

even one for a nonviolent, unrelated offense such as drunk driving, as an indication that an applicant has an “attitude.”

This view provoked impassioned responses from the advocates. One pointed out that battered women—especially women of color—are sometimes coerced by their batterers into committing criminal acts. Another added that women of color distrust the criminal justice system and questioned whether a group of predominately white system practitioners could be sensitive to their issues.

The advocates explained that most of the battered women enrolled in nonviolence education classes “live disorderly lives and have disorderly behavior.” The majority of them would therefore be eliminated from consideration if a clean record was required for admission into the program.

After debating this issue, the core group reached yet another uncomfortable compromise. We acknowledged the reality of battered women’s lives by not requiring a clean record. However, we held the line at assaultive behavior. A candidate, we decided, could not have a prior assault charge. Further, we excluded defendants who had been charged with violent behavior toward law enforcement officers. Any other criminal history would be reviewed later as part of the full evaluation of an applicant.

Advocates accepted this compromise as the best they could get; system practitioners saw it as the furthest prosecutors should go. We agreed that if probation requested, we would revisit the eligibility requirements and revise them if needed. In addition, advocates trusted that the full evaluation of candidates would be thorough and sensitive to a woman’s history of being battered. With these understandings, we were ready as a group to look at the rest of the factors to be considered for admission. What criteria would we use for fully evaluating candidates?

## *2. Factors Considered for Admission*

“Give me ambiguity or give me something else.”

—Bumper sticker

Though system practitioners had sought a program defined by strict guidelines for admission, the complexity of the issues involved made such guidelines impossible. So far, we had balanced opposing perspectives and reached uncomfortable compromises on the initial consideration of applicants. Our next

step was to delineate the remaining factors prosecutors and probation would use in considering candidates for admission to the program. In addition to developing these criteria, we created narrative guidelines that allowed us to better address the ambiguous, complex realities characterizing the lives of battered women who use violence, as well as to balance our varying viewpoints.<sup>159</sup>

We first revisited the defendant's criminal history and history of violent behavior as factors in the evaluation. The guidelines we adopted acknowledge that if a partner's abuse has been ongoing, a defendant may have been violent with that partner more than once. We agreed to exclude only those defendants who have a history of widespread, aggressive, violent behavior or who have engaged in patterns of violence in other situations.

The defendant's history of victimization also recurs in the evaluation factors and guidelines, which state that the intent of the program is to protect the safety of both parties and to avoid making victims of battering more vulnerable to violence through the actions of the criminal justice system. For the purpose of this program, we define battering as establishing a pattern of coercion and intimidation, threats, and physical or sexual violence; this definition does *not* include isolated incidents of violence or abuse that is exclusively psychological or emotional in nature. We agreed that an applicant for the program need not be the victim of severe, high-risk violence but that a definite pattern of battering needs to be established.

Another factor we considered is the severity of the incident. Because the program was created for misdemeanor domestic violence offenders, most assaults resulting in serious injuries would be charged as felonies and would exclude those defendants from consideration. However, prosecutors saw a need to maintain the flexibility to reject a candidate if the offense was charged as a misdemeanor but the assault was particularly brutal in nature.

We also decided to consider the nature of the defendant's admission to the offense. Prosecutors wanted an oral admission to be made to the probation officer (in addition to the admission in court), in part as an indicator of a defendant's willingness to participate in recommended education and counseling. This admission is required. Advocates, though, didn't want the program to become a

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<sup>159</sup>The evaluation guidelines for probation officers and prosecutors are included in Appendix 7.

“dumping ground” for cases in which self-defense could or should have been raised. They were adamant that defendants in these cases not be steered toward the program simply because it would be easier than working out a more favorable plea agreement or taking a case to trial. Balancing these perspectives, the guidelines ask the probation officer to document statements describing circumstances of self-defense and then to recommend further review by the City Attorney’s Office for alternative resolution or dismissal.

In addition to the defendant’s admission, the complainant’s views are considered as a factor in determining admission. In our jurisdiction, statutory requirements mandate seeking a victim’s input regarding a proposed disposition.<sup>160</sup> However, in keeping with the philosophy of the program, our focus here is obtaining the victim’s thoughts about the impact of offering a deferral on his or her ongoing safety. Both probation officers and prosecutors agreed to explore the reasons for the complainant’s views and to consider them in our review of the defendant’s application.

Prosecutors and probation officers also consider the circumstances surrounding the use of violence. This guideline is inclusive in the sense that a broad range of behavior by ongoing victims is considered, including the use of violence as a form of retaliation or as a means of coping with the violence experienced in intimate relationships. However, we articulated in this guideline a need for a link between the defendant’s use of violence and ongoing victimization she has experienced. We indicate, for example, that a defendant is not necessarily appropriate for the program if the complainant has not engaged in intimidating, coercive, or physical abuse for an extended period of time, or if the incident itself is not related to the experience of previous violence.

