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The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims

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ABSTRACT

Prosecutors are failing victims of gender violence as witnesses and when they become defendants in cases related to their own victimization. But it is questionable whether that behavior should be labeled misconduct. The vast majority of these behaviors range from misuses of discretion to things that some might consider best practices in handling gender violence cases. Nonetheless, prosecutors not only fail to use their discretion appropriately in gender violence cases, but they take affirmative action that does tremendous harm in the name of saving victims and protecting the public. The destructive interactions prosecutors have with victims of gender violence are not aberrations, or merely the poor choices of a few "bad apples," but a result of overreliance on the criminal legal system to address intimate partner violence. These choices also reflect the extent to which prosecutors have embraced the stereotype of the "perfect victim." The operation of absolute immunity for actions that prosecutors undertake in the context of their roles as advocates ensures that some actions—including arresting victims, misleading courts, and filing retaliatory cases against victims—are upheld by courts, though these actions might appear to be misconduct to those outside the justice system.

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INTRODUCTION

On November 2, 2014, Renata Singleton's boyfriend, Vernon Crossley, grabbed Ms. Singleton's cell phone during an argument and destroyed the phone.[1] The police were called and arrested Crossley.[2] Shortly thereafter, the Orleans Parish District Attorney's Office contacted Ms. Singleton.[3] Ms. Singleton informed the Orleans Parish District Attorney's Office that she was not interested in participating in prosecution. Ms. Singleton had three children and a new job. She did not want to spend what little spare time she had on a criminal case involving a man with whom she was no longer involved.[4] Nonetheless, on April 21, 2015, the Orleans Parish District Attorney's Office delivered two "subpoenas" to Ms. Singleton, ordering her to speak with the District Attorney's Office on April 24, 2015. The documents stated, "A FINE AND IMPRISONMENT MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE."[5] Those "subpoenas," however, were not legally binding documents issued by a court. Instead, the documents were fabricated by the District Attorney's office, designed "to coerce victims and witnesses into submitting to interrogations by prosecutors outside of court."[6] After a friend in law enforcement told Ms. Sin-

1. Complaint & Jury Demand at 33, Singleton v. Cannizzaro, No. 2:17-CV-10721 (E.D. La. Oct. 17, 2017) [hereinafter Complaint & Jury Demand].

2. *Id.*

3. *Id.*

4. *Id.* at 33–34.

5. Sarah Stillman, *Why Are Prosecutors Putting Innocent Witnesses in Jail?*, NEW YORKER (Oct. 17, 2017), https://bit.ly/2ywWVAv [https://perma.cc/M3KD-Q8W3].

6. Complaint & Jury Demand, *supra* note 1, at 2. For a photograph of one of these documents, see Tim Morris, *District Attorney's 'Fake Subpoenas' Degrade the Legal Process*, NOLA.COM (Apr. 27, 2017), https://bit.ly/2Be4JaZ [https://perma.cc/657X-3V9P].

gleton that she had not been properly served with a subpoena, Ms. Singleton decided not to attend the meeting.[7] On April 24, 2015, Orleans Parish Assistant District Attorney, Arthur Mitchell, asked the Orleans Parish Criminal District Court to jail Ms. Singleton as a "material witness."[8] Mitchell told the court that Ms. Singleton failed to appear pursuant to a valid subpoena.[9] Judge Robin Pittman issued an arrest warrant and set Ms. Singleton's bond at $100,000. Judge Pittman based Ms. Singleton's bond on Mitchell's statements to the court.[10]

On May 29, 2015, aware of the outstanding warrant for her arrest, Ms. Singleton went to the Orleans Parish District Attorney's Office and told Mitchell that she would not answer questions without an attorney present.[11] Mitchell responded, "You're the victim. You don't get a lawyer."[12] Ms. Singleton was arrested, handcuffed, and taken to the Orleans Parish Prison.[13] This arrest was Ms. Singleton's first, and she was afraid for herself, for her children, who had been left without a parent in the house, and for her new job, which she worried she would lose.[14] Because Ms. Singleton could not pay the $100,000 bond, she remained in Orleans Parish Prison for the next five days.[15] On June 2, 2015, Ms. Singleton finally appeared before a judge—dressed in an orange jumpsuit, shackled hand and foot, chained to the other people appearing before the court that day.[16] She was released on a reduced bond of $5,000 and given a curfew and an ankle monitor.[17]

Mr. Crossley, who was arrested for destroying Ms. Singleton's phone, had a different experience with the justice system. His bond was initially set at $3,500.[18] Crossley paid the bond and was released on the day that he was arraigned.[19] He pled guilty to two misdemeanors.[20] He did no jail time.[21] And because he pled guilty,

7. Complaint & Jury Demand, *supra* note 1, at 34.
8. *See infra* Part I.C.
9. Complaint & Jury Demand, *supra* note 1, at 34.
10. *Id.* at 35.
11. *See id.* at 35–36.
12. Stillman, *supra* note 5.
13. Complaint & Jury Demand, *supra* note 1, at 36.
14. *Id.*
15. *Id.* at 3.
16. *Id.* at 37.
17. *Id.*
18. *Id.* at 3.
19. *Id.*
20. *Id.* at 5.
21. *Id.*

the Orleans Parish District Attorney's Office never needed Ms. Singleton to testify against him.[22]

Renata Singleton was not the only victim of gender violence[23] subjected to arrest and incarceration as a result of a material witness warrant in Orleans Parish. The Orleans Parish District Attorney's Office requested and received material witness arrest warrants for a victim of child sex trafficking, who was held for 89 days, and a rape victim, held for 12 days.[24] In some cases, these victims were held in the same prisons as those arrested for crimes against them.[25]

Orleans Parish District Attorney Leon A. Cannizzaro, Jr. defended his office's use of what some would call extreme tactics to compel witness cooperation. When asked about jailing victims of rape as material witnesses, Cannizzaro responded, "If I have to put a victim of a crime in jail, for eight days, in order to . . . keep the rapist off of the street, for a period of years and to prevent him from raping or harming someone else, I'm going to do that."[26] Cannizzaro described the use of arrest as an "inconvenience."[27] A spokesman for his office maintained that in some cases, the only alternative to making an arrest is dismissal of the case, which the office will not do.[28] Cannizzaro specifically justified the request for an arrest warrant in one domestic violence case on the grounds that the victim was no longer cooperating with prosecutors.[29]

Orleans Parish Assistant District Attorney Chris Bowman described the use of fraudulent subpoenas as office "policy," explaining that "[m]aybe in some places if you send a letter on the DA's

22. *Id.* at 37.

23. Gender violence refers to harm that is inflicted as a result of a person's gender, gender identity, or gender expression, or is created or exacerbated by gender hierarchy or gender-related privilege or oppression. Leigh Goodmark, *CONVERGEing Around the Study of Gender Violence: The Gender Violence Clinic at the University of Maryland Carey School of Law*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 661, 662–63 (2015).

24. Complaint & Jury Demand, *supra* note 1, at 29–30. The victim of child sex trafficking lost her housing and custody of her child as a result of being incarcerated. *See id.*

25. *See* Joel Gunter, *Why Are Crime Victims Being Jailed*?, BBC News (May 6, 2017), https://bbc.in/2ScEX0a [https://perma.cc/SF8A-MBHG].

26. Jenavieve Hatch, *District Attorney Defends Jailing Rape Victims Who Won't Testify*, HUFFPOST (Apr. 29, 2017), https://bit.ly/2DOoXd3 [https://perma.cc/G9LG-G2WD].

27. Gunter, *supra* note 25.

28. Stillman, *supra* note 5.

29. Charles Maldonado, *Orleans Parish Prosecutors Are Using Fake Subpoenas to Pressure Witnesses to Talk to Them*, LENS (Apr. 26, 2017), https://bit.ly/2S0WSYD [https://perma.cc/5RDF-HYPP].

letterhead that says, 'You need to come in and talk to us,' . . . that is sufficient. It isn't here. That is why [it] looks as formal as it does.'"[30] Cannizzaro claimed that no one had ever been arrested as a result of the failure to comply with a fraudulent subpoena.[31] The federal lawsuit filed on behalf of Renata Singleton and other crime victims alleges that at least ten arrest warrants were issued based on prosecutors' assertions that witnesses had failed to appear in response to these subpoenas, and six witnesses were jailed.[32]

The Orleans Parish District Attorney's Office's policy of using fake subpoenas to justify the arrest of material witnesses is extreme. But Cannizzaro is at the outer reaches of a long line of prosecutors using legal process to compel victim participation in cases involving gender violence.[33] Prosecutors justify these tactics in two ways: either by claiming that the rule of law and public safety demand that victims of gender violence participate in prosecution, or by asserting a desire to safeguard the victim—to save the victim's life. This spectrum of prosecutorial overreach is the most extreme manifestation of the ongoing push to take gender violence "seriously."[34]

That push seems to end, however, when victims become defendants. Orleans County provides another example. In March 2005, Catina Curley shot and killed her husband, Renaldo Curley, after Mr. Curley physically and emotionally abused both Ms. Curley and her children for a decade.[35] Mr. Curley kicked Ms. Curley so hard that he dislocated her shoulder.[36] He broke her nose.[37] He attempted to push Ms. Curley out of a moving car.[38] He strangled Ms. Curley while hitting her in the face.[39] Mr. Curley also bit Ms. Curley, leaving visible marks on her skin.[40] Ms. Curley's children could not count how many times they had seen their father

30. *Id.*

31. *See* Complaint & Jury Demand, *supra* note 1, at 17 (citing Paul Murphy, *Practice of Fake Subpoenas to Be Stopped by Orleans DA*, 4WWL (Apr. 27, 2017), https://bit.ly/2RwIi5S [https://perma.cc/S65A-Y74P]).

