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PROSECUTORIAL DISCRETION TO CHARGE IN CASES OF SPOUSAL ASSAULT: A DIALOGUE*

JANE W. ELLIS**

INTRODUCTION

Spousal assault¹ is a crime of momentous proportion in our society.² Yet in spite of the high incidence of this crime and its serious

* Permission of the author is required for reproduction. This article would have been impossible without the many people working in the field and on the scholarship that appears throughout the footnotes. I wish to extend personal thanks for their time to Sally Buckley, Bebe Kivitz, Roberta Kuriloff, Lisa Lerman, and Maria Marcus. In addition, I am indebted to friends including Barbara Goren, Michele Hirschman, and, most of all, Jack Litewka.

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¹ The adjective "spousal" is used here because of the familiarity of the phrase "spousal assault" or "spouse abuse," but it is not meant to imply that marriage is a prerequisite for concern about violence in intimate relationships. One commentator has written that victims of these assaults "include wives or women in any form of intimate relationships with men . . . [but] it is important to note that battering relationships are more frequent among married couples." L. WALKER, *THE BATTERED WOMAN* xv (1979).

Nor is the neutrality of the word "spousal" intended to obscure the fact that most commentators agree that female victims are particularly vulnerable. Gelles notes that

there are men who are hit and injured by their wives. Perhaps as many wives hit their husbands as are hit by their husbands. But the real issue is that the social position of women in the family and society makes them much more vulnerable to the torment of violence.

R. GELLES, *FAMILY VIOLENCE* 142 (1979). For a discussion of the controversy concerning the frequency of wife versus husband battering, see J. FLEMING, *STOPPING WIFE ABUSE* 326-29 (1979). Researcher Murray Straus has articulated nine ways in which the sexist organization of society creates and maintains patterns of violence against women. See Straus, *Sexual Inequality, Cultural Norms and Wife-Beating* in *VICTIMS AND SOCIETY* 543 (E. Viano ed. 1976). In order to accentuate the special vulnerability of women, this paper will use female pronouns or nouns when referring to victims and male pronouns or nouns when referring to assailants or defendants.

Unless otherwise indicated in text or footnotes, the word "assault" is not used as a term of art, but is synonymous with the general term "abuse" and is intended to convey the idea of physical or threatened physical attack of any sort, from pushing or shoving to stabbing or shooting. The factual and legal nature of such "assaults" constitute the material of portions of the dialogue which follows.

² Estimates of the amount of spousal abuse in this country are imprecise because of the lack of careful record keeping of reported cases and the (probable) large number of unre-

repercussions for victims,³ children of violent parents,⁴ and society as a whole,⁵ the response of the criminal justice system has been and continues to be reticent. Police seldom arrest offenders,⁶ prosecutors seldom prefer charges,⁷ and judges, when they have an opportunity to sentence

ported incidents. In an effort to establish a probability scale, one study was designed and implemented with a random sample of 2,143 families. From this study, it was estimated that one out of every six couples in the United States engage in at least one incident of violence each year. . . . Over the course of a marriage the chances are greater than one in four (28%) that a couple will come to blows. . . . As with violence toward children, the 'milder' forms of violence are the most common. . . . Throwing an object, slapping, spanking, pushing and grabbing.

R. GELLES, *supra* note 1, at 92. The same study projected that "no fewer than 2 million women are victims of severe physical violence each year." *Id.*

One commentator, with the help of the Center for Women Policy Studies in Washington, D.C., compiled a sample of recorded cases in a variety of jurisdictions. That compilation showed, for example, that in "1974, San Francisco Police reported that 50% of their calls were for family disturbances," and, "[I]n Atlanta, 60% of all calls received on the night shift are reported domestic disputes. . . ." J. FLEMING, *supra* note 1, at 330.

³ Victims of such assaults suffer a great variety of harms ranging from bruises and anxiety to death. A 1973 FBI study shows that "one fourth of all murders occurred within the family, and one-half of these were husband-wife killings." D. MARTIN, *BATTERED WIVES* 14 (1976). Walker has recorded details of the sorts of injuries which are incurred by victims, along with a number of case histories. See L. WALKER, *supra* note 1, at 78-106.

⁴ Children of violent parents suffer both physical and emotional harms. Fleming reports an English study showing that in 50% of the "families where spouse abuse occurred, the children were also involved in the violence." J. FLEMING, *supra* note 1, at 331. For a description of the emotional damage done to children in homes with violent spouses, see *infra* notes 48-49.

⁵ Society pays dearly for this violence. The costs include injuries (including death) to both victims and police, the medical and police resources which must be devoted to the incidents, and, possibly, a higher incidence of criminal violence generally. One study in progress by Karen Seccombe, a doctoral student at Washington State University, reports that the higher crime rate among women during the last ten years "can't be pinned on the feminist movement—rather, . . . violence by men against women is the major factor . . . the most common factor among women criminals is that they have either been battered by a husband or a boyfriend or raped." Sloane, *In Brief*, National NOW Times, Nov., 1981 at 2, col. 3.

The violence is self-perpetuating as well. Gelles has found

that if a child is exposed to violence in the home and is the victim of parental violence, that child is quite likely—as much as 1,000 times more likely than a child raised in a nonviolent home—to grow up and use violence against a child or spouse. . . . Many a battered wife has divorced her violent husband only to be the victim of her teenage children's violence.

R. GELLES, *supra* note 1, at 142.

⁶ One commentator stated that the most common complaint heard from wife/victims is that if and when the police arrive on the scene, they rarely do anything at all. D. MARTIN, *supra* note 3, at 92. For numerous examples of official non-arrest policies of various police departments, see *id.* at 90-99; J. FLEMING, *supra* note 1, at 171 ("in many cities it is difficult for women being attacked by men they know . . . to get emergency police help."). But see INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE TRAINING KEY 245, WIFE BEATING (advocating arrest). The importance of arrest has been demonstrated in a recent study. See *infra* note 130.

⁷ One commentator noted, "Prosecutors are faulted as often as police for denying battered women access to the criminal courts. Only a fraction of the requests women make to prosecutors for arrest warrants are granted." Gates, *Victims of Rape and Wife Abuse*, in WOMEN IN THE COURTS 195 (1978); accord J. FLEMING, *supra* note 1, at 199-200 (citing a study by

at all, are lenient.⁸

Although both the police and the judiciary make crucial independent choices concerning the treatment of these assaults, the prosecutorial decision to charge is pivotal. A prosecutor who consistently refuses to initiate a prosecution following an arrest will communicate to police that these events are not to be treated as crimes and, accordingly, are not worth valuable time and effort.⁹ Similarly, a prosecutor who never brings a batterer before a judge, or who does so only rarely, will insulate the judiciary from the fact of the frequency of these assaults.¹⁰

The legal tradition which permits the infrequent prosecution of cases of spousal assault is the much criticized, yet almost universally followed, concept of prosecutorial discretion to charge.¹¹ The essence of

James Bannon, Executive Deputy Chief of Police, Detroit, which found that 92% of battered women cases were not prosecuted); D. MARTIN, *supra* note 3, at 110-15; Eisenberg & Micklow, *The Assaulted Wife: 'Catch 22' Revisited*, 3 WOMEN'S R. L. REP. 138, 158 (1977); Parnas, *Prosecutorial and Judicial Handling of Family Violence*, 9 CRIM. L. BULL. 733, 735 (1973); Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S R. L. REP. 12-13 (1978) ("At present, men correctly perceive that . . . even if they are arrested, they will not be ultimately punished for their violence.").

With the help of grants from the Law Enforcement Assistance Administration (LEAA), a small number of prosecutors around the country have devised and maintained experimental programs for the prosecution of cases of spousal assault. The results of this significant work have been collected and described in L. LERMAN, *PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE* (1981). This important work will be referred to throughout this paper.

⁸ See, e.g., Gates, *supra* note 7, at 187-89 (discussing the "reluctance of judges to treat serious assaults between couples as a crime"); accord A. BOYLAN & N. TAUB, *ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE & EQUITABLE ISSUES*, PART II, 116 (1981); D. MARTIN, *supra* note 3, at 114-18; Note, *Wife Beating: Law & Society Confront the Castle Door*, 15 GONZAGA L. REV. 171, 197 (1979); Center for Women Policy Studies, Washington, D.C., *Response to Violence in the Family*, (Jan.-Feb. 1981).

⁹ For interesting material on police response to prosecutorial action or inaction in general, see the classic work on the operation of discretion in the decisions of police, Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decision in the Administration of Justice*, 69 YALE L.J. 543, 554 n.20 & 560 n.28 (1960). See *id.* at 575 n.67 and accompanying text for a discussion of the police-prosecutor relationship in the handling of felonious assault cases.

¹⁰ Although judges bring their own biases to these cases, see *supra* note 8 and accompanying text, one prosecutor's office which has brought these cases regularly into court reports that "[t]he Courts are becoming more willing to get involved with the cases and thus begin to break the cycle of violence in the home." Euster, *Statistics Summary for the Battered Women's Project of the Seattle City Attorney's Office* 6 (1980).

¹¹ The discretion to charge is virtually unfettered. See *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965); *Powell v. Katzenbach*, 359 F. 2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966), *reh'g denied*, 384 U.S. 967 (1968). But see *Nader v. Saxbe*, 497 F.2d 676, 680 n.19 (D.C. Cir. 1974) (discretion not a shield for arbitrariness). The practice is followed by state as well as federal authorities. See F. MILLER, *PROSECUTION* 154 (1969) ("With rare exceptions, legislatures and appellate judges officially approve of this allocation of power to prosecutors . . .").

The literature documenting the operation of this discretion and suggesting a variety of means to curb it is voluminous. See, e.g., K. DAVIS, *DISCRETIONARY JUSTICE* 188-214 (1969);

this discretion is the prosecutor's power to choose not to initiate a prosecution, even in those cases in which sufficient evidence to support a conviction exists.¹² A variety of reasons are given as justification for this enormous grant of power to the prosecutor. Among these are the problems of limited resources¹³ and outdated statutes,¹⁴ as well as the need to evaluate each case individually.¹⁵ In the end, however, a prose-

A. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* (1981); F. MILLER, *supra*, at 293-345; Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770 (1933); Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473 (1976); Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976); Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507 (1956-57); Noll, *Controlling a Prosecutor's Screening Discretion Through Fuller Enforcement*, 29 SYRACUSE L. REV. 697 (1978); Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); Comment, *Justice Department's Prosecutorial Guidelines of Little Value to State and Local Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 955 (1981); Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519 (1969); Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130 (1975); Note, *Nonfeasance: A Threat to the Prosecutor's Discretion*, 30 IND. L.J. 74 (1954-55).

The American Bar Association (ABA) has prepared Standards for prosecutors to follow, including Standard 3-3.9 Discretion in the Charging Decision, which will be referred to repeatedly in the dialogue which follows this introduction. See ABA, STANDARDS FOR CRIMINAL JUSTICE 3-1.1—6.2 (2d ed. 1980) (hereinafter cited as ABA STANDARDS).

For discussions of legal challenges or legislative responses to the infrequent prosecution of cases of spousal assault in the context of the discretion to charge, see A. BOYLAN & N. TAUB, *supra* note 8, at 281-88; Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CAL. L. REV. 1657, 1699-1702 (1981); Blum, Memorandum on Prosecutorial Discretion (1981) (unpublished memorandum available through National Center on Women and Family Law, Inc., New York); see also *supra* note 7 and citations therein.

¹² "The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. . . ." ABA STANDARDS, *supra* note 11, 3-3.9(b). As one commentator notes, "The authority . . . to refuse to prosecute a complaint or indictment . . . is profound." Lezak, *The Prosecutor's Discretion—the Decision to Charge*, in THE PROSECUTOR'S DESKBOOK 23 (1971).

¹³ See LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533-34 (1970) ("No prosecutor has available sufficient resources to prosecute all of the offenses which come to his attention"); ABA STANDARDS, *supra* note 11, 3-3.9 commentary at 3-56 ("Realistically, there are not enough enforcement agencies to investigate and prosecute every criminal act that occurs").

¹⁴ The problem of outdated laws is part of the larger problem of overcriminalization. See ABA STANDARDS, *supra* note 11, 3-3.9 commentary at 3-56 (referring to "breadth of criminal legislation"). LaFave, *supra* note 13, at 533; Remington & Rosenblum, *The Criminal Law and the Legislative Process*, CURRENT PROB. CRIM. L. 481, 485-86 (1960) (noting confusion created by failure to revise criminal codes and weed out "inconsistencies, overlapping provisions, archaic language, and obsolete provisions").

¹⁵ See, e.g., ABA STANDARDS, *supra* note 11, 3-3.9 commentary at 3-56 ("The public interest is best served and evenhanded justice best dispensed not by the mechanical application of the 'letter of the law,' but by a flexible and individualized application of its norms through the exercise of a prosecutor's thoughtful discretion."); LaFave, *supra* note 13, at 534.

cutor's decision not to charge an individual or not to prosecute an entire class of offenses may be based on criteria as unspecific as "the public interest"¹⁶ or "the interests of the criminal justice system."¹⁷

The operation of discretion requires a society to trust the prosecutor's good faith and ability to assess correctly the nature of the public interest. This assessment is no easy task, however, in relation to spousal assault. Our culture has a history of not only tolerating, but approving, the striking of a wife by a husband.¹⁸ In addition, there is a long-standing tradition of not intervening, particularly with the criminal process, in what are often referred to as "family squabbles."¹⁹ The pressure to change this pattern of infrequent or non-prosecution is very recent,²⁰ and, in the absence of severe physical injury, many questions remain about how the criminal justice system should treat these cases. Although many decisions not to charge may be due to overt sexism,²¹ many more may be the result of our society's confusion about the proper role of the criminal justice system in relation to "minor violence"²² in families or intimate relationships.²³

It is not an answer, unfortunately, to say that it is the province of the legislature to decide when the criminal process should be invoked. Our system's acceptance of prosecutorial discretion means that a prosecutor must evaluate a legislative mandate in the light of specific facts and the prosecutor's own perceptions of the public interest. Yet the mo-

¹⁶ ABA STANDARDS, *supra* note 11, 3-3.9 commentary at 3-56.

