Response to Commentators

Michelle Madden Dempsey, Villanova University School of Law

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Response to Commentators, by Michelle Madden Dempsey

I am grateful to Criminal Law & Philosophy for organizing this symposium on my book, Prosecuting Domestic Violence: A Philosophical Analysis (OUP 2009)—and am especially indebted to Professors Kinports and Cowan for their careful, generous, and challenging engagements with my arguments. I am relieved to find that Professors Kinports and Cowan are mostly positive in their evaluation of the book’s merits and delighted to find their critical reflections have offered me the opportunity to think more deeply about the project I undertook in the book.

I found much with which to agree in both commentaries. Indeed, I will have little to offer in response to Professor Kinports’ article until the end of my own comments here, except to note that I found her critique of prosecutors-as-community-representatives as illuminating as it was disheartening. Perhaps one way to increase the likelihood that prosecutors might someday act as genuine representatives of their communities (in whole or in part) would be to enhance transparency in the exercise of prosecutorial discretion, such that communities will be better able to understand and respond to prosecutorial decision-making. As Kinports correctly notes, “decisions not to proceed with charges are particularly likely to be shielded from the public view.” Requiring prosecutors to articulate their reasoning in such cases may go some way toward answering Cowan’s important question: “what duties or obligations do prosecutors have with respect to cases that are not pursued?” While I did not take up the question in my book, I am sympathetic to the view that prosecutors should have a duty to explain their reasoning in cases where charges are dismissed.1

Similarly, I found a great deal of Professor Cowan’s comments enlightening and found myself agreeing enthusiastically with her recommendations that criminal justice measures should not be viewed as the only appropriate response to domestic violence. As she notes, “arrest and prosecution [should be] used alongside advocacy for victims and anti-violence programmes for abusers” rather than “solely relying on prosecution and criminal punishment.” Having chosen to focus the book solely on the prosecution of domestic violence, I did not examine in any detail other possible responses, save to mention briefly the consequential relationship that might sometimes exist between prosecutorial pursuit action and securing treatment for abusive defendants (Dempsey 2009, p. 160). As Cowan helpfully reminds us, focusing on prosecution should not obscure from our view other potentially more effective responses to domestic violence.

I have organized my responses below by commenting first on several matters raised by Professor Cowan, to suggest that our views are perhaps not as inconsistent as might be supposed. I then address a concern raised by both Kinports and Cowan regarding the practical implementation of feminist domestic violence prosecution.

1 I take no view here on whether and how to enforce such a duty. For an argument in favor of internal regulation, see (Miller & Wright 2008).
Should Domestic Violence in its Weak Sense Ever Be Prosecuted Without Victim Support?

Cowan attributes to me the claim that, “[o]nly domestic violence in its strong sense can be considered by prosecutors for criminal prosecution even where the victim withdraws her support for the prosecution” and that “[i]f victims withdraw their support for the prosecution of [domestic violence in its weak sense], prosecutors should not pursue the action.” As I hope will be made clear below, these claims were not stated in my book and, indeed, are not logically implied by my argument. While I did not address the issue at length in my book, I do in fact believe there are cases of domestic violence in its weak sense which should be prosecuted even without the victim’s support.

Cowan is right, of course, to focus on the distinction between domestic violence in its strong and weak senses, since this distinction is the central analytic tool in my book’s argument (Dempsey 2009, pp. 103-128). In sum, the distinction runs along the following lines: in its strong sense, domestic violence consists of the intersection of three elements: (1) violence that occurs (2) in a domestic context, which (3) has a tendency to sustain or perpetuate patriarchy; while in its weak sense, domestic violence consists of the intersection of only the first two elements (that is, (1) violence occurring (2) in a domestic context). In Chapter Six of the book, I set out this analysis in a Venn diagram, which not only illustrates the difference between domestic violence in its strong and weak senses, but further highlights the relationship between 13 related concepts, including domestic abuse, generic violence, stranger rape, etc. (Dempsey 2009, p. 115).

As I argued in the book, if prosecutors can successfully disaggregate the two kinds of domestic violence and target domestic violence in its strong sense for particularly aggressive prosecution, then other things being equal prosecutors can thereby realize values associated with the expressive denunciation of patriarchy (Dempsey 2009, p. 179). Moreover, if such denunciation is habituated, prosecutors can realize values associated with reconstituting the character of their state and, perhaps, their community as less patriarchal—that is, as more feminist (Dempsey 2009, p. 180).