32. *Id.*

33. *See infra* Part I.

34. LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 110–13 (2012) [hereinafter GOODMARK, A TROUBLED MARRIAGE].

35. Josie Duffy Rice, *New Orleans Woman Sentenced to Life in Prison for Killing Abusive Husband Is Granted New Trial*, APPEAL (July 27, 2018), https://bit.ly/2AnoAXg [https://perma.cc/6WHQ-KEP8].

36. *See id.*

37. *See id.*

38. *See id.*

39. *Id.*

40. *Id.*

abuse their mother.[41] When Ms. Curley tried to call the police, Mr. Curley broke her phone.[42] Nonetheless, Ms. Curley was well-known to the police. In 11 years, police had filed six reports as a result of Mr. Curley's violence towards his wife.[43]

On the night Ms. Curley shot her husband, Mr. Curley shoved her onto the bed, threw a soda can at her, and said, "Bitch, you going to make me hurt you."[44] Ms. Curley called family members for help, but could not leave the house because her keys were in the same room as Mr. Curley.[45] With nowhere to go, she took Mr. Curley's revolver out from under the mattress, knowing that Mr. Curley would come after her.[46] When he did, Ms. Curley thought, "If he gets close enough to me, he is going to take this gun from me and he is going to beat me again."[47] As Mr. Curley continued to advance, Ms. Curley fired one shot.[48] The shot hit Mr. Curley in the chest and killed him.[49]

Catina Curley was charged with second-degree murder as a result of her husband's death.[50] Prosecutors argued that Ms. Curley was not afraid of Mr. Curley; after all, she had not asked her family to come to the house or called the police.[51] Not only did Ms. Curley's lawyer not put on evidence about the violence Ms. Curley experienced, Ms. Curley's lawyer did not even explore whether such evidence might be beneficial to the case.[52] Ms. Curley was convicted and sentenced to life in prison without the possibility of parole.[53]

In 2018, however, Ms. Curley's sentence was overturned.[54] The Louisiana Supreme Court found that Ms. Curley's counsel had been ineffective and ordered a new trial.[55] Ms. Curley was released on $1,000 bond, over the objections of the Orleans Parish District Attorney's Office. District Attorney Cannizzaro said that the court's decision to set bond at $1,000 was "disturbing, dishearten-

41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. Rice, *supra* note 35.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. State v. Curley, 2016-1708, p. 21 (La. 6/27/18); 250 So. 3d 236, 250.

ing, and unprecedented."[56] Cannizzaro made it clear that his office would continue to prosecute Ms. Curley aggressively: "This woman already was found guilty of deliberately killing someone with a gunshot to the chest. The [Louisiana] Supreme Court did not exonerate her of committing murder. It only ordered that a new trial be held."[57]

Prosecutors in Orleans County and in jurisdictions all over the United States are failing victims of gender violence, both as witnesses and when they become defendants in cases related to their own victimization. But it is questionable at best whether that behavior should be labeled "misconduct."[58] While some interactions between prosecutors and victims of gender violence certainly constitute misconduct, the vast majority of these behaviors range from misuses of discretion to things that some might consider best practices in handling gender violence cases. And the operation of absolute immunity for actions that prosecutors undertake in the context of their roles as advocates[59] ensures that some actions—including arresting victims, misleading courts, and filing retaliatory cases against victims—are upheld by courts, though these actions might appear to be misconduct to those outside the justice system. Problematic prosecution policy in the context of gender violence is not, strictly speaking, misconduct.

The destructive interactions prosecutors have with victims of gender violence are not aberrations, or merely the poor choices of a few "bad apples"; instead, such choices are the product of the push to criminalize intimate partner violence over the last 40 years.[60] These choices also reflect the extent to which prosecutors have embraced the stereotype of the "perfect victim," whose meekness ensures that she will accede to the prosecutor's requests to testify and who never fights back.[61] Prosecutors not only fail to use their dis-

56. Rice, *supra* note 35.

57. *See* Ramon Antonio Vargas, *$1,000 Bail Set for New Orleans Woman Given New Trial on Charge that She Murdered Abusive Husband*, NEW ORLEANS ADVOC. (June 29, 2018), https://bit.ly/2Wzg5ix [https://perma.cc/M2RP-5P5F].

58. Prosecutorial misconduct includes failure to provide discovery, overcharging, witness tampering, suborning perjury, improper jury selection, improper argument, and the introduction of improper evidence. H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal,* 63 CATH U. L. REV. 51, 60–68 (2013). Witness tampering includes attempts to influence the testimony of a witness, intimidation of witnesses, and misrepresentation of information to witnesses, all of which occur in gender violence cases. *See infra* Part I.

59. *See infra* Part III.

60. *See* LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 14–15 (2018).

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

cretion appropriately in gender violence cases, but they take affirmative action that does tremendous harm in the name of saving victims and protecting the public. What that harm looks like, how prosecutors are immunized from the consequences of that harm, and what we might do about it are the subject of this Article.

I. VICTIMS OF GENDER VIOLENCE AS WITNESSES

The interactions prosecutors have with victims of gender violence are shaped by the context in which those interactions occur. When victims of gender violence are witnesses in criminal prosecutions, the relationship the prosecutor has with those witnesses is colored by the prosecutor's own attitude about gender violence, concern about winning cases, and office policies that mandate a particular approach to gender violence cases. These factors can combine to create an atmosphere in which prosecutors justify ignoring, disregarding, or mistreating victims of gender violence if necessary to win cases.

A. Prosecutorial Attitudes Towards Gender Violence

Prosecutors who doggedly pursue gender violence cases have different motivations. Some attorneys become prosecutors specifically because of a desire to combat gender-based violence.[62] As Cheyna Roth, a former prosecutor, writes, "I graduated from law school ready to make a difference for abused women."[63] The desire to protect abused women is often shaped by stereotypes about victims of violence. Victims of violence are expected to be meek, passive, compliant, and non-violent,[64] waiting to be rescued from their violent partners by the "good guys" in law enforcement. Victims of violence are also expected to be willing to do whatever prosecutors ask in service of prosecutors' attempts to keep them safe. Prosecutors sometimes see themselves as saving victims of gender violence, even when, or particularly when, victims seem unwilling or unable to save themselves.[65] Honolulu prosecutor Keith Kaneshiro de-

62. *E.g.*, Cheyna Roth, *'I Feel Like a Fraud': Confessions of a Broken-Down Domestic Violence Lawyer*, VICE (July 7, 2016), https://bit.ly/2RgOU8z [https://perma.cc/CY2X-8PRL].

63. *Id.*

64. Goodmark, *supra* note 61, at 83.

65. *See, e.g.*, Alex Barber, *Prosecutor Orders Arrest of Woman as Material Witness to Testify Against Her Alleged Abuser*, BANGOR DAILY NEWS (Sept. 20, 2013), https://bit.ly/2ReoDrl [https://perma.cc/4FTA-3UZU]; Kate Barcellos, *Taking the Call: Legal System Aims to Tackle Domestic Violence*, RUTLAND HERALD (Aug. 31, 2018), https://bit.ly/2sPhlk9 [https://perma.cc/AJ24-RYFV]; Roth, *supra* note 62; Joann Snoderly, *Kodiak District Attorney Sets Sights on Domestic Vio-*

scribed his office's work as doing "a lot of things to help victims of domestic violence, even when the victims did not know what's good for them."[66]

Zealous prosecution may also have more self-directed motives. Prosecutors pursue gender violence cases because prosecutors are concerned with maintaining law and order[67] or because prosecutors fear the political ramifications of appearing not to take gender violence seriously.[68] In her study of New York City's misdemeanor courts, law professor Issa Kohler-Hausmann found that prosecutors were concerned that the failure to take every possible precaution in a case involving intimate partner violence could result in future violence, which could in turn lead to questions being asked about how avidly the prosecutor pursued the original case.[69] Prosecutors want to insulate themselves from political consequences in the event that violence recurs. As one assistant district attorney told Kohler-Hausmann, prosecutors pursue cases involving intimate partner violence "because it covers, they see it as covering their backs. . . . On the off chance that something happens again, it's not their fault; they tried to prosecute it."[70]

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lence, U.S. NEWS & WORLD REP. (Jan. 6, 2018), https://bit.ly/2RNLpM3 [https://perma.cc/65L8-XGRP].

66. Rebecca McCray, *Jailing the Victim: Is It Ever Appropriate to Put Someone Behind Bars to Compel Her to Testify Against Her Abuser?*, SLATE (July 12, 2017), https://bit.ly/2uS25CR [https://perma.cc/RE7Y-PC2H]; *see also* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 67–68 (2007) (describing her interaction with a domestic violence prosecutor: "The prosecutor went on to say that she had a duty to fight domestic violence and that she was going to fulfill that duty, with or without Mrs. Jefferson's help").

67. *See* Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 402–03 (2001); *see also supra* note 7 and accompanying text.

68. *See* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 89, 140, 168 (2017). Pfaff notes, however, that there is little research on why prosecutors make the choices that they make. *Id.* at 134.

69. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 209–10 (2018).

70. *Id.* at 140; *see also* MICHELLE KAMINSKY, REFLECTIONS OF A DOMESTIC VIOLENCE PROSECUTOR: SUGGESTIONS FOR REFORM 14 (2012). As Michelle Kaminsky notes:

> Prosecutors are public officials who are held publicly accountable. If a woman is injured because we failed to follow through on a case, regardless of a victim's wishes, we will be held responsible. I would be a liar if I didn't acknowledge how this truth affects my decision making process.

KAMINSKY, *supra*, at 14.