¹⁷ NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, STANDARD 1.1 CRITERIA FOR SCREENING (1973), *quoted in* F. MILLER, R. DAWSON, G. DIX & R. PARNAS, CASES & MATERIALS ON CRIMINAL JUSTICE ADMINISTRATION 827 (1976) [hereinafter cited as NATIONAL ADVISORY COMM'N].

¹⁸ For the history of a man's legal right to "chastise" his wife, see Eisenberg & Micklow, *supra* note 7, at 138-39.

¹⁹ *Id.* at 145-46.

²⁰ See, e.g., L. LERMAN, *supra* note 7, at 2-8, for a description of the beginning of the movement calling attention to the problem of spousal assault and its neglect by the criminal justice system.

²¹ Some of the worst examples of sexist attitudes affecting prosecutorial decisionmaking can be found in Eisenberg & Micklow, *supra* note 7, at 158-59. These and other examples will be explored in the dialogue which follows. Straus, *supra* note 1, at 554, gives the following statement as one of the nine ways in which sexist attitudes maintain patterns of violence against women: "9. Male Orientation of the Criminal Justice System."

²² The phrase "minor violence" is taken from the Commentary to the ABA STANDARDS, *supra* note 11, at 3-57 ("This discretion is commonly exercised in family conflicts where minor violence occurs").

²³ Fleming states that

Many [prosecutors] are truly confused about whether prosecution benefits battered women, but their main concern is making law enforcement and prosecution appear to work in highly publicized criminal cases and those with unanimous condemnation. . . . The American criminal-justice system has no definitive answers . . . to the questions about what behavior is worthy of punishment. . . .

J. FLEMING, *supra* note 1, at 196-97.

ment this discretion is permitted, many assumptions about these events come into play. The prosecutor, as a member of a society which has tolerated or ignored these events up until recently, is no less susceptible to a variety of assumptions, attitudes and misperceptions than any other citizen.²⁴

The dialogue which follows is an exploration of possible responses to a seemingly simple question: When should a family 'fight' which involved physical force or the threat of physical force be treated as a family 'crime'? It attempts to bridge the gap which now exists between those who favor prosecution of cases of "minor violence" in families or intimate relationships and those who do not, and the gap between the language of a number of criminal statutes and the enforcement of those statutes. We lack consensus concerning the criminality of domestic violence, and where there might be conviction we instead find ambivalence.

PROSECUTORIAL DISCRETION TO CHARGE IN CASES OF SPOUSAL ASSAULT: A DIALOGUE

QUESTIONER: We should begin by stating our respective positions. I would have you initiate a prosecution in all cases of violence or threatened violence in which the offender and victim are spouses or intimates and in which there is probable cause²⁵ to believe that a criminal statute has been violated.²⁶

²⁴ In discussing the kinds of offenses for which clear policies are needed "to maintain the desired measure of consistency" of prosecution, Norman Abrams refers to "crime arising out of intra-family squabbling." Abrams, *supra* note 11, at 11-12. He states, "The offenses on this list usually have an element of controversy about them. There is often lacking a popular consensus that enforcement should be one hundred percent or that the conduct should be treated as a serious crime or, indeed, as a crime at all." *Id.*

²⁵ Probable cause is the determination that "the facts and circumstances within [his] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). Standard 3-3.9(a) of the ABA STANDARDS, *supra* note 11, states that "[i]t is unprofessional conduct for a prosecutor to institute . . . criminal charges when it is known that the charges are not supported by probable cause." This Standard further provides as the test for charging that "[a] prosecutor should not institute . . . criminal charges in the absence of sufficient admissible evidence to support a conviction." *Id.* If "support" is understood as "win," the prosecutor must believe there is "proof beyond a reasonable doubt of every fact necessary to constitute a crime." In re Winship, 397 U.S. 358, 364 (1970), before instituting a charge. The Questioner in the dialogue would employ the less weighty probable cause standard.

²⁶ Criminal codes vary from state to state and it is the responsibility of prosecutors to enforce the law of their state. Hence, no specific statutes are named at this point. One commentator has found that "[i]n most states the laws are adequate, but they are not enforced in instances of family violence." Fields, *Representing Battered Wives*, 3 FAM. L. REP. 4025, 4028 (1977).

A number of state legislatures, perhaps in hopes of calling their desire for enforcement to

PROSECUTOR: And I, for a variety of reasons, do not believe that criminal prosecution is appropriate in all cases involving intimates or spouses, particularly when the offense consists of no more than threats or minor violence.

QUESTIONER: I must say that I find the expression 'minor violence'²⁷ anomalous, but that's neither here nor there. Can I assume that you wouldn't refuse to charge in all cases involving spouses or intimates?

PROSECUTOR: Yes, you can. I'd certainly prosecute if a serious case came to my attention.

QUESTIONER: You must tell me, then, how you decide that one case is serious and another is not.

I. THE SERIOUS-
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PROSECUTOR: If there'd been an arrest, for example, felonious assault,²⁸ I'd be concerned and . . .

QUESTIONER: You learn of these cases after an arrest has been made?²⁹

PROSECUTOR: I get some victim complaints, but by and large I do get these cases after an arrest, yes.³⁰

QUESTIONER: So a threshold requirement of a serious case is that the police consider it sufficiently serious to merit an arrest?

PROSECUTOR: Yes, there's a lot of screening done by the police.³¹

the attention of police and prosecutors, have "revised their criminal law regarding domestic violence. . . . Substantive classification does not generally exclude possible application of the ordinary criminal law, and more criminal justice procedures are the same than are different." A. BOYLAN & N. TAUB, *supra* note 8, at 174.

²⁷ See *supra* note 22.

²⁸ For purposes of this dialogue, felonious assault will be defined in the same way in which the Model Penal Code defines aggravated assault: "A person is guilty of aggravated assault if he: (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. . . . (Proposed Official Draft 1962) MODEL PENAL CODE § 211.1(2).

²⁹ The source and type of information received by prosecutors vary enormously from jurisdiction to jurisdiction, as does the amount of screening done by police. See Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 16-17 (1980). For purposes of this dialogue, a jurisdiction is envisioned in which the prosecutor receives reports of felony and misdemeanor arrests and then screens those cases before a formal charge is filed.

³⁰ Victim complaints could be initiated in two ways: (1) by the victims themselves with no advice, or (2) by the victims on the suggestion of a police officer who felt that an arrest was not appropriate, but that prosecution might be. This discrepancy is the result of the law of arrest, which frequently precludes an arrest if an officer believes a misdemeanor did occur but did not witness the crime. For a discussion of changes in arrest powers in cases of spousal assault, see L. LERMAN, *supra* note 7, at 119-33.

³¹ See *supra* note 6.

QUESTIONER: And your next step?

PROSECUTOR: I'd consider the extent of the harm.³² I'd want to know whether there was serious physical injury.³³

QUESTIONER: And is your reason for saying that you'd be concerned about felonious assault the fact that serious physical injury is an element of that offense?³⁴

PROSECUTOR: That's correct.

QUESTIONER: So you're dependent, then, on the officer's judgment concerning the severity of the injury as well as on his decision to arrest?

PROSECUTOR: That's the system and I have to work with its constraints. I get arrest reports; I'm not the one who goes out answering calls.

QUESTIONER: I don't share your philosophy. I think you can work with constraints or work to change constraints, but I don't want to talk about your relationship with police right now.³⁵ What happens if you get a report of a misdemeanor arrest, say a simple assault?³⁶

PROSECUTOR: It depends, but it's likely that I wouldn't charge.

QUESTIONER: Because that offense is likely to involve only minor physical injury?

PROSECUTOR: Yes, though I would check to see whether there were other indications of serious injury. There might, for example, be a medical report.

³² The ABA STANDARDS include "the extent of the harm caused by the offense" as one factor the prosecutor may consider in making his or her decision. ABA STANDARDS, *supra* note 11, 3-3.9(b).

³³ Seriousness of injury as a criterion for charging in cases of spousal assault is mentioned in a variety of sources. *See, e.g.*, J. FLEMING, *supra* note 1, at 200; D. MARTIN, *supra* note 3, at 110, 112; Fromson, *Responsibilities of the Prosecutor in Spouse Assault Cases*, in U.S. DEP'T OF JUSTICE, PROSECUTOR'S RESPONSIBILITY IN SPOUSE ABUSE CASES 4 (1980); Note, *supra* note 8, at 196.

Similarly, seriousness of injury is a criterion for finding family violence criminal and therefore transferable from Family Court to Criminal Court in New York State. *See, e.g.*, In the Matter of Montalvo v. Montalvo, 286 N.Y.S.2d 605, 55 Misc. 2d 699 (1968). Unfortunately, not all prosecutors are as willing to consider charging, even when serious injury exists, as the prosecutor in this dialogue. *See supra* note 7 and sources cited therein.

³⁴ *See supra* note 28.

³⁵ Improved communication and reporting between police and prosecutors have been achieved in some of the experimental programs. *See, e.g.*, L. LERMAN, *supra* note 7, at 36-39.

³⁶ For purposes of this dialogue, simple assault will be defined according to the MODEL PENAL CODE's definition: "(1) Simple assault. A person is guilty of assault if he: (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or . . . (c) attempts by physical menace to put another in fear of imminent serious bodily harm." MODEL PENAL CODE § 211.1 (Proposed Official Draft 1962).

QUESTIONER: A medical report is an indication of seriousness?

PROSECUTOR: I think the existence of the report itself is a useful indicator, yes. If an injury requires medical attention. . .³⁷

QUESTIONER: You mean if someone has decided that an injury requires medical attention?³⁸

PROSECUTOR: I agree there's some subjectivity there, but reports are useful. They not only have facts, but they provide corroboration.

QUESTIONER: You transmute fact into evidence quickly.

PROSECUTOR: I have to. It's my responsibility to prove an offense has occurred.

QUESTIONER: But proving an offense has occurred is different from deciding what offense, assuming probable cause, is worth proving. Would you ever charge in a case in which there were no serious physical injuries?

PROSECUTOR: Yes. We might get an assault with a deadly weapon.³⁹ Say an assailant came at a victim with a gun or knife and missed. There might be no injuries at all, but that's serious enough to merit consideration for prosecution.⁴⁰

QUESTIONER: To merit consideration?

PROSECUTOR: I'd have to evaluate all the facts. Do you want me to make up an entire hypothetical for you?

QUESTIONER: Not now. I'm curious about that evaluation, but I want to stick with this business about seriousness for a minute. In your deadly weapon example, is seriousness a function of the weapon?

PROSECUTOR: Yes. You can kill or maim someone with a knife or gun.

QUESTIONER: So it's the potentially serious physical injury which concerns you?

³⁷ In a study asking subjects to rank the seriousness of certain crimes, an injury which resulted in the victim's receiving medical attention was rated as a "4," while a minor injury "which does not require or receive professional medical attention" was given only a "1." See M. WOLFGANG, *CRIMES OF VIOLENCE* 16-17 (1967).

³⁸ It is known that in spouse abuse cases "[e]mbarrassment may inhibit a victim from getting medical attention." Fromson, *supra* note 33, at 13.

³⁹ The MODEL PENAL CODE defines aggravated assault as follows: "(b) attempts to cause or purposely or knowingly or recklessly causes bodily injury to another with a deadly weapon." MODEL PENAL CODE § 211.1(2b).

⁴⁰ The deadly weapon criterion is frequently used in screening cases of spousal assault. See *supra* note 33.

PROSECUTOR: That's a fair statement.

QUESTIONER: It brings us back, however, to the same notion of seriousness. In both examples, it's serious physical injury, though one is actual and the other potential.

PROSECUTOR: Uh huh.

QUESTIONER: What is the significance to you of a serious physical injury?

PROSECUTOR: The answer seems so obvious, I'm not sure I understand your question.

QUESTIONER: I'm trying to understand both your emphasis on physical injury and your concern with severity.

PROSECUTOR: Physical? Physical injury's the most apparent thing, the most upsetting thing.

QUESTIONER: Apparent physical injury is the most apparent thing.

PROSECUTOR: True.

QUESTIONER: So it's the emotional impact of physical injury?

PROSECUTOR: Yes, it frightens people, and with no reason. It's invasive, it may be life endangering.

QUESTIONER: And when we're frightened we move more quickly to condemn the behavior that generated the result that upsets us?⁴¹

PROSECUTOR: I think so, yes.

QUESTIONER: And when the physical injury is not severe it is less evocative and therefore we're slower to condemn?

PROSECUTOR: I think it's true that people don't care as much. They may not worry about the next time in the same way they would if there were severe injury.

QUESTIONER: In spite of the fact that it may be the same act which in one case causes severe injury and, in another, little or no physical injury?⁴²

⁴¹ The language of criminal law conveys the relationship between that law and our fears in its use of the word apprehend. (We apprehend when we are apprehensive.)

⁴² That the relationship between act and result is a complex one is demonstrated by § 2.03 of the MODEL PENAL CODE: "Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result." MODEL PENAL CODE § 2.03, *reprinted in* J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, CRIMINAL LAW: THEORY AND PROCESS 733 (1974).

PROSECUTOR: I think it's valid to assume that serious injury is generally the result of a serious or more serious act . . .

QUESTIONER: I'm not sure I agree . . .⁴³

PROSECUTOR: . . . and it's also true that it's difficult to react to what you can't see.

QUESTIONER: Yet you admit there can be serious unseen injuries?

PROSECUTOR: Yes, there may be serious internal injuries.⁴⁴

QUESTIONER: Or serious external injuries which are not readily visible.⁴⁵

PROSECUTOR: Is that common in these cases?

QUESTIONER: Yes. Or terrible fear.⁴⁶ And you're unlikely to see the harm done to the children of such families.

PROSECUTOR: Do you really think seeing a minor assault harms children?

QUESTIONER: I think they are harmed, yes,⁴⁷ and that they learn.⁴⁸ And you can't see the injury which was never reported or the one which hasn't occurred.

⁴³ See *infra* text accompanying note 99.

⁴⁴ See L. WALKER, *supra* note 1, at 223 ("The second category [of battered women's injuries] is internal injuries which cause bleeding and malfunctioning of organs").