That, in any event, is the kernel of my argument. There is a good deal more packed into the concepts at work, and my book is a detailed explanation of what, precisely, each of these claims means. Notably, however, nowhere in the book did I make the claims Cowan attributes to me—that “[o]nly domestic violence in its strong sense can be considered by prosecutors for criminal prosecution even where the victim withdraws her support for the prosecution” or that “[i]f victims withdraw their support for the prosecution of [domestic violence in its weak sense], prosecutors should not pursue the action.” Nor are such claims logically implied by my argument. Rather, the logical implication of my argument is far more modest: when a prosecutor is faced with two sets of cases that are otherwise identical in all salient respects (that is, other things being equal), there is an important value to be realized in targeting cases of domestic violence in its strong sense for aggressive prosecution and, in comparison, declining to target cases of domestic violence in its weak sense for equally aggressive prosecution. These implications are wholly consistent with prosecutors being justified in pursuing some cases of domestic violence in its weak sense without victim support. Indeed, I can easily imagine cases of domestic
violence in its weak sense in which the violence was extreme enough to justify proceeding without the victim’s support—say, where one brother knifes another, causing the victim grievous bodily harm.²

Any confusion on this point is no doubt due to my failure to elaborate the different ways in which prosecutors can decline to target cases for particularly aggressive prosecution.³ Perhaps the best way forward in understanding the various ways prosecutors might decline to target a set of cases is to get clear about methods of targeting cases.⁴ To take one example of targeting I employed while prosecuting, consider the order in which prosecutors screen non-arrest police reports for the purpose of deciding whether to file charges.⁵ In many jurisdictions, non-arrest reports are not routinely submitted to the prosecuting authority unless there is strong evidence of a serious criminal offense. In the Domestic Violence Prosecution Unit I supervised, however, we obtained all of these reports and—when time allowed—we reviewed them to see whether any charges could be filed in appropriate cases. The number of non-arrest reports was overwhelming, to say the very least. Literally, stacks of reports sat piled-up on my desk each day, waiting to be screened for possible charges. In order to avoid falling terribly far behind in this backlog, we adopted a strategy of screening that tracked the unwritten prosecution policies I outlined in the introduction to my book:

1. Domestic-violence cases will be selected for prosecution by the DV Unit based on their similarity to what is perceived to be the paradigm of domestic violence: wife battering. As such, cases involving violence amongst siblings, cousins, platonic room-mates, or by carers of vulnerable adults will rarely if ever be treated as cases of domestic violence for these purposes.

2. Domestic-violence cases will be prioritized for aggressive prosecution by the DV Unit when the violence tends to sustain or perpetuate gendered power disparities. As such, the following types of case will be prioritized: those in which the relationship between the named victim and defendant bear hall-marks of stereotypical gender expectations (eg, he works while she attends to childcare and housework, he controls the finances, etc.); those in which the socially

² I do not mean to imply that every case of violence between brothers is necessarily domestic violence in its weak sense and can never constitute domestic violence in its strong sense. That said, it strikes me as unlikely that many cases of violence between brothers would be the sort that tends to sustain and perpetuate patriarchy. If my hunch is right, then such a case would constitute domestic violence in its weak sense—no matter what degree of physical violence is involved.

³ In discussing what declining to target domestic violence in its weak sense might entail, the only example I gave was the parenthetical “(eg, by dismissing pursuant to victims’ requests in such cases).” While, of course, I intended the “eg” to signal that there are other methods by which a prosecutor might decline to target such cases, I did not take the opportunity to expound upon those other methods.

⁴ I do not mean to present targeting and declining to target as the only two options available to prosecutors when deciding how to handle a case. Indeed, while I do not recommend it as a justifiable exercise of discretion, it is conceivable that prosecutors might pursue cases in an arbitrary fashion, neither targeting nor declining to target any particular set of cases.