B. No-Drop Prosecution

Prosecutorial zeal in gender violence cases may also be a function of policies adopted by prosecutors' offices. Although as a general proposition "[p]rosecutors prosecute,"[71] some prosecutors' offices have adopted specific policies in gender violence cases that commit them to prosecuting whenever they have sufficient evidence to do so, regardless of the victim's wishes.[72] These policies are known as no-drop prosecution policies.

No-drop prosecution grew out of advocacy by the anti-violence movement in the 1980s challenging the failure of prosecutors to pursue intimate partner violence cases.[73] Prosecutors explained their failure to bring such cases as a consequence of victims' reluctance to cooperate with prosecution; without a victim's testimony, prosecutors contended that they could not prove the cases beyond a reasonable doubt.[74] As District Attorney Cannizzaro stated, "Don't just make a complaint and run away and think magically the bad guy is going to be automatically convicted and go to jail. Our system does not work like that."[75] Prosecutors responded to pressure from anti-violence groups by pledging to push intimate partner violence cases forward. First, prosecutors attempted to advance intimate partner violence cases by using evidence-based or victimless prosecution techniques to build cases.[76] If such techniques did not provide sufficient evidence to move forward, prosecutors attempted to either entice the victim's cooperation through the provision of services and support ("soft no-drop prosecution") or compel victim participation if the victim's involvement was deemed necessary to make the case ("hard no-drop prosecution").[77] In hard no-drop jurisdictions, a victim may be required "to sign statements; be photographed to document injuries; be interviewed by police, prosecutors, or advocates; provide the State with other evidence or

71. Michelle Madden Dempsey, *Toward a Feminist State: What Does "Effective" Prosecution of Domestic Violence Mean?*, 70 MOD. L. REV. 908, 912 (2007).

72. *See generally* Robert C. Davis et al., *A Comparison of Two Prosecution Policies in Cases of Intimate Partner Violence: Mandatory Case Filing Versus Following the Victim's Lead*, 7 CRIMINOLOGY & PUB. POL'Y 633 (2008).

73. *See* GOODMARK, A TROUBLED MARRIAGE, *supra* note 34, at 108–11.

74. *Id.*

75. Gunter, *supra* note 25.

76. Evidence-based or victimless prosecution requires law enforcement to collect evidence and build cases involving intimate partner violence as though the victim of the crime will not be available to testify—much as they do when prosecuting a homicide case. GOODMARK, A TROUBLED MARRIAGE, *supra* note 34, at 110–11.

77. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1863 (1996).

information; produce her children if subpoenaed; and appear in court throughout the proceedings. Mandated participation may also involve forced testimony."[78]

Defenders of no-drop prosecution policy argue that the failure to implement the strongest version of such policies undermines the legitimacy of state efforts to address gender violence.[79] As law professor Cheryl Hanna writes, "When a batterer and his defense attorney know that a victim's failure to cooperate may result in case dismissal, they control the judicial process."[80] Such policies are also said to help victims of violence recognize the seriousness of the abuse they face, ensure that scarce state resources are not wasted on cases that are dropped, deter those who abuse from continuing to do so, and prevent others in the system, including police officers, from questioning the need to investigate intimate partner violence cases.[81]

Prosecutors in offices with no-drop prosecution policies can and do pursue cases without the victim's cooperation, "provided [they] have sufficient evidence from other sources to establish guilt."[82] And prosecutors in no-drop jurisdictions stress the importance of working with the victim to achieve a resolution that satisfies both the victim's wishes and the prosecutor's responsibilities.[83] But no-drop policies can involve putting serious pressure on victims to testify. Some prosecutors believe that victims are more likely to cooperate when victims fear the consequences of ignoring prosecutors' requests for assistance. As one prosecutor explained, "I tried to make [the victim] believe that it would be more painful for them to not cooperate than it would be to cooperate."[84] Nonetheless, at least one study suggests that women who have been subjected to abuse support no-drop prosecution policies.[85] Sixty-five percent of the women surveyed supported no-drop prosecution, although vic-

78. *Id.* at 1867.

79. *See, e.g.*, *id.* at 1891–92.

80. *Id.* at 1891.

81. *See id.* at 1891–93.

82. Andre L. Taylor, *High Point Police Domestic Violence Initiative Gaining National Attention*, WINSTON-SALEM J. (Aug. 4, 2018), https://bit.ly/2HyjvP7 [https://perma.cc/H9RR-TLTF].

83. *See, e.g.*, Barcellos, *supra* note 65.

84. Kirsch, *supra* note 67, at 402.

85. *See* Alisa Smith, *It's My Decision, Isn't It? A Research Note on Battered Women's Perceptions of Mandatory Intervention Laws,* 6 VIOLENCE AGAINST WOMEN 1384, 1398 (2000).

tims believed that the policies would be more beneficial to others than to them.[86]

C. Material Witness Warrants

When victims are unwilling to participate in prosecution, one powerful tool in the prosecutor's no-drop arsenal is the material witness warrant. The government has long used material witness warrants to ensure the availability of witness testimony; such warrants date back to the Judiciary Act of 1789.[87] Modern material witness laws enable prosecutors to ask law enforcement to arrest and hold witnesses whose testimony is deemed essential to the prosecution of a case.[88] In many states, those detained on material witness warrants are not entitled to constitutional protections, counsel, or compensation for their time.[89]

It is impossible to know how often prosecutors are using material witness warrants to arrest and hold victims of gender-based violence pending the trials of their partners; such cases generally only come to light when reported by the media.[90] Jessica Mindlin of the

86. *Id.* at 1396. Note, however, that the women were asked to respond to the following statement: "Some communities have no-drop policies. A no-drop policy means that the prosecutor will pursue charges against a defendant in domestic violence cases even when a victim wants to drop the charges." *Id.* at 1400. No mention seems to have been made of the possibility that the victim could be subpoenaed, arrested, or incarcerated as a result of no-drop prosecution. Giving respondents a fuller understanding of the specifics of no-drop policies might have changed the results.

87. Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 OHIO ST. J. CRIM. L. 681, 684 (2009).

88. *See generally* NAT'L CRIME VICTIM LAW INST., SURVEY OF SELECT STATE AND FEDERAL MATERIAL WITNESS PROVISIONS (2016), https://bit.ly/2FGjK9c [https://perma.cc/4DRE-68Q7]. In some states, defendants can also ask that material witnesses be held. *Id.* The decision to hold a material witness can also be made sua sponte by a judge in some states. *See, e.g.,* Erin Fuchs, *Woman Who Allegedly Endured 2-Day Beating Arrested, Taken to Jail to 'Save Her Life*, BUS. INSIDER (Sept. 21, 2013), https://read.bi/2FCT9dg [https://perma.cc/8V7W-3KB6] (referencing Tennessee Judge Ben McFarlin, who argued that he had victims of domestic violence arrested and held if they did not come to court because he could not otherwise connect them with resources); Samantha Michaels, *Courts Are Jailing Victims of Sexual Assault: Yes, You Read That Right*, MOTHER JONES (Oct. 31, 2016), https://bit.ly/2FMszgS [https://perma.cc/8J8H-TGB2] (describing how a court ordered Brandy Buckmaster held in an Oregon jail for about 50 days to ensure that she testified against the prison guard who assaulted her; the guard was free during that time).

89. Ronald L. Carlson, *Distorting Due Process for Noble Purposes: The Emasculation of America's Material Witness Laws*, 42 GA. L. REV. 941, 946, 952–53 (2008).

90. *See, e.g.,* Barber, *supra* note 65; Jodie Fleischer, *Innocent Victim Speaks Out About Being Jailed for 17 Days,* WSBTV.COM (May 1, 2012), https://2wsb.tv/2FNAUB9 [https://perma.cc/Y8E3-9QJY]; Nate Morabito, *Advocates Horrified*

Victim Rights Law Center believes that while such detentions are relatively rare, prosecutors have "consistently" used material witness warrants to hold victims of gender-based violence in some jurisdictions, including California, Washington, and Maine.[91] But some prosecutors acknowledge that the aggressive use of material witness warrants is office policy. Prosecutor Keith Kaneshiro, who staunchly defends his office's no-drop policy, had a woman arrested at her graduation party in order to ensure her testimony.[92] The actions of other prosecutors make clear that their office policy is to aggressively seek material witness warrants. Reporters in Washington County, Tennessee identified over a dozen victims of intimate partner violence who were jailed after the victims declined to participate in prosecution. Prosecutor Tony Clark defended the policy, saying that prosecutors needed to "send a message": "I'm not going to go back and apologize for what we've done, because I think we were doing the right thing. At some point in time, where do we draw the line in saying that we're just going to dismiss these cases if a victim doesn't appear?"[93] Victims often suffer harsh treatment while incarcerated. Donna Oliver, one of the Tennessee victims jailed after failing to appear, alleged that she was "grabbed by both male and female guards, thrown down, (sprayed), had every ounce of clothing taken from me, even my glasses. . . . My knees were badly bruised. You could see grab marks all over my legs."[94] Correctional officers concurred that they had used force and chemical spray against Oliver.[95] Notwithstanding Oliver's claims, Clark denied that the use of arrest was harmful, stating: "Do I think we're re-victimizing victims? No I don't."[96]

Even in jurisdictions where prosecutors acknowledge that material witness warrants should be used sparingly, victims of violence are jailed when prosecutors believe that those victims will not appear to testify otherwise. Crystal Rodriguez, for example, failed to appear for her boyfriend Patrick Iraheta's court date, despite signing a subpoena agreeing to appear.[97] Rodriguez had told prosecutors that she did not want to testify against Iraheta, who allegedly "placed his hands on [Rodriguez's] throat, leaving scratches and red

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After Domestic Violence Victims Jailed in Washington County, TN, WJHL.COM (Sept. 11, 2016), https://bit.ly/2szEpTP [https://perma.cc/979A-CHFN].

