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Voiceless Victims: Addressing the Issues of Prosecuting Intimate Partner Violence Without Victim Cooperation

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VOICELESS VICTIMS
Addressing the Issues of Prosecuting Intimate Partner Violence without Victim
Cooperation

Written By: Carolyn Powers

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“Oh my god, I love you. I haven’t been able to call you... I’m goin’ to the Supreme Court... you gotta’ be there... you gotta sit up front and tell them that what you wrote in the report was a lie... Oh my god, let me talk to my son... hi, baby... I don’t wanna’ be here.”¹

Perhaps the most common, complex, and difficult crimes to prosecute are those which involve intimate partner violence (referred to as IPV). Almost paradoxical in nature, prosecuting crimes of IPV raises a host of ethical, evidentiary, and moral issues. Unlike other crimes of violence, the interests and objectives of the State and the victim² are often in conflict.

The role of the prosecutor, as a “minister of justice,” is to serve the community, preserve public safety, and pursue just remedies where a crime has been committed. This is consistent with the main objectives of criminal law, which are to define, control, and punish unacceptable societal behavior. Unfortunately, however, the prosecutor’s objective in addressing crimes of IPV may be directly adverse to the victim’s wishes. Frequently, victims of IPV do not wish to pursue charges; even if initially cooperative, many victims refuse to cooperate with the State because of emotional, financial, and psychological ties to the perpetrator.

Where most IPV cases involve uncooperative or even hostile complainants, the prosecutor must address several questions if they intend to proceed with prosecution. The most pressing of these is often, “Can I prove this case beyond a reasonable doubt without the victim’s cooperation?” If yes, the State may proceed with an evidence-based prosecution without the victim. However, if no, the prosecutor must decide if it is appropriate to subpoena a victim, escort the victim to court,

¹ Amy E. Bonomi et al., “Meet me at the hill where we used to park”: *Interpersonal processes associated with victim recantation*, 73 SOC. SCI. & MED. 1054, 1057 (2011).

² It should be noted that the terms “victim”, “complainant”, and “complaining witness” are used interchangeably throughout the paper. Though prosecutors should aim to use the terms “complainant” and “complaining witness” when describing an alleged victim of IPV, for clarity, the term “victim” is primarily used throughout the paper.

or in the most extreme circumstances, request a warrant be ordered for the victim's contempt of court.

Even if the case can be proven without the victim's cooperation, there still exists a concern about victim autonomy and agency. Victims may resist moving forward for a variety of reasons. First, the victim may suffer financial and personal consequences due to the prosecution of their intimate partner. The victim is often emotionally and psychologically invested in the relationship with the perpetrator. Some victims share children with the perpetrator, share a home with the perpetrator, share a bed with the perpetrator. Yet, conversely, if a prosecutor's office decides to dismiss the charges because of the victim's wishes and desire not to cooperate, there exists a public safety concern and, in some cases, even a risk of homicide.

The solution lies in better understanding the victim's perspective and state action tailored to the specific situation and victim. First, prosecutorial discretion and risk assessment ought to be data-driven, focused on an understanding of what the risk factors are for homicide and severe injury. Where the risk of severe injury and homicide is great, these concerns may outweigh the prioritization of victim autonomy. These risk factors should similarly be considered when assessing which victims require access to services, and efforts should be made to ensure state resources are allocated to the most vulnerable. Further, state contact with the victim must be compassionate, trauma-informed, and guided by a more thorough understanding of why victims recant. Services and law enforcement personnel should be mindful of victim agency and autonomy and seek ways to promote them, including through state-sponsored crime victim advocates and legal aid attorneys.

I. PROSECUTING INTIMATE PARTNER VIOLENCE: DEFINING THE ISSUE

The United States Centers for Disease Control and Prevention defines intimate partner violence as “abuse or aggression that occurs in a romantic relationship.”³ IPV includes violence within current and former romantic relationships and a variety of behavior such as physical violence, sexual violence, stalking, and psychological aggression.⁴ Perpetrators of IPV often use psychological tactics, which may involve coercion, to enforce power and control dynamics within the intimate relationship.⁵ Depending on the jurisdiction, many forms of IPV will be classified as crimes and addressed through prosecution in the criminal legal system. However, crimes of IPV are notoriously difficult to prosecute successfully due to the interpersonal relationship between the victim and the perpetrator.

Statistical data points to the scope of the problem, underlining IPV as a serious and common issue in the United States. Understanding its scope, as well as the root causes, are essential first steps in defining and understanding the problem.

a. STATISTICAL DATA: THE SCOPE OF THE PROBLEM

IPV is highly prevalent in the United States. In their lifetime, approximately 41% of women and 26% of men will experience IPV; this includes sexual violence, physical violence, or stalking.⁶ Likewise, over one in five women and one in seven men will have an experience with a former or current intimate partner that constitutes serious physical violence during their life.⁷ Furthermore,

³ MATTHEW J. BREIDING ET AL., NATIONAL CENTER FOR INJURY AND PREVENTION CONTROL, INTIMATE PARTNER VIOLENCE SURVEILLANCE UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS 2.0 (2015).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

additional data from the National Intimate Partner and Sexual Violence Survey shows that nearly one in eleven women have been raped by an intimate partner in their lifetime.⁸

Additionally, victims of IPV are at a much higher risk of homicide victimization. Data shows that approximately 20% of homicide victims are killed by someone who was a current or former intimate partner; when that data is narrowed to represent solely female homicide victims, that number becomes one in two.⁹ Beyond immediate physical injury or death, IPV has serious lifelong consequences; studies show that those impacted by IPV are more likely to report negative mental and physical health outcomes – both acute and chronic.¹⁰ The negative health consequences for victims of IPV are extensive and may include heart conditions, digestive problems, reproductive problems, depression, and post-traumatic stress disorder.¹¹ Further, victims of IPV are more likely to engage in smoking, binge drinking, and other sexual risk activities.¹²

However, IPV does not just impact the individuals involved. In addition to family members, society at large faces collateral costs associated with IPV. Societal costs may include the cost of medical services, criminal justice costs, and lost work productivity.¹³ The devastating and tangible consequences to individuals and communities lead to the only rational conclusion, IPV is a public safety and public health issue that necessitates state intervention.

⁸ *Ibid.*

⁹ See Fast Facts: Preventing Intimate Partner Violence, Center for Disease Control and Prevention, (Oct. 11, 2022), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html>.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 126 (2005).

b. THEORY: UNDERSTANDING INTIMATE PARTNER VIOLENCE

The Power and Control Wheel and the Cycle of Violence have often been used to illustrate how and why IPV occurs.¹⁴ Though every intimate relationship is unique, the abusive techniques associated with these theories can be useful in understanding how violent intimate partner relationships persist. First, the Power and Control Wheel underscores the fact that violence inflicted by the perpetrator on their victim often originates from a desire to assert power and control over their victim rather than an impulse to inflict harm.¹⁵ Then, the Cycle of Violence can be used to explain the cyclical process of events that allows the IPV to continue.¹⁶

The Power and Control Wheel connects the physical and sexual violence done to victims, located at the rim of the wheel, to the desire for power and control, shown as the hub of the wheel.¹⁷ The two concepts are linked by spokes which demonstrate how an abuser may utilize numerous techniques to perpetuate the violent relationship and the coercive dynamics within.¹⁸ These spokes highlight many of the techniques used, including economic, emotional, or verbal abuse.¹⁹ Often, the most pervasive technique is emotional abuse which may consist of minimization and denial of the abuse, as well as blaming the victim for the abusive behavior.²⁰ Emotional abuse can be extremely influential in the victim's decision to stay in the relationship.²¹

¹⁴ Michelle Byers, *What are the Odds: Applying the Doctrine of Chances to Domestic-Violence Prosecutions in Massachusetts*, 46 NEW ENG. L. REV. 551, 555 (2012); Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 209 (2007).

¹⁵ Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, *supra* at 209.

¹⁶ Michelle Byers, *What are the Odds: Applying the Doctrine of Chances to Domestic-Violence Prosecutions in Massachusetts*, *supra* at 555.

¹⁷ Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, *supra* at 209.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

The Cycle of Violence theory fits in well with an understanding of the Power and Control Wheel. The Cycle of Violence includes a relationship cycle that involves tension, abuse, and harmony, wherein a violent event will occur after a period of tension between the abuser and the victim.²² However, shortly following the abuse event, the abuser will apologize and seek to reconcile with the victim, inducing the victim to stay and remain entrapped in the relationship.²³ It is important to note that as the cycle repeats, the abuse events often escalate in frequency and intensity, becoming increasingly more dangerous.²⁴

c. THE VICTIM PERSPECTIVE

The Supreme Court notes in *Davis v. Washington* that domestic violence²⁵ is “notoriously susceptible to intimidation or coercion of the victim to ensure she does not testify.”²⁶ Though research on the likelihood of recantation and noncooperation is deficient, reports suggest that as many as 80% of IPV victims recant during the course of prosecution or refuse to cooperate with prosecutorial efforts.²⁷ Often the victim’s refusal to cooperate with prosecution and recantation occur together; recantation is defined by the withdrawal of one’s initial allegations of abuse and a reconstruction of the abuse event in a way that is often more favorable to the perpetrator. The

²² Michelle Byers, *What are the Odds: Applying the Doctrine of Chances to Domestic-Violence Prosecutions in Massachusetts*, *supra* at 555.

²³ *Ibid.*

²⁴ Hayley Boxall & Siobhan Lawler, *How does Domestic Violence Escalate Over Time?*, AUSTL. INST. OF CRIMINOLOGY (2021).

²⁵ The term “Intimate Partner Violence” is used to define violence that specifically occurs between intimate partners who are romantically involved. The term “Domestic Violence” describes a broader range of relationships than IPV but is often used interchangeably to describe IPV. Due to the specific patterns of psychological abuse and concerns with intimate relationships, the paper focuses on the challenges associated with prosecuting violence within intimate partner relationships.

²⁶ *Davis v. Washington*, 547 U.S. 813, 833 (2006).

²⁷ Amy E. Bonomi et al., “*Meet me at the hill where we used to park*”: *Interpersonal processes associated with victim recantation*, *supra* at 1054.

period of prosecution is a time of immense stress for any victim; however, it is uniquely stressful for victims of IPV, who are often faced with threats of (or actual) retaliation or pleas to reconcile.²⁸

Yet, the decision to withhold cooperation from prosecutorial efforts is, in some regard, specific to the individual victim and should not be overgeneralized. It may be motivated by socioeconomic factors, psychological factors, the level of social support in the victim's life, the victim's ethnic or racial background, or immigration status. Most research on IPV relationships focuses on why victims remain in or leave abusive relationships. This may serve as a supplementary aid to the following limited research on why victims recant or withhold cooperation in IPV prosecutions. Though the research is illuminating when it comes to an understanding of the victim's perspective in an IPV prosecution, it must be acknowledged that there is no "one size fits all" reason why victims remain in IPV relationships, withhold cooperation, or recant their allegations of abuse.

i. SITUATIONAL FACTORS

A study conducted by researchers Erez and Belknap in 1998 sought out the victim's perspective on IPV and the criminal legal system's effectiveness in intervening. Through self-administered surveyed responses of fifty uncooperative victims, victims listed numerous reasons for their unwillingness to cooperate with the prosecution.²⁹ The most pressing reason was found to be the fear of their abuser, which was followed closely by the belief that the justice system was ineffective when it came to protecting them and prosecuting their abuser.³⁰ However, victims also

²⁸ Lisa Goodman et al., *Obstacles to Victims' Cooperation With the Criminal Prosecution of Their Abusers: The Role of Social Support*, 14 VIOLENCE AND VICTIMS 427, 429 (1999).

²⁹ E. Erez & J. Belknap, *In their own words: Battered women's assessment of the criminal processing system's responses*, 13 VIOLENCE AND VICTIMS at 251 (1998); Sara C. Hare, *What Do Battered Women Want? Victims' Opinions on Prosecution*, *supra* at 614.