⁴⁵ T. DAVIDSON, CONJUGAL CRIME 32 n.* (1978) ("Inflicting nonvisible injuries (at least nonfacial ones) seems to be a specialty of many of the middle-class wifebeaters coming to my attention."). But see *id.* at 33 ("Despite the men's knowledge of inflicting nonvisible injuries, most . . . attacked the head most frequently and then the face"); accord Eisenberg & Dillon, *Medico-Legal Aspects of Representing the Battered Woman*, 5 OKLA. CITY U. L. REV. 645, 649 (1980).

⁴⁶ Terror may be manifested by less observable physical symptoms such as "acute anxiety attacks resulting in heart palpitations, hyperventilation. . . ." L. WALKER, *supra* note 1 at 224; accord J. FLEMING, *supra* note 1, at 88 ("Agitation and anxiety bordering on panic. . .").

⁴⁷ There is now a substantial body of evidence indicating the harm done to children in homes with violent parents. For example, Walker states: "Impressive data, however, demonstrate that children who live in a battering relationship experience the most insidious form of child abuse. Whether or not they are physically abused by either parent is less important than the psychological scars they bear from watching their fathers beat their mother. . . ." See also L. WALKER, *supra* note 1, at 149-50 (Walker does not limit her definition of battering to severe physical assaults, but includes less severe assaults and psychological harms. Much of her book is devoted to an elucidation of the nature of "battering."); see also *id.* at 276 ("Older male children were aggressive, easily frustrated and engaged in disruptive behavior. . . . Female children were likely to become 'withdrawn, passive, clinging and anxious.'"); D. MARTIN, *supra* note 3, at 23 ("Children who 'merely' witness physical violence between their parents suffer emotional trauma.").

⁴⁸ See R. GELLES, *supra* note 1, at 142 (indicating the learned behavior involved in spouse abuse); see also *supra* note 5.

PROSECUTOR: What do you mean?

QUESTIONER: You may be seeing an isolated example of assault in what is in fact a pattern of repeated behavior.⁴⁹

PROSECUTOR: You're not suggesting that I should prosecute someone for a crime they may some day commit?

QUESTIONER: No, I'm not. I'm suggesting that you ought to consider prosecuting a person for the crime they did commit in spite of the fact that it does not meet your serious physical injury standard, and I'm offering up two utilitarian reasons for doing so. The harm may be more serious than you perceive, and you may be able to disrupt a pattern of behavior before more serious physical harm, including homicide, is done.⁵⁰

⁴⁹ In a sample of 2,143 families, researchers discovered that "for about half the couples the pattern is that if there is one beating, there are likely to be others . . . violence . . . when it occurs, tends to be a recurrent feature of the marriage." M. STRAUS, R. GELLES & S. STEINMETZ, *BEHIND CLOSED DOORS* 41-42 (1981). A recent two-year study by the Institute for Social Analysis showed that "[m]ore than a quarter of the victims of family violence suffered repeated problems from the same person for months or even years after the original case. . . ." *A Study of Patterns in Family Violence*, N.Y. Times, June 8, 1983, at C14, cols. 3-4.

A fact of particular concern to prosecutors is the finding, in another study, that there is a correlation between frequency of violence and the type of intervention sought by victims. This study found that "[w]omen hit weekly to daily are most likely to call the police, while women hit less often . . . are more inclined to get a divorce or legal separation." R. GELLES, *supra* note 1, at 100.

⁵⁰ Raymond Parnas recommends that the criminal justice system intervene in cases of minimal violence, referring to "[a]ll of the data showing the . . . experience of escalation from minimal to aggravated injury. . . ." See Parnas, *The Relevance of Criminal Law to Inter-Spousal Violence*, in *FAMILY VIOLENCE* 190 (J. Eekelaar & S. Katz eds. 1978). Parnas is a pioneer in the study of the criminal justice system's handling of cases of spousal assault. See generally Parnas, *supra* note 7. His recommendation is particularly telling in light of the fact that his early research was spurred by a belief in the need to "effectively [divert] cases from the criminal process." *Id.* at 755. He now advocates a "tradition response of arrest, prosecution and sanction . . . not only at the upper levels of violence, but also at the first minimal signs of trouble." Parnas, *supra*, at 191.

There is no consensus among those commentators who favor more prosecution of cases involving severe injury concerning the prosecution of "minor violence" cases. For example, Fleming recommends that

[a]dvocates should take care to concentrate their efforts on the most serious cases of abuse, which, if unprosecuted, are most likely to result in even more serious harm to the battered woman. Insisting on prosecution of every single case is unrealistic and not in the best interest of many victims.

J. FLEMING, *supra* note 1, at 200. Although this writer would agree that it is important not to neglect the most serious cases, it does not necessarily follow that it is essential to concentrate on those cases at the (possible) expense of the less serious ones. In fact, insofar as the importance-of-concentrating-on-more-serious-cases position is based on an expectation of the increased severity of future assaults, it would seem more desirable to intervene sooner rather than later in a possible pattern of abuse. It is important to recognize, furthermore, that an insistence on the importance of prosecuting cases of minor injury is not the same as an insistence on prosecuting every single case. Prosecutors who wish to attempt new ways of dealing

But it's not only practical considerations that divide us. I suspect we have many different attitudes toward these events, and I want to learn more about how you decide whether to charge. Could we go back to our assault with a deadly weapon example? You said you'd have to evaluate various factors.

PROSECUTOR: Yes. My decision would depend a great deal on my sense of the victim.⁵¹

QUESTIONER: How so?

PROSECUTOR: Assuming that I believed her myself,⁵² I'd want to consider her ability to convince a judge or jury that she was telling the truth. Assault with a deadly weapon is an "attempt" offense⁵³ and attempts are tough to prove. I'm assuming, by the way, that I can't count on witnesses in making my decision.

QUESTIONER: No, I wish you'd assume you did have witnesses. Otherwise, we'll get caught up in the question of proof again.

PROSECUTOR: Wait a minute. You need to understand that likelihood of conviction is the first tenet of any charging decision.⁵⁴

with these cases may have, depending on the number of cases which come to their attention, difficult choices to make concerning resources and priorities. That reality is not, however, a reason for diminishing the significance of early intervention.

Fleming's concern about victims introduces the complex issue of the relationship between the decision to prosecute and the needs and/or desires of victims. Various aspects of this issue are touched upon throughout this dialogue.

⁵¹ A prosecutor's "sense of the victim" has many variations in the classic rationales for infrequent or non-prosecution of these cases. *See, e.g.*, Micklow & Eisenberg, *supra* note 7, at 158 ("The focus in each instance is whether the victimized wife is perceived as a 'worthy' victim deserving of both the prosecutor's and courts' efforts.").

On the other hand, the difficulties of victim testimony are real. Prosecutors must work to devise means of preparing victim-witnesses in order that they have less chance of presenting a victim who "takes the stand and is so frightened that she becomes unable to speak or to give coherent testimony." L. LERMAN, *supra* note 7, at 23. A variety of solutions to this problem are available. *See id.* at 44-55.

⁵² One of the first obstacles that victims encounter in the criminal justice system is that law enforcement officials "do not believe the victim." Woods, *supra* note 7, at 10.

⁵³ *See supra* note 39.

⁵⁴ *See supra* note 25. The sentence requiring "sufficient admissible evidence to support a conviction" is "new" according to the History of Standard, ABA STANDARDS, *supra* note 11, at 3-54. The National Advisory Commission on Criminal Justice Standards and Goals, however, does not consider it a new criterion: "An accused should be screened out of the criminal justice system if there is not a reasonable likelihood that the evidence admissible against him would be sufficient to obtain a conviction and sustain it on appeal." NATIONAL ADVISORY COMM'N, *supra* note 17, STANDARD 1.1 CRITERIA FOR SCREENING.

This dialogue takes place in a jurisdiction in which the likelihood of conviction is a basic criterion for charging. Recent research indicates that different prosecutorial styles place varying emphasis on the likelihood of conviction as an initial screening devise. Mellon, Jacoby and Brewer identify four "basic policy types or models: Legal Sufficiency, System Efficiency, Trial Sufficiency, and Defendant Rehabilitation." Mellon, Jacoby & Brewer, *The Prosecutor*

QUESTIONER: Is that the reason you feel you must think about the effect of the victim on someone other than yourself?

PROSECUTOR: That's right.

QUESTIONER: But doesn't conviction depend in part on your ability to convince a judge or jury that a crime has been committed?

PROSECUTOR: Yes.

QUESTIONER: And isn't your ability to persuade likely to be affected by your own perception of the victim?

PROSECUTOR: Yes.

QUESTIONER: So we can't really begin to determine either the likelihood of conviction or whether you think that you should charge, given probable cause, without knowing more about how *you* perceive the victim.

PROSECUTOR: That's true.

QUESTIONER: Or the victim's injuries.

PROSECUTOR: You're implying that I'm concerned with the seriousness of the injuries because of my evaluation of the effect on others?⁵⁵

QUESTIONER: Which is based, in turn, on its effect on you. Yes, I was wondering if that wasn't part of your concern.

PROSECUTOR: I'm not sure what I think about that. I will tell you, however, that these cases are notoriously difficult to prosecute, and that fact affects my charging decision.⁵⁶

QUESTIONER: Difficult to win?

PROSECUTOR: Difficult to win.

QUESTIONER: I see we'll have to talk about this business of likelihood of conviction at some point, but I have one more question about serious injuries. You gave me an example of a case in which you might charge where there were no injuries but you also said you probably

Constrained by His Environment: A New Look at Discretionary Justice in the United States, 72 J. CRIM. L. & CRIMINOLOGY 52, 59 (1980). Brooklyn was studied and classified as a System Efficiency model. *Id.* at 62-65.

Whatever the across-the-board policy in relation to likelihood of conviction, the evidence is clear that this criterion is applied almost invariably to cases of spousal assault. *See, e.g.*, J. FLEMING, *supra* note 1, at 200; D. MARTIN, *supra* note 3, at 110, 112; FROMSON, *supra* note 33, at 4.

⁵⁵ *See supra* note 41 and accompanying text.

⁵⁶ The prosecutor's observations about the difficulties of these cases are quite correct. *See* L. LERMAN, *supra* note 7, at 22.

wouldn't prosecute a misdemeanor case. Would you ever prosecute a case of minor violence involving spouses or intimates?

PROSECUTOR: I won't say absolutely not, but it's not likely, and I certainly wouldn't prosecute as many cases as I imagine you'd like.

QUESTIONER: And are you more apt to prosecute cases with minor injuries if the participants are strangers than if they have a relationship?

PROSECUTOR: Yes,⁵⁷ and there are good reasons for that.

QUESTIONER: Good. It's your reasons that interest me. Why don't we put the issue of seriousness aside for now, and you can tell me how you think about these cases.

II. STATE INTER- VENTION IN INTIMATE RE- LATIONSHIPS	PROSECUTOR: Fine. To begin with, I don't think the State should be quick to intervene in family arguments. ⁵⁸
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QUESTIONER: You use the word 'argument'. What about family 'assaults'?

PROSECUTOR: That's more troubling, I agree, but if the assault is minor, then prosecution may make things worse rather than better.⁵⁹

QUESTIONER: Worse for whom?

PROSECUTOR: For the couple.⁶⁰

⁵⁷ For a summary of the studies indicating a greater likelihood of prosecution of "stranger" assault cases than "prior relationship" cases ("prior relationship" frequently is a euphemism for family or intimate relationship), see L. LERMAN, *supra* note 7, at 24-29. Numerous other examples of policies of less prosecution in relationship than in stranger assaults can be found in Parnas, *supra* note 7.

A Bronx Case Evaluation Form, designed to measure "the seriousness of the case for prosecution" is a striking example of this differentiation. This form quantifies various factors for purposes of screening. Scores are all positive, ranging from 1.3 ("intimidation") to 18.7 ("defendant with more than one felony conviction"), with the exception of the score for "victim and defendant—same family" which is assigned a *negative* value of 2.8! Bronx Case Evaluation Form, reproduced in J. JACOBY, PRE-TRIAL SCREENING IN PERSPECTIVE 38-39 (1976).

A recent study of the handling of these cases by the Manhattan District Attorney's office indicates that, in cases charged, the existence of a prior relationship means there is a greater likelihood of charge reduction (from felony to misdemeanor assault) than in stranger assault cases. See *Prior Links to Victim Cited in Reducing of Felonies*, N.Y. Times, Feb. 25, 1982, at B6, col. 3.

⁵⁸ For an excellent discussion on the "societal interest in marital privacy" and its peculiarly chameleon character, see A. BOYLAN & N. TAUB, *supra* note 8, at 60-69. This privacy interest is not limited to marriage, although that institution defines the concept's legal boundaries.

⁵⁹ The notion of making things worse, as will be demonstrated, extends to concerns about the relationship *per se*, the defendant and the victim.

⁶⁰ One commentator states, "[T]he charging decision would place an additional strain on

QUESTIONER: How so?

PROSECUTOR: What if they want to make up their differences later? I'd think a criminal prosecution by one against the other would make a reconciliation almost impossible.⁶¹

QUESTIONER: In what way?

PROSECUTOR: Well, the defendant isn't apt to be feeling conciliatory toward someone who is prosecuting him.

QUESTIONER: Toward you?

PROSECUTOR: I meant toward the victim.⁶²

QUESTIONER: Then the defendant is not too apt to be wanting to make up differences, as you say. Is that what you meant?

PROSECUTOR: Yes.

QUESTIONER: Then "they" are not going to be wanting to make up and we have no problem.

PROSECUTOR: Look. What if the defendant would like to continue the relationship, but feels that as a matter of pride he can't remain involved with someone who is willing to send him to jail?

QUESTIONER: Then your defendant is going to have to choose between his pride and his love. Is that really the State's concern?

PROSECUTOR: No, but it becomes a concern if it's the victim who wants to make up and who may feel that if she testifies . . .

QUESTIONER: That the defendant may choose his pride instead of her?

PROSECUTOR: . . . You're making a complicated situation into black and white. The relationship may be tenuous. The testimony may tip the scales.⁶³

an inevitably continuing relationship. Prosecutors prefer that the solution of the difficulties be an amicable one." F. MILLER, *supra* note 11, at 267; accord L. LERMAN, *supra* note 7, at 16.

⁶¹ "[T]he state should be properly hesitant to interfere in a marital squabble. Bringing a marital assault into court may prolong and intensify marital disagreements, solidify hostilities, and convert unpleasant memories into permanent grudges." Lobsenz, *Prosecutorial Management of the Uncooperative Victim-Witness*, 15 CRIM. L. BULL. 301, 306 (1980).

