

4-26-2023

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Recommended Citation

Nancy Simpson, *Benefits and Drawbacks of No-Drop Policies and Evidence-Based Prosecution*, 26 RICH. PUB. INT. L. REV. 141 (2023).

Available at: <https://scholarship.richmond.edu/pilr/vol26/iss3/5>

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BENEFITS AND DRAWBACKS OF NO-DROP POLICIES AND
EVIDENCE-BASED PROSECUTION

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ABSTRACT

In order to combat the massive threat that domestic violence poses to public safety, prosecutors' offices across America have enacted no-drop policies requiring prosecutors to seek a guilty verdict on all domestic violence cases. However, for many and varied reasons, victims of domestic violence are often hesitant to testify against their abusers in court proceedings. Evidence-based prosecution, sometimes called victimless prosecution, has become the goal for many prosecutors seeking to hold abusers accountable when the victim does not want to testify. However, there can be practical barriers to successful evidence-based prosecutions, which, when combined with strict no-drop policies, leave prosecutors no option but to force reluctant victims to testify. This article discusses the interplay between well-intentioned no-drop policies, the practical limitations to evidence-based prosecution, and the effects of these policies on the victims they seek to protect.

INTRODUCTION

At first glance, no-drop policies appear to be an ideal way to move forward in domestic violence cases without the victim's testimony. Typically reliant on evidence-based prosecution, no-drop policies encourage or require prosecutors to proceed to trial on all domestic violence matters, even where the victim is uncooperative or does not wish to testify. As prosecuting domestic violence became more common in the late 1980s and early 1990s, evidence-based prosecution gained popularity.¹ Coupled with the cultural shift from seeing domestic violence as a family matter to encouraging state intervention, as well as emerging knowledge about the control abusers often exert over their victims, the rise of evidence-based prosecution spawned a proliferation of no-drop policies. Prosecutors' offices began implementing no-drop policies with the hope that abusers could be brought to justice even if they had frightened their victims out of testifying. Viewed in the best light, no-drop policies are a way to protect victims and deter abusers from avoiding the consequences of their actions.

However, in practice, no-drop policies can have more negative than positive ramifications. Evidence-based prosecutions, upon which no-drop policies are heavily reliant, can sometimes be untenable for line prosecutors' day-to-day practice. Depending on the severity of the current instance of abuse and the diligence of the responding officers, prosecutors may lack enough

¹ Lawrence Busching, *Rethinking Strategies for Prosecution of Domestic Violence in the Wake of Crawford*, 71 BROOK. L. REV. 391, 392-93 (2005).

evidence to prove even probable cause, much less guilt beyond a reasonable doubt. Thus, in offices with strict, or “hard” no-drop policies, when victims are uncooperative and there is insufficient non-testimonial evidence to support a conviction, line prosecutors are often forced to make unwilling victims testify. As this article will discuss, forcing prosecutions forward at the expense of the unwilling victim is harmful not only to the victim herself,² but to the community, the prosecutor’s office, and even to the abuser. Blanket policies mandating no-drop prosecution, even with uncooperative witnesses, should be replaced with individual-level discretion on whether to move forward with a case. This involves trauma-informed knowledge about the outcomes of mandatory prosecution versus dropping charges against abusers.

I. THE RISE OF EVIDENCE-BASED PROSECUTION

As recently as the 1970s, domestic violence in America was seen as a problem to be dealt with in the home, rather than through the criminal legal system.³ Men were viewed as well within their rights to beat their wives, and police were hesitant to respond to incidents that took place within the home and between married or cohabitating couples.⁴ However, as the women’s rights movement grew and expanded from the 1960s and 1970s into popular recognition, both the federal and state governments began to change their laws to include criminal culpability for domestic violence and spousal abuse.⁵

The grand culmination of this movement was the Violence Against Women Act (“VAWA”), passed by Congress in 1994 with the support of now-President Joseph R. Biden.⁶ VAWA sought to provide federal remedies for women who were victims of gender-based violence, but it also promoted and provided funding for states that aggressively prosecuted domestic violence cases, even misdemeanors.⁷ With the passage of VAWA, many states began pursuing domestic violence cases with a new vigor.⁸ However, a large

² Though people of all genders and sexes are victims of domestic violence, I will be referring to victims throughout this paper with typically female pronouns, as female-identifying people are statistically more likely to be victims of domestic violence compared to male-identifying folks. *Domestic Violence Statistics*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/stakeholders/domestic-violence-statistics/> (last visited Apr. 2, 2023).