91. Michaels, *supra* note 88.
92. McCray, *supra* note 66.
93. Morabito, *supra* note 90.
94. *Id.*
95. *Id.*
96. *Id.*
97. Fleischer, *supra* note 90.

marks."[98] Prosecutors believed that they could not prove their case against Iraheta without Rodriguez's testimony.[99] DeKalb County, Georgia, prosecutor Sherry Boston requested a material witness warrant for Crystal Rodriguez, which ultimately caused Rodriguez to be held for 17 days.[100] Boston justified her action by stating her belief that Rodriguez would be in "grave danger"[101] if the case did not go forward, given the history of violence in the relationship. On the third day of Rodriguez's incarceration, Iraheta posted bond and was released.[102] Rodriguez's release was delayed, however, as a result of issues with scheduling and with the jail, which failed to send her to a hearing and took four additional days to release her after being ordered to do so.[103] While that delay "concerned" Boston, she nonetheless continued to justify Rodriguez's detention because "we did think it was necessary to get the testimony."[104] Iraheta later pled guilty, obviating the need for Rodriguez's testimony.[105]

Maine prosecutor Maeghan Maloney, who learned about the use of material witness warrants in a training course for district attorneys, said that she wished that she did not have to seek the warrants, but must sometimes do so "for the cases where if I didn't use it, I'd be in the position of talking about why [the victim] was killed."[106] Maloney said that she asked for a material witness warrant to hold Jessica Ruiz after Ruiz changed her mind about testifying; Ruiz's lawyer said that Ruiz never received a subpoena in the case.[107]

D. Perjury

Some victims, when compelled to testify, choose to recant allegations of violence or otherwise testify untruthfully in order to pro-

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. Barber, *supra* note 65. The violence alleged in this case was particularly serious; Maloney alleged that Robert Robinson hit Jessica Ruiz with a ring, leaving marks on her body, beat Ruiz with a broom with such force that the broom broke, and held Ruiz by the throat. Maloney further alleged that Robinson had dug a grave for Ruiz before the assault began; when Robinson took Ruiz to see the grave, she was able to escape. *Id.*
107. Maloney alleged that Ruiz stopped communicating with prosecutors after talking with Robinson's mother and attorney. Ruiz's attorney, Lisa Whittier, said that Ruiz "fully intended to testify" but never received Maloney's subpoenas, which, Whittier alleged, were sent to the wrong address. *Id.*

tect themselves or their partners.[108] Recanting runs the risk of prosecutorial retaliation.[109] In *State v. McCaleb*,[110] for example, the defendant alleged that his conviction was tainted because prosecutors had threatened to prosecute the complaining witness for perjury if she did not testify consistently with her original statement. Prosecutors allegedly told the victim that she "would need a babysitter for [her] daughter because her dad would be in jail and her mom would be in jail."[111] In *McCaleb*, the victim recanted an earlier statement notwithstanding the alleged threat by prosecutors. It is impossible to know how often prosecutors make such threats, what impact they have on victims' decisions to testify, or how often prosecutors choose to pursue perjury charges as a result of recantation.

But prosecutors do use perjury charges to punish victims of violence for recantation.[112] After Deborah Harper testified at her boyfriend's criminal trial and denied that her boyfriend had assaulted her, prosecutor Sean Daugherty filed perjury charges against Harper; Harper was incarcerated for 365 days.[113] Daugherty explained that while recantation was understandable on a "human level," the need for truthful testimony outweighed any concern he had about jailing a victim of violence.[114]

Similarly, Samantha Adams made a sworn statement in a petition for an injunction against her husband, but later recanted that statement and attempted to tell prosecutors and the court that she wished to rescind her statement.[115] After her efforts to rescind were unsuccessful, Adams signed a second statement in which she retracted the earlier account and stated that she had been coerced into making the first statement.[116] Adams's second statement led

108. Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149 (2009).

109. Recanting also runs the risk of incurring judicial ire. When prosecutors forced Meredith Bell to testify against her boyfriend, Adrian Spraggins, Bell recanted her statement. At trial, Bell testified that her earlier statement was false and that her trial testimony was accurate. The judge responded: "So let me see if I've got this all straight. We're here trying this case because you are a liar. Is that correct?" GOODMARK, A TROUBLED MARRIAGE, *supra* note 34, at 126–27.

110. State v. McCaleb, 2004-Ohio-5940, 2004 WL 2526406.

111. *Id.* ¶ 63. Because the victim recanted her statement nonetheless, the court found that the alleged threat did not affect Mr. McCaleb's substantive rights and therefore did not constitute prosecutorial misconduct. *Id.*

112. Kirsch, *supra* note 67, at 403.

113. Aaron Dome, *Domestic Violence Victim Gets Jail for Lying About Beating*, DESERT DISPATCH (Feb. 18, 2011).

114. *Id.*

115. Adams v. State, 727 So. 2d 983, 983–84 (Fla. Dist. Ct. App. 1999).

116. *Id.* at 984 n.2.

to the dismissal of the charges against her husband for violating the injunction.[117] Adams, however, was convicted of perjury by contradictory statement; her conviction was upheld on appeal.[118] The court noted "that criminal consequences attach to the false swearing of complaints, even where the affiant might have been motivated by the desire to benefit the person against whom the complaint was sworn."[119]

Concerns about prosecutorial coercion seem to emerge only in the context of challenges to the convictions obtained as a result of that coercion. In *State v. Asher*,[120] for example, Kenneth Asher told his wife Barbara Haunz-Asher that she should leave the house because "he might be tempted to hit her."[121] The next day, Haunz-Asher filed a complaint, and her husband was charged with making a threat of imminent physical harm.[122] When the prosecutor called Haunz-Asher to testify at trial, she refused to give evidence. The prosecutor reportedly was quite angry at Haunz-Asher's refusal, asking the trial judge to compel her testimony or find her in contempt.[123] Instead, the judge granted a continuance.[124] Before the case came back to trial, Haunz-Asher was subpoenaed to testify before the grand jury. The prosecutor told the grand jury:

> This lady has filed domestic violence charges against her husband and then when we got into court she refused to answer any type of questions about what he had done to her and so the feeling that I think she gave everybody was that she may have lied on the affidavit and on her complaint and we just want to get to the bottom of that so that's who we are going to bring in now.[125]

The prosecutor told Haunz-Asher that she had immunity in the domestic violence case and therefore could not be prosecuted for falsification, which is the crime that the grand jury was ostensibly called to investigate. The prosecutor asked many of the same questions he had asked at trial, which Haunz-Asher answered.[126] When her husband's trial resumed, the prosecutor recalled Haunz-Asher

117. *Id.* at 984 n.3.
118. *Id.* at 983–84.
119. *Id.* at 984; *see also In re* Balliro, 899 N.E.2d 794 (Mass. 2009) (upholding disciplinary sanction for lawyer who testified untruthfully in domestic violence matter after telling police and prosecutors that she did not wish to pursue charges).
120. State v. Asher, 679 N.E.2d 1147 (Ohio Ct. App. 1996).
121. *Id*. at 1149.
122. *Id*.
123. *Id.*
124. *Id.*
125. *Id.* at 1150.
126. *Id.* at 1150–51.

to the stand and impeached her with her grand jury testimony.[127] Asher was convicted of making a threat of imminent physical harm and appealed the conviction.[128]

The appellate court noted a number of concerns with the prosecutor's behavior. The court began by acknowledging that "frustration on the part of the prosecution is understandable when one spouse invokes the help of the criminal justice system against an allegedly abusive spouse, but then refuses to testify."[129] Despite the court's sympathy with the prosecutor's frustration, particularly given what the court called its "well-motivated concern for the victim, the prosecution *cannot* run roughshod over an accused's right to a fair trial, which is what happened in this case."[130] The court found that the prosecutor's use of the grand jury "to coerce and compel the testimony of Haunz-Asher so that the prosecution could use it in its case against Asher" was improper.[131] That coercion, the court continued, had so colored Haunz-Asher's testimony that Asher's due process rights had been prejudiced.[132] The court reversed Asher's conviction.[133] Note that the concern here is not with the way that the victim of this crime was treated by prosecutors,[134] but with the impact of that treatment on the defendant's due process rights. Coercion of victims by prosecutors is acceptable so long as that coercion does not impair the defendant's right to a fair trial.

II. VICTIMS OF VIOLENCE AS DEFENDANTS

Prosecutors seem not to care quite as much about the safety and well-being of victims of violence when those victims become criminal defendants. The transformation from victim to defendant happens, at least in part, because "survival action is often criminalized action."[135] And when victims of violence take action to protect themselves, they are overcharged, over-sentenced, and denied parole because prosecutors continue to oppose their release, notwithstanding evidence of victims' rehabilitation.

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127. *Id.* at 1151.
128. *Id.* at 1149.
129. *Id.*
130. *Asher*, 679 N.E.2d at 1149.
131. *Id.* at 1150–51.
132. *See id.* at 1152.
133. *Id.* at 1153.
134. The court did, however, include a reminder in its opinion that Haunz-Asher "was the victim in this case, not the accused." *Id.* at 1149.
135. Alisa Bierria & Colby Lenz, *Battering Court Syndrome: A Structural Critique of "Failure to Protect"*, *in* THE POLITICIZATION OF SAFETY 91, 91 (Jane Stoever ed., 2019).