⁶² It is interesting to note that this prosecutor's perspective of the victim's role in the prosecution shifts depending on whether the concern is interference with the relationship (victim as prosecutor) or vindictiveness of victim (state as prosecutor). For the latter perspective, see *infra* text accompanying notes 88-91.

⁶³ For further exploration of the issue of victim reluctance, see *infra* text accompanying notes 79-84, 115-26.

QUESTIONER: Isn't that a choice for the victim?

PROSECUTOR: But if I can predict that the victim will drop out and not testify, then why should I charge in the first place?

QUESTIONER: Because you're a public official and by not charging you convey the idea that the State is willing to tolerate such assaults.

PROSECUTOR: My point is that I think tolerance may be in the public interest.

QUESTIONER: Who is the public?⁶⁴

PROSECUTOR: All of us. The society.

QUESTIONER: You? Me? We disagree. The victim? The defendant? They have different interests.

PROSECUTOR: I would say that in general our society would prefer to try to help keep the relationship intact than to prosecute a minor offense.⁶⁵

QUESTIONER: So you weigh all the different interests and you come up with an unnamed "in general" rather than the interests of the victim or of anyone else who might desire a prosecution?

PROSECUTOR: You make it sound as if I'm disregarding the victim.

QUESTIONER: *You* make it sound as if you're disregarding the victim.

PROSECUTOR: You're oversimplifying again. All I'm saying is that if I have two choices, and one may preserve or help preserve the relationship and the other may harm or help destroy the relationship, I think that most people would be more likely to opt for the former.

QUESTIONER: We're going in circles. I wonder if I'm misunder-

⁶⁴ Abrams suggests that "[v]arious factors might influence a prosecutor to adopt a practice of nonprosecution. Opposition by the community might be such a ground. Immediately, of course, the question must be raised, 'which community?'" Abrams, *supra* note 11, at 15 (footnote omitted).

⁶⁵ The Chief Prosecutor of Washtenaw County, Michigan, exhibited an extreme version of this attitude in an interview with Eisenberg & Micklow: "Does the time-honored concept, the sanctity of marriage, override society's interest in the enforcement of the criminal law? I think that the sanctity of marriage is more sacred than the criminal law and the one-punch fight . . . It overrides the criminal code." Eisenberg & Micklow, *supra* note 7, at 158. A more subtle version of the same rationale is found in one of the reasons for Family Court (rather than Criminal Court) jurisdiction over assaults (including felonious assaults) involving family members: "[I]t is true that the primary purpose of family offense jurisdiction is to help the family rather than the individual." In *The Matter of Montalvo v. Montalvo*, 286 N.Y.S.2d 605, 611, 55 Misc. 2d 699, 704 (1968).

standing part of your meaning. Could we go over what we've just discussed?

PROSECUTOR: All right.

QUESTIONER: Didn't we agree that if both victim and defendant want to continue the relationship, then it will continue?

PROSECUTOR: Yes.

QUESTIONER: And that it's only if the relationship is "tenuous," as you say, that we need to worry?

PROSECUTOR: Yes.

QUESTIONER: But a tenuous relationship means that either the victim or the defendant or both have doubts or may not desire the relationship?

PROSECUTOR: Right.

QUESTIONER: And didn't we agree that their doubts or their desires are their business, not the business of the State?

PROSECUTOR: Depends on what you mean by "not the business of the State."

QUESTIONER: It's their choice and they alone have control over those decisions.

PROSECUTOR: Yes, but if we tilt the choice one way or the other, then it becomes the State's business.

QUESTIONER: One way or the other?

PROSECUTOR: Yes.

QUESTIONER: To help the relationship or to harm it?

PROSECUTOR: That's right.

QUESTIONER: And we would favor the relationship by not charging?

PROSECUTOR: Uh huh.

QUESTIONER: Which means that a decision favoring the relationship favors the defendant over the victim.

PROSECUTOR: How so?

QUESTIONER: First, the victim has been harmed and nothing has happened to the defendant. Second, the victim will have to learn to cope with her fear and anger while the defendant won't even have to

confront his pride.⁶⁶

PROSECUTOR: But she'll only have to cope, as you say, if she wants us to prosecute.

QUESTIONER: She's harmed whether she wants prosecution or not. But go ahead. What if the victim *does* want you to prosecute?

PROSECUTOR: I'd still hesitate.

QUESTIONER: Why?

PROSECUTOR: Because the victim will change her mind in most cases. I told you, she'll drop out.⁶⁷

QUESTIONER: But if your concern is the relationship I see no problem if the victim drops out.

PROSECUTOR: It isn't my job to initiate prosecutions that come to nothing.

QUESTIONER: So the concern isn't only a need to avoid making a choice which you think may harm the relationship.⁶⁸ It's also concern about the potential conflict between that need and your need as prosecutor to complete a prosecution successfully. Is that right?

PROSECUTOR: There's a conflict there, yes.

QUESTIONER: I feel haunted by your need for convictions.

PROSECUTOR: That's not my only reason for shying away from these cases. I'm not sure that we should treat minor assaults, let alone menacing words or threats,⁶⁹ in relationships as crimes.

⁶⁶ This point has been made in slightly different ways by both D. MARTIN, *supra* note 3, at 116, and A. BOYLAN & N. TAUB, *supra* note 8, at 69 ("But, where the partners conflict, the state is incapable of protecting that relation; in choosing whether or not to act, the state inevitably aligns itself with one partner or the other.").

⁶⁷ See *infra* text accompanying notes 115-26.

⁶⁸ Walker's research indicates that concern over maintaining relationships in which violence has occurred is misguided: "The best hope for such couples is to terminate the relationship. There is a better chance that with another partner they can reorder the power structure and as equals can live in a nonviolent relationship." L. WALKER, *supra* note 1, at 29.

⁶⁹ "Menacing" may be an element of simple assault, see *supra* MODEL PENAL CODE § 211.1(c), or it may be a separate offense. For example, the Seattle City Code defines "menacing" as follows:

(1)(a) by physical action he intentionally causes or attempts to cause another person reasonably to fear imminent serious bodily injury or death; or (b) by a present threat to another person subsequent to a history of threats or violence between himself and such other person, he intentionally causes or attempts to cause such other person reasonably to fear serious bodily injury or death.

SEATTLE, WASH., CITY CODE § 12A.04.050(1973). The significance of threats in relation to possible injury should not be underestimated. A study of domestic violence in Kansas City "revealed that violence was preceded by threats in 50 to 80 percent of the cases, and the

QUESTIONER: I know. That's why we're talking.

PROSECUTOR: People in relationships get upset with one another. There's lots of emotion, people sometimes lose control.⁷⁰ I don't want to live in a society which picks up every person who's gotten upset and swung at someone and puts them through a prosecution.

QUESTIONER: I'm not sure that I'm following you.

PROSECUTOR: I'm saying that I feel uneasy about your recommendation that there be a prosecution in every case. It sounds as if you want to run a sort of police state with a cop running in to make arrests in every family fight.⁷¹

QUESTIONER: I don't desire a police state either. Nor do I understand what a police state has to do with what I'm saying.

PROSECUTOR: If every time a man hits his wife or his housemate . . .

QUESTIONER: You have to prosecute?

PROSECUTOR: Or the police arrive at the door and make an arrest. It's frightening.

QUESTIONER: But how do they get to the door?

PROSECUTOR: What do you mean?

QUESTIONER: Well, you mentioned police states. Do you imagine that I'm recommending the streets be filled with police who go into every home checking to see whether some man has just hit his wife?

PROSECUTOR: No, you're exaggerating.

QUESTIONER: I'm not exaggerating, I'm asking. How do the police get to the door?

PROSECUTOR: Someone calls them.

QUESTIONER: And that someone is apt to be either the victim or a witness, is that right?

[companion] Detroit study confirmed the importance of threats as a predictor of violence. The Detroit data revealed that '53 out of 90 homicides involving family members were preceded by threats.' J. FLEMING, *supra* note 1, at 333.

Nor should the significance of threats in the absence of later violence be diminished. As with assaults resulting in minor physical injury, threats can cause much suffering in and of themselves. See *supra* note 46 and *infra* notes 113, 117 and accompanying text.

⁷⁰ See *infra* notes 99-100 and accompanying text.

⁷¹ This concern was expressed by a Yale Law student in a personal conversation with the writer of this paper.

PROSECUTOR: Probably the victim.

QUESTIONER: So the victim has asked the police to enter her home. She's opened the door to the State in effect.

PROSECUTOR: Yes, but . . .

QUESTIONER: But?

PROSECUTOR: It doesn't follow that she wants a prosecution. She may have asked the State to intervene because she was frightened.⁷²

QUESTIONER: That seems plausible. Are you saying, then, that you want to consider the victim's purpose in calling the police before you initiate a prosecution?

PROSECUTOR: Yes.

<p>III. IMAGES OF THE VICTIM: MOTIVES, DESIRES, AND NEEDS</p>	<p>QUESTIONER: All right. Let's talk about the effect of the victim's purpose or motive⁷³ on your decision whether to charge.</p>
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PROSECUTOR: To begin with, I'm disturbed by your leap from frightened victim to prosecution.

QUESTIONER: I agree that there's a leap here. In fact there are a number of leaps here. For example, you began by saying that the victim might have contacted the police out of fear. . .

PROSECUTOR: Yes.

QUESTIONER: . . . and you then assumed that because she was afraid, her reason for contacting the police was to get protection.⁷⁴

PROSECUTOR: That's right.

⁷² There is general agreement that victims seek intervention because they are, "at the very least, frightened." D. MARTIN, *supra* note 3, at 13.

⁷³ "Illustrative of the factors which the prosecutor may consider [are] . . . possible improper motives of a complainant." ABA STANDARDS, *supra* note 11, 3-3.9(b)(iv). The notion of motive is therefore formally introduced into the prosecutor's deliberations. Impropriety, the justification for this consideration of victim motivation, as opposed to motive *per se*, is discussed *infra* note 86, and accompanying text. See also NATIONAL ADVISORY COMM'N, *supra* note 17, Standard 1.17 ("Any improper motives of the complainant").

⁷⁴ It is commonly believed that a victim's fear (motive in the sense of emotion, drive) means that she contacted the police for protection (motive in the sense of goal or purpose). See, e.g., Hamlin, *The Nature and Extent of Spouse Assault* in U.S. DEP'T OF JUSTICE, PROSECUTOR'S RESPONSIBILITY IN SPOUSE ABUSE CASES 8 (1980) ("A call to the police is often a call only to have an outside authority figure stop the beatings"). Another assumption that is made about these cases is that the victim wants authorities to somehow repair a disintegrating relationship. See, e.g., A. GOLDSTEIN, *supra* note 11, at 72 ("In cases of domestic violence . . .

QUESTIONER: And you then decide that because prosecution won't serve that assumed purpose, which is itself an assumption, that you shouldn't charge. Correct?

PROSECUTOR: You can't ignore the fact that prosecution may make things worse for the victim.⁷⁵

QUESTIONER: How so?

PROSECUTOR: If it angers the defendant, he may hurt her again.⁷⁶

QUESTIONER: If you don't prosecute, he may hurt her again.

PROSECUTOR: But the danger isn't as immediate. I can't feel right about going ahead if I think it may set off another assault.

QUESTIONER: The danger may be more immediate if you do nothing.⁷⁷ But either way, the problem of danger to the victim points to a need to help ensure her safety, not a need not to charge. Don't you have options? Aren't there shelters in your community? Can't you assist her in getting a protective order?⁷⁸

PROSECUTOR: I can try, but there's a lack of shelters.

QUESTIONER: I hope you've brought that fact to the attention of the public.⁷⁹ Assuming that the victim has somewhere to go or can be

the criminal complaint is often a call for official help in deteriorating relationships, not for criminal prosecution").

Whatever the validity of either vision of the victim's reasons for calling the police, it is important not to allow such assumptions to obscure the need to ask what Raymond Parnas calls the "basic question," to wit, "what response, if any, should the legal system make after the dispute has been halted by police intervention?" Parnas, *supra* note 50, at 190.

⁷⁵ It is essential that prosecutors work to differentiate those concerns for the victim which are paternalistic (and may, therefore, mask underlying biases) and those which are based on actual needs that the victim may have. One of these needs—the need for safety—is touched on at this point. For a discussion of other victim needs, see *infra* note 117.

For an example of prosecutorial paternalism, see Eisenberg & Micklow, *supra* note 7, at 158.

⁷⁶ It is an irony that the requirement that victim-witnesses disclose their addresses to prosecutors, who may then give these addresses to the charged assailant's attorneys (who may, in turn, give them to assailants) is one factor that increases the danger to a victim who chooses to prosecute. See D. MARTIN, *supra* note 3, at 113.

⁷⁷ Insofar as there is a connection between police refusal to arrest (or to impress upon the mind of an assailant that assault is a crime) and prosecutorial reluctance to charge, the prosecutor may have to share in the blame for renewed violence immediately following the departure of the police from the home. The threat of post-conviction danger has also been given as reason for nonprosecution of spousal assault cases. For a response to this rationale, see Parnas, *supra* note 50, at 191.

⁷⁸ This Article does not address the important issue of victim safety. For more information on this topic, see, e.g., A. BOYLAN & N. TAUB, *supra* note 8; L. LERMAN, *supra* note 7.

⁷⁹ For an example of a prosecutor who has brought this problem to the attention of the public, see the comments of Ruth Nordenbrook, Assistant County Prosecutor, King County,

made safe, would you still not prosecute?

PROSECUTOR: The point I was trying to make is that prosecution wasn't the reason the victim called the police, yet the call to the police is what you've offered as justification for the State's intruding in the form of prosecution.

QUESTIONER: Now, wait, because I am assuming that a crime has been committed. Are you saying that the State should only prosecute if the victim called the police with prosecution in mind?

PROSECUTOR: You wait a minute. You're contradicting yourself. First you seemed to be implying that I wasn't concerned enough with the victim's desires. Now you seem to be suggesting that I ignore those desires.

QUESTIONER: I'm not suggesting that at all. I'm trying to understand what significance the victim's reasons have in your decision-making. Do the State and the victim have to have purposes which coincide?