³⁰ *Ibid.*

pointed to (in descending importance) concern for their children, their distrust or difficult experiences with the criminal legal system, and financial dependence on the defendant.³¹

In another study done by Bennet in 1999, uncooperative victims voiced their frustration with the criminal legal system, explaining they were confused by the process and the information they received, were frustrated with the slow pace of the criminal legal system, and expressed fear regarding testifying against their abuser at proceedings.³² When it came to Black victims and victims of color, there was an additional expressed concern related to sending their intimate partner to jail due to high incarceration rates in their communities.³³ Further, other victims of specific religious, ethnic, and racial backgrounds classified the potential community abandonment as an unacceptable collateral consequence that might result from cooperating with the prosecution.³⁴

In another study completed by Hare in 2002, ninety-four female intimate partner victims were interviewed; of the ninety-four, twenty-eight stated that they were uncooperative at the time of prosecution.³⁵ The female intimate partner victims were interviewed individually and gave the following reasons for their desire to withdraw cooperation: the most frequent reason (given in 38% of the cases) was that they did not believe that their abuser needed to be punished due to the minor and unintentional nature of the crime, this was followed by an emotional and financial commitment to the defendant (in 23% of the cases).³⁶ Victims also stated that they believed that the defendant

³¹ *Ibid.*

³² L. Bennett et al., *Systemic obstacles to the criminal prosecution of a battering partner: A victim perspective*, 14 JOURNAL OF INTERPERSONAL VIOLENCE 761 (1999); Sara C. Hare, *What Do Battered Women Want? Victims' Opinions on Prosecution*, *supra* at 614.

³³ *Ibid.*

³⁴ Barbara Hart, *Battered Women and the Criminal Justice System*, 36 AM. BEHAVIORAL SCIENTIST at 624 (1993).

³⁵ Sara C. Hare, *What Do Battered Women Want? Victims' Opinions on Prosecution*, *supra* at 614.

³⁶ *Ibid.*

needed help rather than jail time (in 11% of the cases), and others said that they just wanted to be left alone by the defendant (in 11% of the cases).³⁷

Victims of IPV are rarely influenced to recant or refuse cooperation for any one reason alone. Understanding how situational factors influence a victim's decision against cooperation is essential to addressing a victim's needs and concerns through state-sponsored resources. It is important to note that some of the concerns voiced in the studies, which were all conducted over twenty years ago, may be less prevalent as new policies and procedures advance. For example, victim confusion with the system may be increasingly addressed by victim advocates, the desire for mental health treatment or anger management rather than incarceration may be satisfied through new diversion and treatment programs, and state resources may progressively provide the requisite funding to victims of IPV during the vulnerable period of pending prosecution. When the State has the ability and resources to address situational concerns, victims are more likely to cooperate; yet the studies that *solely* analyze situational factors lack an appreciation for the coercive dynamics of IPV relationships.

ii. PSYCHOLOGICAL FACTORS

Despite the importance of understanding why victims refuse to cooperate from a situational perspective, post-prosecution victim perspectives on the situational reasons for noncooperation are lacking. To reach a true understanding of noncooperation, the psychological and coercive forces associated with violent intimate relationships must be examined. Often, emotional attachments to an intimate partner, paired with intimacy needs, play a crucial role in influencing the victim to

³⁷ *Ibid.*

recant, remain in an abusive relationship, and become uncooperative with the State.³⁸ This becomes further compounded by the often strategically abusive behavior of the perpetrator.³⁹

In a novel study done in 2011 by Bonomi and others, researchers analyzed recorded jail calls between perpetrators and victims. This analysis provided a consistent framework for understanding the behaviors and reactions associated with the process of victim recantation in a criminal IPV case.⁴⁰ The study shows that when contact continues between the victim and the perpetrator, either in person or via jail calls, the perpetrator is able to use minimization, gaslighting (a form of emotional abuse), intimidation, and sympathy appeals to erode victim agency and influence a victim to withdraw cooperation.⁴¹

The conversational data allowed researchers to construct a framework for the interpersonal processes between victims and perpetrators during the period of prosecution: researchers specifically focused on the processes associated with the victim's decision to recant in an IPV prosecution and illustrated how couples constructed their recantation plans when it was clear that the victim would recant.⁴² The interpersonal process was identified as having five unique phases, each of which eroded the victim's decision to cooperate with the prosecution. Though the phases were not always linear, they included: one, the couple's discussion of the abusive event; two, the perpetrator's minimization of the event, including a shifting of blame to the victim; three, the discussion of positive memories and feelings about the couple's relationship paired with an invocation of life without each other; four, the perpetrator's request or instruction to the victim to

³⁸ Amy E. Bonomi et al., "*Meet me at the hill where we used to park*": *Interpersonal processes associated with victim recantation*, *supra* at 1055.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Id.* at 1057.

⁴² *Id.* at 1056.

recant their story; and five, the construction of the recantation plan redefining the abusive behavior to protect the perpetrator.⁴³

At the beginning of this process, and shortly after the abusive event, the victim's agency and autonomy from the abuser were identified as being strong and coupled with feelings of anger, blame, and regret.⁴⁴ However, as the conversations between the perpetrator and victim continued, the coercive dynamic of the relationship caused the victim's agency and autonomy to erode through a series of psychological tactics, with the most prevalent being the perpetrator's minimization and redefining of the abuse event.⁴⁵ Eventually, the victim began to adopt the redefined abuse event, and their agency eroded. The victim and the perpetrator reunited as a partnership against those "that [did] not understand them", which was then met by feelings of relief and hope on behalf of the victim.⁴⁶

Further, though not emphasized in the Bonomi study, like others who experience trauma, victims of IPV may have little memory of the abuse event, may involuntarily repress traumatic events, or may have experienced so many traumatic episodes of IPV that they have a hard time distinguishing them from each other.⁴⁷ This may make them more susceptible to the coercive tactics prevalent in an IPV relationship, but further, in a system that's purpose is to seek out the truth and ferret out inconsistency or insufficiencies in a victim's recollection of a criminal event, victims are often concerned about cooperating and subjecting themselves to criminal proceedings where they may be unable to provide strong evidence. Understanding the psychological impacts

⁴³ *Id.* at 1059.

⁴⁴ *Id.* at 1056.

⁴⁵ *Id.* at 1056.

⁴⁶ *Ibid.*

⁴⁷ Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, *supra* at 204.

of IPV is crucial to understanding the victim's perspective on prosecuting crimes of IPV and is important in the effort to foster cooperation among victims and address vulnerability concerns.

d. THE STATE PERSPECTIVE

The State's main priority in addressing IPV is to ensure public safety and hold the perpetrator accountable for harm to the victim and the community. Public attitudes regarding IPV have evolved over the past few decades. Historically, IPV was disregarded as a private matter which did not necessitate intervention. However, due to public outcry in the late 1900s regarding the seriousness and prevalence of IPV, states moved towards harsh mandatory action. Presently, there seems to be a current movement towards understanding how to best balance the need for IPV prosecution with the desires and autonomy of the victim, exhibiting a better understanding of the victim's perspective and needs, as well as the psychological motivators behind IPV.

i. HISTORY

The government has often been criticized for its lack of action in prosecuting and controlling the crime of IPV. Whether it was a law enforcement officer's failure to arrest a perpetrator or a prosecutor's dismissal of charges, the State was under consistent scrutiny for the message that it was sending: "Intimate partner violence is not a criminal matter that warrants state deterrence, but rather a private family matter that may be dealt with at home." These notions arose from attitudes in the mid-nineteenth century and colonial period, where it was common to "punish one's wife." As one North Carolina court put it in 1868, "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."⁴⁸

⁴⁸ *State v. Rhodes*, 61 N.C. 453, 459 (1868).

It was not until the 1970s and 1980s that the State began to codify civil and criminal remedies addressing IPV.⁴⁹ These laws began to establish rights for victims who sought civil injunctions or other forms of civil redress to protect themselves from their abusers.⁵⁰ Criminally, states began prosecuting crimes of IPV; however, states were ill-equipped to address the interdependent relationship of the crime victim and abuser, and state attitudes of inaction remained, especially given the State's inability to support the victim properly.⁵¹

Due to public outcry and concern for violence, states began moving towards policies that addressed IPV. However, despite addressing the problem, various ethical and moral concerns arose due to rigid policies which left the State with no choice but to take criminal action, such as 'Mandatory Arrest' and 'No-Drop Prosecution' policies. These policies statutorily mandated that police officers made arrests where there was probable cause that IPV had occurred, and prosecutors were required to prosecute crimes of IPV even when victims were uncooperative.⁵²

As a result of Mandatory Arrest policies, there was a dramatic rise in family violence arrests.⁵³ Consequently, there was an increase in prosecution, as well as No-Drop policies which resulted in a decline in dismissal rates across the United States.⁵⁴ Hard No-Drop policies were defined as pursuing "domestic violence prosecutions regardless of the victims' stated wishes, as long as they had adequate proof."⁵⁵ Soft No-Drop policies, on the other hand, still encouraged prosecutorial

⁴⁹ Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, *supra* at 196.

⁵⁰ *Id.* at 197.

⁵¹ *Id.* at 198.

⁵² *Id.* at 199.

⁵³ *Id.* at 217.

⁵⁴ *Id.* at 225.

⁵⁵ *Id.* at 221.

preference for prosecuting cases of IPV regardless of victim cooperation; however, these policies allowed for more discretion and generally took the victims' perspectives into account.⁵⁶

ii. PRESENT DAY

Though presently, there are more effective policies and resources available to address crimes of IPV as well as the issue of uncooperative victims, numerous unique obstacles still exist when it comes to prosecuting these crimes.

Victims of IPV can be difficult witnesses because of their resistance to criminal prosecution. This can stem from psychological factors influencing a victim's ability or desire to cooperate in a prosecution. Even when victims are cooperative, like other violent crime victims, they may be unreliable because of the trauma associated with the abuse, impacting their memory or consistency.⁵⁷ Further, Bonomi's research explains that victims may initially cooperate with law enforcement but later decide to recant. Recantation can be a significant obstacle to a successful prosecution; where recantation consists of a false narrative, the reformulated description of the abuse event may be credible to a certain extent and absolve the abuser of the crime.⁵⁸ At the very least, numerous alternative descriptions of an abuse event damage the credibility of the victim, who is often the State's primary witness.⁵⁹ In many cases, recantation is enough to foster reasonable doubt that the abuser did not commit the crime, leading to a dismissal of the prosecution.

⁵⁶ *Ibid.*

⁵⁷ *Id.* at 222.

⁵⁸ Amy E. Bonomi et al., "*Meet me at the hill where we used to park*": *Interpersonal processes associated with victim recantation*, *supra* at 1059.

⁵⁹ *Ibid.*

Yet, beyond the issue of victim cooperation exists the concern for victim safety and repeated violence. Though there exists little research on the escalation of IPV throughout the relationship, it is often understood that abuse often escalates in frequency and intensity.⁶⁰ Most of what is understood of escalation comes from an accumulation of police reports detailing victims' subjective accounts.⁶¹ There is a serious concern for prosecutors that, should they dismiss a case involving severe physical injury, the abuse will escalate and ultimately result in the victim's death. In strangulation cases, for example, victims strangled by an intimate partner are 7.5 times more likely to be murdered than those who have not.⁶²

Further, the scope of the harm may go past the injury and negative impact on the victim. It can also be harmful to others peripherally involved in the relationship as well. Children, for example, are of particular concern when prosecuting crimes of IPV. Even if the child does not experience the violence directly, witnessing IPV done by or onto a parent can be traumatic and detrimental to the child's wellbeing. Moreover, incidences of child abuse are higher in homes where IPV exists.⁶³ The Adverse Childhood Experiences Survey demonstrates the damaging and long-lasting consequences of witnessing IPV as a child; child witnesses to IPV "exhibit lower social competence and higher aggressive, antisocial, fearful, and inhibited behaviors."⁶⁴ Another study examined how children impacted by violence in the home may be more aggressive as a "result of

⁶⁰ Hayley Boxall & Siobhan Lawler, *How does Domestic Violence Escalate Over Time?*, AUSTL. INST. OF CRIMINOLOGY (2021).

⁶¹ *Ibid.*

⁶² Nancy Glass, Jacqueline Campbell, et al., *Nonfatal Strangulation is an Important Risk Factor for Homicide*, 21 J. OF EMERGENCY MEDICINE at 329 (2008).

⁶³ *Domestic Violence & the Courtroom Knowing the Issues... Understanding The Victim*, American Judges Association, <http://aja.ncsc.dni.us/pdfs/domestic-violence-the-courtroom.pdf> (2012).