³ See NANCY K. D. LEMON, *DOMESTIC VIOLENCE* L. 6-7 (5th ed. 2018).

⁴ See *id.*

⁵ See *id.* at 7.

⁶ Busching, *supra* note 1, at 392.

⁷ Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.); see Busching, *supra* note 1, at 392.

⁸ See Busching, *supra* note 1, at 392.

and obvious stumbling block for states attempting to move forward on all domestic violence cases emerged: the frequent reluctance of victims to participate in the prosecution.⁹ Unlike victims of many other crimes, victims of domestic violence are often unwilling to testify against their abusers for a number of reasons.¹⁰ Not only do many victims not wish to testify in court, but they often do not wish for the criminal charges against their abuser to go forward at all.¹¹ A victim may fear future violence in retaliation for testifying against an abuser;¹² she may be reliant on the abuser for financial support, housing, or childcare responsibilities;¹³ or she may still be in love with the abuser, trapped in the cycle of abuse, and simply not wish for him to go to jail.¹⁴

Faced with this barrier to prosecuting domestic violence cases, prosecutors' offices began seeking forms of evidence sufficient to prove domestic violence that could replace a victim's testimony at trial, and evidence-based prosecution was born.¹⁵ Prosecutors began trying domestic violence cases relying exclusively on evidence such as responding officer testimony, recordings of 911 calls, photographs or medical records of any injuries sustained by the victim, eyewitness testimony available from neighbors or children of the victim, and statements made by the defendant to officers when they arrived on-scene.¹⁶ Trying cases in this manner allowed prosecutors to proceed in domestic violence cases, and sometimes secure convictions, even without the testimony or support of the victim. Evidence-based prosecution was lauded as a success for vindicating terrified victims and securing justice against dangerous abusers.¹⁷ As recently as July 2017, the National Association of District Attorneys strongly advocated for the use of evidence-based prosecution in all domestic violence cases.¹⁸

⁹ *Id.* at 392-93.

¹⁰ *Id.*

¹¹ *Id.* at 392.

¹² *Id.* at 393.

¹³ *Id.* at 392.

¹⁴ *Id.* at 392-93.

¹⁵ *Id.* at 393.

¹⁶ See Eve S. Buzawa & Aaron D. Buzawa, *Evidence-Based Prosecution: Is It Worth the Cost?*, 12 CRIMINOLOGY & PUB. POL'Y, 491, 495 (2013).

¹⁷ Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 863-64 (1994).

¹⁸ NAT'L DIST. ATT'Y ASS'N, WOMEN PROSECUTORS SECTION, NATIONAL DOMESTIC VIOLENCE PROSECUTION BEST PRACTICES GUIDE 14-15 (2017), <https://ndaa.org/wp-content/uploads/NDAA-DV-White-Paper-FINAL-revised-July-17-2017-1.pdf>.

II. NO-DROP PROSECUTION POLICIES

As evidence-based prosecution became more common and prosecutors began securing convictions against abusers even without testimony from victims, prosecutors began seeing “victimless prosecutions,” as they had come to call them, as a best practice in the field.¹⁹ As it became clear that cases could, in fact, be resolved with a guilty verdict even without the cooperation of the victim, prosecutors began insisting that there was never a reason not to prosecute a domestic violence case if there was enough evidence to support probable cause that abuse had occurred.²⁰ Elected district and Commonwealth attorneys from across the country began implementing office-wide policies that domestic violence cases should never be “dropped,” or nolle prossed, because there always existed the possibility that the case could be won regardless of the presence or absence of victim testimony.²¹

“No-drop” prosecution policies exist in many different forms and levels of adherence. Some offices have “soft” no-drop policies, which merely encourage line prosecutors to move forward with every domestic violence case, while others have “hard” no-drop policies, which require prosecutors to pursue charges against accused abusers.²² Some offices go as far as to include no-drop domestic violence prosecution in their official written policy statements.²³ In fact, four states—Utah, Wisconsin, Florida, and Minnesota—have no-drop domestic violence prosecution enshrined as a legislative mandate.²⁴ Some offices choose, rather than having a formally written no-drop policy, to have a more general word-of-mouth requirement that domestic violence cases be pursued by any means necessary.²⁵ The decision about an office-wide no-drop philosophy is typically enacted from the top down; as a new elected top prosecutor comes into office, this policy may change and evolve over time, even within the same office. Likewise, some offices have no policy whatsoever regarding whether to pursue domestic violence prosecutions without the cooperation of the victim, leaving that decision to the discretion of the line prosecutors who handle each case.²⁶

¹⁹ Cory Adams, *Deterring Domestic Violence: Prospects for Heightened Success in the Victimless Prosecution of Domestic Violence Cases*, 11 J. CONTEMP. LEGAL ISSUES 51, 51-52 (2000).