Motives also are examined by prosecutors and probation. This factor concerned advocates, who feared that prosecutors wanted to establish a continuum of motives ranging from acceptable to unacceptable. Prosecutors, however, saw such examination as the means for fully understanding the context in which the battered woman had used violence. We reached a compromise: the guidelines state that our intent is to exclude those whose motive is the ongoing domination of

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<sup>160</sup>Minn. Stat. §611A.03 (2002 & Supp. 2003); Minn. Stat. §611A.0301 (Supp. 2003); Minn. Stat. §611A.031 (2002); Minn. Stat. §611A.0315 (2002); Minn. Stat. §611A.037 (2002); Minn. Stat. §611A.038 (2002); Minn. Stat. §611A.039 (2002).

their partners.

Finally, we consider a defendant's willingness to participate in recommended education and counseling programs. Because a deferral involves minimal court controls, we see such willingness as necessary to assure us that a defendant will follow through with the conditions of the deferral agreement.

The disposition and criteria now in hand, we were ready to implement our new prosecution policy—or so we thought. As we finalized the admission criteria in core group meetings, a number of procedural issues emerged. Like everything else we had encountered, these problems tested our patience as we identified and attempted to solve them. As might be expected, many discussions were devoted to addressing the issues we now faced in implementing the policy.

## X. ISSUES IN IMPLEMENTING THE PROSECUTION POLICY

“Wisely and slow. They stumble that run fast.”

—William Shakespeare, *Romeo and Juliet* act 2, sc. 3, line 94 (Cambridge University Press 1963) (1599).

As previously discussed, our prosecution policy and accompanying guidelines for evaluating candidates combined a few bright-line criteria with many “gray area” considerations. We had been unable to reduce the dynamics of ongoing abusive relationships to a simple checklist, but our guidelines created a framework for prosecutors to view the reality of the lives presented to us in case files. Through many months of discussions, we thought that we would know those dynamics when we saw them. However, the guidelines offered a structured way of analyzing and contextualizing responsive or retaliatory violence.

Almost a year and a half after our journey had begun, we were ready to adopt the prosecution guidelines. We did this by formally creating a program that positioned the guidelines within the larger context of the system changes and interagency support needed for the success of this prosecution initiative. Though focused on case decisions to be made by prosecutors, a collective effort requiring changes in practice and procedure in several Duluth agencies was needed to make it work.

### *A. The Memorandum of Understanding*

As a core group we formalized the changes in our working relationships by creating a memorandum of understanding (MOU).<sup>161</sup> A probation officer initially suggested this approach. To him, an MOU provided a certain degree of comfort with the process of change. He wanted to be sure that just as probation was making policy changes to better address the issue of battered women using retaliatory violence, other agencies were doing the same. He also wanted assurance that we would join him in resolving any problems arising from these changes. The MOU would document our collective commitment to work together to find solutions.

The MOU we drafted first clarified the objectives of intervention that guided us—victim safety, deterrence of identified offenders, and general deterrence to the

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<sup>161</sup>The Memorandum of Understanding is included in Appendix 9.

use of violence in intimate relationships. These objectives provided the context for our specific purpose: to improve our community's capability of responding to domestic violence cases in which victims of battering are charged with assaulting their abusers. We then addressed the changes in role to which four agencies and one individual had committed. The highlights of these changes and some related issues are discussed in the following subsections of this monograph.

### *B. Early Identification of Cases*

As we discussed the changes in work practices that would be required to successfully implement the prosecution program, it became clear that prompt identification of potential cases was imperative. Realizing that thoughtful evaluation of candidates would require additional time, we wanted to identify potential participants early in the process. This goal was achieved through the services of Duluth's domestic violence specialist.

Established under a separate grant funding source, the specialist position was a ready-made resource for the early identification of potential cases. As part of her work, the specialist routinely prepared background files on all domestic cases that were then made available to practitioners by the time of arraignment. These files contained information about past calls for assistance, prior police reports, applications for protection orders, and other records that assisted Duluth practitioners in contextualizing the current incident. The domestic violence specialist now agreed to flag potential applicants to the prosecution program. Early identification in place, we could now act more quickly in reviewing candidates for the program.

### *C. Probation Procedures*

This early identification of cases permitted the core group to next take on several significant procedural changes within the probation office. One of them addressed an issue that had repeatedly been raised at core group meetings: the problem of battered women defendants who immediately pled guilty at arraignment, without the benefit of legal counsel, or perhaps without even speaking with an advocate. The core group's probation officers recalled that local judges had on occasion permitted guilty pleas to be withdrawn at probation's request. This had occurred in arraignment court at the time of sentencing, after completion of a presentence investigation (PSI) by a probation officer.

Members of the core group concurred with our probation office representatives that two things were necessary: the judges needed to know about the new program and the probation officers needed to fully understand it. This led to conversations with judges (discussed in a later subsection) and to a series of meetings between prosecutors and probation officers, in which we explained the program so that probation officers conducting PSIs for the arraignment court could identify likely candidates. Aided by the background files created by the domestic violence specialist, they were encouraged to bring these defendants to the attention of their supervisor or to city prosecutors before sentencing had occurred. Prosecutors agreed to ask for stays in the proceedings to allow for further consideration of these cases.