PROSECUTOR: Not necessarily, but it's a difficult problem when they don't. Which would you have me choose?

QUESTIONER: You know my bias. I would say your job is to enforce the laws.

PROSECUTOR: And I'd say that my job is to consider all the factors, including the victim's feelings, and then make an enforcement decision.

QUESTIONER: We can agree that your job includes both tasks⁸⁰ But you must begin with either a concern about enforcing a given law or the need to weigh all factors.

PROSECUTOR: It comes out the same either way.

QUESTIONER: The way it comes out may be a function of the emphasis you place on either task. If you begin by considering the victim's feelings, and here you assume they are against prosecution or at least not for prosecution, then you may go no further in your deliberations. If you start by deciding that it's important to enforce the laws against assault, your view of the victim's role may take on a different significance.

Seattle, Washington, in *Victims of Crime or Victims of Justice?* 2 (Aug. 10, 1977) (Program Sponsored by ABA Section on Criminal Justice, Annual Meeting, Chicago, Illinois).

⁸⁰ See the ABA STANDARDS, *supra* note 11, Standard 3-1.1 at 3-6, describe the function of the prosecutor: "(b) The prosecutor is both an administrator of justice and an advocate. The prosecutor must exercise sound discretion in the performance of his or her functions." The administrator function is described in the Commentary: "[T]he prosecutor acts as a decision maker on a broad policy level and . . . also has responsibility for deciding whether to bring charges. . . ." *Id.* at 3-7.

PROSECUTOR: That may be. One way or the other, though, I'll still have to evaluate all the factors.

QUESTIONER: Go ahead, then, and evaluate.

PROSECUTOR: What I started to say before is that I don't feel comfortable with the idea of taking over and prosecuting if the victim's request for help was meant to be no more than a call for protection.

QUESTIONER: Let me ask you something. Is it true that in all cases in which a victim's purpose in calling the police or coming in to report a crime is to obtain protection, rather than to see someone prosecuted, that you'd decide not to prosecute?

PROSECUTOR: I don't assign the same weight in all cases to the victim's desires, no.⁸¹

⁸¹ The prosecutor shifts the discussion at this point from a consideration of the possible discrepancy between the prosecutor's task and the victim's reasons for calling the police to a consideration of the weight to be assigned to the victim's desires with regard to whether to prosecute. This shift is possible because of the (commonly made) assumption that the victim does not want to prosecute. *See supra* note 74.

There is disagreement among those persons who have worked extensively with spouse abuse cases, and who favor prosecution of those cases, concerning the issue of the role of the victim's wishes in the decision whether to charge. *See* L. LERMAN, *supra* note 7, at 42-43. This study of experimental programs describes three programs (Santa Barbara, Philadelphia, and Westchester County, New York) in which charges are filed "only if evidence is sufficient and the victim wishes to participate." *Id.* at 42 (emphasis in original). The Los Angeles City Attorney's Office does not ask the victim's wishes, but makes the decision whether to charge on the basis of the prosecutor's own evaluation of the case. Seattle, Washington, prosecutors file charges automatically when an arrest has been made, but only if the victim elects a prosecution when there has been no arrest. *Id.* at 42-43.

Differences between these policies, however, may be more apparent than real. There are different situations in each office which call for or require different treatment of victims; these differing situations may be more determinative of the victim-wish policy than any special political or psychological vision of the victims of spousal assaults. For example, in New York there is a legal requirement that victims be advised "of their 'right of election,' that is their right to choose which court their case will be heard in." J. Pirro, *Criminal Law News* (Westchester County District Attorney Office, Sept. 1980). In Seattle, a superb police call referral system enables the prosecutor to contact victims by letter in cases in which the police have not made arrests, urging them to assist in a prosecution. To ask the victim to come forward and discuss the possibility of prosecution creates a very different situation with regard to the victim's desires than one in which a victim has come forward of her own initiative. A copy of the victim contact letter used by Seattle City Attorneys may be found in L. LERMAN, *supra* note 7, at 37. Finally, in Philadelphia, the issue of victim choice may be more theoretical than actual. Prosecutor Bebe Kivitz reports that almost all the victims she sees want prosecutions to proceed at the outset. Interview with Attorney Bebe Kivitz of the Domestic Abuse Unit of the District Attorney's Office, Philadelphia, Pennsylvania (Nov. 30, 1981).

Attorney Kivitz' observation concerning victim desires at the outset introduces the second element of the issue of victim choice in the prosecution of spousal assault cases: the handling of the "reluctant victim." What is important to note at this point is that victim reluctance does not necessarily occur at the time that a filing decision must be made. Instead, it is a phenomenon which is anticipated, and it is that anticipation which plays a role in the

QUESTIONER: I didn't think so. If there were a robbery, for example . . .

PROSECUTOR: I get your point.

QUESTIONER: . . . or a less serious, I use the word loosely, offense. What about the victim of a petty theft?

PROSECUTOR: There we go. If the victim didn't care about a prosecution, I probably wouldn't charge.⁸²

QUESTIONER: That's a property crime. What about physical force?

PROSECUTOR: It makes some difference, yes.⁸³ In general, I'm more inclined to prosecute a crime involving physical force, even if the victim isn't seeking a prosecution.

QUESTIONER: Yet in our hypothetical, you've made another choice.⁸⁴

PROSECUTOR: In our hypothetical the consequences for the victim seem more momentous. There's more to lose than in other assault cases.

QUESTIONER: More to lose?

PROSECUTOR: Well, there's a relationship . . . oh.

QUESTIONER: I see we haven't dispensed with that idea.

PROSECUTOR: It's hard to let it go.⁸⁵ But there's another reason why I might decide not to prosecute because of the victim's motives. It stems from the fact of the relationship, though it isn't because of my concerns about harming a relationship.

QUESTIONER: What is that?

prosecutor's decision to charge. For further discussion of this problem, see *infra* notes 115-126, and accompanying text.

⁸² "When the crime charged is a nonserious felony or misdemeanor, it is common . . . to abide by the request of a reluctant victim." Hall, *Role of the Victim*, 28 VAND. L. REV. 931-951 (1975).

⁸³ One commentator notes, "While the 'less serious crime' category is imprecise, prosecutors generally exclude from this category crimes in which real or threatened physical force is used." *Id.*, at 931.

⁸⁴ Hall found that "[i]n domestic squabbles, however, *even when force is used against one spouse*, the complainant's request to dismiss the charge frequently is honored. . . ." *Id.* (emphasis added).

⁸⁵ A most dramatic, and tragic, example of our culture's reluctance to interfere, even when force is used, in the face of a relationship or an assumed relationship between a man and woman is the Kitty Genovese case. Fleming dedicated her book to Genovese and records the fact that "[a]lthough thirty-nine people heard her screams and cries, no one called the police. Most explained that they had thought the murderer was her husband." J. FLEMING, *supra* note 1, at xi. Studies indicating norms approving violence in relationships are discussed in Straus, *supra* note 1, at 550-51.

PROSECUTOR: Well, relationships have emotional histories as well as immediate emotional intensity. If I knew there were no serious physical injuries, and if I found the victim less than credible, I might become suspicious about motive in a way that I would not with an assault upon a stranger.⁸⁶

QUESTIONER: If the victim is less than credible, you may have a problem with probable cause, not with motive.

PROSECUTOR: I used the wrong word. I'm skeptical about her motives, but I do believe that she was hit. For example, if the victim and defendant had had an argument, a heated argument, and he hit her once, and she wasn't really hurt . . .

QUESTIONER: Really hurt?

PROSECUTOR: . . . physically injured, but she's still furious. She could be upset about something he'd said or done and not about being hit. She could come here, file a complaint against him, and hope that he gets prosecuted.⁸⁷

QUESTIONER: You're talking about dealing with a vindictive victim?

PROSECUTOR: Yes. I don't think the situation is too likely, but . . .

QUESTIONER: But why does this situation worry you, likely or not?

PROSECUTOR: Because the victim is using the prosecution as a way of getting back at the defendant and I don't think it's appropriate to crank up the whole apparatus of the criminal law for that purpose.

QUESTIONER: Because?

PROSECUTOR: Because the system doesn't exist to right private wrongs or fight private fights.⁸⁸

QUESTIONER: I thought one of the theories underlying our system of public prosecution was a preference for funnelling private vengeance into socially acceptable forums.⁸⁹ Crimes against persons are considered

⁸⁶ The discussion which follows deals with the "possible improper motives" referred to *supra* in note 73.

⁸⁷ Miller notes that "[t]ypically, the victim of [a family] assault is initially insistent upon prosecution of the offender." F. MILLER, *supra* note 11, at 266.

⁸⁸ Fleming states: "The cardinal rule of the criminal-justice system is that it exists to punish criminals who threaten the peace and order of the state. It is concerned with redressing *public*, rather than *private* wrongs. . . ." J. FLEMING, *supra* note 1, at 197 (emphasis in original).

⁸⁹ "[A]n inescapable and critical function of the criminal law is to satisfy and to channel

public wrongs and are treated as such.

PROSECUTOR: That's true, but what I'm hypothesizing is a victim who isn't feeling vengeful about the criminal act, but just about the defendant in general or maybe about something else that he did. Let me give you an analogy. Say you have a creditor who's angry that a certain person hasn't paid up. One day the creditor and his debtor get into an argument, the debtor shoves the creditor and the creditor then decides to use the threat of prosecution as a means of forcing the man to pay.⁹⁰

QUESTIONER: You're saying that you don't want our victim to be able to sue or threaten to use the criminal system to serve some other end?

PROSECUTOR: Yes, exactly.

QUESTIONER: I'm not sure that your example is analogous. Your creditor hopes to gain something that's extrinsic to the prosecution *per se*, something in addition to revenge. He hopes to get his money.

PROSECUTOR: But our victim could use the threat of prosecution in the same way.

QUESTIONER: How so?

PROSECUTOR: I'll elaborate. Say the victim and defendant had been fighting because he'd been seeing another woman. The victim hopes the prosecution will effectively end that other relationship.

QUESTIONER: And what does the victim stand to gain?

PROSECUTOR: She hopes to end the other relationship.

QUESTIONER: And live happily ever after with the defendant?

PROSECUTOR: I'm not going to fall into that trap. I know you'll repeat what we've discussed about prosecution harming relationships.⁹¹ No, the goal is ruining the other relationship.

QUESTIONER: So she gains the pleasure of knowing she's prevented the defendant from having his happiness?

PROSECUTOR: That's right.

the retributive feelings aroused by those who offend." Goldstein, *Appendix to A. VON HIRSCH, DOING JUSTICE* 174 (Report of the Committee for the Study of Incarceration 1976).

⁹⁰ The ABA STANDARDS provide: "If prosecution is sought by a private party out of malice or to exert coercion on the defendant, as is sometimes the case in *matters involving sexual offenses or debt collection*, for example, the prosecutor may properly decline to prosecute." (emphasis added); ABA STANDARDS, *supra* note 11, standard 3-3.9(b)(iv) commentary at 3-56.

⁹¹ See *supra* notes 58-68 and accompanying text.

QUESTIONER: But that sounds like revenge rather than a separate goal.

PROSECUTOR: I guess you could look at it that way.

QUESTIONER: And I don't imagine that you've disqualified this victim because of the fact that she was angry?

PROSECUTOR: No, of course not.

QUESTIONER: I ask because I'm troubled by what you said before—that the victim was mad, but not about being hit.

PROSECUTOR: I think I can explain what I meant. If she isn't angry about being hit, then the system isn't serving a retributive function because of the crime. It's merely serving as a channel for all the angers that can mount up over time in a relationship.

QUESTIONER: How would you even know so much about the focus or source of this victim's anger?

PROSECUTOR: What if the victim told me?

QUESTIONER: I have trouble accepting that possibility, even for a hypothetical. You've painted a picture of a scheming victim who wants to use you to serve some other end. She's not likely to announce that she doesn't really care about the very act for which she hopes you'll bring a prosecution.

PROSECUTOR: Then say that a credible witness says "She told me so."

QUESTIONER: Even if I accept that possibility, it doesn't eliminate my second worry about this case. Do you really believe that a person could be so angry about so many things and not at all angry about being hit? She might be less angry about that than about some other things, but not at all angry?

IV. THE BLAME-
WORTHINESS
OF THE AS-
SAILANT AND
VICTIM

PROSECUTOR: I agree it's hard to draw a line around emotions, but I'm still troubled by the source of her feelings. Normally, motivation wouldn't be as important in my decision, but if I prosecute this man, who may not be a violent person, who was just upset by an argument, then his life may be harmed in a variety of ways.

QUESTIONER: Yes, he'll be put through the ordeal of a prosecution. If he's convicted he'll feel and be stigmatized.

PROSECUTOR: Yes, and for one who hit in an upsetting situation!

QUESTIONER: So the concern then isn't the victim's motivation *per se*, but the fact that prosecution seems disproportionate to the offense?⁹²

PROSECUTOR: Under the circumstances, it does seem disproportionate.

QUESTIONER: Yet you said before that serious physical injury would merit consideration for charging. Would it seem less disproportionate if he'd done more harm, if he'd knocked out teeth, badly injured an eye, broken a bone?

PROSECUTOR: I think it might.

QUESTIONER: That sounds as if you're deciding that the victim must suffer in a way and in an amount that you consider equivalent to the suffering of being prosecuted before you're willing to charge.

PROSECUTOR: It doesn't sound good, but there's some truth in that. It sounds less unpleasant if you think about the fact that you've stripped away some of the import of serious injury. I said earlier that I thought it was safe to assume that a more severe injury is indicative of a more serious act.⁹³

QUESTIONER: Yes, and I wasn't sure if I agreed. In fact, I wasn't sure what you meant.

PROSECUTOR: I think there may be a correlation in many cases between the severity of an injury and the desire to harm.

QUESTIONER: So you infer greater culpability from the fact of more severe injury and that inferred culpability justifies a prosecution?

PROSECUTOR: That's right.