⁵ Non-arrest police reports are written by police officers to track incidents where an arrest has not (yet, anyway) been made. In some incidents, the arrest was not made because the suspect had fled the scene prior to the police officer’s arrival; in others, an arrest was not made because there was not probable cause that any criminal offense had been committed; in still others, there was probable cause, but the police officer on the scene exercised his or her discretion to decline to make an arrest. In jurisdictions that have adopted so-called “mandatory arrest” policies, the third option is meant to be foreclosed to police officers. For an insightful discussion of such policies, see (Goodmark 2012).
dismayed partner is degraded and/or denied basic requirements of living an autonomous life (eg, she is not permitted to have her own friends, independent access to money, or to travel away from home unattended, etc.) and/or those in which the violence evinces a sadistic desire to make the socially disempowered partner suffer (Dempsey 2009, p. 5).

At the time and place where I prosecuted (mid to late 1990s in a small, rural, mid-western US jurisdiction), and where the history and social context of many relationships at issue were fairly well known to the local prosecutors, there was some basis upon which to divide cases according to these policies (although, no doubt, the attempt to do so failed on some occasions). With these policies in mind, we plowed through the huge piles of non-arrest reports, attempting to identify and file charges quickly in cases of (what I now refer to as) domestic violence in its strong sense. As for the other cases, we either declined to prosecute or, for the most part, simply placed those reports at the bottom of the stack for consideration on another day. If we never found the time to get around to charging those cases, then so be it. We had bigger fish to fry, and those big fish were the cases that met the indicia outlined in the above policies. Notably, however, this is neither to say that we would always defer action on cases that failed to meet those indicia, nor that the policies instructed prosecutors to decline to charge in such cases. Rather, it merely instructed prosecutors not to make those cases a priority; that is, not to target them for particularly aggressive prosecutorial pursuit action. Where cases were otherwise identical in all salient respects, we would target those that met the policies’ indicia, and decline to target those that did not. Such a policy was (and is) entirely consistent with filling charges quickly in cases that called for aggressive prosecution, even if they did not meet the policies’ indicia—such as the brother-on-brother knifing discussed above.

My book argues that *ceteris paribus* habitually targeting domestic violence in its strong sense and declining to target cases of domestic violence in its weak sense can contribute to the project of feminist domestic violence prosecution. As I hope is now clear, there are a number of ways in which prosecutors might decline to target such cases—of which, dropping charges in cases of victim withdrawal is merely one. To be sure, habitually declining to target cases of domestic violence in its weak sense would lead prosecutors to be more likely to dismiss such cases when the victim withdraws support for the prosecution—but dismissal surely would not be required in all such cases. Rather, in some cases of domestic violence in its weak sense, it may indeed be justifiable to pursue a prosecution even without the victim’s support.

**On Patriarchy, Postmodernism and Same-Sex Domestic Violence**

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6 I do not take this last point to negate the value of attempting to disaggregate the cases. On the value of attempting, see my discussion of telic value at (Dempsey 2009, pp. 65-67).

7 Of course, in cases where there was no probable cause to believe that an offense was committed, we declined to charge irrespective of whether the case involved the indicia outlined in the policies.

8 On the distinction between prosecutorial pursuit and non-pursuit actions, see (Dempsey 2009, pp. 53-54).

9 Consistent with the policies, such a case could of course be aggressively prosecuted; although it might be handled by a different, non DV-specific prosecution unit. A policy that prioritizes cases for prosecution *by a DV Unit* does not speak to the issue of whether cases that fall outside the DV Unit’s remit should be aggressively prosecuted by another prosecution unit.
Cowan expresses concern that my distinction between patriarchal from non-patriarchal (i.e., feminist) conduct is “overly dichotomous” and “smacks of a kind of totalizing political and philosophical stance that does not account for complexity or nuance in motivation, action and outcome.” She asks: “[a]re there no actions that can be said to fall somewhere between these two poles?”

Let me start by noting that I am entirely in agreement with Cowan on this point. In no way did I mean to imply that conduct must be either patriarchal or non-patriarchal, with no other more nuanced options on the table. Rather, my claim was simply that “one’s actions may possess a patriarchal or non-patriarchal (i.e., feminist) character.” This view is entirely consistent with the fact that one’s actions may possess a character falling somewhere between these poles, or beyond. Compare the logical structure of my claim to the claim that one’s actions may possess a generous or stingy character. This claim is consistent with the both of the following views (1) one’s conduct may be more or less stingy (thus falling between the poles of generosity and stinginess); and (2) one’s conduct might approach neither the virtuous mean of generosity, nor the vicious extreme of stinginess, but may instead fall closer to the vicious extreme of spendthriftiness. So, too, on my account, one’s conduct may be more or less patriarchal (thus falling between the poles of being feminist and being patriarchal); and (2) one’s conduct might approach neither the virtuous mean of being feminist, nor the vicious extreme of being patriarchal, but may instead fall closer to a vicious extreme we might characterize as being misandropic.10 To be clear then, on my view it is not the case “that one is either ‘for us or against us’,” as Cowan suggested. There are, indeed, shades of gray.