A related problem—that of gathering information about the victimization experienced by defendants—required changes to the probation department’s PSI form. The written instrument used by probation officers conducting presentence investigations for the court had already undergone significant revisions since inception of the Duluth model. Rejecting the notion of a “good citizen” approach that focused the attention of the court on the defendant’s status in the community, probation agents used newer procedures that reasserted the emphasis on the defendant’s conduct and the level of danger posed to the victim. This victim safety–focused approach had been used for several years prior to the core group’s work.<sup>162</sup>

We also realized that the PSI form now required an additional section to address the factors we had identified as significant criteria. A defendant’s history of using abusive behavior was well documented in the existing form; this served probation’s interests in typical domestic cases in which the defendant was most appropriately viewed as a batterer. However, a defendant’s history of victimization had not been at the forefront of practitioner thinking prior to the core group’s work. We now needed a way to guide probation officers in gathering and reviewing this information.

City prosecutors worked closely with probation to draft and implement changes to the PSI form. The result was a simple worksheet that focused on two

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<sup>162</sup>See Arrowhead Regional Corrections-Duluth, Pre-Sentence Investigations and Sentencing Recommendations for Domestic Violence–Related Misdemeanors: A Model for Corrections Agencies (Apr. 1997) (available by contacting Minnesota Program Development, Inc., Domestic Abuse Intervention Project, 202 East Superior Street, Duluth, MN 55802).

areas. First, probation officers were directed to describe the extent of ongoing physical abuse experienced by the offender in the relationship. Second, they were asked to indicate what type of information documented this abuse. Examples of possible documentation, listed with checkoff boxes, included police reports, protection orders, shelter visits, and medical records. Minor changes to the PSI form itself were made to provide simple procedural follow-up directions. These included referring the case to the probation officer assigned to the prosecution program, setting a new court date, and giving an application to the defendant.

One of the most significant contributions probation made to program implementation was assigning one agent to handle the evaluation of cases. Although all probation officers needed to be acquainted with the program to identify appropriate cases at arraignment, we expected that most of the referrals to the designated officer would come from city prosecutors.

Assigning an experienced probation officer provided consistency to the application of our criteria. Probation officers were as concerned as the rest of us with the possibility of potentially undeserving applicants manipulating the criteria and, ultimately, the program itself. Having one probation officer work with the City Attorney's Office strengthened our initiative and heightened our expectations of success. This probation officer had joined the core group midway through our work and soon became integral to group meetings and vital to our evaluation of individual cases.

#### *D. Application Form*

Closely related to changes in the PSI format was the development of an application form to be completed by defendants interested in the prosecution program.<sup>163</sup> The focus of this form was obtaining background information from applicants about the violence they have experienced. We used it early on in cases coming to the prosecutors and probation for evaluation.

However, we eventually discontinued its use after seeing the resistance of many clearly eligible women. The court process was difficult for them; it seemed to be made impossibly so by our requirement of paperwork to be filled out. Even with the assistance of defense attorneys or battered women's advocates, the application form seemed to screen out eligible defendants, rather than draw them

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<sup>163</sup>The application form is included in Appendix 10.



in. Over time we found that we were able to obtain the information we needed in other ways. Key sources included the defendants' interviews with probation and written documents such as police reports and 911 printouts. As we gained experience in evaluating candidates, we found it less necessary to rely on the structural support that the application form had been designed to provide us.

#### *E. Education Groups for Program Participants*

An important resource for Duluth prosecutors was developed at about the same time as our prosecution plan. Through independent efforts of battered women's advocates, an education group had been designed specifically for women who use violence. The advocates had struggled to address the problematic life situations of many women who use violence against abusive partners. What were the best ways to meet the needs of battered women who had used violence? An honest approach, they determined, was one that viewed such women neither simply as victims nor simply as "female batterers."

Some of the advocates working separately on this issue had been core group members from the beginning. Their efforts had consistently resulted in sensitive insights, nuanced observations, and thought-provoking questions for the rest of the group. Though this endeavor was separate from the development of the prosecution program, the timing of their work on developing an education group for battered women who use violence could not have been better. Prosecutors liked this group for two reasons: it provided an alternative criminal justice approach and it reflected our belief in the importance of viewing women in the group holistically. Doing so did not ignore the realities of the lives of women who were victims of battering—even if they did use responsive violence.

Because the guidelines were appropriately drafted in gender-neutral terms, we found it equally necessary to discuss options for men who may be admitted to the prosecution program. We asked the men's program coordinator at the DAIP to make a presentation to us. He sought to keep the distinction between "assault" and "battering" clear and pointed out that the experience of a victim of assault differs from the experience of a victim of battering.

