford & Regoli, *supra* note 15, at 142.

141. See Buzawa & Buzawa, *supra* note 7, at 123; Ford & Regoli, *supra* note 15, at 142; cf. Hilton, *supra* note 16, at 5 ("[A] woman who is trying to end a violent relationship might fear having to face the offender in court and risk him knowing of her whereabouts.").

142. Some women may request the withdrawal of charges because the initiation of prosecution alone seems to have produced the desired changes in the defendant's behavior. Hart, *supra* note 84, at 628; see also Buzawa & Buzawa, *supra* note 7, at 123 (stating that victims may drop charges after they have achieved greater power status in the relationship).

staying in the violent relationship.<sup>143</sup> As one battered woman observed:

I was afraid every second. If I refused to testify he would maybe not blame me for getting arrested. If I testified and he didn't get convicted he'd have more power over me than ever before. If I testified and he didn't get jail time, I'd be in the same boat. It seemed like there were about eight scenarios that would go against me and only one that would work out.<sup>144</sup>

### III. BENEFITS & DRAWBACKS OF NO-DROP POLICIES

The arrival of no-drop policies has been met with both approval and alarm. This part explores the arguments for and against no-drop policies and further tests those arguments against the experience of jurisdictions that have adopted them.

#### A. *Benefits*

Advocates of no-drop policies argue that they are highly effective at reducing high case attrition rates and facilitating the cooperation of victims. Indeed, early reports show that the policies are quite successful. Case dismissal rates range from ten to thirty-five percent compared with fifty to eighty percent dismissal rates in jurisdictions that have not adopted a no-drop approach.<sup>145</sup> Some limited data indicate that in jurisdictions with no-drop policies, victims fully cooperate with prosecutors in sixty-five to ninety-five percent of cases.<sup>146</sup> Fewer vic-

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143. Cahn, *supra* note 15, at 163; see Hart, *supra* note 84, at 626 ("Criminal justice system personnel too often believe that battered women will be safer and less exposed to life-jeopardizing violence once they are separated from the offender. Quite to the contrary, evidence of the gravity of violence inflicted after separation of the couple is substantial."). Kathleen Ferraro explains a battered woman's framework for making choices this way:

Responding to physical violence entails a wide repertoire of strategies of survival, some of which are invisible to outsiders. . . . Survival strategies involve scrutinizing an array of individuals and institutions for effectiveness. Within the bounds of her relationship, the woman must evaluate each resource as making a positive or negative contribution to the safety of herself and her children. The demands of maintaining a delicate balance of outside interference add to the complexity of calculating safety. Any resource that upsets that balance threatens her survival.

Ferraro & Pope, *supra* note 1, at 106.

144. Asmus et al., *supra* note 22, at 130.

145. See *supra* notes 21-22 and accompanying text; see also Missouri Task Force Report, *supra* note 9, at 527 (stating that "[n]o-dismissal policies have been successfully implemented in many communities in the United States, including some in Missouri").

146. McLeod, *supra* note 7, at 401. The reported figures refer to jurisdictions that have proactive prosecution programs and policies, including no-drop policies. Proactive prosecution programs include victim support services that encourage victims to continue with prosecution. The decision to drop or continue prosecution under these programs ultimately lies with the victim. *Id.*

tims ask that charges be dismissed,<sup>147</sup> and some victims who initially ask for a drop, end up cooperating fully.<sup>148</sup>

Some prosecutors and advocates also assert that no-drop policies have affected the batterer's conduct towards the victim. As several of them have observed, some batterers cease harassing their victims after they discover that the victim no longer controls the case.<sup>149</sup> Some prosecutors contend that batterers more readily plead guilty to the charges once they realize that the case will not be dismissed.<sup>150</sup> Furthermore, under a rational offender theory, the threat of certain prosecution is asserted to have a deterrent impact on the batterer's future behavior.<sup>151</sup>