That said, it may be worth noting that in presenting this book at various law schools in the United States, I have come up against a critique which runs directly counter to the concerns Cowan expressed. In discussion with some feminist readers, it has been suggested to me that my claim (that “one’s actions may possess a patriarchal or non-patriarchal (i.e., feminist) character”) is flawed insofar as I even allow for the possibility that some actions may have a non-patriarchal character. In a world so deeply structured by patriarchal inequality, so the argument went, every action has a tendency to sustain and perpetuate patriarchy. I imagine that Cowan would share my confusion regarding how best to respond to such a claim—for it seems just about as totalizing (and obscuring) and one can imagine. Dumbstruck on one occasion when confronted with this complaint, I stirred my coffee and wondered how to respond. Finally I ask my interlocutor whether, in her view, my coffee-stirring had a tendency to sustain and perpetuate patriarchy. The answer (“yes, of course”) underscored a strange fact of philosophical argumentation: one person’s redactio is another’s proof.

On a related point, Cowan attributes to me the claim that “all feminisms share a desire to end patriarchy” and she questions the plausibility of this claim by asking whether “all feminisms [would] even agree that patriarchy ... is a useful concept.” My use of the label “feminist,” however, did not refer to the variety of strands of actually-existing social movements and theories that self-identify as feminist. Undoubtedly, if we think in terms of those “feminisms,” as Cowan puts it, it may very well be the case

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10 In an early draft of the book, I included a rather long and boring analysis of character traits, in which I noted that my account of patriarchy maps onto the view that feminism is something akin to a virtuous mean, with patriarchy and misandry constituting the vicious extremes. For the sake of simplicity, I dropped this discussion rather early in the redrafting process.
that we would find some strands that do not find patriarchy to be a useful concept.\footnote{Although, that said, it seems that those who are most likely to reject the usefulness of the concept of patriarchy, or closely related concepts, are also those most likely to be urging us to “take a break from feminism” (Halley 2006). By and large, it seems clear that most self-described feminists do tend to find patriarchy or closely related concepts to be useful. As the first line of the basic overview of Feminist Legal Philosophy in the Stanford Encyclopedia of Philosophy observes, “Feminist philosophy of law identifies the pervasive influence of patriarchy on legal structures, demonstrates its effects on the material condition of women and girls, and develops reforms to correct gender injustice, exploitation, or restriction” (Francis and Smith 2009, 2013).} My use of the label “feminism” was simply a way of referring to a point of view that is concerned to act against what I refer to as patriarchy.\footnote{On this point of view can be understood in relation with other points of view that are concerned to act against intersecting wrongful structural inequalities, see (Dempsey 2009, pp. 129-135).} In this usage, the label feminism is a conceptual placeholder and its oppositional relationship to patriarchy is an analytic proposition which is true in virtue of its meaning as it relates to the conceptual analysis of patriarchy I set forth in Chapter Seven of my book. Cowan and others may complain that my conceptual analysis of patriarchy fails to reflect anything true and salient about the world as it is, but that is quite a distinct line of attack from one that attributes to my argument aspirations to give an account of the variety of actually-existing strands of “feminisms,” an aspiration my argument never professed to have. Of course, in the event that one finds my conceptual analysis of patriarchy wanting, I would welcome any refinements, amendments, and especially clarifications that might be offered to advance our understanding of the concept. Indeed, it is that aspiration which inspired me to attempt to set out a conceptual account of patriarchy in the first place. As I noted at the outset of so doing, I did “not claim to present a complete philosophical analysis of patriarchy” or “attempt to account for every sense in which the term is properly used” (Dempsey 2009, p. 129). Insofar as Cowan’s claim is simply that there are self-identified feminists who do not find patriarchy a useful concept, then we have no real disagreement. I am happy to concede the point, although I consider it to be a matter of sociological inquiry as distinct from philosophical analysis.