As an outcome of our discussions, the DAIP committed to developing a program for male victims of battering. Such a program had never before been requested; the anticipated small number of male participants led the DAIP to decide that an individual program would be tailored for each man admitted into

the prosecution program. The DAIP's program would emphasize accountability, responsibility, and the effects of violence in the community. Support groups would also be offered to these men, though it was pointed out that no man had ever come forward when such services had been offered in the past. The core group decided that both men and women would be required to attend twenty-six weekly meetings, the standard requirement in Duluth.

#### *F. Meetings with Judges and Defense Attorneys*

Realizing our prosecution plan would affect the work practices of virtually everyone in the Duluth system, we knew it was crucial to inform both judges and defense attorneys of the new program. We did this in two ways. First, the chief prosecutor and lead probation officer met with our judicial district's chief judge and fully explained the new prosecution program to him. He agreed to write a letter of support for the program to all judges in the Duluth courthouse.

Next, the prosecutor and probation officer together visited each Duluth judge. During casual drop-in visits we provided copies of the prosecution and evaluation guidelines for them to review. These unscheduled visits served as a time when each judge could informally discuss the program with us and we could answer questions. We also encouraged follow-up contact and questions.

Second, we scheduled a session with our public defender's office at their weekly staff meeting. All city prosecutors and core group probation officers attended. Again we provided copies of the guidelines and discussed our reasoning in developing the criteria that would be used. Our discussion was informal and geared toward answering predictable questions.

At the request of the core group's advocates, we emphasized to the defense attorneys present that we were not intending the program to become a dumping ground for cases in which self-defense was more properly argued. We encouraged the public defenders to raise the issue of self-defense whenever it was appropriate. In our relatively small criminal justice system, all practitioners in the room, including probation officers, had established working relationships with each other and were on a first-name basis. As such, we had frequently discussed possible self-defense claims during our work together on domestic cases. Raising the issue in our meeting clarified our intended role for the prosecution program.

### *G. More Meetings with Prosecutors and Probation Officers*

Issues unique to the daily work of probation officers and prosecutors had continually emerged during core group meetings on implementation of the program. Role plays conducted during our meetings helped to illustrate some of the anticipated problems. We decided to meet specifically to talk about the issues for our two agencies.

We covered a number of technical issues over the course of two meetings. A key issue for probation officers concerned options available for defendants who complete the prosecution program and then reoffend. How would we establish a continuum of consequences? We agreed that the deferral program would be available only once to qualifying defendants.

We also discussed the procedure we would follow when a participant did not comply with the terms of the program. Prosecutors took responsibility for making arrangements to bring such defendants back into court and later worked out the details of how hearings scheduled for revocation of the deferral agreement would be handled procedurally.

Another area of discussion concerned who would make the ultimate decision about accepting a defendant into the program. Prosecutors pointed out that the decision to either prosecute or resolve cases could not ethically be delegated to another agency: probation officers readily agreed that the City Attorney's Office would make the decisions about applicants, factoring in the evaluations probation had submitted. This offered at least two advantages. Prosecutors would receive the benefit of the probation agent's expertise, and probation officers were pleased that any challenges from defense attorneys or criticisms from judges would be properly directed at prosecutors, not them.

Questions about the form of the deferral agreement also needed resolution. Three options were debated, including a formal written deferral agreement; a written agreement similar to a standard probation contract; and an agreement in the form of a one-page memo from the probation officer to the defendant. This issue persisted well into the first year of the prosecution program's implementation. For a variety of reasons, we finally settled on the use of a memo outlining the conditions of the deferral.<sup>164</sup> This memo, from the probation officer to the program participant, includes a signature block for the defendant. It is

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<sup>164</sup>The form of this memo is included in Appendix 11.

placed in the defendant's court file when the deferral agreement is entered into the court record. The prosecutor puts the specific conditions of the deferral on the record orally and the defendant makes an oral admission for the record as well.

#### *H. Alcohol Use by Program Participants*

As we approached the start date of the prosecution program, we faced the increasingly pressing issue of battered women defendants who abuse alcohol. It had come up in virtually every meeting; now it reached a critical point. Our specific question was whether abstinence from alcohol should be required of every defendant participating in the prosecution program. Probation officers felt strongly that abstinence should be required of everyone. Battered women's advocates suggested that it should be required only in cases in which an individual demonstrates a problem with alcohol.

The issue polarized the core group. Then one advocate proposed a middle-ground solution. Noting that we were developing the policy because prosecuting these cases makes women who have experienced ongoing abuse more vulnerable, she argued that prosecutors could require those program participants with drinking problems to actively pursue help. Another advocate commented that when women abuse alcohol, they make themselves more vulnerable, so the abuse becomes a safety issue. But, another advocate added, if they could stop drinking, they would.

A tense exchange then occurred. The middle-ground proponent asserted, "She's already getting a deal from the prosecutor. If she isn't willing to become actively involved in a sobriety plan, then she should be prosecuted." Another advocate challenged her: "Is it one of the goals of our plan to create sobriety?" A probation officer jumped in: "It's a goal of our plan to increase her safety and this is directly related to safety."