⁶⁴ National District Attorneys Association, Women Prosecutors Section, *NATIONAL DOMESTIC VIOLENCE PROSECUTION BEST PRACTICES GUIDE*, at 11 (2017); *Adverse Childhood Experiences (ACEs)*, Centers for Disease Control and Prevention, <http://www.cdc.gov/violenceprevention/acestudy/> (2016).

the child victim and/or witness developing an attitude that justifies the use of violence as a way of enhancing reputation or self-image.”⁶⁵

With the disturbing prevalence of IPV as a factor in homicides and the negative effect on other individuals, prosecutors still take a serious stance when it comes to prosecuting crimes of IPV even as they move away from rigid no move away from rigid no-drop policies. Instead, prosecutor’s offices are adapting to address the prevalence of victim recantation. Additionally, many law enforcement agencies have recognized the importance of thorough investigation and evidence collection during the response to the incident in preparation for and anticipation of an evidence-based prosecution. Yet, even where there seems to be some growth, many offices advance policies that continue to lack depth and perpetuate harm to victims of IPV.

II. ETHICAL IMPLICATIONS OF PROSECUTING CRIMES OF INTIMATE PARTNER VIOLENCE WITH AN UNCOOPERATIVE VICTIM

The ethical implications can be logically derived from the reality of prosecuting IPV without a cooperative witness. Given the prevalence of victim noncooperation, prosecuting attorney’s offices and the judicial system have attempted to wrestle with this issue in a way that serves the State and addresses public safety concerns. However, in doing so, the State has complicated its relationship with the victim, the complaining witness in the matter, imposing upon what the victim may deem a private matter and their sense of autonomy and agency. Further, constitutional and evidentiary concerns exist with prosecuting a defendant without a complaining witness or with a complainant who has recanted their story.

⁶⁵ National District Attorneys Association, Women Prosecutors Section, *NATIONAL DOMESTIC VIOLENCE PROSECUTION BEST PRACTICES GUIDE* *supra* at 11; Jeffrey Edleson, *Problems Associated with Children's Witnessing of Domestic Violence*, http://www.vawnet.org/printdocument.php?doc_id=392&find_type=web_sum_AR (1997).

a. THE PROSECUTOR’S ROLE, SUBSTANTIVE DUE PROCESS, AND THE PUBLIC DUTY DOCTRINE

Prosecutors have a duty to administer justice in a way that aligns with the values of their community. Rather than representing a single client, such as the crime victim, prosecutors must represent the public, a group that includes the defendant. The path to a just outcome becomes convoluted, however, when it comes to prosecuting crimes of IPV. Yet, in determining whether state action is appropriate, the question of whether the State has a responsibility to act at all must first be addressed. The State often has no duty to act or intervene in dangerous situations involving its individual citizens; violations of a victim’s substantive due process rights are only substantiated where the State was directly involved in the harm done to the victim, or the victim was in State custody during the time of the harm. For example, an argument could be made that the State has a constitutional duty to intervene where two individuals in state custody had a violent altercation (i.e. a fight between inmates in prison); however, where harm or violence occurs between private individuals outside of state custody, the state has no constitutional responsibility to protect them.

In *DeShaney v. Winnebago County Department of Social Services*, decided in 1989 by the Supreme Court, the court held that it had no constitutional duty to protect an individual from abuse done by a private actor.⁶⁶ The Winnebago County Department of Social Services had failed to act in the case, ultimately returning a child to his abusive father, despite strong evidence of abuse.⁶⁷ After being returned to his father’s custody, Deshaney’s father beat him so severely that he fell into a life-threatening coma.⁶⁸ The court determined that because there was no direct tie or connection between the State’s actions and the child plaintiff’s injuries, there was no violation of

⁶⁶ *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).

⁶⁷ *Id.* at 192-194.

⁶⁸ *Ibid.*

the plaintiff's substantive due process rights.⁶⁹ The court instead stated that the substantive due process clause was "phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."⁷⁰ In *DeShaney*, the child plaintiff lived out the rest of his life permanently physically and mentally disabled, dying at the age of thirty-six in 2015.⁷¹ The *DeShaney* case sent an important message to victims of violence and the State's responsibility to them – the State has no constitutional duty to protect them, a notion which extended into tort law doctrine.

The Public Duty Doctrine imparts immunity from liability on state actors shielding the State from certain negligence claims. The Public Duty Doctrine recognizes that law enforcement officials owe a duty of public safety to the collective public but not to individual citizens.⁷² To establish injury and harm, the plaintiff must exhibit that the State has failed to act consistently in a way that neglects its duty to the collective public.⁷³ Individualized cases of failure to act will not suffice for bringing negligence claims against the State.⁷⁴

DeShaney, however, was decided in 1985. In the 1980s, American sentiment regarding domestic violence and IPV was shifting. By the 1990s, there was an increasing implementation of mandatory arrest policies and no-drop policies, mandating state action. The issue of whether the State owed a constitutional duty to protect individuals where they were statutorily required to do so arose in *Castle Rock v. Gonzales*. In *Gonzales*, the plaintiff's children were murdered after

⁶⁹ *Id.* at 195.

⁷⁰ *Ibid.*

⁷¹ Crocker Stephenson, *Obituaries: Joshua (DeShaney) Braam, Boy at center of famous 'Poor Joshua!' Supreme Court dissent dies*, MILWAUKEE J. SENTINEL, (Nov. 11, 2015), <https://archive.jsonline.com/news/obituaries/joshua12-b99614381z1-346259422.html/>.

⁷² G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, *supra* at 118.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

they were kidnapped by their biological father, who was the subject of a Stay Away Order of Protection which prevented him from contact with both Gonzales and her children.⁷⁵ The plaintiff alleged that the order of protection, which required state action, imparted a property interest onto her and that law enforcement officials violated her constitutional right to substantive due process through the State's failure to act.⁷⁶

Despite being notified by the plaintiff numerous times throughout the day of the active order of protection and kidnapping, which would have required the arrest of the plaintiff's ex-intimate partner using all reasonable means, law enforcement officials took no action for eight hours.⁷⁷ Later in the day, the children were killed.⁷⁸ The court rejected that the plaintiff had acquired any property interest derived from the order of protection, even where state legislators had clear legislative intent to require state action by law enforcement and other State actors.⁷⁹

The court explained the deeply rooted nature of law enforcement discretion even in the face of such gross inaction, explaining that even where a statute has “made enforcement of restraining orders “mandatory” because of the domestic violence context of the underlying statute, that would not necessarily mean that state law gave the respondent an entitlement to enforcement of the mandate.”⁸⁰ The court states that instead, laws mandating state action serve different and other positive purposes apart from the benefit they confer on IPV victims.⁸¹ The court's reasoning seems relatively flawed; the legislative intent behind laws addressing IPV is clearly motivated by a desire to promote victim safety and state action that would ensure it.

⁷⁵ *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005).

⁷⁶ *Ibid.*

⁷⁷ *Id.* at 780.

⁷⁸ *Id.* at 753.

⁷⁹ *Id.* at 756.

⁸⁰ *Id.* at 765.

⁸¹ *Ibid.*

Nevertheless, victims in cases where state action is mandated have no constitutional right to protection and no guarantee that the State will act or intervene in the face of violence. In the name of law enforcement discretion, the Court has nullified the relative effectivity of Mandatory Arrest and No-Drop policies.⁸² However, an alternative argument may exist through the lens of the Public Duty Doctrine. It would seemingly follow that a state's failure to act when mandated to do so statutorily might violate its duty to the collective rather than to the individual. More specifically, for if the statutory mandates imposed by the state legislature are not enforced by law enforcement officers, they are in direct violation of their duty to protect society at large.

The State's obligations to IPV victims are minimal relative to its civil liability and substantive due process. Technically, prosecuting attorney's offices could consistently take no action when confronted with the issue of victim noncooperation and remain in compliance with their civil and constitutional obligations to the complainant. However, when the prosecutor is confronted with their ethical obligations as a "minister of justice" to the public, the concept of duty shifts relative to the foreseeability of future serious injury and homicide. The statistics speak for themselves; IPV is known to be a prevalent and dangerous issue within all communities and presents a serious safety concern. Due to the likelihood of escalation and homicide associated with crime, prosecutors have an ethical obligation to intervene. Prosecutors are bound by their ethical obligations to serve their community in the pursuit of justice. Even when a victim is uncooperative and unwilling to testify against their abuser, there remains an ethical obligation for the prosecuting attorney's office to act or, at minimum, develop alternative solutions to address the injustices arising from IPV.

⁸² G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, *supra* at 117.

Justice is an elusive term that vaguely proscribes the prosecutor's resulting ethical responsibilities. Though it is unlikely that inaction would result in disciplinary action or civil liability, the ethical obligation to intervene in some instances should be standard practice in prosecuting attorney's offices. Given the harms associated with IPV – to communities, children, and the victim themselves – the prosecutor has an ethical responsibility to prevent the furtherance of injustice when it is brought to their attention. However, the prosecutor's action will vary in type and force depending upon the risk factors and an independent analysis of the matter and relationship at hand.

b. THE PROSECUTOR'S RELATIONSHIP WITH THIRD PARTIES

ABA Model Rules of Professional Conduct Rule 4.4 (a), as well as ABA Criminal Justice Standards for the Prosecution Function Standard 3-3.4 (d), explains that lawyers shall not “use means that have no substantial purpose other than to embarrass, delay, or burden a third person.”⁸³ When a prosecutor decides to move forward with a case in the name of public safety, justice, and protecting the victim from further risk, but without the cooperation or support of the victim, the victim often experiences burdens and embarrassment associated with the prosecution of their intimate partner. While the prosecution of the crime serves a substantial purpose of public safety and harm prevention, prosecuting without the victim's cooperation requires an analysis of its impacts on the victim as a third party.

When the State decides to subpoena a victim of IPV, it often calls the victim as a witness against their own volition. The victim likely has an extensive relationship with their abusive intimate partner whom they are testifying against and may experience burdens and risks associated

⁸³ MODEL RULES OF PRO. CONDUCT r. 4.4 (a) (AM. BAR ASS'N 2002); CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION s. 3-3.4 (d) (AM. BAR ASS'N 1968).

with their testimony. These burdens and risks may be significant: victims of IPV are “most often killed when attempting to seek legal redress or when leaving an abusive relationship.”⁸⁴ They may be in the best position to know the risks associated with testifying.⁸⁵

Outside of the risk of future physical harm, a defendant’s sentence stemming from a criminal prosecution, which may include incarceration, can create financial hardship or other collateral consequences for the victim. For example, if the perpetrator and victim share finances, the loss of the perpetrator’s income could significantly impact the victim and their family. In addition, if the victim and perpetrator share children or childcare responsibilities, the perpetrator’s potential incarceration may result in additional childcare costs for the victim.

The victim may be so unwilling to cooperate with the prosecution that they fail to appear when summoned. In this case, the prosecuting attorney’s office is at a crossroads; they may either proceed without the victim or enforce the subpoena by issuing a material witness warrant for contempt of court. Victims may refuse to appear in court for several reasons, including fear, shame, or attachment to their violent intimate partner. Arresting the victim, a third party in the criminal prosecution, is a drastic measure and unquestionably burdensome and embarrassing for the victim. Many prosecuting attorney’s offices will only issue a warrant for the victim’s contempt of court in the most extreme circumstances. In making the decision, prosecutors undertake a balancing test of sorts, weighing the seriousness of the crime and the relative risk for future harm against the unquestionable imposition on the victim’s autonomy and liberty.

King County Prosecuting Attorney’s Office (Seattle) has not sought a material witness warrant in six years. Senior Deputy Prosecutor and Chair of the Domestic Violence Unit, David

⁸⁴ Barbara Hart, *Battered Women and the Criminal Justice System*, *supra* at 626.