A. Overcharging and Over-Sentencing

Prosecutors have a tremendous amount of discretion in deciding what charges to bring against those who use violence; there are few external checks on prosecutorial decisions about charging.[136] The charging decision has consequences that ripple throughout the life of the case, affecting plea bargaining, sentencing, and parole decisions. Prosecutors frequently "slap[ ] on a slew of charges," bringing charges that they may have little chance of proving beyond a reasonable doubt, to convince defendants to plead guilty.[137] Law professor John Pfaff writes, "If prosecutors decide to move a case forward, their choice of what charges to bring is limited solely by what they think they can prove—or what they think they can convince defendants they can prove."[138] The prosecutor's choice of a charge determines the sentencing range the defendant faces.[139] And if convicted, inmates are sometimes questioned in post-conviction proceedings about why prosecutors made the choice to charge one crime over another, the implication being that prosecutors opted for the more serious charge because the conduct itself warranted a heavier penalty.[140]

The prosecutorial tendency to charge every conceivable violation and seek the longest sentence possible holds in cases involving victims of gender violence who become criminal defendants. As Alisa Bierria and Colby Lenz observe, that motivation has driven the rise of felony murder and aiding and abetting prosecutions against mothers whose partners harm their children.[141] The stories of Kelly Savage and Tondalo Hall are illustrative. In 1995, 22-year-old Kelly Savage was charged with first-degree murder for aiding and abetting her husband, Mark Savage, in the death of her four-year-old son, Justin.[142] The charge was based on Ms. Savage's deci-

136. *See* PFAFF, *supra* note 68, at 130.

137. *See* Jordan Smith, *If a Prosecutor Breaks the Law in Secret, Does the Crime Exist? Not According to Texas Prosecutor*s, INTERCEPT (June 15, 2018), https://bit.ly/2B7m6tT [https://perma.cc/G3FP-X9B5].

138. PFAFF, *supra* note 68, at 133.

139. *Id.* at 131. Pfaff writes, "I once heard a retired DA tell a conference that he and his colleagues would figure out what the 'just' sentence for a defendant was, and then try to pick the right set of charges to make sure the judge had to impose something close to that." *Id.*

140. The Maryland Parole Commission, for example, asked one of my clients why prosecutors had charged her with second-degree murder rather than manslaughter, given the underlying facts that she described. The woman, of course, could not answer that question. Her parole was denied.

141. Bierria & Lenz, *supra* note 135, at 97–98.

142. *See id.* at 99–100

sion to leave Justin at home with his father while she ran errands.[143] Those errands were part of a safety plan Ms. Savage had developed with a domestic violence hotline; Ms. Savage was attempting to leave her husband at the time of Justin's death.[144] Nevertheless, the prosecution argued that Ms. Savage "directly 'aided and abetted'" Mr. Savage in Justin's death.[145] Ms. Savage was convicted of first-degree murder and sentenced to life without the possibility of parole.[146]

Tondalo Hall's story is similar to Kelly Savage's story. Ms. Hall was 22 years old when her boyfriend, Robert Braxton, broke their daughter's toe, leg, and ribs while diapering the baby.[147] Braxton had also physically, emotionally, and economically abused Ms. Hall.[148] Braxton was charged with multiple counts of child abuse, carrying a potential life sentence.[149] Prosecutors charged Ms. Hall with permitting child abuse.[150] On October 16, 2006, Ms. Hall pled guilty to permitting Braxton to seriously harm their children and failing to immediately get medical care for the children.[151] Ms. Hall agreed to a blind plea, which meant that she was not guaranteed a particular sentence but understood that she would receive a sentence equal to or less than Braxton's sentence.[152] She also agreed to testify against Braxton.[153]

Although Ms. Hall asked to be transported to court separately from Braxton, they were taken to court together; during those rides, Braxton continued to threaten Ms. Hall.[154] Not surprisingly, Ms. Hall attempted to shield herself from Braxton's abuse during the trial.[155] Prosecutors were unhappy with Ms. Hall's testimony, alleging that she minimized Braxton's conduct and attempted to

143. *Id.* at 99.
144. *Id.*
145. *Id.* at 99–100.
146. *Id.* at 100.
147. Petition for Writ of Habeas Corpus at 3, Hall v. Aldridge, 2017 OK Dist. Ct. CV-17-67U.
148. *Id.* at 4–5.
149. Plea of Guilt and Summary of Facts, State v. Braxton, 2006 OK Dist. Ct. CF-04-6403U [hereinafter Guilty Plea, *Braxton*], https://bit.ly/2sNTYYg [https://perma.cc/9KC9-VSG8].
150. Plea of Guilt and Summary of Facts, State v. Hall, 2006 OK Dist. Ct. CF-04-6403U [hereinafter Guilty Plea, *Hall*], https://bit.ly/2sNTYYg [https://perma.cc/9KC9-VSG8].
151. *Id.*
152. *Id.*
153. *See* Petition for Writ of Habeas Corpus, *supra* note 147, at 6.
154. Bierria & Lenz, *supra* note 135, at 105.
155. *See* Transcript of Formal Sentencing After Previous Plea of Guilty at 11–13, State v. Hall, 2006 OK Dist. Ct. CF-04-6403U, https://bit.ly/2sNTYYg [https://perma.cc/9KC9-VSG8].

protect him.[156] Fearing that Ms. Hall had undermined their case significantly, prosecutors entered into a deal with Braxton, who pled guilty to two counts of child abuse and was sentenced to ten years imprisonment, with eight years suspended.[157]

At Ms. Hall's sentencing hearing, prosecutors were indignant about Ms. Hall's testimony.[158] Ms. Hall's defense attorney noted that Ms. Hall's testimony was colored by her fear of Braxton. The judge acknowledged that Ms. Hall was likely afraid of Braxton, given the history of Braxton's violence against Ms. Hall and their children.[159] Nonetheless, and despite the fact that the person who had actually harmed the children would serve only two years in prison, prosecutors contended that Ms. Hall "should spend a significant part of the rest of her life in prison for what she did to these children."[160] Ms. Hall was ultimately sentenced to 30 years imprisonment.[161] Braxton had already been released from prison by the time Ms. Hall was sentenced.[162]

Prosecutors also overcharge when victims of violence kill their abusers, often ignoring a documented history of victimization and treating the victims' actions as if they did not occur within a context of violence. The cases of Arriel Bryant and Jaqueline Dixon are illustrative. Arriel Bryant's partner, Richard Kelley, had been charged with domestic violence against Bryant three times in seven years prior to his death and had been convicted twice in 2011 and 2016, respectively.[163] Kelley strangled, punched, pushed, and threatened Bryant, on occasion in front of their children.[164] In September 2018, Bryant shot and killed Kelley.[165] Despite the long history of violence Bryant endured, prosecutors charged Bryant with aggravated murder. Answering a defense argument that Bryant represented a classic case of "battered woman syndrome," prosecu-

156. *Id.* at 6, 11.

157. Guilty Plea, *Braxton*, *supra* note 149.

158. *See* Transcript of Formal Sentencing After Previous Plea of Guilty, *supra* note 155, at 5–8, 10–11.

159. *Id.* at 12.

160. *Id.* at 7.

161. *Id.* at 13.

162. *See* Guilty Plea, *Braxton*, *supra* note 149.

163. Adam Ferrise, *Attorney: 'Classic Case of Battered Women's Syndrome' for Cleveland Woman Charged in Deadly Shooting, Amber Alert*, CLEVELAND.COM (Sept. 14, 2018), https://bit.ly/2CLd85s [https://perma.cc/5R6L-25N8].

164. Scott Noll, *Mother Charged with Murder Was Victim of Repeated Domestic Abuse*, NEWS 5 CLEVELAND (Sept. 12, 2018), https://bit.ly/2DzzDff [https://perma.cc/B4V7-BQ3W].

165. *Id.*

tor Jose Torres responded that the multiple gunshots justified the charge and asked for bond of $1 million.[166]

In July 2018, Jacqueline Dixon shot and killed her husband in their front yard.[167] Ms. Dixon explained that her husband, Carl Omar Dixon, had charged at her aggressively. Moreover, Ms. Dixon had a protection order against her husband, which she obtained in 2016 after he punched her in the face and verbally abused her.[168] Nonetheless, Dallas County District Attorney Michael Jackson sought a murder charge before the grand jury because "someone got killed."[169] As law professor Angela Davis notes, Jackson had a number of options other than seeking a murder charge; he could have sought a lesser charge, or declined to seek charges altogether.[170] Even if he had "the evidence to get that indictment, the question is whether it's the fair and right thing to do under the circumstances."[171]

Overcharging is at the heart of one of the best-known cases involving a criminalized survivor—the case of Marissa Alexander. While Alexander's case has generated a significant debate about the gender and racial dimensions of the deployment of "stand-your-ground" laws,[172] the case also illustrates the power of prosecutorial charging decisions. In 2012, Alexander was charged with three counts of aggravated assault for firing a gun into the ceiling of her home after her ex-husband, Rico Gray, threatened her.[173] No one

166. Ferrise, *supra* note 163.

167. William C. Anderson, *Prosecutor Pursues Murder Charge for Woman Who Defended Herself from Abuser*, APPEAL (Aug. 23, 2018), https://bit.ly/2FNB6B7 [https://perma.cc/KJ3D-6GMU].

168. Police chief Spencer Collier seemed to believe that had Dixon only enforced her order, the shooting could have been prevented:

> It is pretty clear that the judicial system worked in this situation because the protection from abuse order was in place. I am not sure which judge handled the matter, but I applaud him for doing his job. . . . However, the order is simply a piece of paper if the complainant does not seek its enforcement.

Breanna Edwards, *Woman Shot and Killed Abusive Husband in Driveway, Now Faces Murder Charges Even Though Alabama Is a 'Stand Your Ground' State*, ROOT (Aug. 3, 2018), https://bit.ly/2SeRH6R [https://perma.cc/E2PL-RXCC].