Prosecutors, who can no longer cite "victim noncooperation" as a legitimate reason to dismiss a case, have learned to prosecute cases without the benefit of victim testimony.<sup>152</sup> Prosecutors utilize police investigation resources more fully and apply evidentiary rules to these "victimless prosecution" cases more creatively.<sup>153</sup>

The so-called "didactic" function of no-drop policies is also asserted to impart significant benefits. From the standpoint of legal inaction, no-drop policies convey to the prosecutor that the victim should not be the "leader of prosecutorial efforts."<sup>154</sup> Additionally, it conveys to deputy prosecutors the strong state interest involved—that the state, and not just the victim, is harmed by the batterer's conduct.<sup>155</sup>

From the standpoint of victim noncooperation, no-drop policies also are asserted to convey to the victim society's assessment of the pains inflicted on her.<sup>156</sup> Batterers, in turn, receive the message that their behavior is no longer tolerated by the state and is punishable by law.<sup>157</sup>

147. Gwinn & O'Dell, *supra* note 13, at 1514 ("Once prosecutors and police officers stop asking victims whether they want to press charges, they quickly find that victims stop asking to press charges or drop charges.").

148. Asmus et al., *supra* note 22, at 136-37.

149. *See id.* at 118; Gwinn & O'Dell, *supra* note 13, at 1514.

150. Goolkasian, *supra* note 15, at 73; *Developments, supra* note 1, at 1540 (Susan Kaplan, Los Angeles Deputy City Attorney, commented: "Once the [batterer] realizes, 'Hey this is a crime, this is prosecutable'; he pleads guilty right there."); Waits, *supra* note 17, at 323.

151. Ferraro & Pope, *supra* note 1, at 101-02 ("Rational choice deterrence theory posits that men who batter will ponder the chance of punitive consequences before inflicting violence on wives and lovers.").

152. *See* Asmus et al., *supra* note 22, at 134-140; Gwinn & O'Dell, *supra* note 13, at 1517; *supra* notes 46-52, 61-68, and accompanying text.

153. *See* Asmus et al., *supra* note 22, at 139-49; Gwinn & O'Dell, *supra* note 13, at 1512-13.

154. Cahn, *supra* note 15, at 163; Gwinn & O'Dell, *supra* note 13, at 1505.

155. *Cf. supra* note 105 and accompanying text (discussing effect of low prioritization of domestic violence cases on deputy prosecutors).

156. Goolkasian, *supra* note 15, at 73 ("Having an official 'no-drop' policy demonstrates the prosecutor's view that spouse abuse is a serious crime."); Cahn, *supra* note 15, at 163.

157. *See supra* note 32 and accompanying text.

## B. Drawbacks

The adoption of no-drop policies also raises significant concerns due to their effects on the role of prosecutors and the plight of victims.

### 1. Prosecutorial Concerns

If adopted legislatively, no-drop policies could lead to encroachments into areas traditionally left to prosecutorial discretion and perhaps violate the separation of powers between the three branches of state government.<sup>158</sup> Further, undue restrictions on a prosecutor's power to forgo prosecution could subvert the goal of individualized justice. No-drop policies may restrict inquiry into the multitude of factors often examined by prosecutors to guarantee that government action against an individual is justified.<sup>159</sup>

No-drop policies could also lead to waste in prosecutorial resources. Without the cooperation of the victim, convictions will most likely prove more difficult to secure.<sup>160</sup> No-drop policies could force prosecutors to proceed with cases they would otherwise drop due to the low chances of winning.<sup>161</sup> In the end, prosecutors' efforts could have been better used in cases in which convictions were easier to secure.<sup>162</sup>

Finally, in light of budgetary constraints in local governments and shortages in prosecutorial resources, excessive focus on domestic violence cases, which are mostly misdemeanors in nature, could divert resources away from more serious cases.<sup>163</sup>

### 2. Victim Concerns

Concerns about the possible effects of no-drop policies frequently focus on the victim's safety. Prosecutors and advocates often fear that the continued prosecution of some domestic violence cases will expose battered women to retaliation from their batterers.<sup>164</sup> 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.<sup>165</sup> And, victims' safety can be further endangered if no-drop policies inadvertently lead to battered women refraining from calling the police.<sup>166</sup>

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158. Cahn, *supra* note 15, at 163.