⁸⁵ *Ibid.*

Martin, pointed to his unit’s Material Witness Warrants in Domestic Violence Cases Policy as outlining the essential considerations his unit makes before the application for such warrants and explained how the policy allows for such warrants only in a narrow set of circumstances.⁸⁶ The policy recognizes the “serious equity concerns” with issuing material witness warrants and how such warrants “alienate victims and deprive them of any sense of control.”⁸⁷ However, Mr. Martin simultaneously explained that the office’s goal is to protect domestic violence victims and prevent harm where there is an indication that the victim’s life or the lives of the victim’s children are in grave danger.⁸⁸ Therefore, the policy outlines a set of risk factors, including a history of domestic violence combined with suicidal or homicidal threats, the use of deadly weapons, the need to protect children, a significant criminal history, stalking behavior, or uniquely egregious behavior.⁸⁹

According to the office’s written policy on Issuing Material Witness, five people must agree that it is appropriate when deciding to issue a material witness warrant: they include, the victim advocate, the victim advocate’s supervisor, the prosecutor, the prosecutor’s supervisor, and the Domestic Violence Unit Chair.⁹⁰ Efforts to gain cooperation and locate the victim must have been well documented.⁹¹ When the decision has been made, law enforcement should make every effort to bring the victim directly to court rather than holding them prior to their court appearance.⁹²

⁸⁶ Video Interview with Mr. David Martin, Chair of the King County Prosecuting Attorney’s Office Domestic Violence Unit (Apr. 5, 2023).

⁸⁷ King County Prosecuting Attorney’s Office Material Witness Warrants in Domestic Violence Cases Policy, Section I – Basic Principles (2023).

⁸⁸ Video Interview with Mr. David Martin, Chair of the King County Prosecuting Attorney’s Office Domestic Violence Unit (Apr. 5, 2023).

⁸⁹ King County Prosecuting Attorney’s Office Material Witness Warrants in Domestic Violence Cases Policy, Section II – Office Policy on Issuance of Warrants in Domestic Violence Cases (2023).

⁹⁰ King County Prosecuting Attorney’s Office Material Witness Warrants in Domestic Violence Cases Policy, Section III – Office Protocol to be Followed before Issuing a Material Witness Warrant in a Domestic Violence Case (2023).

⁹¹ *Ibid.*

⁹² *Ibid.*

Once an uncooperative IPV victim's appearance has been secured, however, through the issuance of a material witness warrant or subpoena, victims face the reality and fear that comes with testifying truthfully. The process of testifying about abuse requires the victim to describe their abuse in great detail, which is retraumatizing and stressful.⁹³ Further, the victim is subject to cross-examination and confrontation by the defense and, often, the prosecutor as well.⁹⁴ If a victim recants their allegation of abuse and perjures themselves on the stand, though unlikely, they may be confronted with perjury charges as testifying falsely is a crime. Either way, the State has put them in a position of extreme stress.

The State should make every effort to ascertain victim cooperation before trial by providing resources, maintaining contact with the victim, and considering their desires. However, if cooperation cannot be secured, a prosecutor upholds their ethical responsibility to the victim as a third party when they adopt solutions similar to those implemented in the King County Prosecuting Attorney's Office. When the necessity of intervention outweighs the victim's liberty interest, that determination to issue a warrant should be made carefully and tactfully. In executing a material witness warrant, the State should take all reasonable measures to ensure that their imposition on the victim is minimal. Regarding confronting the uncooperative witness with their prior inconsistent statements, the prosecutor should be mindful of the victim's position, should encourage the victim to tell the truth, and should remain transparent with the victim about the impeachment process.

⁹³ Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, at 772 (2005).

⁹⁴ *Id.* at 797.

c. PROSECUTORIAL DISCRETION: A MULTIFACTOR DETERMINATION

The ABA Criminal Justice Standard for Prosecution Standard 3-4.4 outlines factors ideally considered when a prosecutor exercises their discretion to file, maintain, or dismiss charges.⁹⁵ It should be noted that even where prosecutors can support a charge with evidence, they are not obligated to pursue prosecution. However, the relative strength of the case should be taken into account; and, without the cooperation of the complaining witness, evidence-based prosecutions lack the strength associated with testimonial evidence provided by the victim.

When deciding whether to pursue an IPV prosecution, prosecutors should always account for the views and motives of complaining witnesses. In many IPV prosecutions, the complainant, who is the victim of the violence, often desires the charges to be dropped. Not only should the IPV victim's views and desires be considered, but so too should the motives behind them. For example, if recantation and lack of cooperation stem from a place of coercion from the perpetrator, the prosecutor may be more inclined to press charges; however, if recantation stems from collateral consequences that may be felt by both the victim and perpetrator, such as financial or childcare consequences, the prosecutor should consider whether the State can aptly protect the victim from these harms and whether alternatives such as diversion or treatment may be applicable.

Consistent with the role of the prosecutor, perhaps the most crucial consideration is the extent or absence of harm caused by the offense and the likelihood of future injury to the victim. The two are frequently interrelated; the severity of the abuse and the type of abuse can be crucial to determining future risk. For example, the strangulation of an intimate partner increases that intimate partner's risk of being killed by their abuser by a likelihood of seven times.⁹⁶

⁹⁵ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION s. 3-4.4 (AM. BAR ASS'N 1968).

⁹⁶ Nancy Glass et al., *Nonfatal Strangulation is an Important Risk Factor for Homicide*, *supra* at 329.

An individualized approach is the best practice for exercising prosecutorial discretion and determining whether proceeding with an uncooperative complainant is appropriate. An understanding of the victim's motives and intentions in deciding whether they want to cooperate, as well as the future risks and consequences, are all critical factors in determining whether prosecution is appropriate. Equally as important is that such a decision be made collectively by the prosecutor, the prosecutor's supervisor, and a victim advocate.

d. EVIDENTIARY ISSUES

Due to the difficult nature of prosecuting a crime without the cooperation of the State's primary witness, state legislatures have made concessions and carve-outs to facilitate the prosecutor's ability to meet their burden of proving their case beyond a reasonable doubt. Meeting the State's burden of proof is further complicated by the private nature of IPV; the victim may be the only witness to the violence occurring in the home, out of sight of witnesses who might corroborate the facts of an incident. Sometimes, where the victim is uncooperative, the State moves forward with an evidence-based prosecution if they believe they can meet their burden of proof based solely on physical evidence, admissible statements, and other testimony. However, in doing so, some states have attempted to bend specific evidentiary rules to meet the State's needs, resulting in ethical concerns about protections and rights afforded to the defendant.

In particular, the defendant's right to confrontation may be called into question when the State moves forward with an evidence-based prosecution and elects to admit hearsay statements made by the victim. Additionally, some states have elected to implement special propensity evidence exceptions for crimes of IPV. This evidentiary exceptionalism for IPV prosecutions is inappropriate; states need to do a better job collecting supportive evidence within the bounds of the confrontation clause and victim autonomy or suffer the consequences.

Finally, victim recantation imposes an ethical obligation on the prosecutor to disclose the exculpatory evidence to the defendant, consistent with *Brady v. Maryland*. However, despite this binding precedent to disclose, some prosecutors do not perceive recantation as exculpatory evidence, often because of their subjective perception of the credibility of the original disclosure.

i. THE STATE’S RESPONSIBILITY TO THE DEFENDANT:
CONFRONTATION CLAUSE ISSUES

Often, when the State moves forward with an evidence-based prosecution where the victim is uncooperative, the burden of proving the case beyond a reasonable doubt becomes substantially more difficult. If the State cannot secure the uncooperative witness’ appearance, admitting the victim’s prior allegations of abuse becomes challenging, but not impossible; consistent with *Davis v. Washington*, the State may introduce certain hearsay statements made by the victim if they are considered non-testimonial and made during an ongoing emergency. Additionally, some states have allowed for the medical diagnosis and treatment hearsay exception to extend to include the identification of the perpetrator as the source of the injury. Short of these exceptions, hearsay statements are inadmissible to prove the defendant’s guilt if the victim is not called to testify at trial.

Testimonial statements made by witnesses to law enforcement about the events at issue fall squarely within the bounds of the confrontation clause.⁹⁷ When a complainant makes statements to law enforcement personnel following the incident, that witness should be called by the prosecution so that defense counsel has an opportunity to confront the witness and test their credibility. The sixth amendment states that the accused has a right “to be informed of the nature

⁹⁷ *Crawford v. Washington*, 541 U.S. 36 (2004).

and cause of the accusation” and “to be confronted with the witnesses against him.”⁹⁸ Without such an opportunity for confrontation, the defendant’s sixth amendment right has been impeded.

Crawford v. Washington set forth a general rule consistent with the Framers’ understanding: “Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”⁹⁹ This restrictive rule preventing the admission of testimonial hearsay statements made by the victim makes it incredibly difficult to prove the perpetrator’s guilt beyond a reasonable doubt where the victim is not cooperative with prosecutorial efforts. Without calling the State’s primary material witness during the trial, all testimonial statements made by the victim are considered excluded.

To address the concern of non-cooperation and unavailability, states attempted to find a way around the confrontation clause, theorizing that victims in IPV cases may be considered unavailable due to pressure or harm from their violent intimate partner. Thus, the defendant should not be afforded his sixth amendment right to confrontation due to a “forfeiture by wrongdoing” theory.

In *Giles v. California*, however, the Supreme Court rejected this kind of “special, improvised” version of the Confrontation Clause, which California had explicitly intended to use in IPV prosecutions.¹⁰⁰ *Giles* was an extreme case. The defendant had murdered the IPV victim before trial.¹⁰¹ Still, the court held that the concept of “forfeiture by wrongdoing” should be construed strictly when used as an exception to the confrontation clause, explaining that it was not established at the time of the Bill of Rights’ founding.¹⁰² In *Giles*, it could not be established that

⁹⁸ U.S. CONST. amend. VI.

⁹⁹ *Crawford v. Washington*, *supra* at 59.

¹⁰⁰ *Giles v. California*, 554 U.S. 353, 376 (2008).

¹⁰¹ *Id.* at 380.

¹⁰² *Id.* at 366.

the killing was to prevent testimony; therefore, the testimonial hearsay statements were excluded.¹⁰³

Though the Supreme Court acknowledged in *Giles* that it had approved a Federal Rule of Evidence entitled ‘Forfeiture by Wrongdoing’ – the Court stated that it only applied when the defendant intended to and did, in fact, “procure the unavailability of the declarant as a witness” through wrongdoing and with the intention of preventing the witness from testifying.¹⁰⁴ Even though the victim was murdered following an incident of IPV and the perpetrator was unquestionably responsible for the victim’s unavailability; the court was unconvinced that the incidental effect of unavailability was sufficient to warrant the use of the hearsay exception *without the specific intent*.¹⁰⁵ The court highlighted that though murder and noncooperation were an obstacle in the State’s pursuit of safety and protecting victims of IPV, the defendant’s constitutional rights were the priority.¹⁰⁶

Despite the dismal outlook on the admissibility of a victim’s out-of-court statements, the Sixth Amendment and *Crawford*’s holding do not prevent the admission of all statements made by the complainant. The rule provided in *Davis v. Washington* defined specific statements made by a complainant during the course of a 9-1-1 call as non-testimonial in nature and, therefore, admissible at trial.¹⁰⁷ Instead, statements made to a 9-1-1 operator were deemed made for the primary purpose of obtaining police assistance to address an ongoing emergency rather than to establish or prove past events in a way relevant to criminal prosecution.¹⁰⁸ The statements and

¹⁰³ *Id.* at 368.

¹⁰⁴ *Id.* at 367.

¹⁰⁵ *Id.* at 373; Kendall Foley, *The Prosecutorial Problem of Uncooperative Domestic Violence Victims and Overcoming its Evidentiary Implications in Missouri*, 90 UMKC L. REV. 885, 902 (2022).

¹⁰⁶ *Giles v. California*, *supra* at 376.

¹⁰⁷ *Davis v. Washington*, *supra* at 833.

¹⁰⁸ *Id.* at 814.

identification could be used during the criminal prosecution because they were uttered as the events were actually happening rather than describing a past event for the primary purpose of gathering evidence.¹⁰⁹

Nevertheless, in the same opinion, the court remained rigid in its emphasis that testimonial statements were prohibited. With a different set of facts, in the case of *Hammon v. Indiana*, the court determined that should the statements be written and signed by the victim at the request of a police officer at the scene but after the incident, they would be considered testimonial and, if admitted at trial, violative of the defendant's sixth amendment right.¹¹⁰ In *Hammon*, though the complaining witness gave the statement at the scene soon after the climax of the violent incident, the statements were considered testimonial in nature, as they described what had occurred in the past and were given for the purpose of law enforcement efforts.¹¹¹

The prosecution may be able to admit hearsay statements made by the victim in a different way, however. If the victim's statements were made instead to medical providers describing the incident or the injuries, they may be admissible. Federal Rule of Evidence 803(4), as well as many state rules modeled after it, proscribes an exception to the hearsay rule when the statements were made for medical diagnosis or treatment, describe past or present symptoms or sensations, the inception of those symptoms, or their general cause.¹¹² However, the exception does not typically allow for hearsay statements identifying who was at fault for the injury.¹¹³

¹⁰⁹ *Id.* at 829.