169. Anderson, *supra* note 167.

170. *Id.*

171. *Id.*

172. *See, e.g.*, Mary Ann Franks, *Men, Women, and Optimal Violence,* 2016 U. ILL. L. REV. 929, 952–54 (2016); Mary Ann Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099, 1118–19 (2014) [hereinafter Franks, *Real Men Advance*].

173. Kirsten Powers, *Angela Corey's Overzealous Prosecution of Marissa Alexander*, DAILY BEAST (July 19, 2013), https://bit.ly/2RPBnK6 [https://perma.cc/XA92-ZJWE].

was injured during the incident.[174] Gray had a long history of abusing women, including Alexander.[175] He admitted to abusing Alexander at least four or five times, including one incident during which Gray pushed Alexander backwards, causing her to hit her head on a bathtub, resulting in an injury requiring medical attention.[176] Gray originally testified that, as Alexander had said, he chased her around the house and was refusing to leave when Alexander fired the gun into the air.[177] Alexander turned down the prosecution's plea offer of three years imprisonment, went to trial, was convicted, and was sentenced to 20 years incarceration.[178] After her conviction was overturned on appeal in 2013, prosecutor Angela Corey announced her intention to retry Alexander on the three counts of aggravated assault and to seek consecutive, rather than concurrent, sentences.[179] Facing a possible 60-year sentence, Alexander agreed to plead guilty to the three counts of aggravated assault and was sentenced to three years imprisonment, plus an additional two years of house arrest and monitoring.[180] While some saw the plea deal as a loss for Angela Corey,[181] Corey, in fact, got everything she had wanted in the original plea deal and more.

In all of these cases, prosecutors could have considered the history of violence in determining what charges to bring. That history could have spurred prosecutors to reduce the charges or not bring charges at all. Instead, prosecutors in each case sought the most serious charges. In Jacqueline Dixon's case, the grand jury declined to indict. In an unusual move, Ms. Dixon's lawyers were permitted to present their version of the facts to the grand jury.[182] Given the

174. *Id.*

175. Franks, *Real Men Advance*, *supra* note 172, at 1118.

176. Powers, *supra* note 173.

177. Gray later changed his story several times. Amanda Marcotte, *Prosecutors Now Seeking a 60-Year Sentence for Marissa Alexander's Alleged Warning Shot*, SLATE (Mar. 4, 2014), https://bit.ly/2G4t5Hm [https://perma.cc/H22S-GZPE].

178. The resulting 20-year sentence seemed to upset Judge James Daniel, who noted that as a result of the mandatory minimum sentence, the decision was "entirely taken out of my hands." Derek Kiner, *How the Marissa Alexander Plea Deal Really Went Down*, FOLIO WKLY. MAG. (Dec. 3, 2014), https://bit.ly/2MHYn8g [https://perma.cc/5H7G-KMM4].

179. The additional counts were because Gray's two children were in the home when the shot was fired. Marcotte, *supra* note 177.

180. Sam Sanders, *Florida Woman in 'Stand Your Ground' Case Accepts Plea Deal*, NAT'L PUB. RADIO (Nov. 25, 2014), https://n.pr/2HExDXf [https://perma.cc/KG54-E83Q].

181. Kiner, *supra* note 178.

182. Carol Robinson, *Selma Woman Charged in Husband's Shooting Death Cleared by Grand Jury*, AL.COM (Oct. 12, 2018), https://bit.ly/2Tg5wih [https://perma.cc/SN34-JGF2]. Grand juries are largely seen as tools of the prosecutor; in some jurisdictions, defense attorneys may not even attend grand jury proceedings,

influence that prosecutors are widely acknowledged to have with grand juries,[183] a cynic might argue that District Attorney Jackson allowed the grand jury to hear the defense because Jackson did not wish to prosecute Ms. Dixon but needed the political cover that the grand jury provided. Either way, it is clear that Jackson, like many prosecutors, declined to use his charging discretion on Ms. Dixon's behalf, notwithstanding the evidence of past domestic violence. The failure to exercise prosecutorial discretion in charging directly affected the sentences of Kelly Savage, Tondalo Hall, and Marissa Alexander, and depending upon the outcome of Arriel Bryant's case, could have a profound impact on her sentence as well.[184]

B. Post-Conviction

Post-conviction proceedings provide prosecutors with another opportunity to exercise discretion in ways that recognize the context within which victims of violence have committed their crimes or the growth that victims of violence have experienced during incarceration. But some prosecutors are unable to see past the original offense and attempt to minimize the violence victims experienced to block victims' release from incarceration.[185]

Again, Kelly Savage's case is instructive. Savage was unable to offer evidence about her own victimization in her 1998 trial.[186] In 2002, however, California passed a law enabling victims of violence to submit writs of habeas corpus in cases where those victims were unable to submit evidence at trial about "intimate partner battering and its effects."[187] Savage filed a habeas claim under the new

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let alone present evidence. *See* Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?,* 82 B.U. L. REV. 1, 63 (2002).

183. Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 263 (1995) (explaining that grand juries are thought to act as a "rubber stamp" for prosecutors, willing to "'indict a ham sandwich' if asked to do so by the government").

184. Although my discussion is largely confined to intimate partner violence, this same phenomenon occurs in the context of human trafficking as well. Victims of trafficking who are forced to assist their traffickers are frequently prosecuted for crimes related to their own trafficking, and prosecutors are often unwilling to consider that context in charging decisions and sentencing allocutions. The Human Trafficking Clemency Initiative, of which I am a part, is working with a number of these women to seek commutation of excessive and unjust sentences.

185. R. Michael Cassidy, *Undue Influence: A Prosecutor's Role in Parole Proceedings*, 16 OHIO ST. J. CRIM. L. (forthcoming).

186. Victoria Law, *The Abuse Excuse: Dismissing Domestic Violence and Its Effects in the Criminal Court System*, REWIRE.NEWS (Mar. 8, 2017), https://bit.ly/2nakZRv [https://perma.cc/8U3T-MDQR].

187. *Id.*

law.[188] All parties agreed that Savage was a victim of violence and that she had not directly caused her child's death.[189] Nonetheless, the prosecution continued to contend, as they had at trial, that Savage's "failure to protect" her child made her as culpable for the child's death as her husband, who beat the child to death.[190] Moreover, the prosecution minimized the violence that Savage endured, saying, "While I can respect that someone has been abused in their life, there are some instances where the law says, I don't want to be heartless, but so what, who cares."[191]

In a system that rewards prosecutors for convictions and lengthy sentences,[192] prosecutors may consciously or unconsciously be loath to give up what they see as victories. As a result, prosecutors actively and passively work to undermine victims' petitions for parole and other forms of post-conviction relief.[193]

III. PROSECUTORIAL IMMUNITY AND THE LINE BETWEEN PERMITTED AND ILLEGAL CONDUCT

The prosecutorial behaviors discussed in this Article are problematic at best, and abusive at worst. But, with a very few exceptions, victims of violence cannot seek redress for this conduct through the legal system. Prosecutors are immune from liability for decisions and conduct related to the initiation and pursuit of a case.[194] Even cases involving dubious prosecutorial behavior are protected by immunity.

Prosecutors are absolutely immune from liability for seeking material witness warrants, even when they make false statements to

188. *Id.*

189. Bierria & Lenz, *supra* note 135, at 100.

190. *Id.* at 101.

191. *Id.* at 102.

192. Gary Blankenship, *Lawyers Must Retain Their Link to the People,* FL. BAR NEWS (Aug. 15, 2005), https://bit.ly/2St853q [https://perma.cc/KPY3-SEMY].

193. I have had this experience in my own practice. I have attempted to reach out to my clients' prosecutors to see if they would be willing to support the clients' petitions for parole. In one case, a former prosecutor known for his efforts to improve Maryland's parole system on behalf of incarcerated people did not return my calls asking him to support my client's petition. Another former prosecutor swore that he would work to ensure that my client spent every day of her life in prison, without hearing about her numerous accomplishments during her incarceration. For an argument on limiting the input of prosecutors in parole decisions, see Cassidy, *supra* note 185.

194. Imbler v. Pachtman, 424 U.S 409, 427–28 (1976); *see also* Loupe v. O'Bannon, 824 F.3d 534 (5th Cir. 2016); Giraldo v. Kessler, 694 F.3d 161 (2d Cir. 2012); Adams v. Hanson, 656 F.3d 397 (6th Cir. 2011); Flagler v. Trainor, 663 F.3d 543 (2d Cir. 2011).

secure those warrants. In *Flagler v. Trainor*,[195] to secure a material witness warrant so Stephanie Flagler could be held until trial, prosecutor Matthew Trainor allegedly lied in representing to the court that Flagler was unwilling to testify in a domestic violence proceeding against her ex-boyfriend.[196] The U.S. Court of Appeals for the Second Circuit held that even if Trainor had, in fact, lied to the court about Flagler's willingness to testify, that conduct came squarely within his "'function' as an advocate" and was therefore immunized.[197] The court noted that while prosecutorial immunity could leave a "genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty,"[198] "society has found more benefit in insulating the exercise of prosecutorial discretion."[199] Similarly, in *Adams v. Hanson*,[200] the U.S. Court of Appeals for the Sixth Circuit held that a prosecutor was immune from liability for making allegedly false statements to support a material witness warrant.[201] The plaintiff, who was six months pregnant, spent 12 days in jail without being brought before the court.[202] Like the Second Circuit, the Sixth Circuit noted that arguments made to support the request for a material witness warrant fall within the prosecutor's role as advocate for the state, even when the prosecutor's statements are false.[203] The Sixth Circuit instead chided the trial court for failing to give Adams an opportunity to be heard or setting bail before issuing the warrant.[204]