159. See Buzawa & Buzawa, *supra* note 7, at 122-23.

160. *Id.*

161. *Cf. Developments, supra* note 1, at 1556 (noting that prosecutors often drop domestic violence cases due to the perception that they are unwinnable).

162. See Buzawa & Buzawa, *supra* note 7, at 122.

163. *Id.* at 123.

164. Hart, *supra* note 84, at 627 (discussing predisposition phase violence).

165. See *Developments, supra* note 1, at 1541; Gwinn & O'Dell, *supra* note 13, at 1516-17.

166. Buzawa & Buzawa, *supra* note 7, at 123.



Many victim advocates fear that victims will be revictimized by the courts.<sup>167</sup> Because the manner in which no-drop policies will be enforced depends to a large degree on the good faith and discretion of prosecutors themselves, victims and their advocates anticipate that prosecutorial and organizational interests will often override victim concerns.<sup>168</sup> Instances of victims being jailed for contempt have been reported in several jurisdictions.<sup>169</sup>

Some critics contend that no-drop policies serve to undermine battered women's attempts at empowerment. 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.<sup>170</sup> In conjunction, no-drop policies could deflect attention away from other less punitive and coercive means of coaxing victims to participate in the criminal justice process.<sup>171</sup> The focus on victim reluctance and prosecutorial control may obscure other shortcomings in the system's treatment of battered women.<sup>172</sup>

### C. *No-Drop Policies Reconsidered*

The lessons learned from research studies and the experience of jurisdictions that have implemented no-drop policies provide valuable insights into their risks and rewards.

The first insight, perhaps, is that more studies are needed to assess the effectiveness of these policies.<sup>173</sup> Although most reports indicate that jurisdictions with such policies have lowered their dismissal rates, a detailed and rigorous national study has yet to be performed. In addition, jurisdictions with no-drop policies have discovered that a

167. Wisconsin Equal Justice Task Force, *supra* note 84, at 186.

168. Buzawa & Buzawa, *supra* note 7, at 123.

169. Gwinn & O'Dell, *supra* note 13, at 1517; Minnesota Supreme Court Task Force on Gender Fairness in the Courts, *supra* note 7, at 885. In Anchorage, Alaska, for example, the contempt power of the court was used against a victim when she was jailed for refusing to testify against her batterer. Waits, *supra* note 17, at 323 n.317.

170. *Developments*, *supra* note 1, at 1541; see Ford & Regoli, *supra* note 15, at 158.

171. Cf. Ford & Regoli, *supra* note 15, at 158 (finding that by allowing victims to drop charges *after* the initial hearing and supporting them to follow through, prosecution could make victims' lives safer—but only if victims do not eventually choose to drop).

172. Domestic violence cases, for instance, receive insufficient police investigatory support. Lerman, *supra* note 22, at 29. Additionally, battered women are often given little or inaccurate information about their legal options, thus discouraging them from continuing further. See Eaton & Hyman, *supra* note 88, at 427 (indicating that victims were indirectly dissuaded from proceeding in criminal court due to unclear or incorrect information given by criminal justice personnel, including prosecutors); Ford & Regoli, *supra* note 15, at 140 (stating that victims often have unrealistic expectations about the legal process and prosecutors do not have the time to explain the process to them).