²⁰ NAT'L DIST. ATT'Y ASS'N, *supra* note 18, at 14.

²¹ *Id.*

²² Robert C. Davis et al., *Effects of No-Drop Prosecution of Domestic Violence upon Conviction Rates*, 3 JUST. RSCH & POL'Y 1, 3 (2001).

²³ Corsilles, *supra* note 17, at 859-60.

²⁴ *Id.* at 863.

²⁵ *Id.* at 859-60.

²⁶ *Id.* at 855-56.

III. PROSECUTORS' OPTIONS IN DOMESTIC VIOLENCE CASES

Irrespective of a particular office's policy on "victimless prosecution," there is a limited set of outcomes for any given domestic violence case once it arrives at a prosecutor's office. In most instances, the best-case scenario is that the defendant agrees to plead guilty to the charge, or charges, against him. This outcome is typically achieved by plea bargaining, or agreeing to reduce the requested sentence, in advance of the trial date.²⁷ In plea bargaining, prosecutors can offer to drop one of the more serious charges if a defendant pleads guilty to a lesser charge, or if there is only one charge, a prosecutor can agree to ask for domestic violence or substance abuse counseling (or both) in lieu of jail time.

In many jurisdictions, if the defendant does not have a criminal history of domestic violence, a prosecutor can also ask the judge to withhold his or her finding in the case and, if the defendant successfully completes counseling, dismiss the charge at a later date. For example, in Virginia, the First Offender Statute allows a judge to defer disposition on a Misdemeanor Assault and Battery on a Family Member charge for two years for a defendant who has no instances of prior domestic abuse on his record.²⁸ If the defendant successfully completes any court-ordered therapy and does not acquire any new criminal charges within that two-year period, the misdemeanor charge is dismissed.²⁹

When a defendant pleads guilty, there is no trial, and thus there is no need for the victim to testify. In many cases, the abuser is ordered by the court as a term of his guilty plea to complete classes to help change his relationship with violence and become a better partner.³⁰ If the current offense is the abuser's first criminal charge for domestic violence, he often serves no jail time.³¹ For all these reasons, this outcome is best for not only the victim but also the community and the defendant, who is mandated to improve his

²⁷ *How Courts Work: Steps in a Trial Plea Bargaining*, AM. BAR ASSOC. (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining/.

²⁸ VA. STAT. §§ 18.2-57.3(A), (D) (2023).

²⁹ *Id.* at § 18.2-57.3(E).

³⁰ *See, e.g.* NAT'L INST. OF JUST., U.S. DEP'T OF JUST., PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS, AND JUDGES 54 (2009), <https://www.ojp.gov/pdffiles1/nij/225722.pdf> (stating that, in a study of domestic violence cases, a little less than half of those convicted were sent to anger management classes).

³¹ *Id.* at 48.

behavior. Many domestic violence cases that are isolated incidents do resolve in a guilty plea, because the perpetrator of the violence is seeking to avoid jail time and may feel remorse for his behavior.³²

However, many batterers are unwilling to plead guilty to domestic abuse for a plethora of reasons. Serial abusers seek control over their victims, and often do not see their behavior as wrong or criminal.³³ They do not want to allow their victims to “win” by admitting to the abuse in open court, and even when the evidence against them is overwhelming, often insist that they are innocent.³⁴ When these types of cases arise, or when a defendant otherwise refuses to plead guilty, a new set of options emerges for prosecutors. If the victim is ready and willing to go forward and testify against her abuser, the prosecutor can proceed to trial with relative confidence in a conviction and with sufficient evidence to at least establish probable cause that the incident in question did occur. When a victim cooperates with the prosecution of her abuser, the prosecutor’s job is made easier.

In the case of a reluctant victim, however, the prosecutor often has a more difficult choice to make. She can decide to: 1) move forward with the case using evidence-based prosecution, relying only on evidence outside of the victim’s testimony; 2) move forward with the case, but call the victim as a witness despite her reluctance; or 3) “drop” or *nolle prosequere* the charges against the defendant, ending the judicial system’s involvement with the matter. Each of these options has benefits and drawbacks for the victim, the community the prosecutor is charged with representing, and the defendant.