Prosecutors have also successfully claimed immunity in cases where they brought unfounded charges against victims of violence. In *Loupe v. O'Bannon*,[205] the U.S. Court of Appeals for the Fifth Circuit held that a prosecutor was immune from liability for bringing a malicious prosecution against a victim of domestic violence related to her testimony in another matter.[206] In that case, Kristin

195. Flagler v. Trainor, 663 F.3d 543 (2d Cir. 2011).
196. *Id.* at 546.
197. *Id.* at 548.
198. *Id.* at 547 (quoting *Imbler*, 424 U.S. at 427–28).
199. *Id.*
200. Adams v. Hanson, 656 F.3d 397 (6th Cir. 2011).
201. *Id.* at 411.
202. *Id.* at 400.
203. *Id.* at 405; *see also* Doe v. Harris Cty., No. H-16-2133 (S.D. Tex. Sept. 29, 2017) (dismissing claims against a Harris County prosecutor who allegedly made false statements to secure material witness warrant against Jane Doe, which resulted in her being incarcerated and assaulted by both inmates and guards).
204. *Adams*, 656 F.3d at 406.
205. Loupe v. O'Bannon, 824 F.3d 534 (5th Cir. 2016).
206. *Id.* at 534

Loupe's boyfriend, David Adams Jr., was arrested for assaulting Loupe.[207] Loupe spoke with police at the time of Adams's arrest.[208] At Adams's bond hearing 18 months later, prosecutors asked Loupe about the incident.[209] Loupe responded that she did not recall the incident clearly, but that Adams had hurt her arm.[210] In response to prosecutor Robin O'Bannon's questioning, Loupe denied several times that Adams had hit her in the face. O'Bannon asked that Loupe be arrested; the judge refused.[211] O'Bannon then called the officer who took Loupe's statement to testify; that officer said that Loupe had never claimed that Adams hit her in the face.[212] O'Bannon ordered a sheriff's deputy to arrest Loupe for filing a false police report.[213] Loupe was arrested and released that evening.[214] She was charged with criminal mischief for filing a false police report.[215] At trial, prosecutors stipulated that Loupe was not guilty and Loupe was acquitted.[216] Loupe then brought suit against O'Bannon for malicious prosecution.[217] The U.S. Court of Appeals for the Fifth Circuit held that prosecutors are immune from liability for "initiating and pursuing a criminal prosecution" even when prosecutors act "maliciously, wantonly, or negligently."[218]

In some cases, courts ratify problematic prosecutorial techniques. In 2008, Karla Giraldo sought medical care for a cut over her eye, telling the emergency room doctors that she had been accidentally cut when a glass broke.[219] The doctors suspected that Giraldo had been abused and contacted police.[220] The police took Giraldo against her will to the police precinct. After holding Giraldo for five hours, the police took her to the district attorney's office, where Giraldo was interrogated for an additional two

207. *Id.* at 536.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Loupe*, 824 F. 3d at 536.
216. *Id.* Although prosecutors frequently drop charges, for a variety of reasons, it is uncommon for prosecutors to stipulate that a defendant is not guilty.
217. *Id.* at 537.
218. *Id.* at 539, 540 (quoting Rykers v. Alford, 832 F.2d 895, 897 (5th Cir. 1987)).
219. Giraldo v. Kessler, 694 F.3d 161, 164 (2d Cir. 2012).
220. *Id.* Whether doctors were required to make a report to police is questionable. New York law requires that doctors report all potentially life-threatening injuries inflicted by a knife or other sharp object. *See* N.Y. PENAL LAW § 265.25 (McKinney 2013). It is unclear from the facts provided in the case whether Giraldo's cut could have been considered life-threatening.

hours.[221] Throughout her time in custody, Giraldo repeatedly asserted that she was not interested in participating in prosecution. That same day, Giraldo's boyfriend was arrested and arraigned.[222] Giraldo sued police and prosecutors, alleging that she had been "unlawfully detained, held against her will and maliciously interrogated."[223] The court found not only that prosecutors were immune from liability for their actions, but also that the prosecutors had acted appropriately.[224] The court explained:

> Once the arrest took place, legal decisions at the core of the prosecutorial function—pursuit of the charges, arraignment, bail, etc.—had to be made by appellants and made quickly. . . . Appellee was obviously an important witness with regard to the proceeding against [Giraldo's boyfriend]. That she claimed her injuries resulted from an accident hardly weighed against interviewing her. Viewing the circumstances objectively, her claim that her injuries were the result of an accident might well cause a reasonable prosecutor to believe that interrogation was even more necessary than would have been the case in more common circumstances.[225]

Given the substantial leeway courts have given prosecutors in determining what constitutes carrying out activities related to the prosecutor's role as an advocate, courts frequently immunize what some would consider prosecutorial misconduct. As Jessica Ruiz's lawyer, Lisa Whittier, explained, Ruiz would not seek redress after being arrested pursuant to a material witness warrant because District Attorney Maeghan Maloney "abused the material witness statute, but [the prosecutor] did nothing illegal."[226] The Orleans Parish District Attorney's Office's use of fabricated subpoenas and misleading documents to coerce witness compliance,[227] for example, may well be shielded from liability because the process of securing witnesses for trial falls within the advocacy function, even if prosecutors make false statements in that process.

Absolute immunity may be abrogated only when a prosecutor's behavior is clearly not undertaken as a function of the prosecutor's role as an advocate, as in *S.V. v. Kratz*.[228] In 2009,

221. *Giraldo*, 694 F.3d at 164.
222. *Id.*
223. *Id.*
224. *Id.* at 167.
225. *Id.*
226. Barber, *supra* note 65.
227. *See supra* notes 1–32 and accompanying text.
228. S.V. v. Kratz, No. 10-C-0919, 2012 WL 58333185 (E.D. Wis. Nov. 16, 2012).

Stephanie Van Groll called police after being strangled by her partner.[229] District Attorney Kenneth Kratz asked to meet with Van Groll to discuss the case.[230] Shortly after their meeting, Kratz began texting Van Groll repeatedly, urging her to begin a sexual relationship with him and "reminding her that he had considerable money and power as a District Attorney that made a relationship with him attractive and desirable."[231] Kratz's texts suggest that his desire for the relationship and his willingness to pursue Van Groll's partner were linked in some way.[232] Van Groll feared that "if she doesn't do what he wants, Kratz will throw out her whole case."[233] Two additional women came forward with similar claims.[234] Kratz resigned in October 2010, and the suit was settled in 2013.[235] Kratz's case may be the rare case of prosecutorial misconduct in the context of gender violence that could have resulted in a finding of liability.

Prosecutorial immunity prevents prosecutors from being held accountable for behavior ranging from mildly problematic to egregious. Immunity shields review of decisions about what crimes to charge and how to ensure that witnesses participate in prosecution. It likely also emboldens prosecutors, making them more willing to engage in questionable tactics to secure witness testimony, prevent recantation, and force plea deals.[236] The question, then, is how to prevent prosecutors from using these tactics.

IV. CORRECTING PROSECUTORIAL OVERREACH

A. Victims as Witnesses

Prosecutors are engaging in behavior that does real harm to victims of gender-based violence. But nothing requires that prosecutors use material witness warrants aggressively or pursue perjury charges against witnesses. Both victims and experts agree that aggressive prosecution policy makes victims of violence less likely to

229. Complaint at 2, S.V. v. Kratz, No. 10-C-0919, 2012 WL 58333185 (E.D. Wis. Nov. 16 2012).

230. *Id.*

231. *Id.* at 3.

232. *See id.* at 4.

233. Lee Ferran et al., *Third Woman Accuses Wisconsin DA of 'Sexting' Harassment*, ABC NEWS (Sept. 21, 2010), https://abcn.ws/2Ut4Giw [https://perma.cc/3MTB-3UCJ].

234. *Id.*

235. Associated Press, *'Sexting' Lawsuit Against Former Prosecutor Settled*, TWIN CITIES PIONEER PRESS (Feb. 12, 2013), https://bit.ly/2RNU296 [https://perma.cc/APP3-ZS46].

236. My thanks to Gale Burford for this observation.

participate and chills reporting in the future.[237] As former prosecutor Casey Gwinn notes, forcing victims to participate in prosecution is "a misuse of the power of the criminal justice system. Prosecutors across America win these cases without victim testimony. Cases don't get better when you jail your victims."[238] Aggressive prosecution policies defeat their own purpose if they ensure that victims won't engage the legal system if violence recurs. Renata Singleton, for example, has said that she is unlikely to call police again if attacked: "I'd rather get choked and survive than go back to jail."[239] This chilling effect is precisely why the Violence Against Women Act[240] prohibits recipients of federal monies under the Act from using those funds to support policies or procedures that require victims to take part in prosecution.[241]

Some prosecutors are beginning to appreciate the damage caused by misuse of material witness warrants. In response to a particularly egregious misuse of a material witness warrant in a sexual assault case which resulted in the victim being jailed for 27 days and beaten by guards and inmates, District Attorney Kim Ogg has discontinued the use of material witness warrants in cases involving sexual or intimate partner violence.[242] Prosecutors could simply stop seeking material witness warrants in cases involving sexual or intimate partner violence. Research suggests that prosecutors could forgo the use of material witness warrants with little impact on prosecutorial effectiveness.[243]

Prosecutors could also change the way in which they conceptualize their work to correct prosecutorial overreach. For example, law professor Michelle Madden Dempsey has argued that domestic violence prosecutors should distinguish among types of domestic violence cases. Dempsey argues that prosecutors should deploy mandatory interventions only in those cases where the violence is serious and ongoing, prosecution is likely to reduce the violence, the violence perpetuates or sustains patriarchy, and community in-

237. *See* Alisa Smith, *It's My Decision, Isn't It?: A Research Note on Battered Women's Perceptions of Mandatory Intervention Laws*, 6 VIOLENCE AGAINST WOMEN 1384, 1386 (2000).