Ultimately, prosecutors decided to adopt the middle-ground solution. Another uneasy truce prevailed, but the debate had revealed a degree of tension between some advocates and probation officers that needed to be addressed. This led to several informal lunch gatherings for the advocates and probation officers who would be working most closely with battered women in the program. They worked out their differences so that the prosecution program could begin. During the following months, their working relationships grew increasingly stronger. These relationships reflected personal growth based on thoughtful consideration of the issues and a willingness to listen to the viewpoints of others. This growth

mirrored a similar broadening of views experienced by the rest of the core group.

### *I. Name That Program*

During the months we worked as a core group trying to anticipate and address the implementation issues we knew we would face, we also realized that we needed a name for our fledgling program. We wanted to set the right tone by using the right name. We held a contest within the core group, the “Name That Program” contest. (“Hey! Win a Prize!” our flyer proclaimed.)

After considering various possibilities and contest entries, we finally settled on the name “Crossroads.” We realized that we couldn’t solve the problems of all battered women defendants. Instead, we decided that we were looking for defendants who had just begun using violence in response to being victimized. These were defendants who we hoped would choose to take a different direction. To us, “Crossroads” reflected the opportunity to take responsibility for changing one’s behavior.

Some of us also realized the parallel application of the “Crossroads” concept to our own core group’s process and to us as individuals. We were at a crossroads professionally; we had now chosen a path. Would it be the right one? We were about to find out.

## XI. CONSIDERING THE CASES

“[T]he citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.”

—Attorney General of the United States Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology, 3, 6 (1940).

The first applicant came our way the day after the Crossroads Program began. Her case was quickly followed by another. Every aspect of the development of the Crossroads Program had been contentious and difficult; reviewing these first two cases was no different. During the first couple of years of the program, we considered approximately thirty-five applicants. Although a few of them were obviously appropriate, most required a great deal of discussion. Along the way a number of both frustrating and fascinating issues emerged. This section of the monograph outlines the major problems we faced and how we resolved them, using examples of cases we considered.<sup>165</sup>

### *A. Meeting with Probation to Evaluate Applicants for the Crossroads Program*

“I look at the Crossroads Program as a way of creating equity.”

—Duluth city prosecutor, at a core group meeting

Because developing the Crossroads Program had been so difficult, the prosecutors in the City Attorney’s Office decided that consistent application of our newly adopted criteria was extremely important. To achieve this consistency we agreed to meet to review each application. We weren’t sure whether we would all agree on which candidates should be admitted. However, we decided that a majority vote would prevail. Fortunately, our criminal division consisted of three prosecutors. Two of us needed to agree, then, that any particular defendant met the criteria for admission.

Our very first case highlighted a problem with this process. Sensitive to the time constraints of the probation department, prosecutors reviewed the applicant based on a written evaluation prepared by our probation officer (the officer assigned to work with the Crossroads Program). This evaluation was a narrative

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<sup>165</sup>The names of those involved have been changed.

that used the prosecution and probation guidelines we had developed but did not include a recommendation. Though it was extremely helpful and followed the format we had all agreed upon, we found that many questions remained unanswered.

The case itself was problematic. It concerned the mutual arrests of a young woman, “Lisa,” and her husband. In the incident, Lisa called 911 for help, saying that her husband had hit her. When Duluth police officers arrived they saw red marks around her right eye and cheek. Lisa told officers that she and her husband had argued about the volume of the TV. She said she then pushed him away from the TV and hit him with an open hand four or five times on the shoulder. Her husband then slapped her in the right side of her face with an open hand. Lisa ran from the apartment to a pay phone to call the police. Lisa’s husband offered the same account, saying that he swung with his left hand when he slapped her in the face.

This case first came to the attention of prosecutors when it was intercepted by a probation officer preparing a PSI. Though Lisa had pled guilty, her case was reset to allow us time to consider her for the Crossroads Program. The prosecutor who was then assigned the file observed both Lisa and her husband in court. The prosecutor’s experience led him to suspect that she was quite vulnerable, both in life and in the relationship. Of lower cognitive ability, Lisa described to our probation officer a host of serious issues that she was facing—among other things, her first child had been removed by social services and she was now pregnant again.

Probation also learned that she had an extensive history of being victimized by others, both as a child and as an adult. She was the victim of both incest and rape and had attempted suicide in the past. Lisa had no criminal record. A check of her husband’s criminal history revealed some convictions for serious violent behavior, including rape. However, we eventually determined that none of the convictions involved conduct toward Lisa—she was newly married to him. She told police officers that there had been no physical fighting in the past but that her husband had held her arms down and had pushed her.