¹¹⁰ *Id.* at 819.

¹¹¹ *Ibid.*

¹¹² FED. R. EVID. 804 (4).

¹¹³ Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. Rev. 397, at 429 (2015).

Despite this limitation as to identity, appellate courts in at least eight states as well as one federal circuit court, have expanded this exception to include identification of the assailant in IPV cases.¹¹⁴ One example includes the Oregon Court of Appeals decision in *State v. Roberts*, where an IPV victim had been treated at an emergency room.¹¹⁵ Upon suspecting abuse, the doctor pressed the patient and was able to elicit an admission of abuse as well as the identification of the victim's abuser.¹¹⁶ However, after reporting the abuse to authorities, the victim recanted her allegation of abuse and refused to cooperate with the prosecution.¹¹⁷ Despite the victim's subsequent recantation, the court of appeals decided that the victim's statements to the doctor, including the identification of her abuser, were admissible under the medical treatment and aid hearsay exception.¹¹⁸

Courts have consistently permitted hearsay exceptions, like the exception for medical diagnosis or treatment, in child abuse prosecutions and have reasoned that such expectations in IPV prosecutions are analogous.¹¹⁹ IPV cases are different; they involve adult victims who are often consciously and intelligently refusing to cooperate with prosecution.¹²⁰ Seeking special treatment in IPV cases, the State aims to bolster its evidence through the use of improvised hearsay exceptions, circumventing the fact that the victim has consciously and intelligently recanted their allegations of abuse and addressing the consequential weaknesses in the case that results in an ethical way.

¹¹⁴ *Ibid.*

¹¹⁵ *Id.* at 431; *State v. Roberts*, 775 P.2d 342 (Or. Ct. App. 1989).

¹¹⁶ Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, *supra* at 429.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, *supra* at 433.

¹²⁰ *Ibid.*

1. OVERCOMING THE HEARSAY OBSTACLE

If the State secures the victim's appearance and the victim testifies, using out-of-court statements becomes much more straightforward. Although the victim will be testifying as part of the State's case in chief, it will often seek to admit the victim's out-of-court statements to impeach the victim's recantation. The victim's prior statements are then admissible due to the defendant's ability to confront the witness. Though this seems counterintuitive, if the State secures the appearance of an uncooperative victim-witness, even one who may perjure oneself, they allow the defendant their confrontation right. This, in turn, permits the state to bring in the victim's prior statements.

The victim's inconsistent testimony and prior statements, paired with the expert witness' testimony about the effects of IPV and the commonality of victim recantation, can be the fairest outcome for all parties. Certain states, such as California, have crafted certain evidentiary rules focused on the importance of expert witness testimony to support the State's theory that a victim's recantation may not be credible.¹²¹ There are drawbacks, however, including the revictimization of the victim, embarrassment of being confronted with inconsistent statements, fear, and placing the victim in a position to perjure themselves.

The narrow admissibility of the victim's out-of-court statements can make it very difficult for a prosecutor to prove an IPV case without the victim's appearance. When looking at the ways that recantation arises and the motivators behind it, it seems as though the "Forfeiture by Wrongdoing" exception might be an appropriate hearsay exception to bring in the victim's prior testimonial statements. Currently, the Supreme Court explains in *Giles* that the "Forfeiture by

¹²¹ Tom Lininger, *Prosecuting Batterers After Crawford*, *supra* at 812.

Wrongdoing” exception applies in very limited circumstances and only when the perpetrator’s behavior clearly exhibits intent to prevent the victim’s availability from testifying.¹²² However, as prosecutors begin to understand more about recantation, through studies like Bonomi’s “Meet me at the hill where we used to park”, this might be more readily proven.¹²³ If Bonomi’s reconstruction of the interpersonal processes between the victim and perpetrator exhibits intentionality behind the perpetrator’s minimization and instruction to recant, the “Forfeiture by Wrongdoing” hearsay exception would seemingly apply.

Statements made by the victim that are not testimonial – such as those made to 9-1-1 operators during an ongoing emergency – may also be admissible consistent with *Davis*. Further, certain states have extended the medical diagnosis and treatment exception to include the identification of the perpetrator of abuse.

Despite these exceptions, statements made by the victim outside the courtroom setting are limited in their admissibility, and understandably so. The defendant must be afforded the constitutional protections of the sixth amendment during a trial. This constitutional right to confrontation applies regardless of the State’s inability to secure victim testimony or cooperation, leaving the State between a rock and a hard place. The State must choose to either call the victim against their will via subpoena or material witness warrant, attempt to prove the abuse beyond a reasonable doubt without the victim’s statements – relying solely on other evidence, or dismiss the charges outright. The State may not impede upon the defendant’s constitutional rights to

¹²² *Giles v. California*, *supra* at 373.

¹²³ Amy E. Bonomi et al., “Meet me at the hill where we used to park”: *Interpersonal processes associated with victim recantation*, *supra* at 1059.

confrontation because of its inability to admit supportive testimony from the victim regarding the IPV.

ii. PROPENSITY EVIDENCE EXCEPTIONS

It is well established that incidents of IPV tend to repeat and escalate throughout the course of a relationship. Consequently, some states believe that, due to the recurring nature of the crime, carve-outs in a state's evidence code should exist to prove a perpetrator's propensity for IPV. This starkly contrasts with the rationale behind the Federal Rule of Evidence 404, which states, "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."¹²⁴

By 2017, six states had implemented exceptions to their rules against propensity evidence for IPV cases. These included Alaska, California, Illinois, Louisiana, Michigan, and Wisconsin.¹²⁵ Yet, while there is an argument that an act of IPV often fits within a larger scheme of power and control exerted by the perpetrator, establishing a highly relevant reason for introducing such evidence, valid concerns regarding the prejudicial nature of such evidence exist. For instance, these exceptions have been used to show not only prior incidents with the current intimate partner, but IPV incidents with the perpetrator's previous partners as well. In allowing the admission of such evidence, the State creates the presumption that the cycle of violence is never-ending and, should they go free that the perpetrator will pose a risk to any intimate partner they may have in the future.

¹²⁴ FED. R. EVID. 404.

¹²⁵ AEQUITAS, Strategies in Brief, *Evidence of Other "Bad Acts" in Intimate Partner Violence, Sexual Violence, Stalking, and Human Trafficking Prosecutions*, Iss. 31 at 8 (May 2017).

The opposing argument would be that admission of such evidence would establish the intent, motive, and modus operandi behind the perpetrator's actions. When IPV victims recant, they often construct an alternative narrative that minimizes or rationalizes the perpetrator's behavior. For example, in the alternative narrative, the perpetrator's actions may be construed as accidental or done in self-defense. By allowing the State to use prior incidents of IPV committed by the perpetrator, the prosecution can establish that the conduct was intentional and motivated by the perpetrator's desire to assert power and control over the victim during the course of their relationship. Further, should the type of abuse be consistent with other partners in the perpetrator's past, the State might seek to establish that the incident was consistent with the perpetrator's modus operandi in intimate relationships.

Though propensity evidence might be helpful to IPV prosecutions without a cooperative witness, creating exceptions for IPV prosecutions to solve issues associated with meeting the burden of proof is not the answer. IPV prosecutions should be supported by admissible evidence or not pursued at all. The prosecutor must choose whether the risk of future harm and homicide is so significant that it would outweigh the ethical concerns in issuing a subpoena or a warrant to compel the uncooperative victim's testimony. If that subjective analysis yields that it is not, the prosecution should be abandoned.

iii. EXCULPATORY EVIDENCE: VICTIM RECANTATION AND A PROSECUTOR'S DUTY TO DISCLOSE

Under the ABA Model Rules of Professional Conduct Rule 3.8 (d) and *Brady v. Maryland*, the prosecutor has an ethical obligation to disclose any evidence which "tends to negate the guilt of the accused or mitigates the offense."¹²⁶ Despite this, some prosecutors grapple with the fact

¹²⁶ MODEL RULES OF PRO. CONDUCT r. 3.8 (d) (AM. BAR ASS'N 2020); *Brady v. Maryland*, 373 U.S. 83 (1963).

that recantation falls within the definition of exculpatory evidence. Disclosing evidence of victim recantation is incredibly important and unethical to withhold. Regardless of how credible the prosecutor may feel the original allegation is, it is the finder of fact who must determine the credibility of testimony or evidence. Should the victim testify to a story that differs from their original version, the prosecution may introduce their prior inconsistent statements both to impeach the credibility of the recantation and to prove the allegations of abuse. To do otherwise puts the innocent defendant at risk of being convicted and the guilty defendant at risk of going free.

e. THE PROBLEM-SOLVING PROSECUTOR

As described in ABA Criminal Justice Standards for the Prosecution Function Standard 3-1.2, the primary duty of the prosecutor is to pursue justice.¹²⁷ However, more specifically, the prosecutor should be a knowledgeable problem-solver, described in subsections (e) and (f) of the standard.¹²⁸ Subsection (e) explains that prosecutors “should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases.”¹²⁹ This is especially important when prosecuting cases of IPV, which are notoriously complex and often involve the State’s and the victim’s opposing interests. Frequently, when victims discover that prosecution might result in alternatives to incarceration, such as diversion or court-mandated treatment for their intimate partner, they become more receptive to prosecution and cooperate.¹³⁰

Subsection (f) extrapolates on this, stating that the prosecutor “is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice

¹²⁷ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION s. 3-1.2 (AM. BAR ASS’N 1968).

¹²⁸ *Ibid.*

¹²⁹ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION s. 3-1.2 (e) (AM. BAR ASS’N 1968).

¹³⁰ Phone Interview with Ms. Marnie Layon, Deputy District Attorney in San Diego District Attorney’s Family Protection Unit (Apr. 7, 2023).

system” who should “seek to reform and improve the administration of criminal justice.”¹³¹ This is especially important in addressing the aims of prosecuting IPV, which are to avoid impeding on the defendant’s rights and minimize the harm to the victim’s agency and autonomy, all while pursuing safety and harm reduction for the victim and the community.

However, to solve the problem, prosecutors must first understand it. Understanding IPV requires a deep knowledge of the psychological, theoretical, and practical aspects of IPV. Prosecuting IPV is different than prosecuting most other crimes; prosecutors assigned to prosecute IPV should receive special training and strive to implement effective policies and procedures which effectively address IPV without impeding defendant rights. To do so, states should aim to implement the support services addressed in the paper, focus on evidence collection, and encourage victim cooperation and autonomy.

III. PROSECUTORS WITH PROGRESSIVE POLICIES

Though the issue of prosecuting crimes of IPV is clearly multilayered and complex, numerous prosecutor’s offices have developed thoughtful approaches to address moral, evidentiary, and ethical problems with prosecuting these crimes. King’s County District Attorney’s Office (Brooklyn), San Diego District Attorney’s Office, and King County Prosecuting Attorney’s Office (Seattle) provided the following accounts of how they view prosecuting crimes of IPV where so many victims are uncooperative. Each account highlights the importance of assessing risk and providing victim-centered advocacy; however, the offices vary in their policies and approaches.

¹³¹ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION s. 3-1.2 (f) (AM. BAR ASS’N 1968).

a. SAN DIEGO DISTRICT ATTORNEY’S OFFICE¹³²

San Diego District Attorney’s Office has been at the forefront of IPV Prosecution Policy for several years. The lead prosecutors in their office emphasize victims’ rights and approach crimes of IPV through a trauma-informed lens. Marnie Layon, a Deputy District Attorney in the San Diego District Attorney’s Office Family Protection Unit and co-chair of the Domestic Violence Fatality Review Team, brings a perspective on the office’s policies and procedures to address IPV. Ms. Layon stresses the importance of understanding the theory and psychology behind IPV. Where other offices express frustration with victims’ lack of cooperation, San Diego District Attorney’s Office focuses on the entire picture – looking to financial, emotional, and other reasons why victims might not cooperate and keeping an open line of communication with those impacted by IPV.