A. OPTION 1: EVIDENCE-BASED PROSECUTION

The first option that many prosecutors consider in the case of a reluctant victim is evidence-based prosecution.³⁵ As discussed above, evidence-based prosecution relies on admitting at trial such evidence like medical records, injury photographs, officer testimony, other witness testimony, or 911 calls made by the victim or witnesses.³⁶ Evidence-based prosecution is an excellent option in many domestic violence cases and offers several benefits for prosecutors. It allows the case against the abuser to move forward without forcing the victim to testify, which keeps her safe from retaliatory abuse and

³² See *id.* at 44.

³³ See generally LUNDY BANCROFT, *WHY DOES HE DO THAT?: INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN* (2002).

³⁴ See generally *id.*

³⁵ See *supra* Section I.

³⁶ Buzawa & Buzawa, *supra* note 16 (stating that “[u]nder an evidence-based approach, a victim’s direct testimony is only one more piece of evidence and her desires with regard to moving forward with prosecution is important only as it affects a prosecutor’s ability to garner a successful conviction.”).

also avoids re-traumatizing her by not forcing her to relive the incident in open court.³⁷ It also meets the prosecutor's goal of achieving consequences for the abuser, whether they end up with jail time, counseling, or both.³⁸

Despite the benefits, evidence-based prosecution is not without its drawbacks. Although not forcing the victim to testify is often seen as a method of keeping her safe from retaliatory abuse, if the case goes forward at all, even without her testimony, an abuser may still feel that the prosecution is her fault for calling the police or refusing to drop the charges and may re-victimize her anyway.³⁹ One study conducted on a trial group showed that neither trial nor conviction were the most successful ways to prevent repeat victimization; rather, the most effective factors preventing abusers from recidivism were judicial oversight, like court-mandated counseling or therapy, and the ability of the victim to control the course of the prosecution.⁴⁰

Additionally, there can be significant evidentiary barriers to evidence-based prosecution. Any photographs or medical records introduced at trial require authentication, which means more witnesses have to be subpoenaed to appear and testify.⁴¹ 911 calls made during or shortly after the domestic violence incident, a centerpiece of evidence-based prosecution, can only be admitted if they meet a hearsay exception.⁴² The two most common hearsay exceptions under which 911 calls may be admitted are 1) the present sense impression exception, which allows hearsay evidence that is describing something as it happened in real-time, and 2) the excited utterance exception, which allows hearsay evidence that is blurted out in fear or excitement as an event is happening or shortly thereafter.⁴³ These exceptions do not, however, allow the 911 calls to be automatically entered into evidence; the prosecutor must argue to the judge why the specific 911 call in question meets either of the hearsay exceptions, and the attorney for the defendant has the opportunity to argue why it does not. If a relied-upon 911 call is excluded from evidence at trial, it often creates an insurmountable barrier to proving guilt beyond a reasonable doubt.

An additional hearsay evidentiary barrier exists regarding officer testimony. Prosecutors often call the officer or officers who responded to the scene of the domestic violence incident and made the arrest as witnesses for

³⁷ Busching, *supra* note 1, at 395.

³⁸ *Id.*

³⁹ Buzawa & Buzawa, *supra* note 16, at 496, 498.

⁴⁰ *Id.* at 498.

⁴¹ Adams, *supra* note 19, at 51-53; Corsilles, *supra* note 17, at 863-64.

⁴² Adams, *supra* note 41, at 53-54.

⁴³ Busching, *supra* note 1, at 394; VA. R. EVID. 2:803.

the prosecution.⁴⁴ However, officers usually arrive after the violence has subsided and must rely only on their observations and the statements of the parties involved to determine what happened.⁴⁵ Because they typically do not witness the actual act of domestic violence, instead arriving after it has concluded, they usually cannot testify to any firsthand observation of the abusive incident.

Additionally, officers cannot convey to the court any information about what the victim said to them upon their arrival, unless the victim's statements meet one of the hearsay exceptions discussed above. This means that if the officer arrives on-scene and the victim has a black eye and says, "My husband punched me in the face," all the officer may say in court is that the victim appeared to have an eye injury and that based on her statements, he proceeded to arrest her husband. However, without any evidence before the court that the husband's punch was the intentional cause of the victim's black eye, there is reasonable doubt as to the husband's guilt.

A final evidentiary concern regarding evidence-based prosecution is simply lack of evidence. If the domestic violence incident did not result in any noticeable injuries, then there will be no injury photographs or medical records upon which the prosecutor can rely to prove her case. Likewise, if an officer responds to a call from a neighbor about a domestic violence incident, but upon arrival the victim refuses to speak to him about the incident, or says she injured herself somehow, there is very little he can testify to at trial. As one scholar notes, the "viability of such a prosecution still depends on the admissibility of various components of the police report."⁴⁶ For these reasons, although evidence-based prosecution can be successful and result in a conviction in some instances, it certainly has its drawbacks and cannot always be considered a reliable or realistic avenue for securing a domestic violence conviction.