This case illustrates an issue that frequently came up as we considered cases: should we bend or change the criteria, or should we hold the line on what we had taken many months of thoughtful discussion to develop? It was our first case and already we were struggling. Should we change the criteria so that Lisa could be

admitted, or should we focus on the bigger picture? If we disregarded our agreed-upon criteria, we would set a bad precedent and the Crossroads Program itself would become meaningless, a program without standards.

In this case, by investigating the circumstances of some 911 calls for assistance and by scheduling a second meeting with the probation officer, we reached the consensus that Lisa could be admitted without compromising our criteria. We learned that to understand the complete picture, we needed to include the evaluating probation officer in our discussions. Over time, these discussions helped her to refine her evaluations and anticipate the questions and concerns we would have. We ended up thinking these difficult issues through with her, even though as prosecutors it was our role to make the final decision.

### *B. Self-Defense Issues*

“The law is the law—and a bad stove is a bad stove.”

—Susan Glaspell, *A Jury of Her Peers*<sup>166</sup>

From the beginning, we had debated whether an expansive view of self-defense was appropriate in looking at the actions of a battered woman who has used responsive violence. This issue had underscored every one of our core group meetings. We had focused a great deal of our attention on understanding the context in which battered women use violence. In doing so, we had begun to see the inadequacies of the legal concept of self-defense as applied to the actions of battered women.

However, our immediate goal was to offer a prosecution alternative to women who had *not* engaged in self-defense, but who met the criteria we had developed. We had assured the battered women’s advocates in the group that Crossroads would not become known as a “self-defense lite” program. We did not want the program to become a repository for weak cases.

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<sup>166</sup>Susan Glaspell, *A Jury of Her Peers*, in *Lifted Masks and Other Works* 279, 294 (1993). Originally published in 1917, Glaspell based this short story on her 1916 one-act play, *Trifles*. The story and play are about a battered woman who is suspected of killing her abusive husband. Remarkable and compelling, these works are based on an actual court case that Glaspell covered as a young newspaper reporter. It involved a farm wife in Iowa who was prosecuted for killing her sleeping husband with a hatchet. The case is *State v. Hossack*, 89 N.W. 1077 (Iowa 1902). See also Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of Her Peers Who Appreciate Trifles*, 33 Am. Crim. L. Rev. 229 (1996).



Our second case highlighted this issue. Both “Shelley” and her husband had been charged by the arresting officers. From reviewing police reports and meeting with the evaluating probation officer, we learned that Shelley had been her husband’s punching bag for years. Multiple assault convictions against him had resulted. In the incident under review, Shelley frantically called 911 for help. Officers heard her voice coming from upstairs saying, “Oh God, please come and help me.” They found her alone, crouched down in the corner of a bedroom. Large amounts of blood were on the floor. Shelley was dressed only in her underwear and it appeared she had a head injury.

She told officers that she and her husband had argued earlier that evening at a bar. When they arrived home, Shelley grabbed all the keys to the gun cabinets and their vehicles. She went into the bedroom and pushed the bed up against the door to keep her husband from coming in. Right after she’d gone to bed, her husband started pounding on the door. He forced his way into the room, picked up the bed, and flipped it over.

Shelley fell onto the floor and saw the bed frame “flying” at her. It hit her in the head. She said she got up and ran after her husband and started hitting him. She told officers that she was hitting her husband out of anger. She also said she’d grabbed all of the keys to the vehicles and gun cabinets because her husband had threatened suicide a few days earlier. She said her husband could have a drinking problem. The officers noted that Shelley herself appeared to be extremely intoxicated.

Shelley’s husband admitted to flipping the bed over. However, he claimed that Shelley came at him first and began the fight by hitting him. He had no marks consistent with being hit. Shelley refused to be photographed, saying her husband had told her that if she ever got her picture taken because she was hurt, he was going to “make her pay for it.” Shelley also told officers that just two weeks earlier her husband had choked her “pretty hard.”

This court case file resulted from the correct application of Duluth’s mandatory arrest policy. However, the inequities were obvious. Two questions shaped our discussions: should the case against Shelley be dismissed, or should we admit her into the Crossroads Program? Prosecutors acknowledged the case was weak, but as one prosecutor stated later in a core group meeting, “Our number one goal is public safety. If she provokes a person who she knows is violent, this creates a huge safety issue for her.” Though we wanted Shelley to

receive the benefit of the women's education groups, the decision was eventually made for us. Consistent with what we suspected was a significant alcohol problem, Shelley refused to participate when she learned about the requirements for an alcohol evaluation and for abstaining if she was found to have a drinking problem. Because the case was weak, it was eventually dismissed. The advocate who was working with her expressed concern that Shelley was in a very dangerous situation.

### *C. Police Arrest Policies and Training*

Cases like Shelley's were used in a series of police trainings conducted by prosecutors in the City Attorney's Office. In accord with the terms of our grant, we devoted our training time with Duluth police officers to a close examination of self-defense. We reviewed with them the necessity of eliminating self-defense as a possibility before probable cause for an arrest could be established. We further emphasized the importance of determining the context in which the violence has occurred—exploring the possibility of victimization before ruling out self-defense.