Further, Ms. Layon noted how the power dynamics of the State can be reflective of those with the perpetrator in the victim’s life. She explained that she does not feel comfortable impeding on a victim’s agency and autonomy after the victim has been consistently disempowered in their intimate relationship – connecting this reasoning to the victim’s healing process and allowing victims to decide when they are ready to speak openly about their abuse. She highlighted the importance of open and transparent communication with the victim, explaining that, in her initial conversations with victims, she tells them that she will not bring them into court to testify against their will, even though she may be able to via a subpoena or a warrant.

Yet, the victim-centered conversations that Ms. Layon emphasized went beyond the scope of the criminal case. In addition to referrals to state resources existing untethered from the criminal

¹³² Phone Interview with Ms. Marnie Layon, Deputy District Attorney in San Diego District Attorney’s Family Protection Unit (Apr. 7, 2023).

prosecution, Ms. Layon distributes her contact information to victims to convey that should they make their own autonomous decision to go forward with a criminal prosecution in the future, she would be only a call away.

Under Marsy's Law, the California Victims' Bill of Rights Act of 2008, victims have a right to be notified throughout the criminal proceedings against their perpetrator.¹³³ Ms. Layon explained that throughout her conversations with victims, she consistently seeks solutions that serve both the victim and the State, such as programs like Domestic Violence treatment programs, Anger Management Classes, Addiction Treatment, or other alternatives to incarceration. Part of this rationale is to ally the District Attorney's Office with the victim, diffusing the fear that the State solely wants to punish or incarcerate their intimate partner.

These conversations may also include transparency about more difficult subjects, such as the consequences of failing to proceed with prosecution, which cannot be proven without victim cooperation. These consequences may include the removal of any criminal protection order and the dangers of remaining in an abusive relationship. She explained that if there is strangulation involved, she speaks to victims about homicide statistics. She does this not to scare victims but rather to inform them of the seriousness of the situation that they are in.

The office informs their risk assessments with statistical data collected within the county – including from their Domestic Violence Fatality Review Team, which meets bi-monthly and has been collecting data for over two decades. During these review meetings, a multidisciplinary team discusses where the State and law enforcement could have prevented murder in a closed IPV homicide case. The team identifies IPV risk factors that the State could have recognized as a

¹³³ CAL. CONST. art. I § 28 (b)

potential homicide concern. The goal is to learn from these closed cases and recognize intervention points or resources that can be utilized in preventing IPV homicides in the future. Ms. Layon explained that one of the team's primary goals, and that of many prosecutors nationally, has been taking a firm stance on strangulation, as it is a huge red flag for fatality.

Unlike other jurisdictions that use specific risk assessment tools in determining whether it is appropriate to move forward with prosecution, San Diego District Attorney's Office allocates that discretion to individual prosecutors. However, despite this subjective discretion, certain risk factors, like strangulation, flag a heightened concern within the county.

Victim advocates also play an essential role, assisting prosecutors in assessing the appropriate decisions for prosecution and resources offered. Ms. Layon explained how specialized victim advocates help with practical resources like security and mental health resources – noting that San Diego County has paired with over 80 multidisciplinary partners to support survivors of IPV and other crimes, through the North County Family Justice Center, One Safe Place. The District Attorney's Office consistently refers victims to this resource hub early in the process. Yet, despite the community resources being an important aspect of the process, the services offered at One Safe Place and any civil action taken, such as divorce actions, custody, or family orders of protection, are not integrated with the criminal legal process of prosecuting an IPV case. In fact, unlike other progressive offices, San Diego District Attorney's Office handles IPV cases exclusive from any related civil or family court matter. Ms. Layon explained how it causes confusion for victims, who might believe that the prosecutor represents them. Time is of the essence in these situations; perpetrators and victims often have a brief separation after an abuse event. San Diego District Attorney's Office prioritizes victim-centered and trauma-informed IPV prosecutions. By prosecuting in this way, they provide victim's support systems which serve as a critical function

of empowering them, fostering the healing process, and encouraging them to take part in holding the perpetrator accountable.

b. KING COUNTY PROSECUTING ATTORNEY’S OFFICE (SEATTLE)¹³⁴

King County Prosecuting Attorney’s Office is focused on the data. Seemingly ahead of the curve, King County takes an incredibly thoughtful approach to prosecuting crimes of IPV. As King County Prosecuting Attorney’s Office’s Domestic Violence Chair, Mr. David Martin leads one of the country’s most innovative domestic violence units. However, he does not limit his advocacy to his work in the office. Mr. Martin is on the Association of Prosecuting Attorney’s Domestic Violence Committee, working closely with twenty-five other leading prosecutors to advance innovative solutions for prosecuting Domestic Violence. In his home state, Mr. Martin has authored legislation serving Domestic Violence victims, “including removal of the marital rape exception, stalking reform, batterer treatment, felony DV sentencing reform, strangulation, and repeat DV assault” laws.¹³⁵ Outside of government work, Mr. Martin works with researchers at universities nationwide to advance research on recantation and victim noncooperation in IPV cases.

While King County acknowledges the importance of a victim-centered approach, they are seemingly more concerned with how to shift the victim’s objectives to align with the State. The office seeks to understand the social and psychological processes that result in victim vulnerability and recantation.

¹³⁴ Video Interview with Mr. David Martin, Chair of the King County Prosecuting Attorney’s Office Domestic Violence Unit (Apr. 5, 2023).

¹³⁵ About Us: Commission on Domestic & Sexual Violence, American Bar Association, https://www.americanbar.org/groups/domestic_violence/about-us/david-martin/.

Mr. Martin acknowledged that while policies affecting criminal reform for prosecuting crimes of IPV must come from the prosecuting attorney, the solutions need not be imagined by them. Therefore, teaming up with epidemiologists, public health experts, and other academics, Mr. Martin, along with other leaders within the King County Prosecuting Attorney's Office, are seeking to identify the root of why victims refuse to cooperate with the prosecution and how and when to address that.

Mr. Martin emphasized the need for an individualized approach to working with victims of intimate partner violence – delving into an understanding of cultural factors, socioeconomic factors, and the unique relationship between the victim and the perpetrator. Through this data, Mr. Martin suggested that the State has an opportunity to allocate resources to the most vulnerable and those who are the most likely to recant. He cautioned against an overreliance on risk assessment tools; although tools can be important in identifying needs and assessing individual situations, they should be coupled with subjective discretion. He spoke on the Ontario Domestic Assault Risk Assessment (referred to as ODARA), a risk assessment tool used by law enforcement personnel tool which assesses the likelihood that an abuse event will recur soon and the risk of lethality due to the IPV; Mr. Martin explained that, though it is likely at the forefront of domestic violence risk assessment tools, it lacks depth.¹³⁶

Regarding state actors, Mr. Martin explained the importance of the King County Prosecuting Attorney's Office's work with their victim advocate counterpart. He stated that advocates should be treated as “peers” to the prosecutors. He explained how vital their perspective is in

¹³⁶ Domestic Violence and Abuse in Relationships: ODARA, Waypoint, <http://www.waypointcentre.ca/cms/one.aspx?portalId=10043&pageId=52600>.

understanding the individualized perspective of the victim, especially given the shortcomings of risk assessment tools.

Regarding office policies, King County prioritizes efficiency and speed when addressing IPV cases and providing victims with resources. Mr. Martin explained how the importance of speed should be coupled with highly skilled state actors. These should include both prosecutors and advocates, who are well-trained and able to complete their work effectively, under pressure, and quickly. Mr. Martin also noted the importance of initial charging decisions for IPV cases. He explained that the charging stage is often the most influential stage of the case – as risk factors are most often considered when assessing the appropriate charge. He explained that the charging prosecutor is likely to define the entirety of the case and must make charging decisions carefully. Therefore, he allocates this responsibility to his more senior prosecutors, who will then assign the cases to line prosecutors throughout the unit. These charges likely indicate which cases will be litigated, and Mr. Martin explained that, ideally, only the most viable matters with the highest risk go to trial.

The same specialized need applies to effective policies regarding evidence collection. Mr. Martin explained that strangulation was of heightened concern for the State because of its association with the risk of homicide. To address this elevated risk, King County has allocated funds to specially trained nurses well-equipped to document injuries associated with strangulation cases. In addition, seeking to address other specific issues that might arise, King County partnered with several legal aid associations to provide a limited number of civil legal aid attorneys to victims of IPV. Through analysis of risk and need with risk assessment tools, the Prosecuting Attorney's Office can then assign these civil attorneys to their most vulnerable victims. The success of such programs is evident; the implementation of civil legal aid attorneys has reduced recantation rates

through thoughtful risk assessment and solutions to address the issue. Yet, despite the program resulting in reduced recantation, the Prosecuting Attorney's Office does not tie the programs and services to criminal prosecution.

Regarding how the criminal and civil worlds of IPV overlap, the office does not take as stringent a stance against civil matters as the San Diego District Attorney's Office; however, their court system is not integrated. Instead, King County Prosecuting Attorney's Office participates in certain civil matters to aid the victim in potentially receiving a civil order of protection or restricting a perpetrator's access to guns.

When a victim does refuse cooperation, the office follows strict protocols regarding the next steps; if it is determined that the case should be pursued, they first assess whether the case is viable and can be proven through an evidence-based prosecution. Evidence-based prosecution is much more prevalent on the felony level, where there is often more evidence. Mr. Martin explained that there is a significantly higher dismissal rate for misdemeanor domestic violence prosecutions, as the victim's testimony is central to proving the case. However, where an evidence-based prosecution is viable, it requires collaboration with police, specially trained in collecting this information, victim advocates, and domestic violence prosecutors. Where evidence must be compelled. With a material witness warrant, advocates and prosecutors come together as peers to discuss steps already taken and the risk of serious harm. When it is decided that a warrant is appropriate, the Domestic Violence chair approves the warrant's issuance. To issue a warrant against a victim who is uncooperative with a criminal prosecution, the office must find that there is a history of IPV as well as: suicidal or homicidal acts or threats, the use or implied use of a deadly weapon, the need to protect a child, a significant criminal history, stalking behavior, or

uniquely egregious conduct.¹³⁷ Further, all other attempts to secure victim attendance must have failed.

King County Prosecuting Attorney's Office is advanced in its approach to addressing crimes of IPV and supporting victims in a way that deters noncooperation and recantation. Though they diverge from other progressive offices with hybrid court models or a strong focus on victim communication, their data-driven approach to innovative solutions has reduced noncooperation. Access to external resources and appropriate allocation of resources to those who need it most has proven to be a very effective approach.

IV. BEST PRACTICES

Intimate partner violence differs significantly from other crimes. Since the United States began taking a more serious stance against IPV in the late 1970s, society has wrestled with how to best prevent, address, and resolve its associated harms. However, so-called "progressive policies" such as Mandatory Arrest and No-Drop Prosecution Policies have proved to be an inappropriate remedy for the problem. These policies neglected the victim's perspective and lacked the compassion and thoughtfulness that addressing IPV necessitates. As society moves towards a better understanding of IPV and the psychological and sociological factors intimately tied to it, so too must our criminal legal system. IPV is traumatizing, disempowering, and harmful to victims, and the State should make efforts to ensure that it does not perpetuate the same effect on them.

¹³⁷ King County Prosecuting Attorney's Office Material Witness Warrants in Domestic Violence Cases Policy, Section II – Office Policy on Issuance of Warrants in Domestic Violence Cases (2023).

a. THE INDIVIDUALIZED APPROACH

Due to the various influences within the perpetrator-victim relationship, justice must be tailored to the individual matter. To meet this need, state actors should be specially trained to identify risk factors and needs associated with IPV. Then, after careful assessment, these factors must be utilized to determine the best solution for the specific situation.

i. PSYCHOLOGICAL CONSIDERATIONS – ATTACKING MINIMIZATION

As identified in Bonomi's research, several interpersonal processes influence a victim's decision to recant or refuse cooperation.¹³⁸ These processes are rooted in the psychological vulnerabilities of the victim and the coercive dynamics of an IPV relationship.¹³⁹ The State should analyze the level of contact and the present state of the relationship in determining how to address the psychological aspect of encouraging a victim's continued participation. The primary psychological vulnerability associated with IPV is the rationalization of the abuse event through minimization and self-blame, which is frequently spurred by the perpetrator.¹⁴⁰ To address this vulnerability and prevent recantation, the State can take several steps to reinforce the seriousness of the abuse event and the dangerousness of the violent relationship.