B. OPTION 2: FORCED VICTIM TESTIMONY

When a prosecutor feels she needs the victim's testimony to meet the evidentiary burden to prove her case and secure a conviction, in some instances, a prosecutor can call a reluctant victim as a witness despite the victim's misgivings. This, however, should only be done if the prosecutor is confident that the victim will tell the truth on the stand. As an officer of the court, the prosecutor has a duty of candor to the tribunal, or trial court, and allowing a victim to testify whom the prosecutor knows will fail to tell the truth is

⁴⁴ See generally WOMEN PROSECUTORS SECTION, *supra* note 20.

⁴⁵ See generally *id.*

⁴⁶ Adams, *supra* note 19, at 56.

considered a violation of professional ethics.⁴⁷

When a prosecutor is fairly confident that the victim will tell the truth on the witness stand, forcing the victim to testify has the benefit of still allowing the prosecutor the opportunity to convict an abuser, theoretically making both the victim and the community at large safer.⁴⁸ However, there are a number of significant drawbacks to calling a reluctant victim to testify. This strategy often produces negative consequences for the victim, the community, the abuser, and the prosecutor's office as a whole.⁴⁹

One major and obvious drawback to calling a reluctant victim as a witness is the very real possibility that she will suffer retaliatory abuse for testifying against her abuser.⁵⁰ If a victim is reluctant to testify, she may be still involved with her abuser, whether in co-parenting a child, cohabitating, or continuing their relationship despite the abuse, which is very common.⁵¹ When a witness testifies in any criminal trial, the defendant has a constitutional right to hear the testimony and "confront," or face, his accuser.⁵² This means that when the victim testifies, the abuser-defendant watches and hears the entirety of the testimony. If he does not like what he hears, and feels that she has embarrassed him or led to his eventual criminal conviction, he may take that anger out on her in the form of continued violence and abuse.⁵³

Relatedly, despite a prosecutor's belief that a victim will testify truthfully, many victims end up recanting or lying on the stand about their abuse. Victims may be frightened by the prospect of having to describe the abuse to the abuser's face, or may be overwhelmed by the entire court proceeding process, which can lead them to panic and lie about their abuse.⁵⁴ Additionally, although victims may intend to be truthful before they testify, once they are sitting in the chair on the witness stand, with a microphone in their face and a hostile defense attorney questioning their story, they may become reluctant

⁴⁷ MODEL RULES OF PRO. CONDUCT R. 3.3 (AM. BAR ASS'N 1983).

⁴⁸ Busching, *supra* note 1, at 398-99.

⁴⁹ See generally Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. UNIV. J. GENDER SOC. POL'Y & L. 465, 483 (2003); Busching, *supra* note 1, at 396; see also Thomas L. Kirsch, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 417 (2001).

⁵⁰ Epstein et al., *supra* note 49, at 476.

⁵¹ See *Why do Victims Stay?*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/why-do-victims-stay> (last visited Mar. 28, 2023).

⁵² See U.S. CONST. amend. VI.

⁵³ Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women's Assessment of the Criminal Processing System's Responses*, 13 VIOLENCE & VICTIMS 251, 260-62 (1998) (noting that in this study fear of the batterer was the highest-ranking reason for not cooperating with the prosecution and for reluctance to follow through with the court case).

⁵⁴ Corsilles, *supra* note 17, at 866-70.

to relive the traumatic event of their abuse in front of so many people.⁵⁵ If the victim does end up lying about their abuse on the witness stand, this has the collateral consequence of communicating to the abuser-defendant that he can intimidate or bully his victim into lying about her abuse and never face legal consequences for his actions, perpetuating the cycle of abuse.