Cowan is somewhat critical of my account of patriarchy in virtue of my failure to engage more extensively with postmodern literature. Cowan is correct in noting that I could have fruitfully engaged with the work of authors such as Carol Smart, in order to flesh out my account of patriarchy and avoided the misleading appearance that my account endorses a “broad, universalizing conception of gendered power relations” (Cowan, citing Smart 1989, p. 26).\footnote{That said, I must confess to finding a great deal of postmodern legal and philosophical scholarship obscure. As such, I often find it difficult to engage with this body of literature. The passage from Schwartz and Friedrichs (1994: 231) quoted by Cowan is illustrative: “A key point is that postmodernism suggests it is more liberating to empower ‘victims’ (an imposed category?) of ‘violence’ (an imposed category?) to reconstitute the meaning of violence they experience than to impose on them a critical interpretation (e.g., ‘knowledge’, ‘truth’, ‘social policy’) of this violence.” Honestly, with so many scare quotes and question marks, I find it difficult to understand what the authors think this particular “key point” of postmodernism means.} Indeed, I agree with Cowan and Smart that it would be naïve to think of patriarchy as “all-powerful.” I had hoped that my explanation of patriarchy as a structural inequality—related to Joseph Raz’s notion of social forms (Raz 1986), but in comparison “somewhat less susceptible to variation ... substantial deviation or outright avoidance [as compared to]
other social forms”—would have suggested that my view is a long way from one that attributes to patriarchy the sort of “totalizing” and “all-powerful” qualities with which Cowan is concerned (Dempsey 2009, pp. 137-139; 147-152).

Finally, Cowan is critical of my failure to place same-sex domestic violence more centrally into my analysis, noting that my focus on heterosexual couple violence risks becoming a “circular exclusion.” Cowan’s circularity critique is set forth in two claims which she attributes to me: (1) “same-sex domestic violence ... does not implicate patriarchy in the same way that male on female domestic violence does”; and (2) “patriarchy only explains heterosexual domestic violence.” However, the claim of circularity fails because, in fact, I rejected the second claim. Instead, I confessed some sympathy with the quite distinct view that, “in at least some cases of same-sex battering, salient features can be illuminated within an account of domestic violence which takes male violence against women as its paradigm” (Dempsey 2009, p. 10). As I explained in Chapter six, the account of domestic violence which takes male violence against women as its paradigm is domestic violence in its strong sense, the sense that includes patriarchy amongst its constitutive elements. To be clear, then, it is my view that patriarchy, as a constitutive element of domestic violence in its strong sense, can do some work in explaining some cases of same-sex domestic violence. As for the matter of just how much work it can do, or how such an account can best be fleshed out, I remain uncertain. Had I been more certain in my views on this topic, it would have enabled me to offer what Cowan seeks: “a more fine-grained understanding of the concept of patriarchy” and of domestic violence. As Cowan correctly points out, such an account is sorely needed—not merely for the purpose of conceptual clarity but in order to guide prosecutorial decision-making in such cases. For this reason, I welcome engagement with those who continue to improve our understanding of the ways in which patriarchy does (or perhaps does not) inform a proper understanding of and response to same-sex couple violence (Hart 1986; Robson 1990; Elliot 2008).

On Prosecuting Domestic Abuse

Cowan correctly notes that my analysis of domestic violence distinguishes domestic violence from domestic abuse. The point of drawing this distinction, however, was not to imply that cases of domestic abuse should never be pursued without victim support. My point was simply to avoid the sort of conflation of violence and abuse illustrated in literature such as the Victor Tadros piece that Cowan discusses (Tadros 2005). In characterizing Tadros’s argument, Cowan observes that he “contrasts domestic abuse with ‘other violence’.” Cowan interprets this contrast to mean that Tadros includes within his account “both violent and non-violent sorts of domestic violence.” While I agree with Cowan’s interpretation of Tadros’s meaning, I chose not to formulate the distinction in these terms in order to avoid the awkwardness and confusion of a conceptual category that includes “non-violent sorts of domestic violence.” After all, if those sorts are non-violent, then why should we use the term “violence” to identify that conceptual category?14