For example, Bonomi highlights the use of videotaped testimonies as a way to ground the victim in the extent of the abuse and injury.¹⁴¹ Shortly after the abuse event, victims should be interviewed, evidence should be documented, and the victim should be provided with state-sponsored support resources. These response tactics can be utilized later in prosecuting the

¹³⁸ Amy E. Bonomi et al., "Meet me at the hill where we used to park": Interpersonal processes associated with victim recantation, *supra* at 1054.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Id.* at 1055.

perpetrator when the victim has been vulnerable to minimization. For example, a victim advocate should contact them immediately following the event. This would provide for consistent communication with someone who serves as a voice for them, who instills their confidence in the reality of the event, and who can combat thought processes that minimize the abuse event. Evidence collected shortly after the event can be used to remind the victim of the extent of their injuries. Recorded testimony can be shown to the victim so that they can hear in their own words what occurred during the abuse event, as well as the extent of their immediate trauma.

Though it should be noted that these tactics may retraumatize the victim and can be painful, in instances of escalating abuse and risk, these measures should be considered a necessary evil to combat the coercive interpersonal relationship between the perpetrator and the victim.

ii. SOCIOECONOMIC STATUS AND ADDRESSING MONETARY NEEDS

An individualized approach is important in addressing crimes of IPV, as it calls for an assessment of the pair's financial situation and how this impacts the victim's cooperation. Between 94-99% of IPV victims also experience financial abuse.¹⁴² Financial abuse can include but is not limited to employment-related abuse, preventing the victim from using financial resources, and coercing the victim into debt.¹⁴³ It is important to note that the victim is in the best position to assess their financial situation and determine the need for restitution, which may often differ from what is available to the State via financial records. The victim's perspective is vital in determining how prosecuting their abuser or leaving their abuser will impact their financial stability.

¹⁴² NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, ECONOMIC AND FINANCIAL ABUSE, <http://ncadv.org/files/domestic%20violence%20and%20economic%20abuse%20ncadv.pdf> (2016).

¹⁴³ *Ibid.*

Though economic concerns may not be the primary motivation in a victim's decision to remain with an abusive partner, they are still essential to address.¹⁴⁴ Ensuring victims are supported financially while cooperating with the State's prosecution is paramount to the State's success in addressing IPV. Without financial support, they may be unable to find transportation or take time off work to testify in court. In addition, victims who do not have housing or other financial means to participate in the prosecution are more likely to return to their abuser. Therefore, it is crucial for prosecuting attorney's offices to be an active voice in advocating for victims' access to safe and affordable housing, allocation of financial resources for basic needs, and restitution.

iii. SOCIAL SUPPORT – ASSESSMENT AND CONTRIBUTIONS

Though the research is lacking on why victims *do* cooperate with the prosecution, conclusions can be drawn from research on why victims leave abusive relationships. External support from others is a particularly significant motivating factor in a woman's decision to leave an abusive relationship. Social support can come from within the victim's community or social network and can be supplemented, or even sourced, from state actors as well.

The research on the importance of social support in an IPV victim's decision to leave a relationship is telling. For example, a study done by Barnett found that 63% of women who did not have social support networks returned to their abusive relationships.¹⁴⁵ This was compared to the 19% of women who made the decision to return despite having strong social support networks outside of the IPV relationship.¹⁴⁶ Social support was found to come from a variety of areas,

¹⁴⁴ Luciane M. Both et al., *Intimate partner violence against women: Operationalized Psychodynamic Diagnosis (OPD-2)*, 15 PLOS ONE 1 (2020).

¹⁴⁵ Ola W. Barnett, *Why Battered Women Do Not Leave, Part 2: External Inhibiting Factors – Social Support and Internal Inhibiting Factors*, 2 TRAUMA, VIOLENCE, AND ABUSE 3 (2001).

¹⁴⁶ *Ibid.*

including the workplace, family, and friends. The conclusion is evident; social support has a significant impact on a victim's decision to leave an abusive relationship.

In a study by Heron in 2022, where women who had left abusive relationships were individually interviewed, 70% of women identified their driving reason for leaving an abusive relationship as external support.¹⁴⁷ The women interviewed stated they had received support from personal relationships or professional providers.¹⁴⁸ Further, victims often pointed to support systems in their personal life as motivators for leaving.¹⁴⁹ They explained how these support systems encouraged them to leave and emphasized the wrongdoing of the abuser.¹⁵⁰

The positive findings of social support in a victim's decision to leave can be translated to fostering victim cooperation in IPV prosecutions. The Heron study's conclusions that external support emphasizes the seriousness of the abuse directly contradict the consequences of the interactions identified in the Bonomi study. The Bonomi study specifically identified the psychological harm imposed on the victim by the abuser at the time of prosecution. Psychological harm involves minimization and rationalization of the abuse event by the perpetrator.¹⁵¹ When the victim has an external support system, they receive a different message about the IPV – that the abuse is serious and the perpetrator must be accountable for it.

The issue is that many IPV perpetrators isolate their victims from their social support networks as a part of the abusive relationship. Therefore, the State should try to identify the scope of the personal support systems in the victim's life and encourage connection or reconnection with

¹⁴⁷ Rebecca L. Heron et al., *Why Do Female Domestic Violence Victims Remain in or Leave Abusive Relationships? A Qualitative Study*, 31 J. OF AGGRESSION, MALTREATMENT AND TRAUMA 677, 680 (2022).

¹⁴⁸ *Ibid.*

¹⁴⁹ *Id.* at 688.

¹⁵⁰ *Ibid.*

¹⁵¹ Amy E. Bonomi et al., "Meet me at the hill where we used to park": *Interpersonal processes associated with victim recantation*, *supra* at 1054.

those support systems wherever possible. The State should also foster relationships with community groups who might welcome and understand the victim during the prosecution period and beyond. Further, prosecutors should advocate for resourcing other support systems like victim advocate programs, counselors, and legal aid attorneys. Though the Heron study identifies informal support as a more effective catalyst for the dissolution of an abusive relationship between the victim and the perpetrator, specialized state actors who can provide additional external support are important to cooperation.¹⁵²

Victim advocates are essential to the victim's support system during an IPV prosecution. They should be trained explicitly in IPV to promote better connections with victims and greater recognition of risk factors. These advocates should be well-resourced and communicative with victims. Victim advocates' primary goals should be promoting victim autonomy and agency, connecting the victim to resources, and assessing the individual case. Further, victim advocates should be treated as peers in the criminal legal system. Prosecutors should seriously consider their judgment and knowledge of the victim's situation to determine how to proceed with the case. Victim advocates may be motivated by other drivers separate from the prosecuting attorney's office. They may be able to assist the victim in fostering social support systems and self-sufficiency.

Legal Aid attorneys may be another helpful actor in the victim's support network, assisting and promoting victim empowerment and agency. Legal Aid attorneys have the ability to work with the victim in a client-centered way as their zealous advocate. Contrast this with the prosecutor, who represents the State rather than the victim. Where a victim is especially vulnerable

¹⁵² Rebecca L. Heron et al., *Why Do Female Domestic Violence Victims Remain in or Leave Abusive Relationships? A Qualitative Study*, *supra* at 680.

and has other legal needs, a legal aid attorney is an important addition to the victim's support network. For example, a Legal Aid attorney may be able to assist the victim in concurrent family court proceedings, explain the legal system to the victim, and make other legal decisions for the victim based solely on the victim's interests.

However, outside of external support, the prosecutor can also provide support to the victim. Connections between the victim and the prosecutor should be empathetic and open. Prosecutors identified as being compassionate and specifically invested in prosecuting IPV should be promoted to those specific roles within prosecuting attorney's office. In addition, these prosecutors should be trained to try and understand the victim's perspective and foster trust.

iv. CULTURAL CONSIDERATIONS: ETHNICITY, RACE, IMMIGRATION, AND SEXUAL ORIENTATION

A prosecutor must assess how individualized cultural aspects impact a victim's willingness to participate with the State. Community and society attitudes and forces may affect a victim's decision to cooperate or recant. In 2005, homicide by an intimate partner was the seventh leading cause of premature death in the general female population.¹⁵³ Comparatively, intimate partner homicide was the *leading* cause of premature death for African American women between the ages of 15 and 45 was homicide by an intimate partner.¹⁵⁴ In addition to this sobering statistic, the Camacho study notes that white victims were significantly more likely to participate in prosecutor and law enforcement efforts than victims of color.¹⁵⁵

There are several reasons why victims from different ethnic, racial, and immigration backgrounds may not want to cooperate with the State. For example, Black victims may hesitate

¹⁵³ Christina M. Camacho & Leanne Fital Alarid, *The Significance of the Victim Advocate for Domestic Violence Victims in Municipal Court*, 23 VIOLENCE AND VICTIMS 288 (2008).

¹⁵⁴ *Ibid.*

¹⁵⁵ *Id.* at 298.

to cooperate with law enforcement because of personal experiences and mistrust.¹⁵⁶ Further, given the excessive state prosecution and incarceration of Black men, Black female victims may be less likely to cooperate because of the State's harm to their community and the refusal to perpetuate state violence on Black men.¹⁵⁷ In addition, noncitizen victims may be fearful that cooperating with the State may lead to negative immigration consequences, their citizenship may be contingent on their relationship with their abuser, or there may be language barriers that discourage noncitizen victims from cooperating.¹⁵⁸ Similarly, the LGBTQ community faces unique concerns, such as violence done to them by the State; they have concerns due to the close-knit nature of their community and unique forms of potential abuse, such as outing.¹⁵⁹

Certain cultures may strongly emphasize family values, and divorce may be objectionable to the cultural community.¹⁶⁰ This may dissuade victims from different cultural backgrounds from exposing their abusive situation to the public. In addition, victims may find that cultural exile due to cooperating with the State is too great a negative collateral consequence.

Ethnic, racial, sexuality, and immigration considerations are perhaps the strongest motivator for an individualized approach to the State's reaction to IPV. State actors should seek to spur diverse staffs who can address particular cultural, racial, and language concerns, whether within the prosecutor's office, the victim advocate staff, or both. Staffing state actors better equipped to understand these unique victim concerns is paramount to addressing this barrier to victim cooperation. In addition to staff diversity, advocates and prosecutors should be aware of

¹⁵⁶ Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, *supra* at 452.

¹⁵⁷ *Ibid.*

¹⁵⁸ Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, WIS. L. REV. 1657, at 1693 (2004).

¹⁵⁹ Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, *supra* at 454; Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, *supra* at 1679.

¹⁶⁰ Ola W. Barnett, *Why Battered Women Do Not Leave, Part 2: External Inhibiting Factors – Social Support and Internal Inhibiting Factors*, *supra* at 7.

and receive specialized cultural competency training so that prosecutors can acknowledge the unique perspective of the victim and attempt to tailor their approach in a way that best serves the victim's situation.

b. DATA-DRIVEN SOLUTIONS

Risk assessment tools can be used shortly after responding to an incident of abuse to gather information about the individuals involved in the intimate partner relationship and understand the scope of abuse. These tools can be incredibly useful in determining which resources should be allocated to the victim – whether it be social support, financial resources, or legal resources. However, data produced by risk assessment tools can also be beneficial when determining the urgency of the matter at hand and the appropriate state response to the abuse event.

Many jurisdictions have chosen to use ODARA in making determinations about an abuse event and perpetrator-victim relationship.¹⁶¹ The tool is meant to be administered by law enforcement personnel in the field with little to no experience in assessing IPV relationships; it consists of several specific questions which qualify the offender into one of seven risk categories. The tool assesses the likelihood that an abuse event will recur soon and the risk of lethality due to the IPV.¹⁶²

ODARA has the ability to account for factors like “drug and alcohol abuse, an increase in the number and severity of violent episodes, threats of self-harm and harm to children, access to weapons, a history of psychiatric impairment, criminal history, the proximity of the victim and their abuser, and noncompliance with court orders.” However, it should be used in conjunction

¹⁶¹ Domestic Violence and Abuse in Relationships: ODARA, Waypoint, <http://www.waypointcentre.ca/cms/one.aspx?portalId=10043&pageId=52600>.