QUESTIONER: Yet the severity may be nothing more than the defendant's bad luck. The victim may have moved at the moment she was hit and so he struck her at a different angle, for example.⁹⁴

⁹² LaFave, *supra* note 13, at 534-35, lists "the most common situations in which prosecutors typically decline to prosecute . . . (c) When the mere fact of prosecution would, in the prosecutor's judgment, cause undue harm to the offender." *Accord* ABA STANDARDS, *supra* note 11, Standard 3-3.9(b)(iii) ("the disproportion of the authorized punishment in relation to the particular offense or the offender" is a factor to consider in the charging decision).

⁹³ *See supra* note 44 and accompanying text.

⁹⁴ This point has been clearly made in M. STRAUS, R. GELLES & S. STEINMETZ, *supra* note 48, in a discussion of their definition of "abusive violence" and its emphasis on act rather than result:

[The things] which influence whether someone who is punched is injured or not, are typically random phenomena such as aim or luck. The research on the difference between an assault and a homicide tends to bear out our position by arguing that a random

PROSECUTOR: That, by the way, is one of the great problems with these cases. It's very hard to prove intent.⁹⁵

QUESTIONER: Isn't that true with stranger assault cases?⁹⁶

PROSECUTOR: Well, I suppose. Maybe my resistance to charge is based on my belief that in the situation we're discussing both parties are probably equally to blame, yet a prosecution would only be directed at the one who hit.⁹⁷

QUESTIONER: They're equally to blame?

PROSECUTOR: Yes, they're fighting, he gets upset, strikes her, regrets it the next minute.

QUESTIONER: His regret makes a difference?

PROSECUTOR: It indicates that he isn't really a violent person.

QUESTIONER: No, it indicates that he's a person who used violence and then regretted it.⁹⁸

PROSECUTOR: But it's the sort of thing which could happen to anybody and the idea of prosecuting all those cases . . .

QUESTIONER: The number of cases is a different issue. When you say it could happen to anybody, is that another way of saying that you still don't consider the act a crime?

PROSECUTOR: I guess it is. Everybody has relationships, gets in arguments and gets upset. I'm not a violent person, but it's not inconceivable that I might get pushed emotionally and lose control for one minute and lash out and hit someone once.⁹⁹ Do you really want me to

phenomenon such as aim often determines if a violent act ends up as a non-lethal assault or as a homicide.

Id. at 21-22. This fact does call into question the element of culpability in the definition of offenses against physical violence.

⁹⁵ The problem of proving intent in spouse abuse cases was indirectly referred to by Manhattan District Attorney Robert M. Morgenthau during an interview in which he explained why these cases are more often reduced to misdemeanors than are stranger assaults. *See Prior Links to Victim Cited in Reducing of Felonies*, N.Y. Times, Feb. 25, 1982, at B6, col. 3.

⁹⁶ District Attorney Morgenthau did not clarify why proving intent was easier in stranger assaults. *Id.*

⁹⁷ The equally-to-blame vision of domestic violence is prevalent. *See, e.g.*, F. MILLER, *supra* note 11, at 267 ("Often the complainant is as 'guilty' as the suspect in contributing to the dispute . . .").

⁹⁸ In established patterns of violence in relationships, as opposed to the one violent outburst being hypothesized in the dialogue at this point, the assailant frequently feels "sorry . . . and conveys his contriteness." L. WALKER, *supra* note 1, at 65.

⁹⁹ According to a study by Gelles, our culture does permit a degree of what is called "normal violence." *See* R. Gelles, *cited in* Straus, *supra* note 1, at 547. Straus remarks that "[t]hese same attitudes are also widely shared by officials of the criminal justice system." *Id.*

be prosecuting cases like that?

QUESTIONER: I really want to understand more of what you're saying. When you said 'anyone' did you mean anyone with a relationship?

PROSECUTOR: Yes.

QUESTIONER: Because relationships generate emotion?

PROSECUTOR: That's right, and because intense emotion has the potential of making a person lose control.¹⁰⁰

QUESTIONER: Would you agree that anyone who is poor might steal because poverty generates emotions and those emotions have the potential of making people lose control?

PROSECUTOR: I'm not sure that it's the same quality of intensity, but even if it is, the person who steals has time to consider the consequences. The person in an argument doesn't.

QUESTIONER: How do you know that? The poor person may be hungry, may walk by a crate of oranges, a loaf of fresh baked bread.

PROSECUTOR: Wouldn't you feel differently if the storekeeper had seen the hungry person coming and had taunted him with the oranges or the bread?

QUESTIONER: Tempted the thief?

PROSECUTOR: Or provoked the spouse.

QUESTIONER: Was that what you meant when you said that prosecution seemed disproportionate to the crime because both were to blame?

PROSECUTOR: You could put it that way, yes.

QUESTIONER: I ask because provocation has different connotations and, as you know, different consequences.¹⁰¹

PROSECUTOR: I understand.

QUESTIONER: Yet you speak of a situation in which prosecution is not justified rather than one in which a prosecution should occur but in which there are mitigating elements.

¹⁰⁰ A study by Straus demonstrated that loss of control is itself governed by norms of the degree of loss of control which is permissible. Straus, *supra* note 1, at 547. It does not take more than ordinary observation to note that a man who hits his wife may "choose" not to hit others, for example employers, who have upset him to an equal degree.

¹⁰¹ "[I]t is settled that, in the absence of a statute providing otherwise, provocation merely by abusive language does not, in itself, justify the commission of an assault or assault and battery." 6 AM. JUR. 2D *Assault & Battery* § 61 (1963).

PROSECUTOR: I think that in a relationship, because of the emotional vulnerability, provocation may rise to the level of a justification.¹⁰²

QUESTIONER: Yet only one person has been accused of hitting.

PROSECUTOR: The other has hit with words.

QUESTIONER: And you will therefore ignore the battery?¹⁰³

PROSECUTOR: You keep making it sound black and white. Look, I'll agree that if there's been no provocation, I should consider charging here—even in the absence of serious injury. I'm making a big concession, but I'm not willing to go farther. In fact, I think it's your turn to answer some questions.

QUESTIONER: Okay.

PROSECUTOR: I want to hear what you'd do with our example if there were provocation. I want to hear you, if it were you and not I who had to decide, say that you would choose to go ahead and initiate a prosecution.

QUESTIONER: The same details that we've been discussing?

PROSECUTOR: That's right. A victim comes in, reports being hit, and you find out that there's been an argument. She's upset about a lot of things, not just being hit, maybe not even about being hit, he's never hit her before, she admits having baited him, she has no visible physical injuries, and she says he's repentant . . .

QUESTIONER: And you want to know if I'd charge?

PROSECUTOR: Yes, and you can assume that the victim is more than willing to testify, that you have no problems of proof.

QUESTIONER: I'm not the one who's worried about proof.

PROSECUTOR: Well you may be soon if you have to imagine being a prosecutor. What would you do?

QUESTIONER: I'd ask many questions.

¹⁰² This attitude is common. For example, Miller refers to the fact that in Detroit, where detectives work in the prosecutor's office and make charging decisions in these cases for the prosecutor, a decision not to file charges "normally is the result when a husband has assaulted his wife but the injury is not serious and it appears that there was 'good cause' for him to do so." F. MILLER, *supra* note 11, at 269 n.22, *quoted* in L. LERMAN, *supra* note 7, at 17.

¹⁰³ Compare the common equation of provocation and justification used by prosecutors, *see supra* note 102, with the provision of the Tennessee Code which makes "assault and battery upon a spouse 'for any cause whatsoever' a misdemeanor." TENN. CODE ANN. § 39-602, *cited* in A. BOYLAN & N. TAUB, *supra* note 8, at 180.

PROSECUTOR: I told you what happened.

QUESTIONER: You didn't tell me what the provocation consisted of.

PROSECUTOR: I said words, but it's not an issue. There's no dispute about whether there was provocation.¹⁰⁴

QUESTIONER: Beauty's in the eye of the beholder. I'd ask about the nature of the provocation.

PROSECUTOR: Okay, say it's no more than vicious words.

QUESTIONER: It's not having served the wrong vegetable with dinner?¹⁰⁵

PROSECUTOR: Don't be ridiculous.

QUESTIONER: And I'd ask about this hit that's being reported.

PROSECUTOR: A smack on the cheek.

QUESTIONER: Once?¹⁰⁶

PROSECUTOR: Just once, yes, and just with his hand.¹⁰⁷

QUESTIONER: Hands aren't always so innocuous. And you said no history of hitting?¹⁰⁸

PROSECUTOR: That might indicate a pattern? No history.

QUESTIONER: With her?¹⁰⁹

PROSECUTOR: The victim couldn't answer that.

¹⁰⁴ Victims of spousal assaults frequently blame themselves for provoking or otherwise causing the violence, a fact which may be attributable at least in part to the fact that we live in a culture in which "the belief that it is rational to blame the victim" is common. L. WALKER, *supra* note 1, at 15.

¹⁰⁵ One commentator found that "[t]he most frequent reasons given by battered women for beatings concern such things as the dinner not being cooked on time or the house being dirty." J. FLEMING, *supra* note 1, at 78.

¹⁰⁶ "Police and prosecutors frequently assume these attacks are 'one-punch' fights, but when the twenty victims of Eisenberg and Micklow's study were hit, it was invariably more than once. Usually they receive a beating that lasted anywhere from five to ten minutes to over an hour." D. MARTIN, *supra* note 3, at 112.

¹⁰⁷ One study reported that "[h]usbands inflicted injuries on their wives with their hands in nearly half the cases [of aggravated assault], followed in frequency by blunt instruments, sharp instruments, and firearms." L. BOWKER, WOMEN, CRIME, AND THE CRIMINAL JUSTICE SYSTEM 125 (1978) (information from a 17-city study done by the National Comm'n on the Causes of Prevention of Violence).

¹⁰⁸ See *supra* note 49.

¹⁰⁹ Findings of a recent study of patterns of violence indicated that 32% of domestic assault defendants had been rearrested for other crimes mostly unrelated to the original victim. See *A Study of Patterns in Family Violence*, *supra* note 49.

QUESTIONER: The assailant might be able to. But let's say no history, one hit, vicious verbal provocation, no injuries. I might warn, then, rather than charging.

PROSECUTOR: Warn?

QUESTIONER: Yes, I might inform the assailant in no uncertain terms that battery is a crime, that I am letting it go this time, but will not the next time whether there's provocation or not. And I'd keep a record of the complaint.¹¹⁰

PROSECUTOR: So you're willing to make an exception to your argument favoring charging in every case with probable cause?

QUESTIONER: I might be willing.

PROSECUTOR: And what's your "might" about?

QUESTIONER: It's a recognition of the fact that real life always has more detail than hypotheticals. And it's also a concession that there may be some cases this extreme which would force me to fall back on my intuition in deciding whether to charge. . . .¹¹¹

PROSECUTOR: I'm delighted to accept one concession.

QUESTIONER: . . . though I always feel safer when I can articulate the basis of a hunch. I think I may be saying "might" because you said that the victim came in.

PROSECUTOR: I did say that. What difference would that make?

QUESTIONER: It makes me wonder whether the police were called. Perhaps they arrived, felt they didn't have grounds for an arrest,¹¹² told the victim to go and file a citizen's complaint.

PROSECUTOR: Okay, say the police were called. So what?

QUESTIONER: Then I might wonder whether the victim had been frightened by being hit. Fear's an injury, you know. It narrows people's lives.

PROSECUTOR: But before you mentioned terrible fear. Now you're worried about ordinary fear?

¹¹⁰ The Westchester District Attorney's Office sends out approximately 200 warning letters each year. The letter states that no charges are being filed, but the complaint will be kept on file. A copy of the letter may be found in L. LERMAN, *supra* note 7, at 67. The letters have been found not to precipitate violence. They also appear to have served some deterrent function: "subsequent violence appears to be rare." *Id.* at 64.

¹¹¹ "The frailties of human language and human perception will always admit of borderline cases. . . ." Goldstein, *supra* note 9, at 586.

¹¹² See *supra* note 30.

QUESTIONER: If a person is made afraid of another person, all it takes is a threat to harm in order to maintain that fear.¹¹³ It's an injury that I consider serious, and so I might charge.

PROSECUTOR: Then assume there's no fear in this situation.

QUESTIONER: All right. I'll make a deal with you.

PROSECUTOR: Okay.

QUESTIONER: If you can find me this collection of facts in reality, then I'll agree to warn instead of charging.

PROSECUTOR: I agree it's unlikely.

QUESTIONER: Particularly in light of the police screening which you said takes place.¹¹⁴

PROSECUTOR: That's true.

QUESTIONER: Could we move back to the sorts of realities among which you are apt to be choosing when you have to consider whether or not to charge?

<p>V. IMAGES OF THE VICTIM: RELUCTANCE TO PROSECUTE</p>	<p>PROSECUTOR: Yes, and I have some realities which are still bothering me. A while ago I mentioned the victim who's going to drop out after I've charged the defendant with an offense.</p>
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QUESTIONER: Yes, I remember. Didn't we decide that your concern had to do with your need to win a conviction?

PROSECUTOR: Yes, but only in part. I'm still not satisfied by your assumption that I shouldn't pay more attention to the victim's feelings in deciding whether to charge.

QUESTIONER: I didn't say that, but why do you think you should pay more attention to the victim's desires?

PROSECUTOR: Well, I'm concerned because I think a prosecution may add to her stress and fear and for no purpose since she's apt to drop out anyway.

¹¹³ Walker found that "[t]here does not need to be a steady reign of terror for the family atmosphere to be emotionally charged. Rather, the stage needs to be set through prior incidents . . . the only variable is when it [the next assault] might occur." L. WALKER, *supra* note 1, at 148. The presence of fear is related to the fact that "violence is often used as a mechanism to control the behavior of family members." M. STRAUS, R. GELLES & S. STEINMETZ, *supra* note 49, at 190.

¹¹⁴ For further discussion of police screening, see *supra* notes 6 & 29. Victims perform a sort of self-screening as well. See *supra* note 49.

QUESTIONER: So you're concerned about putting the victim through more hardship as well as about your need for conviction.

PROSECUTOR: Yes.

QUESTIONER: I want to backtrack a minute. How do you know that the victim is going to drop out?

PROSECUTOR: Anyone who's worked with this type of offense knows that these victims will probably refuse to testify.¹¹⁵

QUESTIONER: How? Do they refuse outright?

PROSECUTOR: No. They might be angry, ambivalent, reluctant.