14 On a side note, while I find much of value in Tadros’s account of the distinctiveness of domestic abuse (or domestic violence, as the case may be), I find it incomplete insofar as it focuses on repetitive nature of the abuse or violence and fails to account for any considerations of patriarchy, gender, structural inequality, etc. Like Cowan, “it is not clear to me that individual acts or several isolated acts over a long periods of time can never support
By drawing a distinction between violence and abuse, and then focusing on violence, Cowan argues that I am guilty of “privileging harm to the body over harm to the mind.” I regret having left such an impression, since I agree with Cowan that the affective dimension of abuse and resulting psychological harms can be and often are even more serious than physical harms. One need only read the literature on torture to understand that physical injuries are often much easier to heal than psychological ones.\(^{15}\)

That said, we should note that the criminal law has long privileged harm to the body over harm to the mind—with the recognition that psychological harm can amount to actual bodily harm or grievous bodily harm coming relatively recently onto the scene (R. v. Burstow and R. v. Ireland [1997]). As such, many acts that would constitute domestic abuse on my account (such as the example I offer in Chapter Nine of John calling Mary a “filthy whore”) would not constitute criminal offenses in most jurisdictions. Since my concern was with the prosecution of criminal offenses, I focused on a category of conduct (domestic violence) that more surely falls within the definition of existing criminal offenses.\(^{16}\)

This point is worth recalling in light of the following claim advanced by Cowan: “Assuming that threats of violence count as domestic abuse, these could form the basis of a successful prosecution, at least in the UK...” Cowan then proceeds to support her claim by citing the “definition of domestic violence in England and Wales, as developed by the Westminster government ... [that is] used by the police to refer domestic violence cases to the CPS [Crown Prosecution Service] for charging and prosecution.” Yet, the definition to which Cowan refers does not itself establish the elements of any criminal offense in the UK. Rather, it covers a broad range of conduct, only some of which can “form the basis of a successful prosecution,” and a good deal of which cannot.

Since my concern was primarily with conduct that can be prosecuted given the typical scope of existing criminal offense definitions, I focused primarily on cases of domestic violence, as distinct from domestic assault. That said, there are, of course, cases of domestic assault that can be prosecuted as criminal offenses—and nothing in my argument should be understood to detract from their aggressive prosecution. Rather, the logical implication of my argument can be identified by mapping the structure of my argument regarding violence onto cases involving abuse. Doing so would support the following conclusion: *ceteris paribus*, prosecutors should attempt to disaggregate cases of domestic abuse from cases of what I refer to as domestic conflict, and in comparison, they should target cases of domestic abuse for particularly aggressive prosecution.

### On the Problems of Practical Implementation: Can Prosecutors Correctly Disaggregate Cases of Domestic Violence?

Both Cowan and Kinports raise the important and difficult concern that my argument may be all but impossible to implement in practice. In response, it may prove helpful to recall that the primary aims of the book were modest. As I wrote in the introduction, “principally, [the book] seeks to *clarify* some issues” (Dempsey 2009, p. vii). In particular, I sought to clarify issues that “perplexed me during my years

\(^{15}\) For a classic study comparing the impact of torture to violence against women, see (Hermann 1992).

\(^{16}\) The offense need not be labeled “domestic violence,” of course. Instead, it may simply be labeled “battery.” On whether a nominate offense is called for, see (Tadros 2005).
as a domestic violence prosecutor, and some further issues that only became perplexing to me once I had the benefit of time and academic distance to reflect on my experiences as a prosecutor” (Dempsey 2009, p. vii). All of this is to say that the primary aims of the book did not include offering any practical recommendations to prosecutors. And so, if the book fails to explain how it is possible to implement a project of feminist domestic violence prosecution in practice, we should not be at all surprised.

That said, it may be worth reflecting on what considerations would have to be addressed in order to implement such a project in practice. As Cowan correctly observes, “in answering Dempsey’s motivating question (‘What should domestic violence prosecutors do if a victim withdraws support for prosecution?’), we need to know whether or not we are talking about domestic violence in its strong or in its weak sense.” That is, we need to disaggregate domestic violence that tends to sustain and perpetuate patriarchy (strong sense) from that which does not (weak sense). The reason we need to do so (or, more precisely, why prosecutors need to do so) is that disaggregation of these two kinds of cases enables prosecutors to target domestic violence in its strong sense for particularly aggressive prosecution. As I argue, “[p]rosecutorial pursuit actions which target domestic violence in its strong sense for particularly aggressive prosecution realize the intrinsic value of expressively denouncing patriarchy,” whereas the same cannot be said of prosecutorial pursuit actions which target domestic violence in its weak sense. In other words, there is an added-value that can be realized when targeting domestic violence in its strong sense—and if prosecutors fail to disaggregate these two types of domestic violence, they will inevitably fail to realize this added-value.