173. See Ford & Regoli, *supra* note 15, at 128.

tremendous amount of resources are needed to effectuate such policies.<sup>174</sup>

Prosecutors with experience in "victimless prosecution" have found that their rates of conviction compare favorably with other types of cases.<sup>175</sup> These prosecutors have found that, despite an initial decrease in conviction rates, successful outcomes increased over time.<sup>176</sup> Prosecutors achieve better results when they deal with victims in a sensitive manner and use specific techniques for introducing evidence when the victim is not present.<sup>177</sup> By refusing to drop charges until the initial hearing, as several jurisdictions have done, prosecutors benefit from increased plea agreements with batterers who plead guilty once they realize the state's staunch position.<sup>178</sup> As judges become conditioned to trying cases without the victim and admitting certain types of evidence under newly-argued exceptions to hearsay rules, cases become much easier to prove.<sup>179</sup> The police also contribute significantly to rates of conviction by improving evidence-gathering.<sup>180</sup> Lastly, when victim advocates counsel victims and support them in other facets of their lives, victims often become more amenable to testifying.<sup>181</sup>

Batterer retaliation represents another genuine concern. However, studies suggest that prosecution does not increase the victim's risk of being subjected to repeat violence.<sup>182</sup> 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.<sup>183</sup>

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174. See Gwinn & O'Dell, *supra* note 13, at 1514 n.38 (discussing the need for a resource intensive system where there is a no-drop policy).

175. *Id.* at 1508 (citing 88% conviction rate in San Diego City Attorney's Office); Sandra G. Boodman, *What Can Be Done?*, Wash. Post, June 28, 1994, at Z11 (noting 87% conviction rate in Duluth, Minnesota).

176. During the first six months of a policy that aggressively prosecuted offenders without victim assistance, the City Attorney's office won only twice in 17 trials. Today, although almost 60% of their cases involve uncooperative or absent victims, conviction rates are at 88%. Gwinn & O'Dell, *supra* note 13, at 1508.

177. See *id.* at 1516-17; cf. *supra* notes 66-68 and accompanying text (discussing procedures used by San Francisco District Attorney's Office).

178. See *supra* note 56, 150, and accompanying text.

179. See Gwinn & O'Dell, *supra* note 13, at 1507 (stating that although 911 tapes were not allowed in the first few cases, judges eventually began admitting them and "the true emotion of the crime started to be felt in the courtrooms in San Diego as never before").

180. See *id.* at 1513.

181. *Id.* at 1515 (stating that prosecutors throughout the country are "finding much greater success in obtaining convictions and in working with victims once they remove the responsibility for the criminal case from the victim"); see Asmus et al., *supra* note 72, at 131.

182. David A. Ford & Mary Jean Regoli, *Preventive Impacts of Policies for Prosecuting Wife Batterers*, in *Domestic Violence: The Changing Criminal Justice Response*, *supra* note 1, at 181, 193.

183. *Id.*

Experience in jurisdictions that have adopted no-drop policies has also shown that the need for conviction can be balanced with victim autonomy. For example, prosecutors in San Diego and Duluth have developed expertise in trying domestic violence cases, and routinely win cases without the aid of victim testimony.<sup>184</sup> In addition, when victims receive support from victim advocates and are relieved of the responsibility to press complaints forward, more victims end up cooperating with the state.<sup>185</sup> In all, except for the most critical of cases, where all other avenues of resolution have been exhausted and the gravity of the harm justifies it, increased victim support and special prosecutorial techniques obviate the need for punitive measures.<sup>186</sup>

#### IV. NO-DROP POLICIES AND A COORDINATED RESPONSE TO DOMESTIC VIOLENCE

This part argues that the benefits of no-drop policies outweigh their risks and calls on states to adopt statutory measures to promote the adoption of no-drop policies in a manner that effectuates existing legislative intent to treat domestic violence as a serious crime.

##### A. Rewards of No-Drop Policies

No-drop prosecution policies, as designed, serve to bridge the gap between statutory commands and everyday enforcement.<sup>187</sup> As designed, they aim to refine prosecutors' discretion in a manner that favors vigorous prosecution<sup>188</sup> and counteract historical and organizational biases towards inaction. Under no-drop policies, prosecutors are compelled to look at each case carefully instead of relying on assumptions about what victims will do next.<sup>189</sup> As experience has demonstrated, victims' reluctance to proceed may stem as much from the treatment they receive from the criminal justice system as the treatment they receive from their batterers.<sup>190</sup>