QUESTIONER: And when you see anger, ambivalence, reluctance . . .

PROSECUTOR: I assume refusal, that's right.¹¹⁶

QUESTIONER: You're a step ahead of me.

PROSECUTOR: It's becoming easier to predict your remarks.

¹¹⁵ Victim reluctance is the most common reason for nonprosecution of cases of spousal assault. For example, L. LERMAN, *supra* note 7, at 13, states: "From the prosecutor's perspective, the primary problem with prosecution of spouse abuse is that it is time wasted, since most victims request that charges be dropped before dispositions are reached."

A prosecutor who has not been personally exposed to the legendary "reluctant victim" will learn of her soon enough through official literature available to prosecutors. So, for example, in elucidating ABA Standard 3-3.9(b)(v) "reluctance of the victim to testify," the Commentary states that

In serious cases . . . the interests of the community require that the prosecutor try to obtain the victim's co-operation. . . . In contrast, the prosecutor may justifiably decline to prosecute less serious offenses because of lack of witness co-operation. This discretion is commonly exercised in family conflicts where minor violence occurs. Often the injured party who calls the police is later reluctant about prosecution. . . .

ABA STANDARDS, *supra* note 11 at 3-57. The California District Attorney's Association has adopted the same view: "If the prosecutor believes that the victim's testimony will not be forthcoming, an assault is ordinarily not subject to successful prosecution and should, therefore, not be filed . . ." CALIFORNIA DISTRICT ATTORNEY'S ASS'N, UNIFORM CRIME CHARGING MANUAL 304-4 (4th ed. 1978 Revisions). The prosecutor is expected to consider interviewing the victim of an assault "[w]hen there is a pre-existing relationship between an accused and a victim." *Id.*

That this sort of commentary may both be based upon and contribute to stereotypic biases can be demonstrated by a careful reading of the following passage by Miller: "Officials commonly believe that [married female] victims of assaults . . . will not willingly prosecute their assailants. . . . When the victim is a [wife] and is unwilling to sign a complaint, the reluctance of the victim is usually accepted by police and prosecutors." F. MILLER, *supra* note 11, at 174-75. What is notable about this excerpt is that the words in brackets have been substituted in both cases for the word "Negro" which is found in the original text.

¹¹⁶ The existence or absence of assumptions about the victim is crucial in the successful or unsuccessful prosecution of the cases. See *supra* note 74 and *infra* note 123.

QUESTIONER: Well tell me what basis you have for your assumption.

PROSECUTOR: What characteristically happens is that if you charge the defendant and get a hearing date, the victim either doesn't show at all or she calls up saying that she's reconciled or doesn't want to testify for some other reason.¹¹⁷

QUESTIONER: And when these victims call up, what do you say to them?

PROSECUTOR: There's nothing to say. I say okay and I dismiss the case, if I've made the mistake of charging in the first place. . . .

QUESTIONER: And when you're speaking to a victim at the first interview, how do you handle the fact of her reluctance and its assumed result?¹¹⁸

PROSECUTOR: I don't actively discourage them from prosecuting, the way some prosecutors do.¹¹⁹ But I spell out the difficulties so that they know what they're letting themselves in for. They often decide right then and there that it's not worth it to them.

QUESTIONER: And if you're not so lucky?

¹¹⁷ Assumed victim concerns, such as the desire to reconcile or worries about financial repercussions should a husband be jailed, have been seen as insurmountable obstacles to prosecution. As to the latter concern, the danger of sanctions affecting the victim and (possibly) her children, Attorney Sally Buckley has devised a solution. She grants victims the right to participate in the sentence recommendation so that a punishment can be given in the case of a conviction, but not one which is fearful for or damaging to the victim or her dependants. See L. LERMAN, *supra* note 7, at 37 ("Victim Contact Letter"). But see, ABA STANDARDS, *supra* note 11, 3-3.9 Commentary at 3-57, where refusal to prosecute is found to be justifiable on the basis that the victim's reluctance stems in part from "the harmful consequences of prosecution to the family."

The second perceived source of victim reluctance is the reconciliation concept, or, as the ABA expresses it, "because the dispute has been resolved." *Id.* As LaFave has written, "The assumption apparently is that uncoerced forgiveness reflects a lack of importance attached to the incident by the victim (and, perhaps by the aggressor), so that non-prosecution is not contrary to the statutory policy of discouraging the settlement of disputes by force." LaFave, *supra* note 13, at 534. Although it is not unimaginable that a reconciliation has taken place (or will take place), there is much reason to believe that the victim's change of heart after charges have been filed is due less to love and more to the possibility "that the woman is pressured. . . . The husband either apologizes and promises . . . reminds her that he supports her financially, or threatens to abuse her still further if she proceeds." Woods, *supra* note 7, at 10. For innovative responses to victim withdrawal problems, see *infra* note 125 and accompanying text.

¹¹⁸ The first interview of a victim of spousal assault (of whatever degree or kind) is the most difficult task of the prosecutor. See, e.g., Filing Guidelines, King County Prosecuting Attorney's Office, reprinted in L. LERMAN, *supra* note 7, Appendix E at 176-77.

¹¹⁹ See, e.g., F. MILLER, *supra* note 11, at 266 ("For several reasons, prosecutors attempt to dissuade prosecution in these cases and are usually successful in that attempt.").

PROSECUTOR: And if you're not so sarcastic, I may answer you.

QUESTIONER: I'm sorry. Go on.

PROSECUTOR: I may ask them to think it over and let me know later what they want to do. A cooling off period is usually enough for them to realize that they're not willing to go through with a prosecution.¹²⁰

QUESTIONER: So you don't actively discourage?¹²¹

PROSECUTOR: No, no. Their needs are respected and I don't have to waste my limited time.

QUESTIONER: And you don't actively encourage?¹²²

PROSECUTOR: Why should I encourage victims who are going to drop out anyway?

QUESTIONER: Because victims, if encouraged, might not drop out.

PROSECUTOR: You're implying that I'm creating a self-fulfilling prophecy?

QUESTIONER: Yes, and there are studies now showing that prosecutors do just that.¹²³

¹²⁰ See, *id.* at 266-67, where the author notes: "Prosecutors are aware that, in many such cases [spousal assaults], the complainant will desire not to prosecute after sufficient time has passed for tempers to cool and second thoughts to be given to the seriousness of this course of action."

¹²¹ The active discouragement of victims is now illegal in New York State, according to the most recent summary of state legislation. See Center for Women Policy Studies, Response to Violence in the Family, State Legislation on Domestic Violence Chart, Washington, D.C. (Sept.-Oct. 1981). This law is the result not only of a history of discouragement by law enforcement officials in Family and Criminal Court, see *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (N.Y. Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979) (litigation directed at the problem of official discouragement), but also of the fact that victims in New York have a choice between criminal and civil remedies. This choice and its detrimental effect on victims is analyzed in Note, *Jurisdiction over Family Offenses in New York: A Reconsideration of the Provisions for Choice of Forum*, 31 SYRACUSE L. REV. 601 (1980).

¹²² Goldstein points out the difference between not discouraging and actively encouraging on the part of the police in the handling of assault cases. See Goldstein, *supra* note 9, at 576. Prosecutorial refusal to charge in these cases on the ground that "victim refuses to prosecute" was a stated reason for the police reticence in encouraging victims to sign complaints. *Id.* at 575 n. 67.

¹²³ See, e.g., F. CANNAVALE, JR. & W. FALCON, IMPROVING WITNESS COOPERATION II:50, II:39 (1976), quoted in K. WILLIAMS, THE ROLE OF THE VICTIM IN THE PROSECUTION OF VIOLENT CRIMES 31 (1978), which concludes:

The assumption was occasionally made that witnesses would not persevere in the prosecution of a friend or relative no matter how cooperative the witness initially seemed to be. . . . Inadequate communications between police/prosecutor and witness was a significant cause of prosecutors' labeling many witnesses as noncooperators . . . not only

PROSECUTOR: And if they call up later because my prophecy has been fulfilled for other reasons?

QUESTIONER: If they call up saying they don't want to testify?¹²⁴

PROSECUTOR: That's what happens.

QUESTIONER: Then you must devise a system to respond to their fears and answer their questions.¹²⁵ You may discover more cooperation than you've imagined possible.¹²⁶

PROSECUTOR: And if I do all that you're suggesting and they still won't cooperate?

QUESTIONER: No conviction.¹²⁷

PROSECUTOR: Look, you can go on until you're blue in the face about the way in which my thinking is distorted by an emphasis on the

because communications difficulties tended to discourage or 'turn off' some witnesses . . . but also because the system, by casting a false shadow of noncooperation on many witnesses, led the *prosecutor* to misinterpret their true intentions.

Lerman is in accord with this assessment:

The recent experience of family violence prosecutors reveals no correlation between any identifiable characteristics of the cases or the victims and the likelihood of cooperation. The probability of victim cooperation is in fact better predicted by the conduct of the *prosecutor* than by the conduct of either the victim or the defendant.

L. LERMAN, *supra* note 7, at 41 (emphasis added).

¹²⁴ Victims do call up and say they wish to withdraw after charges have been filed. Sally Buckley of the Seattle District Attorney's Office reports that 50% of the victims contact her about wanting not to testify. Interview with Sally Buckley, Seattle District Attorney's Office (Nov. 30, 1981).

¹²⁵ Experimental programs have devised systems which do respond to victims' fears and questions. Buckley, for example, reports that victims frequently express fear of going to court or guilt about assisting in the prosecution. Her office sees one of its major tasks as providing victims with information about the court and the prosecutorial system and with emotional support. *Id.*

Support systems are coupled with "no drop" policies: victims are informed that once charges are filed, the prosecutor will proceed with the case even if the victim develops a reluctance. A major advantage of this policy is that the victim cannot be coerced into not testifying or enticed into "repeatedly testing [her] resolve to go to court." L. LERMAN, *supra* note 7, at 44-47. For an example of an abuse of a "no drop" policy, see *infra* note 127.

¹²⁶ These programs have had impressive results in reducing victim-witness attrition in cases of spousal assault. For a summary of the percentage of cases in which victims cooperated, see L. LERMAN, *supra* note 7, at 34-35. For example, in 1979, the Santa Barbara cooperation rate was 92% of the cases in which charges were filed. Sally Buckley reports that her victim attrition rate is no different in spousal assault cases than in other crimes. Interview with Sally Buckley, Seattle District Attorney's Office (Nov. 30, 1981).

¹²⁷ A recent case in Alaska demonstrated an extreme which advocates of a "no drop" policy found inflexible and unfortunate. The victim-wife was jailed for a day because she decided not to testify. See *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, The National Law Journal, Aug. 22, 1983, at 4, col. 3. One advocate called the tactic "outrageous." *Id.* (quoting Lisa Lerman).

need for conviction. But you aren't the one who has to deal with defense attorneys or walk into a courtroom and try these cases.

QUESTIONER: No, I'm not. Nor do I have to bear the consequences of a decision to charge. But I'm not willing to let you fall back on that felt need to convict as long as I sense that that criterion provides a screening function which relieves you of the responsibilities of examining your own assumptions or devising more effective ways of dealing with this type of case.

PROSECUTOR: I have only so much time and money and I have more cases now than you can imagine. If I can charge in some kinds of cases knowing that I'll get convictions and that I'll be able to put people away, to protect the public, then why should I put out effort in other cases and come up with nothing? Particularly when coming up with nothing may convey the idea that people can get away with these assaults?

QUESTIONER: You're saying so many things at once . . .

PROSECUTOR: They're all factors. I can't put one or more aside.

VI. LIKELIHOOD
OF CONVIC-
TION

QUESTIONER: I'd rather look at one thing at a time. I guess you're going to get your chance to explain to me the significance of the likelihood of conviction in your decision whether to charge.

PROSECUTOR: I feel as if you're making me belabor the obvious.

QUESTIONER: Try to be optimistic. I know that I've always enjoyed learning more about the obvious.

PROSECUTOR: Are you familiar with the notion of deterrence?¹²⁸

QUESTIONER: I am.

PROSECUTOR: Then perhaps you'll explain to me how anyone is

¹²⁸ One commentator explains deterrence as follows:

Deterrence is viewed as working in two principal fashions. One involves the effect of imposing criminal sanctions on the subsequent behavior of the individual actually punished. This deterrent effect . . . has come to be known as "special deterrence". . . . The second type of deterrence is concerned with the symbolic effect that punishment may have on potential criminals. The imposition of sanctions on one person may demonstrate to the rest of the public the expected costs of a criminal act, and thereby discourage criminal behavior in the general population. This deterrent effect has come to be known as 'general deterrence.'

Nagin, *General Deterrence: A Review of the Empirical Evidence*, in *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 95 (1978).

going to be deterred from these assaults if there's never a conviction in these cases.

QUESTIONER: Do you know for a fact that charging itself has no deterrent value or that charging without conviction is worse than nothing?

PROSECUTOR: Not for a fact, no.

QUESTIONER: I'd be surprised if you did. My impression is that there is much controversy surrounding the empirical findings about deterrence.¹²⁹

PROSECUTOR: Deterrence is a theory . . .

QUESTIONER: There are studies.

PROSECUTOR: If you want to speak empirically you can, but . . .

QUESTIONER: I want to examine the basis of an assumption . . .

PROSECUTOR: I'm more concerned about common sense.

QUESTIONER: And common sense tells you what?

PROSECUTOR: That people are deterred by the possibility of a conviction.

QUESTIONER: My common sense tells me something different. I don't find it farfetched to imagine that some people might be deterred by the idea of conviction, but others stopped cold by the prospect of being arrested and/or charged whether or not they imagine being convicted.¹³⁰

PROSECUTOR: Come on. Imagine a guy in a bar saying to his friend, "Guess what. I hit my wife the other night, just a little fight, and she called the cops and the damn cop arrested me and the D.A. actually

¹²⁹ See, e.g., Bynum, Forst, Rhodes & Shirhall, *Sentencing and Social Research: A Review of the Literature on Deterrence, Incapacitation, and Rehabilitation*, in EXECUTIVE ADVISORY COMMITTEE ON SENTENCING, CRIME AND PUNISHMENT IN NEW YORK Appendix at 251 (Report to Governor Carey, 1979). This comprehensive discussion of philosophical and empirical aspects of deterrence is concerned with the phenomenon in relation to the formal sanction of sentencing rather than in relation to charging *per se* and any perceived punitive effect which charging might have.