This training was helpful for prosecutors in two ways. First, police officers' heightened awareness during domestic calls would reduce the number of cases that involved self-defense. Second, police reports would document how a defendant had been physically abused and made fearful in a relationship and so would give us additional credible information to use in making Crossroads Program decisions.

Finally, the training introduced the concept of "predominant aggressor," the person involved in a domestic assault who by actions in that incident and in the past has caused the other person to feel the most fear and intimidation. During the first few years of the Crossroads Program, cases coming to the City Attorney's Office for review resulted from a Duluth Police Department policy that did not incorporate primary or predominant aggressor language. This tried-and-true mandatory arrest policy had been in place for over fifteen years and battered women's advocates were reluctant to change it.

The core group process had broadened our thinking, however. Prosecutors in particular saw in a revised arrest policy a way to screen out weak cases (like Shelley's) before a charge was brought. Our reviews of successive cases had shown us many women charged in mutual arrest situations. As in Shelley's case,

self-defense issues were murky and always present if the woman had been the victim of ongoing violence.

We believed that incorporating predominant aggressor language into the arrest policy would eliminate weak cases and allow us to focus on the defendants we had in mind when we designed the program: defendants who were in ongoing physically abusive relationships who had used retaliatory or responsive violence that was clearly *not* self-defense. We wanted to mitigate the consequences imposed by the criminal justice system, but to do so without condoning their behavior.

Several years after this initial training for police, a debate took place within the Duluth Police Department on the merits of a predominant aggressor policy. It was eventually adopted, and officers attended an intensive training on issues related to the policy, including questions about self-defense. The number of arrests of battered women significantly decreased in subsequent months.

Our prosecution policy was the *prosecution parallel* to predominant aggressor policies for law enforcement. Just as police officers were exercising greater discretion in making domestic violence arrests, prosecutors in Duluth were exercising greater discretion in deciding which cases to prosecute. Both police and prosecutor decisions were based on a review of the ongoing patterns of violence in the relationship. We saw these developments as part of our efforts to achieve a “maturity of law” in the coordinated community response we had established years earlier.

#### *D. Establishing Victimization*

“When discussing the importance of the role of advocates, we need to keep in mind that there’s a difference in what a woman will say to an advocate versus a public defender or a probation agent. Women also seem to talk better in a group.”

—Duluth battered women’s advocate, at a core group meeting

As prosecutors and our probation department struggled to consider candidates for the Crossroads Program during its first year, a surprising problem emerged over and over again: we had difficulty determining whether applicants had experienced ongoing physical abuse in their existing relationships. Court and police records were helpful but insufficient to present a complete picture of the

intimate relationships under review.

We had discussed this issue at length in core group meetings, well before the Crossroads Program officially began. As practitioners in the criminal justice system, we knew that the women who were most severely battered would likely be those who were also most fearful to seek help from government agencies. We planned for the absence of official reports by allowing a history of physical abuse to be documented in other ways, such as through statements of family members or friends.

We also took this approach in response to the observations of battered women's advocates who worked primarily with immigrant and refugee women. Such women are understandably even more reluctant to turn to legal authorities for help, due to both cultural issues and concerns about their legal status. These barriers are added to the already complex dynamics of battering relationships that deter women from seeking the assistance of law enforcement or the courts. Thus advocates cautioned us that the victimization of immigrant and refugee women is often invisible to those of us who work in the criminal justice system because a paper trail does not exist. Though the battering they have experienced is very real, we cannot expect to find proof of it in a file.

Establishing victimization became the focal point of many prosecution meetings with probation to consider individual applicants for the Crossroads Program. In some instances women could not be admitted, although we suspected that they were victims of ongoing physical abuse.

For example, "Elena" was arrested by Duluth police officers when they came to her apartment to help her soon-to-be ex-boyfriend remove his clothing and some of his belongings. Elena was four months pregnant and had learned that her boyfriend was cheating on her. She had taken all of his clothing, thrown it on the bedroom floor, and doused it with gasoline. Her fifteen-year-old son stopped her from lighting the pile. Even though he threw the clothing out onto the balcony, the smell of gasoline almost overpowered the officers.

They found Elena sitting on the floor, slumped forward and crying uncontrollably. She refused to acknowledge them or answer questions. At that point, Elena's boyfriend came into the bedroom. She sprang off the floor and charged at him, kicking and throwing punches until the officers were able to restrain her. She then started screaming at him, saying she was going to kill him. She was able to kick him a couple of more times as the officers walked her down

the hallway. Elena fought with them all the way to the squad car. She continued screaming and yelling en route to the jail, saying she had done nothing wrong and that her boyfriend had no right to be in her apartment to get his things.

Two days later, while still in jail, Elena spoke with an advocate. Together they completed a risk assessment form that indicated Elena's boyfriend had hit her before, throwing her from the living room to the dining room. Elena said that her boyfriend was very jealous, controlling, and always violent. She repeated this allegation of physical abuse in her later application to the Crossroads Program.