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184. See *supra* notes 47-48, 64-65, and accompanying text. The San Diego City Attorney's office requested arrest warrants on eight cases between 1988 to 1993. The office had two incidents where the victim was jailed overnight. Gwinn & O'Dell, *supra* note 13, at 1518. The City Attorney's office believes that by vigorously pursuing cases even to the point of incarceration, it has maintained credibility with the defense bar and has achieved convictions in over 2000 cases each year. *Id.*

185. See Gwinn & O'Dell, *supra* note 13, at 1514-15; *supra* notes 146-48 and accompanying text.

186. Gwinn & O'Dell, *supra* note 14, at 1518; cf. Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *supra* note 7, at 887 (stating that where the prosecutor tells the victim at the outset that she is not responsible for the decision-making and convinces the victim that the prosecutor will be her advocate, secondary victimization may be avoided).

187. See Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *supra* note 7, at 889; *supra* notes 32-33 and accompanying text.

188. See *supra* note 33 and accompanying text.

189. See *supra* notes 19, 47, 64-65, and accompanying text.

190. See Lerman, *supra* note 22, at 10; *supra* discussion part II.A.

In addition, by emphasizing prosecutorial control of decisionmaking, no-drop policies communicate the message that domestic violence is a crime against the public order, not just the victim.<sup>191</sup> The use of such policies acknowledges the exigencies and constraints faced by a battered woman, and removes the onus on her to proceed.<sup>192</sup>

Although the application of no-drop policies has resulted in instances of revictimization by the courts, other jurisdictions have identified effective procedures for minimizing these risks.<sup>193</sup> 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.<sup>194</sup>

Arguments that no-drop policies subvert individualized justice fail to account for the fact that no-drop policies only presume continued prosecution; they do not mandate it.<sup>195</sup> No-drop policies help to refine the exercise of prosecutorial discretion in a way that reflects increased *social commitment* to intervening in cases of woman battering.<sup>196</sup>

Arguments that these policies could lead to neglect of cases involving more serious crimes similarly disregard an important reality—the substantial practice of undercharging cases of domestic violence.<sup>197</sup> For example, one national study indicates that more than one-third of misdemeanor domestic violence cases would have been charged as felonies if perpetrated by a stranger.<sup>198</sup> Of the remaining cases, forty-two percent resulted in injury to the victim—a higher injury rate than for felony rape, robbery, or aggravated assault combined.<sup>199</sup> In addi-

191. See *supra* note 32 and accompanying text.

192. See discussion *supra* part II.B.

193. See *supra* notes 175-81 and accompanying text; see also Gwinn & O'Dell, *supra* note 14, at 1517 (finding that through the use of their protocol, they have maintained an 88% conviction rate and, during the past 10 years, have only jailed two victims despite trying 400-500 cases a month).

194. Cf. Angela West, *Prosecutorial Activism: Confronting Heterosexism in a Lesbian Battering Case*, 15 Harv. Women's L.J. 249, 255 (1992) ("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 . . .").

195. See *supra* notes 19, 33, and accompanying text.

196. See *supra* note 32 and accompanying text.

197. See, e.g., Florida Gender Bias Study, *supra* note 9, at 859; Bettina Boxall & Frederick M. Muir, *Prosecutors Taking Harder Line Toward Spouse Abuse*, L.A. Times, July 11, 1994, at 1A1 (stating that 90% of the county's spouse abuse cases are filed as misdemeanors); see also Eaton & Hyman, 88, at 461-62 (reviewing advocates' criticisms that prosecutors reduce or minimize charges in too many cases); Rene Lynch, *Spousal Abuse Is Rarely Prosecuted as a Felony in O.C.*, L.A. Times, June 26, 1994, at A1 (finding that a significant amount of felony arrests are reduced to misdemeanor charges by prosecutors).