¹³⁰ One commentator notes that "[s]ometimes as little as a warning from a judge, an order of protection or an arrest causes men to cease their violent conduct." Woods, *supra* note 7, at 12. A recent study by the Police Foundation confirms "that the best way for the police to prevent repeated acts of violence in the home may be simply to arrest men suspected of assaulting their wives or lovers. . . . [o]nly 10 percent of those arrested generated a new official report . . . within six months" compared with 16% of those who received mediation instead of arrest and 22% of those who were simply ordered to leave their homes temporarily. *Domestic Violence: Study Favors Arrest*, N.Y. Times, Apr. 5, 1983, at C1 & C4, cols. 1 & 3.

charged me with assault. But my lawyer says it's all a joke, because they won't get a conviction." Do you really think his friend, who may have hit his own wife, is going to be deterred by hearing that?

QUESTIONER: It depends on who the friend is, what the friend feels he may stand to lose. These cases aren't limited to the destitute.¹³¹

PROSECUTOR: I suppose some people might be deterred. It's possible. But the public cares about convictions whether or not they have statistical data on deterrence. It reassures them. It reassures me. Why would anyone feel able to rely on a system that can't convict people who are charged?

QUESTIONER: What is there to rely on other than the idea of deterrence which may or may not be operating and certainly not in ways that we can easily predict?

PROSECUTOR: People can rely on convictions because they mean that someone is taken off the streets.

QUESTIONER: The public is reassured because conviction permits incarceration and so the criminal is incapacitated?

PROSECUTOR: That's right.

QUESTIONER: But if we're speaking of minor offenses here, there is little chance of incarceration or little chance of anything more than a very short jail term.¹³²

PROSECUTOR: Maybe so, but it's what the public buys.¹³³

QUESTIONER: You don't have to sell. You can consider educating the public about the nature of these offenses and the importance of initi-

¹³¹ "It is well established that spouse abuse occurs in epidemic proportions in the United States, and that it pervades every race and ethnic group, every economic class, every area of the country." Center for Women Policy Studies, *supra* note 8, at 1. One author found that "[people who work with spouse abuse cases] say that first offenders who have had no prior experience with the criminal justice system are deterred by the threat of prosecution . . ." Fromson, *supra* note 33, at 3.

Sally Buckley of the Seattle District Attorney's Office reports that it is her subjective impression that a number of defendants are upset most of all by the "hassles with the law" rather than by conviction *per se*. Interview with Sally Buckley, Seattle District Attorney's Office (Nov. 30, 1981).

¹³² Sentences are generally minimal: "If an assailant is found guilty, the usual penalty is probation and/or a fine. . . . If the assault is particularly severe or if it's his second or third conviction, he may spend some time in jail and receive a suspended sentence." J. FLEMING, *supra* note 1, at 45.

¹³³ The influence of public opinion on prosecutorial decisions is a complex issue which will not be discussed in this dialogue. For a brief discussion of this question, specifically in relation to election versus appointment of prosecutors, see the commentary to ABA Standard 3-2.3 and references cited therein, ABA STANDARDS, *supra* note 11, at 3-21.

ating prosecutions in an effort to make the State's position unambiguous.

PROSECUTOR: Even assuming that the public might be receptive, I'd still have big problems within the system. What member of the defense bar, for example, is going to negotiate seriously with a D.A. who's never won a case for a given offense? And which of my fellow D.A.'s isn't going to get suspicious about the quality of my work if I keep filling up the docket and then coming up with nothing but dismissals or acquittals?¹³⁴

QUESTIONER: You keep using phrases like "coming up with nothing but" or "never won." Your thinking about convictions obscures the possibility of changing your handling of these cases, which is one of the reasons, by the way, that I began by asking you to charge on the basis of probable cause.

PROSECUTOR: What are you suggesting?

QUESTIONER: That you stop equating infrequent conviction with no conviction and using that equation as justification for not attempting to learn more about solving the problems of proof.¹³⁵ You might begin by substituting the word "seldom" for "never" and see that if over time you can't succeed in changing "seldom" to "sometimes . . ."

PROSECUTOR: "Seldom" isn't going to take me a long ways with a defense attorney.

QUESTIONER: "Seldom" won't get you any leverage?¹³⁶

PROSECUTOR: Depends on the attorney and the attorney's experience. If he knows as much as I do about this type of victim . . .

¹³⁴ One commentator, writing about the prosecutor's better bargaining position if he "consistently succeeds in court," noted that "the effect of this pressure to avoid [possibly unsuccessful litigation] may be that the court calendar remains uncluttered. . . . But it seems unreasonable that the trial process should be reserved only for cases in which conviction is assured. . . ." Cox, *supra* note 11, at 414-15; see also *id.* at 414 (reference to the prosecutor's "status within the office [being] based upon conviction rate").

¹³⁵ Cox noted that "[c]onversion of the prosecutor's desire to win into a resolution never to lose means that he avoids prosecution of doubtful or difficult cases." *Id.*

¹³⁶ Leverage in plea bargaining is frequently acquired by prosecutorial bluffing, a phenomenon described in Ostrow, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581, 1585-87 (1981). This tactic is often used when the prosecutor has insufficient evidence to prove an accused guilty beyond a reasonable doubt. Furthermore, in cases other than spousal assaults, prosecutors are known to file charges in which "the evidence is not likely to support the burden of proof." *Id.* at 1585 n.15.

This writer does not advocate the practice of bluffing, but refers to it in order to demonstrate that if prosecutors are able and willing to proceed in other cases with "so little evidence," they should be prepared to negotiate with a defense attorney when there is more than a little evidence, but some worries about assumed victim withdrawal.

QUESTIONER: This *type* of victim? I think you must work to dispel your stereotype.

PROSECUTOR: It's not just a stereotype; there's the experience of many prosecutors.

QUESTIONER: Many prosecutors have not had the inclination or the opportunity to learn more. I'll tell you now that although I believe what I've been saying about the importance of charging *per se*, I've been pulling your leg a bit. I wanted to hear your thinking about likelihood of conviction, so I waited until now to tell you that you may have a much greater likelihood of conviction if you adopt some of the programs that have been devised by those few prosecutors who have now worked extensively with these cases.¹³⁷ I hope you'll forgive me.

VII. LIMITED RE-SOURCES

PROSECUTOR: I'll forgive you more quickly if you can tell me where these people get the time and the money to handle these cases.¹³⁸ I'm quite concerned that an inordinate amount of resources would be expended in attempting to control infractions of a relatively minor nature.¹³⁹

QUESTIONER: You want me to respond to the question of resources, but the word that's leaping out at me is "minor."

PROSECUTOR: I only meant minor in terms of physical injury. I'm not trying to diminish the significance of these assaults to victims. I'd be willing to expend *some* amount of time and energy, but . . .

QUESTIONER: If some is what you have, then I'm sure you'll make the best use of it that you can.¹⁴⁰ And if you have none, I can only ask

¹³⁷ Lerman found that "[d]omestic violence prosecution units have not only reduced case attrition, but have also obtained a high rate of convictions. Notably, the Seattle program reports that 83 percent of the domestic violence cases which go to court result in convictions." L. LERMAN, *supra* note 7, at 35.

¹³⁸ The experimental programs were originally funded with the help of LEAA grants for a Family Violence Program. The Seattle program is now permanently funded by the City of Seattle. Interview with Sally Buckley, Seattle District Attorney's Office (Nov. 30, 1981). The Philadelphia program receives state and municipal funds. Interview with Bebe Kivitz of the Domestic Abuse Unit of the District Attorney's Office, Philadelphia, Pennsylvania (Nov. 30, 1981).

¹³⁹ This statement, beginning with the word "an" is taken verbatim from F. MILLER, *supra* note 11, at 267.

¹⁴⁰ For a discussion of the difference between the importance of prosecuting this type of offense and an insistence that every single case be prosecuted, see *supra* note 50.

Prosecutors in the experimental programs feel that even with the increased caseload which may result from public recognition that the criminal justice system is now willing to prosecute these cases, there will be "fewer wasted resources." L. LERMAN, *supra* note 7, at 44.

you to make some.

PROSECUTOR: I'm still bothered by something, though. I don't feel good about choosing to put effort into this type of case because I think there's a good chance that violence in relationships is inevitable so that¹⁴¹ . . .

QUESTIONER: I agree that prosecution by itself is probably not going to wipe family violence out of the society, particularly when such violence is perceived as inevitable. But prosecution is your job and it's the contribution that you can make. Other people will have their contributions.¹⁴²

PROSECUTOR: But I think we could use up resources until the end of time and not even lessen this problem.

QUESTIONER: Do you know that for a fact?

PROSECUTOR: No, of course not.

QUESTIONER: Yet you have reason for believing it.

PROSECUTOR: I have a belief that the only lasting solution is for people to learn new ways of relating. In fact, I think that if victims would refuse to be assaulted, if they would simply get out of these relationships, then the problem would be solved.¹⁴³

QUESTIONER: You assume they can leave?

PROSECUTOR: We're talking about adults. Why shouldn't they leave?

This optimistic evaluation is, of course, premised on a belief that some prosecution of these cases is worthwhile. A prosecutor who is opposed to taking on any of these cases would prefer no resources to less waste.

¹⁴¹ F. MILLER, *supra* note 11, at 267.

¹⁴² Other people have been contributing for some time, as the many references in these footnotes indicate. One of the more recent areas in which work has begun is concerned with working with violent (including "minor" violence) men in counseling and consciousness-raising groups. One such group in which men have taken the initiative to work with men is "Emerge" in Somerville, Massachusetts. The work that must be done may reach much further than the changes which focus on the problem of spousal assaults itself. For example, violence in media is a broader area that may play a role in the continued cultural patterns generating the enormous amount of family violence in our society.

¹⁴³ This attitude is widely held: "[T]he prevailing attitude of many prosecutors and judges is that family violence is a private matter and should be worked out . . . without the intervention of the court." M. STRAUS, R. GELLES & S. STEINMETZ, *supra* note 49, at 233. Many also believe that "if only the victim would leave" there would be no need to prosecute, which is simply another version of family violence as a private problem. For many years, prosecutors would not file charges unless the woman indicated that she would leave—by getting a divorce. *See* Eisenberg & Micklow, *supra* note 7, at 158. This "divorce test" reflects both the perception of victim as reluctant and the idea that private solutions are the only real solutions to these problems.

QUESTIONER: Many, many reasons.¹⁴⁴ They may be economically dependent, they may have responsibility for young children and no place to take those children, they may know of no place where they can retreat and the person who's harmed them will not pursue them, they may fear retaliation for an attempt to leave. And you assume that they never do try to leave, but we now know that some number do make that attempt and are then forced back, by hardship, into the homes in which they've been assaulted.¹⁴⁵

PROSECUTOR: I spoke hastily, and I apologize. Still, even granting that there are constraints, I think it's unlikely that anything will change until victims stand up for their right not to be hit.

QUESTIONER: Until they stand up and declare that it's behavior which they will not tolerate?

PROSECUTOR: Exactly.

QUESTIONER: When the society in which they live does tolerate that behavior and communicates that tolerance by refusing to condemn these assaults as criminal?

PROSECUTOR: Do you really believe that if I began to charge more in these cases that the victims of such assaults would change?

QUESTIONER: I do believe that,¹⁴⁶ but I don't think it's the business or the function of the criminal justice system to change victims. I think your task is a simpler one. You can use the resources, or some part of the resources at your command to make an unequivocal statement against the use of force or the threat of force in relationships. And if

¹⁴⁴ Other reasons for victims not leaving, in addition to those listed in the dialogue, are guilt, emotional dependence, low self-esteem, traditional value systems, isolation, ambivalence, embarrassment and shame, fear of insanity, physical illness, learned helplessness—a theory attributed to the work of L. Walker. See L. Walker, *supra* note 1, at 31-35 and 42-54. These factors are each discussed in J. FLEMING, *supra* note 1, at 81-95. A great deal of research has been done in this area. See, e.g., Gelles, *Abused Wives: Why Do They Stay?*, J. MARRIAGE & FAM. 659 (1976).

¹⁴⁵ According to Professor Maria Marcus of Fordham Law School, research done by Professor Murray Straus of the University of New Hampshire Sociology Department indicates that up to 90% of the women do make an attempt to leave home and end up returning because they cannot survive alone financially. Interview with Maria Marcus (Feb. 10, 1982) (discussing her participation in a New York City Bar Association panel discussion on spouse abuse, held Feb. 8, 1982). In short, there is now reason to believe that although women must contend with the various factors listed in the dialogue and in note 144, *supra*, they are also able to overcome these factors in many cases, at least to the point of making an attempt to leave. More research is necessary in order to describe when and under what circumstances these women leave and return.

¹⁴⁶ Attorney Sally Buckley reports that she has received accounts from victims that the fact of prosecution did enable them to gain confidence and assert their right not to be hit. Interview with Sally Buckley, Seattle District Attorney's Office (Nov. 30, 1981).

you'd agree with me that that is a worthwhile task, then we could begin to work on some of the practical challenges of prosecuting these offenses.¹⁴⁷

PROSECUTOR: Assuming that I do decide that I agree, do you think it would be appropriate to devise diversion programs or less formal forums for the less serious cases?¹⁴⁸

QUESTIONER: I'll tell you the first question I'd ask myself if I were trying to make a decision about that issue. I'd wonder whether my interest in such alternatives reflected some special requirement of these cases or whether instead it served merely to shift the ambivalence, our culture's ambivalence, about treating these cases as crimes to a later stage in the process.

PROSECUTOR: I can see this is a whole subject unto itself.

QUESTIONER: Yes. It's another discussion, for another time.

¹⁴⁷ In addition to the information contained in the footnotes to this dialogue, more useful information on a great variety of problems, including the problems of proof, may be found in L. LERMAN, *supra* note 7.

¹⁴⁸ Most of the major works on spousal assaults do discuss the use of alternate forums, pre-conviction diversion, deferred prosecution, and alternative sanctions following conviction. There is no consensus on the use of such devices, processes or punishments, and work remains to be done on developing a clear philosophy concerning the post-charge handling of cases of spousal assault.