¹⁶² *Ibid.*

with individual personal assessments by trained personnel.¹⁶³ ODARA is limited in addressing unique situational factors like interpersonal dynamics between the victim and perpetrator, social support, and cultural considerations. Further, though risk assessment tools offer some insight into future risks of abuse incidents, these tools have only moderate predictive accuracy.¹⁶⁴ For these reasons and others, it is still paramount that the individual state actors assess the situation in addition to this important resource and other similar data-driven tools.

c. STATE-FUNDED RESOURCES

i. PRACTICAL RESOURCES

Basic aid to the victim is vital to ensuring the victim can make an informed and neutral decision about whether to cooperate with a criminal prosecution. Providing victims with basic needs such as food, housing, and security (through criminal protection orders) is important in guaranteeing that choice is made unencumbered by their need for practical resources. It is the first step towards the path of victim cooperation.

ii. APPROACHING EVIDENCE-BASED PROSECUTION: THE IMPORTANCE OF SPECIALIZED STATE ACTORS

The defendant in a criminal proceeding has important constitutional protections that they must be afforded regardless of the victim's non-cooperation. Due to these protections and the high likelihood of victim recantation and non-cooperation, the State should ideally position itself to prove the case without the victim's testimony or out-of-court statements starting at its initial response to the abuse event. Those involved in responding to the IPV event should be knowledgeable about collecting admissible evidence. To do so, policies and procedures

¹⁶³ *Nevada Domestic Violence Resource Manual*, NV: The Urban Group.

¹⁶⁴ Claudia E. van der Put et al., *Predicting domestic violence: A metaanalysis of the predictive validity of risk assessment tools*, 47 *AGGRESSION AND VIOLENT BEHAVIOR* 100, 110 (2019).

emphasizing evidence collection should be implemented for 9-1-1 dispatchers, law enforcement agencies, and medical personnel.

When the State elects to move forward with an evidence-based prosecution, it addresses the prosecution like a homicide case, as if they did not have a victim. One prosecutor explains, “The victim has rendered herself as mute as a corpse.”¹⁶⁵ To proceed with such a prosecution, the State must prioritize evidence collection to strengthen its ability to prove its case beyond a reasonable doubt, no small feat without the State’s material witness. Relevant victim statements that may be admissible in an evidence-based IPV prosecution may include a recording of the 9-1-1 call, deemed admissible consistent with *Davis*, as well as transcripts from the victim’s prior testimony, such as those made at a preliminary hearing.¹⁶⁶ Admissions or statements made by the defendant, if made within the bounds of the defendant’s fifth amendment rights, may also be admissible. Evidence may also include evidence collected at the scene, such as injuries photographed by police or observed by another and physical evidence at the crime scene.¹⁶⁷ If the victim was treated for their injuries, the State may be able to admit medical testimony and statements that fall within the state’s hearsay exceptions and evidence rules.¹⁶⁸ Other witnesses may be called, including family members with relevant knowledge about the intimate relationship or those who may have observed or heard the event.¹⁶⁹ Finally, certain documents may be relevant to establishing the relationship between the perpetrator and the victim, including copies of marriage or birth certificates.¹⁷⁰

¹⁶⁵ Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases without a Victim*, 39 FEB Prosecutor 18, 19 (2005).

¹⁶⁶ *Id.* at 20.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

In collecting evidence, police officers should be aware of the importance of their role in gathering evidence. Without the background knowledge of what evidence they need to support an evidence-based prosecution, many officers will neglect to collect imperative evidence which might not be accessible during the pendency of the proceeding. Therefore, these police officers should be specially trained to gather thorough and reliable evidence at the scene of the abuse event.¹⁷¹ The National District Attorney's Association focuses on various pieces of evidence that police can collect at the time of the abuse incident: "body-worn camera videos of the scene; photographs of the victim and the scene; follow-up photographs; 911 tapes; written statements from the victim, defendant, witnesses, and child witnesses; interviews of neighbors, families, and friends of the victim and defendant; physical evidence; forensic examination results; and jail calls placed by the suspect after the incident."¹⁷² After the arrest of the perpetrator, police should be aggressive in their interviews with perpetrators and approach such interviews with the skill and tenacity that they would during a homicide investigation. Police should seek admissions or confessions from the perpetrator after they have been given their *Miranda* warnings. Additionally, police follow-up should be encouraged. Further, police should follow up with victims subsequent to the abuse event in a way that avoids jeopardizing victim safety. These follow-ups serve a dual purpose, encouraging further evidence collection and communication with the victim about available resources and the seriousness of the abuse event.¹⁷³

Specially trained police officers who collect better and more reliable evidence on the scene can be incredibly effective resources if the victim decides to recant or becomes uncooperative with

¹⁷¹ Ola W. Barnett, *Why Battered Women Do Not Leave, Part 1: External Inhibiting Factors within Society*, 1 TRAUMA, VIOLENCE, AND ABUSE 343 (2000).

¹⁷² National District Attorneys Association, Women Prosecutors Section, *NATIONAL DOMESTIC VIOLENCE PROSECUTION BEST PRACTICES GUIDE*, *supra* at 15.

¹⁷³ *Ibid.*

the prosecution. When strong evidence is collected at the scene, the prosecutor is more likely to maintain the option to pursue prosecution without a cooperative victim or with a victim who has recanted. Additionally, if strong evidence is collected, the State is less likely to issue warrants or subpoenas where prosecution is necessary due to the risk of future harm and the severity of the abuse event. Further, suppose the victim recants and testifies against the State. In that case, evidence can be brought to refute the recantation account and support the People in proving that the abuse event occurred.

Though law enforcement may be the most effective at collecting evidence, other important individuals involved in IPV response should also be aware of the importance of their role regarding evidence collection. Medical professionals, 9-1-1 operators, and prior testimony may be the only way the victim's out-of-court statements become admissible during an IPV prosecution. Therefore, 9-1-1 operators should be aware of and receive training on the admissibility of their conversations with victims during the IPV incident. Consistent with the Supreme Court's decision in *Davis*, statements made during a 9-1-1 conversation are not considered testimonial and may be admissible during IPV prosecution. 9-1-1 operators should acquire information from the victim caller about the perpetrator's actions, the victim's injuries, the identity of the perpetrator, and the nature of the victim and perpetrator's relationship. These 9-1-1 statements are not only germane to emergency response and rendering aid but serve a dual purpose as they are crucial and relevant to an evidence-based prosecution where the victim is uncooperative.

Medical Professionals may be able to testify to the victim's statements about their injuries. Though in many states, the identification of the perpetrator as the cause of the injury may not be admissible, these statements regarding severity and pain can be crucial to an IPV prosecution. In states that deem identification admissible via the medical treatment and diagnosis hearsay

exception, medical professionals should be trained to ascertain the perpetrator's identity and cause of abuse.

The State may call police, 9-1-1 operators, nurses, and other medical professionals as expert witnesses. These involved actors may testify to their observations and opinions on the IPV incident and can be influential to the prosecution's case.¹⁷⁴

In addition to other involved individuals, specialized IPV prosecutors with familiarity and training regarding evidence-based IPV prosecutions and fostering cooperation in IPV victims should be selected for supervisory roles within the prosecuting attorney's domestic violence unit. These prosecutors should mentor other IPV prosecutors on how to pursue evidence-based IPV prosecutions. This success is supported by data; prosecutors specifically trained in IPV have been held to have higher success rates in prosecuting IPV. For example, one study analyzes cases handled by a prosecutor's office with an IPV unit and an office without such a unit over a six-month period.¹⁷⁵ The office with a specialized unit handled 196 cases of IPV, successfully prosecuting 87.2% of them while only dismissing 12.7%.¹⁷⁶ The office without a specialized unit, however, only successfully prosecuted 64.5% of their 189 IPV cases and dismissed 35%.¹⁷⁷

Further, prosecutors should aim to elicit as much information from victims during pre-trial hearings as possible. There is always a chance that a victim who is initially cooperative becomes uncooperative later in the IPV prosecution. However, statements which are made while the defense

¹⁷⁴ Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases without a Victim*, *supra* at 21.

¹⁷⁵ Ola W. Barnett, *Why Battered Women Do Not Leave, Part I: External Inhibiting Factors within Society*, *supra* at 354.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

has an opportunity to confront them, may be admissible at trial even when the victim becomes unavailable as a witness.

In addition to specific training and an emphasis on evidence collection, prosecutors should demonstrate compassion and care when interviewing and interacting with victims of IPV. Patience is paramount to prosecuting a crime with high rates of recantation. Prosecutors should be specially trained to interact with victims in a trauma-informed way and collect information on the victim's individualized experience. The prosecutor should make all efforts to establish trust and a relationship with the victim, as the victim's cooperation is ideal. With such cooperation, the State can avoid an evidence-based prosecution altogether. If a prosecutor cannot move forward without the victim's cooperation, the prosecutor should make efforts to explain the consequences of the victim's decision and provide resources for the future.

d. CONCLUSION: UTILIZING PROSECUTORIAL DISCRETION TO EMPOWER AND PROTECT VICTIMS

Prosecutors have the ability to intervene in an abusive relationship effectively and end the cycle of violence. However, effective IPV prosecutors must have the background knowledge to serve the unique needs of IPV victims. IPV prosecutors should approach prosecution from a trauma-informed approach. This comes with a well-rounded picture of the abuse event and the evidence associated with it, the intimate partner relationship, and the risk factors involved. Additionally, prosecutors must be part of a larger team which works to combat the minimization and rationalization of the abuse event. With such high rates of victim noncooperation and resistance, IPV prosecutors must prioritize communication and meeting with the victim.¹⁷⁸

¹⁷⁸ Ola W. Barnett, *Why Battered Women Do Not Leave, Part 1: External Inhibiting Factors within Society*, *supra* at 354.

One study shows that perhaps the most significant predictor of victim cooperation is the number of times the prosecutor meets with the victim; however, this same study notes that the average number of prosecutor-victim meetings was less than one time, 0.53 times to be exact.¹⁷⁹ Prosecutors must work harder to understand the individual factors impacting the victim involved in the crime they are prosecuting and must make more of an effort to connect and validate the victim; otherwise, the victim will find it much harder to ally themselves with the State, and the statistics reflecting the number of victims who decide to recant will remain the majority.

Mandatory intervention programs such as Mandatory Arrest and No Drop Policies have been proven too rigid. They do not necessarily make victims safer but rather push victims into a position to treat the State as their adversary. Though there are many circumstances where prosecution is warranted regardless of the victim's cooperation, that decision should be made in an informed way based on the specific facts and risk factors associated with the abuse event and intimate partner relationship.

The answer lies in empowering victims through a support system, giving them a voice, and making an informed decision based on risk and public safety concerns. Cooperation can be fostered where the State understands the victim's goals and works to align itself with them. Diversion and other intervention programs can serve as a middle ground for noncooperative victims who wish to avoid the incarceration of their intimate partner. Nevertheless, IPV must be addressed by the State, even when victims are uncooperative. If there is a significant risk of homicide or risk of severe future harm, the State needs to address the abuse through the criminal legal system. In this situation, the State should put itself in the best position to proceed with an evidence-based prosecution. This can be done by implementing policies and procedures which

¹⁷⁹ *Ibid.*

encourage law enforcement and medical personnel to gather admissible evidence effectively. Where the victim must be called to testify to prevent serious future harm, the State should do so in a compassionate way that prioritizes the victim’s safety and dignity wherever possible.

IPV perpetrators must be held accountable. The negative consequences on society, collaterally involved parties, and the victim are too great and too dangerous. Yet, IPV prosecution will remain hampered until prosecutors can effectively address IPV and noncooperation appropriately, the solution to which must be compassionate, thoughtful, and backed by reason.

“A little bit of care goes a long way.” – Doris O’Neal¹⁸⁰

¹⁸⁰ Interview with Ms. Doris O’Neal, Founder of Survivor’s First, Director of Gender Based Violence Services, YWCA Seattle, <https://www.youtube.com/watch?v=zN8TWD9sT0> (Nov. 16, 2022).