Both Cowan and Kinports are right to push me on the issue of whether it is possible (or practical) for prosecutors to tell which acts of domestic violence tend to sustain or perpetuate patriarchy and which do not. While I wholly agree with Kinports’ observation that “the role [of patriarchy] in individual cases of domestic violence may not be obvious,” I shall try to say a bit more in response to these concerns.

First, a point of clarification. While I employed “wife battering” as the paradigmatic case of domestic violence in its strong sense, I did not intend to suggest that “every instance of male violence directed at a female intimate partner is [domestic violence] in its strong sense” (Kinports). Rather, on my view, it is not only conceptually possible for such cases to count merely as domestic violence in its weak sense, it is also the case—or so I assume—that there actually have been such cases. And so, let me be clear: it is my view that not every instance of male violence directed toward a female intimate partner counts as domestic violence in its strong sense.

The question of how many such cases fall into the weak sense of domestic violence remains unclear to me. I suspect that I dealt with some such cases as a prosecutor, but I may have misjudged the context. In any event, my sense is that the vast majority of male-on-female domestic violence cases probably do constitute domestic violence in its strong sense.

Perhaps the best way to reflect on this question is to recount what happened when I first began attempting to disaggregate cases and prioritize domestic violence in its strong sense for aggressive prosecution. In response to this shift in policy, the local defense bar invited me to a meeting, to explain and defend the criteria I would be using to distinguish cases that I would continue to prosecute without
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victim support, from those I would be willing to dismiss if the victim so wished. In broad strokes, I informed them that I would be employing the sort of criteria listed in the two (as then unwritten) policies outlined above.

Before making a decision to dismiss, I explained, I would need to talk with the alleged victim and as many other informed parties—family, friends, etc.—as were willing to talk with me. I explained that I would need to gather information about the context in which the violence took place, what kind of relationship the parties had, and what role the violence might play in their relationship. I explained that I would be far less willing to dismiss in cases where I had reason to believe that the relationship at issue was one of unequal power and where the violence seemed to contribute to or perpetuate that inequality.

A cantankerous defense attorney pounced: “Well, what kinds of things will you be looking for? How will you know who has more power in a relationship?” (The word “power” was dripping with sarcasm, as if the notion of unequal power in domestic relationships was something I had made up as part of some feminist conspiracy.) I confessed that it was impossible for me or for anyone to be absolutely certain, but that in order to exercise my discretion with some degree of consistency, I would be looking for factors such as the following:

(1) Do both the defendant and alleged victim work outside the home?;

(2) Do both have unrestricted and unsupervised access to money and credit cards?;

(3) Do both have a social network of friends and/or family with whom they visit with regularly, unaccompanied by the other party?

If the answer to each of these questions is “yes” for the defendant but “no” for the victim, I explained, those considerations would lead me to be far more likely to pursue charges despite the victim’s request to dismiss. Other considerations I noted included things like, “who is primarily responsible for housekeeping?” and “who is primarily responsible for childcare?”.

The defense attorney replied in frustration: “Well, then—if that’s your criteria, you’re just going to wind up prosecuting all the men!” My response, which I still stand by today, was as follows: “Look, I didn’t create a world in which the answers to these questions fall along gendered lines—but these are the ways that power often operates in families and in society more generally—and it’s a power that I’m not going to ignore when exercising my discretion in these cases. If you want a world in which men don’t get prosecuted more aggressively under these policies, then work to create a world in which the answers to these questions no longer reflect gendered hierarchies of power.”

Undoubtedly, the criteria I used to disaggregate my caseload were especially salient given the context: a small, mostly rural community in central Illinois in the mid to late 1990s. In large metropolitan areas, in other countries, in other times, in any range of other contexts, patriarchy may present itself differently in domestic relationships. For that reason, there is no way to provide a general set of guidelines to

\[17\] The cantankerous defense attorney’s response was unforgettable: “No thanks, I don’t do laundry.”
disaggregate cases of domestic violence in its strong sense from domestic violence in its weak sense. The practical point of my book, therefore, is not to instruct prosecutors on how to find the patriarchy lurking within their domestic violence case files, but simply to point out how and why patriarchy matters when prosecuting domestic violence.