238. McCray, *supra* note 66.

239. Stillman, *supra* note 5.

240. Violence Against Women Act, 34 U.S.C. §§ 12291–12512 (2018).

241. U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, OVW FISCAL YEAR 2018 STOP FORMULA GRANT PROGRAM SOLICITATION (2018); Nate Morabito, *Domestic Violence Grant Prohibits Washington County from Forcing Victims to Participate in Criminal Cases*, NEWS CHANNEL 11 (Sept. 14, 2016), https://bit.ly/2Hzse3M [https://perma.cc/5F68-MUWZ].

242. Gunter, *supra* note 25.

243. Davis et al., *supra* note 72.

terests are served by compelling the victim's testimony.[244] Others have suggested increasing victim agency in prosecution by soliciting victim input into decisions about whether to proceed or providing victims who choose to prosecute with support services, rather than forcing or coercing participation.[245] Prosecutor Michelle Kaminsky endorses this approach. Kaminsky recounts a case in which her insistence on pursuing prosecution over the victim's opposition was based not on Kaminsky's assessment of what the impact might be on the victim, but because "I just didn't want a smug defendant like Seth to get away with what he had done."[246] In retrospect, Kaminsky writes, she should not have pursued the case.[247] Kaminsky argues that "prosecutors need to start incorporating battered women into the decision making process by listening to their wants and needs. While prosecution may be appropriate in some cases, it may not be the best approach in all cases."[248]

Legislatures and courts could also enact safeguards against misuse of prosecutorial power. New York, for example, recently created an independent commission to investigate claims of prosecutorial misconduct.[249] But, as commentators have noted, such a commission may have little impact given that much questionable prosecutorial behavior does not constitute misconduct.[250] Moreover, oversight bodies are embedded in a system that continues to immunize most prosecutorial actions from liability because it assumes that the vast majority of prosecutors are "acting in the

244. MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS 208 (2009).

245. *See, e.g.*, Mary A. Finn, *Evidence-Based and Victim-Centered Prosecutorial Policies: Examination of Deterrent and Therapeutic Jurisprudence Effects on Domestic Violence,* 12 CRIMINOLOGY & PUB. POL'Y 443, 450 (2013); *see generally* Lauren Bennett Cattaneo et al., *The Victim-Informed Prosecution Project: A Quasi-Experimental Test of a Collaborative Model for Cases of Intimate Partner Violence*, 15 VIOLENCE AGAINST WOMEN 1227 (2009) (having empowering experiences with court processes has been linked to improvements in victims' well-being); Lauren Bennett Cattaneo & Lisa A. Goodman, *Through the Lens of Therapeutic Jurisprudence: The Relationship Between Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims*, 25 J. INTERPERSONAL VIOLENCE 481, 499 (2010).

246. MICHELLE KAMINSKY, REFLECTIONS OF A DOMESTIC VIOLENCE PROSECUTOR: SUGGESTIONS FOR REFORM 58 (2012).

247. *Id.*

248. *Id. at* 15.

249. Editorial Bd., *Prosecutors Need a Watchdog*, N.Y. TIMES (Aug. 14, 2018), https://nyti.ms/2Pc0aDh [https://perma.cc/JSA8-6KWP].

250. *See* Maura Ewing, *New York's Prosecutorial Misconduct Review Panel Could Be Groundbreaking*, SLATE (Aug. 28, 2018), https://bit.ly/2wtSgxb [https://perma.cc/B4GK-RY3U].

public interest."[251] And after-the-fact scrutiny requires that those with the least power in the system—victims and defendants—raise claims of prosecutorial misconduct.[252]

There are, however, practices that courts could put into place to prevent misuse of material witness warrants. The constitutional protections that attach after a criminal defendant's arrest are not available to those held on material witness warrants in most states.[253] Recall what Renata Singleton was told: "You're the victim. You don't get a lawyer."[254] But states could provide such protections. District Attorney Kim Ogg has championed Jenny's Law,[255] which entitles victim witnesses in Texas to be represented by a public defender and to a prompt court appearance when the victim witness is threatened with jail.[256] Ogg argues:

> We need to ensure that when we use such a powerful tool as depriving someone of their liberty we give them a chance to respond, in person, with counsel, in open court, and ensure that process is scrutinised [sic]. These are basic rights that are given to the accused. They should be given to the victim too.[257]

Moreover, rather than giving the benefit of the doubt to prosecutors asking for material witness warrants, courts should examine such requests carefully and require prosecutors to justify the issuance of a warrant.[258]

B. Victims as Defendants

Tackling the problem of prosecutorial discretion in charging, sentencing, and post-conviction is equally difficult. Prosecutors

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251. Smith, *supra* note 137.

252. *Id.*

253. Gunter, *supra* note 25. The Fifth Amendment to the U.S. Constitution, for example, ensures that criminal defendants understand their right to remain silent and to have an attorney present during interrogation. U.S. CONST. amend. V. The Sixth Amendment guarantees the right to a speedy trial and to be informed of the nature and cause of any charges brought against the criminal defendant. U.S. CONST. amend. VI. And the Eighth Amendment requires that after arrest, a criminal defendant have access to non-excessive bail. U.S. CONST. amend. VIII.

254. Stillman, *supra* note 5.

255. Jenny's Law was passed by the Texas legislature and signed by the governor in 2017. The provisions are incorporated in various sections of the Texas Code of Criminal Procedure. *See* S.B. 291, 85th Leg., Reg. Sess. (Tex. 2017).

256. *Id.*

257. Gunter, *supra* note 25.

258. *Id.* Judge Laurie White, who issued a material witness warrant that placed a key witness in a murder case in the same jail as the alleged murderer after being misled by Orleans Parish prosecutors about the need to secure his testimony, says that, as a result, she is "not so quick to issue any material witness bond requested by the DA's office until I find out more." *Id.*

could refrain from aggressively pursuing victims of violence who use violence against their partners, a choice law professor Michelle Madden Dempsey refers to as "non-pursuit."[259] Prosecutors could interpret the law of self-defense through a lens that appreciates how that body of law is gendered and make decisions about the amount of force used or the imminence of harm accordingly.[260] Prosecutors could stop using felony murder laws to punish victims of violence for unwitting, minimal, or after-the-fact involvement in crimes of violence perpetrated by the victims' partners and others.[261] Prosecutors could choose to treat cases where the defendant is also demonstrably the victim of violence, and that victimization is directly tied to the crime at issue, differently.

Until prosecutors change their behavior, communities that care about misuse of prosecutorial discretion can call attention to cases where prosecutorial power has been wielded unwisely or unfairly. Campaigns like Free Marissa Now[262] and #FreeBresha[263] brought widespread public attention to the plights of Marissa Alexander and Bresha Meadows, a 14-year-old girl charged with killing her father after suffering years of his abuse. Outlets such as #SurvivedandPunished continue to document the stories of other women, like Tondalo Hall, who remain in prison.[264] Efforts like these help to illuminate the scope of the problem of criminalized survivors and create public pressure for prosecutors to rethink overzealous charging and sentencing decisions.

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259. Dempsey, *supra* note 71, at 913.

260. *See generally* CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW (1989).

261. *See, e.g.*, Danny Wicentowski, *Angel Stewart Won Parole in Missouri. She Still Has a Second Life Sentence in Iowa*, RIVERFRONT TIMES (Aug. 27, 2018), https://bit.ly/2MAaggr [https://perma.cc/T64G-HKMM].

262. *See* FREE MARISSA ALEXANDER, https://bit.ly/2G9jDT2 [https://perma.cc/NJY7-BYJV].

263. *See* #FREEBRESHA, https://bit.ly/2d5qP3b [https://perma.cc/JHM6-SBVC]. Bresha Meadows was 14 years old when she killed her father after suffering years of his abuse. She was charged with murder and, if she had been tried as an adult, could have received a life sentence. Instead, she pled guilty to involuntary manslaughter in the juvenile system. Meadows was released in 2017 after serving one year in a juvenile detention center and six months in a mental health facility. Mariame Kaba & Colby Lenz, *Bresha Meadows Returns Home After Collective Organizing Efforts*, TEEN VOGUE (Feb. 5, 2018), https://bit.ly/2SaAVFL [https://perma.cc/AS6H-EPGZ].

264. *See* SURVIVED & PUNISHED, https://bit.ly/2MxK8Te [https://perma.cc/65K6-SLWG].

CONCLUSION

Renata Singleton is the named plaintiff in a class action lawsuit challenging District Attorney Cannizzaro's policy of using fake subpoenas to coerce victim participation and lying to courts about victims' violations of those fake subpoenas in order to justify the issuance of material witness warrants. Catina Curley was acquitted on March 1, 2019, after spending ten years in prison.[265] The chances that prosecutors will be disciplined or held liable in any way for either of these decisions are slim. But the fact that neither of these actions may constitute prosecutorial misconduct doesn't make them acceptable. Prosecutors should use their discretion in gender violence cases—in all cases—to do justice.[266] Against a backdrop of mass incarceration and the increasing criminalization of victims of gender violence, we, as a society, should demand no less.

265. Heather Nolan, *Judge Finds Catina Curley, Recently Granted New Trial for Killing Husband in 2005, Not Guilty*, NOLA.COM (Mar. 1, 2019), https://bit.ly/2CNxSu6 [https://perma.cc/9XLF-Y685].

266. *See* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 4 (1940).

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