Further, forcing a victim to testify against her will strips her of what little agency she has in her situation. One of the trademark tactics of serial abusers is taking away their victim's agency by controlling them, perpetrating violence on them, and refusing to allow them to leave the situation or make any choices for themselves.⁵⁶ Some prosecutors feel that by going forward with a prosecution, despite the victim's reluctance, and removing her abuser's influence from the situation, that they are actually helping to restore victims' agency.⁵⁷ However, studies show that forcing victims to testify in fact has the opposite effect, and only serves to re-victimize and re-traumatize the victim by not allowing her a say in how the case proceeds.⁵⁸ Victims report feeling safer and experiencing less pre- and post-trial violence from their abusers when they have a voice in the course of the prosecution.⁵⁹

In addition to the negative consequences of forced victim testimony for both the victim, who is re-traumatized and stripped of her agency, and for the abuser, who often gets off without consequence and becomes emboldened to repeat his abusive behavior, there are negative consequences for the community the prosecutor seeks to serve. If victims feel as though they are not respected or empowered by the criminal legal system, that negative perception and mistrust of the police and prosecutors will spread throughout the community, making future reporting of domestic violence for both the specific victim at hand and other victims less common.⁶⁰ Additionally, if the victim's testimony fails to result in the conviction of the abuser-defendant, the message to the community will be that the criminal legal system is unable to secure justice. These seeds of mistrust and reluctance to report are hard to eradicate from the community and will act in direct opposition to prosecutors' mandate to protect and seek justice for all constituents within their communities.

⁵⁵ *Id.*

⁵⁶ *See generally* BANCROFT, *supra* note 33.

⁵⁷ *See generally* Busching, *supra* note 1 (describing the motivation of prosecutors in domestic violence cases).

⁵⁸ Davis et al., *supra* note 22, at 3-4.

⁵⁹ *Id.*

⁶⁰ Epstein et al., *supra* note 49, at 469.

C. OPTION 3: “DROP” THE CHARGES

The final option available to prosecutors who are unable to secure a guilty plea is to request a *nolle prosequi*, or “drop” or nolle prosequi the charges.⁶¹ In some jurisdictions, the choice of whether or not to proceed with charges is reserved solely for the complaining victim.⁶² In other jurisdictions, only the prosecutor to whom the case has been assigned has discretion as to whether or not to move forward, and in others, the prosecutor and victim work as a team to determine whether or not to proceed on charges against the abuser-defendant.⁶³

When a prosecutor moves to nolle prosequi charges against a defendant, those charges are dismissed from the court’s docket.⁶⁴ However, unlike when charges are dismissed for cause or pursuant to a finding of not guilty, when charges are nolle prosequi they may be reinstated against the defendant at any time within the statute of limitations.⁶⁵ Although the charges are “gone” for the present moment, prosecutors still have the power to bring them back.⁶⁶ Dropping legitimate domestic abuse charges can appear at first glance as a failure by the prosecutor to hold the abuser-defendant responsible for his actions, but declining the option to move forward can in many instances have benefits for the victim and the community the prosecutor serves.

One main and compelling benefit to be gained from dropping legitimate domestic violence charges at the behest of the victims is the renewed sense of agency they are able to gain from having control over how their case proceeds.⁶⁷ When in so many other aspects of their lives, all control is exerted by their abuser, having the power to decide not to prosecute, while unhelpful to victims in the short-term, can be vastly beneficial for their long-term safety and future ability to leave their abusers.⁶⁸ Along the same lines, if a victim feels as though she is in control of the proceedings, and nothing bad will happen to her abuser without her consent, she is more likely to continue to report instances of domestic violence to the police. This creates a greater likelihood that the abuser will be convicted eventually, even if he is not convicted

⁶¹ See *Nolle Prosequi*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁶² See generally Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 567 (1999) (discussing the advantages and disadvantages of victim-centered decision making in the prosecutorial process).

⁶³ See Rodney F. Kingsnorth & Randall C. Macintosh, *Domestic Violence: Predictors of Victim Support for Official Action*, 21 JUST. QUARTERLY 301, 302 (2004).

⁶⁴ See *Nolle prosequi*, *supra* note 61.

⁶⁵ See *id.*

⁶⁶ 22A C.J.S. *Effect of Nolle Prosequi* § 280 (2023).

⁶⁷ Davis et al., *supra* note 22, at 3.

⁶⁸ Epstein et al., *supra* note 49, at 470.

of the initial act of violence that led the victim to the prosecutor's office.⁶⁹ Statistically speaking, the victim, especially the victim who is still reluctant to move forward on charges against her abuser, is very likely to continue her relationship with the abuser and be subjected to the cycle of abuse.⁷⁰ If she knows that when the next violent incident occurs, she can involve the criminal legal system while reserving the right to change her mind, she will be more likely to continue to engage with that system.⁷¹

Additionally, if the charges against the abuser are nolle prossed, and several days, weeks, or months later the victim changes her mind and decides she does want to move forward, those charges can be reinstated by the prosecutor. If, however, the prosecutor presses on with the charges despite the victim's initial reluctance and fails to get a conviction, that is the end of the line. Once a not guilty verdict is reached, those charges are forever gone; even if the victim now wishes to testify, double jeopardy protects her abuser from becoming a defendant on those charges again.⁷²