198. Buzawa & Buzawa, *supra* note 7, at 56.

199. *Id.*; see also Hart, *supra* note 84, at 626 (stating that law enforcement personnel "routinely classify] domestic assault as misdemeanors even though the criminal conduct involved actually included bodily injury as serious or more serious than 90% of all rapes, robberies, and aggravated assaults").

tion, experience has shown that where domestic violence is involved, minor assaults often escalate in frequency and severity, sometimes leading to murder.<sup>200</sup> Thus, prosecutors who try domestic violence cases pursue and may thwart some of the most serious and potentially lethal crimes in the system.<sup>201</sup>

### B. *A Proposed State Response*

In light of the benefits of no-drop policies, states should adopt measures to promote their use. Statutory measures promoting no-drop policies should direct state, county, and city prosecutors to develop and implement written protocols that address procedures for: (1) providing victim support; (2) handling withdrawal of victim cooperation; (3) using subpoenas for victims; and (4) gathering corroborating evidence exclusive of the victim's testimony.<sup>202</sup> In contrast to a statement of policy encouraging the use of no-drop policies,<sup>203</sup> measures requiring the development of a written protocol obligate prosecutors to coordinate with community service providers and law enforcement.<sup>204</sup>

State measures should also provide for compliance oversight by a task force or commission on domestic violence.<sup>205</sup> In light of the fact that the theoretical check on a prosecutor's exercise of discretion is public scrutiny,<sup>206</sup> this measure merely serves to institutionalize this oversight by providing an avenue for community members to actively participate.

States should further support the adoption of no-drop policies by setting aside technical assistance grants for prosecutor's offices whose plans meet certain defined requirements.<sup>207</sup> Recipients may be de-

200. See *Developments, supra* note 1, at 1557 (finding that without early intervention, battering episodes frequently lead to more serious assaults and sometimes murder); Stark & Flitcraft, *supra* note 6, at 140 (discussing high frequency of assaults on battered women as tracked through emergency room visits).

201. The undercharging of domestic abuse cases clearly presents yet another example of prosecutors who do not take these cases seriously. See Eaton & Hyman, *supra* note 88, at 462. Although the problem calls out for further examination, it is also beyond the reasonable scope of this Note. For a brief synopsis of the implications of undercharging, see Ford & Regoli, *supra* note 15, at 160 n.2.

202. See discussion *supra* part I.B. (discussing legislation concerning no-drop policies).

203. See *supra* note 70 and accompanying text.

204. A coordinated community response to domestic violence serves as the current model for effectively ending the cycle of violence. *Developments, supra* note 1, at 1550.

205. Cf. Cal. Penal Code § 14142 (Supp. 1994) (establishing county domestic violence task forces); Maine Rev. Stat. Ann. 19 § 770-b (Supp. 1994) (establishing Maine Commission on Domestic Abuse); N.Y. Exec. Law § 575 (McKinney's 1993) (establishing New York state office for the prevention of domestic violence).

206. Goldstein, *supra* note 92, at 10; LaFave & Israel, *supra* note 7, § 13.3(g).

207. Cf. Ca. Penal Code § 273.82 (West Supp. 1994) (setting aside funds for spousal abuser prosecution units that use vertical prosecution measures); Wash. Rev. Code

defined as those offices that have developed plans in conjunction with community-based victim service providers, offices that participate in community roundtables on domestic violence, or offices that provide in-service training to police on reporting and gathering evidence. Through the use of such grants, the state minimizes the possibility of overburdening prosecutors' offices and provides an incentive for prosecutors to work cooperatively with community groups and other justice personnel.

#### V. CONCLUSION

Battering "is a way of 'doing power' in a relationship,' an effort by the batterer to control the woman who is the recipient of the violence."<sup>208</sup> By dismissing cases simply because a victim requests it, prosecutors allow batterers to extend their power and control into the courtroom. No-drop policies have been used in a number of jurisdictions throughout the country and have effected positive changes in the attitudes of victims and justice personnel concerning the role of criminal prosecution in combatting domestic violence. Most importantly, no-drop policies close the gap between the statutory promise of protection for battered women and the justice they receive.

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Ann. § 70.123.40 (1992) (setting aside grants for use to develop protocols among agencies).

208. Mahoney, *supra* note 1, at 53 (footnote omitted).