There are some major downsides to nolle crossing domestic violence charges simply because a victim does not wish to move forward as well. The initial and most obvious downside is that in the moment, the abuser-defendant walks free, having faced no legal repercussions for his abuse. He then returns to the community, and in all likelihood to his victim's life, newly emboldened to commit future acts of violence with apparent impunity. This puts the victim at a high risk for further acts of violence, and because serial abusers tend to have more than one victim over the course of a lifetime,⁷³ also endangers the community as a whole. Overall, however, in many situations, given the specific facts of the case at hand, dropping the charges against an abuser-defendant can be the wisest and most safety-conscious choice a prosecutor can make.

IV. HARD NO-DROP POLICIES IN PRACTICE: WHEN FORCED TESTIMONY IS THE ONLY OPTION

When a victim does not wish to move forward with legitimate charges against her abuser, the prosecutor must perform a tricky and complex

⁶⁹ Kingsnorth & Macintosh, *supra* note 63.

⁷⁰ *Why Do Victims Stay?*, *supra* note 51.

⁷¹ Epstein et al., *supra* note 49, at 490.

⁷² See *Double Jeopardy*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁷³ See generally BANCROFT, *supra* note 33.

balancing act to decide whether option 1, option 2, or option 3 provides the most benefit to all parties involved, as well as to the community. However, in certain prosecutors' offices across America, option 3 is eliminated from line prosecutors' arsenal of choices, leaving them to decide between pursuing evidence-based prosecution or forced victim testimony. Offices in which a hard no-drop policy is established and enforced require their line prosecutors to move forward with domestic violence charges in 100% of cases that come through their offices if at all possible, with the goal of securing as many domestic violence convictions as possible and preventing abusers' witness intimidation from insulating them to the consequences of their actions.⁷⁴

This ensures that effectively, prosecutors must either build a case based exclusively on non-testimonial evidence or summon a reluctant victim to the witness stand. Upon closer examination of how these hard no-drop policies play out in the day-to-day, however, the evidentiary burdens on proceeding with evidence-based prosecution, or option 1, often make it an unattainable solution.⁷⁵ Many prosecutors, then, are forced to resort to option 2, calling a reluctant victim as a witness, and incurring all the negative consequences that come along with this course of action.

As discussed *supra* in Section III, evidence-based prosecution builds its entire case on a body of evidence that can be difficult to successfully introduce into the record at trial.⁷⁶ In addition to these legal evidentiary hindrances, practical concerns also limit prosecutors' ability to admit relevant and probative evidence of domestic violence at trial.⁷⁷ In some prosecutors' offices, communication between police officers and prosecutors is limited to a brief meeting mere minutes before the trial time, meaning prosecutors often have little advance knowledge of what testimony the arresting officers will be able to provide and almost no time to prepare them as witnesses.

Line prosecutors also often face barriers to collecting and reviewing evidence collected by police in a timely manner. Photographs, medical records, and 911 calls often have to be requested specifically by the prosecutor for each trial, and sometimes from several different agencies or departments.⁷⁸ When line prosecutors manage several dockets each week with many cases per docket, requesting, keeping track of, and reviewing all the relevant

⁷⁴ Davis et al., *supra* note 22, at 2-3.

⁷⁵ See generally Adams, *supra* note 19, at 51-52.

⁷⁶ *Id.* at 51-56.

⁷⁷ Jill T. Messing, *Evidence-Based Prosecution of Intimate Partner Violence in the Post-Crawford Era: A Single-City Study of the Factors Leading to Prosecution*, 60 CRIME & DELINQUENCY 238, 240-54 (2014).

⁷⁸ *Id.*

evidence in advance of each domestic violence trial can be incredibly challenging.⁷⁹ This results in prosecutors having to triage their cases and focus only on the most egregious violence or the most cooperative victims.

Due to these inherent difficulties in securing sufficient evidence to move forward with evidence-based prosecution, but also being prevented from dropping the charges, prosecutors often feel they have no choice but to call a recalcitrant victim as a witness, since they would not otherwise have enough evidence to prove their case beyond a reasonable doubt. This creates the potential for all of the significant downsides to forced witness testimony, as discussed *supra* in Section III, to become pervasive within the prosecutors' office as a whole and to permeate into the community it serves.⁸⁰ Additionally, line prosecutors also face the potential ire of judges if they frequently bring cases to trial that have obvious evidentiary flaws or rely exclusively on the testimony of victims who end up recanting or changing their testimony. Prosecutors are placed in a difficult position when they are denied the discretion to nolle prosequere charges they feel lack the proper evidence to prove beyond a reasonable doubt. Trying questionable cases can potentially damage their credibility in front of judges, limiting them when they do move forward with a solid domestic violence case.

V. THE IMPORTANCE OF THE INDIVIDUAL PROSECUTOR'S DISCRETION

Though hard no-drop policies have the desirable goal of keeping the community safe by preventing witness intimidation and securing convictions against abuser-defendants,⁸¹ in practice these policies can end up requiring line prosecutors to frequently force victims to testify against their abusers involuntarily, which creates negative consequences for all parties involved in the case as well as the community. In many situations, dropping the charges against the abuser-defendant actually results in better outcomes than proceeding with a trial that is unlikely to produce a guilty verdict and highly likely to re-traumatize the victim, further destroy her sense of agency, and spread mistrust of the prosecutors' office in the community. For these reasons, hard no-drop policies implemented office-wide by elected prosecutors should be replaced with broad discretion on the part of line prosecutors to determine

⁷⁹ See generally AM. PROSECUTORS RSCH INST., HOW MANY CASES SHOULD A PROSECUTOR HANDLE: RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT (2002).

⁸⁰ See *supra* Section III.

⁸¹ See Davis et al., *supra* note 22, at 3-4.

whether option 1, option 2, or even option 3 is the best path forward for each individual case in which a domestic violence victim does not wish to testify.

While allowing prosecutors the discretion to drop charges results in fewer day-of convictions, it enables the prosecutor's office to become a true resource to victims rather than a cudgel with which to beat them into moving forward on every case. For example, one study stated that in jurisdictions with either hard or soft no-drop policies, only 10-34% of domestic violence charges were dropped, while in jurisdictions without no-drop policies, as many as 50-80% of domestic violence charges were dropped.⁸² At first glance, this would seem like an excellent reason to implement no-drop policies. However, moving forward with the case does not always result in a conviction.⁸³

Even if it does result in a conviction, the conviction in and of itself is unlikely to protect the victim, or future victims, from abuse.⁸⁴ Studies show that court outcomes, whether a guilty plea, a guilty finding, or a not guilty finding, do not have substantial impacts on domestic violence recidivism.⁸⁵ Rather, the most relevant factors in reducing recidivism have been shown to be judicial oversight of an abuser-defendant and, importantly, the victim feeling in control of the prosecution, whichever way it ends up resolving.⁸⁶ Further, victims reported lower levels of both pre- and post-trial violence and feeling overall safer at home when they had a say in the direction of their abusers' prosecution.⁸⁷ Victims are also more likely to re-engage with the criminal legal system when future acts of violence occur if they feel that their wishes will be heard and respected throughout the course of the prosecution.⁸⁸ Overall, victim-centered prosecutions, which allow prosecutors to drop the charges if they feel it is the appropriate choice for the individual case, result in higher levels of victim safety, victim re-engagement with the criminal legal system in the future, and overall community willingness to report domestic violence incidents and seek help.⁸⁹

⁸² Corsilles, *supra* note 17, at 873.

⁸³ *Id.* at 875.

⁸⁴ Buzawa & Buzawa, *supra* note 16, at 498.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Davis et al., *supra* note 22, at 3.

⁸⁸ Kingsnorth & Macintosh, *supra* note 63, at 324-25.

⁸⁹ Mary A. Finn, *Evidence-Based and Victim-Centered Prosecutorial Policies: Examination of Deterrent and Therapeutic Jurisprudence Effects on Domestic Violence*, 12 CRIMINOLOGY & PUB. POL'Y 443, 466 (2013); *see generally* KARIN V. RHODES ET AL., VICTIM PARTICIPATION IN INTIMATE PARTNER VIOLENCE PROSECUTION: IMPLICATIONS FOR SAFETY, NAT'L INST. OF JUST. (2011), <https://www.ojp.gov/pdffiles1/nij/grants/235284.pdf>.

CONCLUSION

In conclusion, while hard no-drop policies aim to protect victims and communities by requiring prosecutors to move forward on all domestic violence charges, line prosecutors can actually better serve victims, the community, and abuser-defendants if they are allowed to exercise the discretion to drop charges against abusers in certain situations. While dropping charges against abuser-defendants does not result in same-day consequences for their actions, it enables prosecutors to account for the cycle of abuse, build up victims' sense of agency, and become a resource for victims in future prosecutions. This, in turn, will help ensure the long-term safety of victims and their communities rather than focusing exclusively on short-term solutions to domestic violence.

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