However, in her interview with probation she was clear that her boyfriend had *not* been abusive to her in the past. She acknowledged that she had been abused before by somebody else, but not by him. We decided not to admit Elena into the Crossroads Program. Although she was represented by an experienced defense attorney and had made contact with a battered women's advocate, we simply did not have any documentation that would have met our criteria for admission.

Elena's case was one of many that later prompted prosecutors to include advocates in our evaluation discussions. Finding adequate documentation was a problem, but we were willing to look to other sources for this information. However, this case demonstrates the importance of intensive advocacy: Elena needed someone to describe and explain her situation, to help her gather family and friends to verify it, and to speak to those of us working on her case in the criminal justice system. We were willing to hear more about her, but we never did.

#### *E. Advocacy Issues*

"A community's coordinated response to domestic violence is only as good as its advocacy for battered women."

—Ellen Pence, founder of Duluth's Domestic Abuse Intervention Project

Our recurring problems in attempting to establish victimization had led both prosecutors and our assigned probation officer to ask some troubling, somewhat cynical questions. We had created the Crossroads Program to address the particular needs of battered women—why were they so hard to find? Why weren't they more forthcoming about the ongoing physical abuse they had experienced? Why were they so often angry and seemingly unappreciative of the program we

had developed for them? We had been through a sometimes arduous experience in establishing the program. Why weren't they thankful?

Frequently discouraged during the first year of the Crossroads Program, we addressed the problem in at least two ways. First, we sought the input of battered women's advocates to help us make considered evaluations of the applicants. Our probation officer had become increasingly attuned to the difficult realities of the lives of the women before us. Nevertheless, she, like prosecutors, still personified the criminal justice system to the women she interviewed, who were sometimes reluctant to disclose information about their lives to "authorities."

As a result, we decided to always include two battered women's advocates in our discussions with probation. One was the advocate who was conducting education groups for battered women; she had been a member of the core group from the beginning. The other was whoever had worked directly with the woman. However, any advocate who wished to contribute to our discussion was welcome.

Our meetings were informal. The probation officer and advocates discussed each case with us and served as resource persons. Sometimes the three prosecutors reached consensus, or at least a conclusion and decision, in their presence. Other times, we needed to reflect on their input and would meet again later to make our decision.

This process reflected the working relationships we had developed and provided battered women's advocates an unprecedented degree of access to the workings of our prosecutor's office. In many cases this collaboration enhanced the quality of our decision making. Ultimately, it also better served battered women as we sought to thoughtfully consider their cases and their lives.

A second way that we tried to address the problem of establishing victimization in the current relationship was by rethinking the concept of advocacy itself. It had become painfully apparent to us during the first years of the Crossroads Program that battered women who had used responsive or retaliatory violence had extensive needs. Their use of violence and resulting arrests exacerbated their already complex situations. They needed more than support; they needed much more than form letters and referrals to other agencies. They needed *advocacy*.

We had developed the Crossroads Program at a time in the history of domestic violence intervention when advocacy for battered women had become increasingly institutionalized. The advocacy some of us had witnessed during the

early years of the battered women's movement was intense, passionate, and effective in securing significant changes for both individual battered women and women as a social class. The energy fueling this advocacy has subtly been diffused by the requirements associated with government funding, employment regulations, and personnel policies. This phenomenon is not limited to one community or geographic area. It has resulted, in part, from general social agreement that "domestic violence is wrong and something should be done about it."

Ironically, as criminal justice practitioners have become more sensitized and creative in doing something about it, "old-style" advocates are becoming more scarce. Perhaps as society's tolerance for domestic violence has decreased, so too has advocates' urgency. The issue of what to do when battered women use illegal violence provides a perfect illustration of the need for *more* advocacy, not less. We have concluded that an enhanced level of advocacy for battered women is absolutely essential to deal with the problem.

The Crossroads Program could go only so far toward achieving justice without advocates speaking up for individual battered women. Though we were entirely open to learning more about the battered women in our case files, the institutional constraints on prosecutors discussed earlier<sup>167</sup> frequently prevented us from fully considering their situations. (For example, we cannot talk directly with defendants who are represented by attorneys.) We needed advocates with knowledge of each applicant's situation to speak on her behalf.

The challenge for battered women's advocates throughout the United States is to rethink the role of advocacy and to re-energize their efforts on behalf of individual battered women. It's too easy to say that this challenge arises only because of uninformed, unskilled, unsympathetic system practitioners. The story of the development of the Crossroads Program illustrates that the phenomenon of insufficient advocacy can occur even when practitioners are pushing the envelope of the criminal justice system in seeking just results for battered women.

Some voices in the battered women's movement are beginning to articulate possible solutions to the decline in individual advocacy.<sup>168</sup> Meanwhile, battered

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<sup>167</sup>See §VII of this monograph.

<sup>168</sup>Ellen Pence, *Advocacy on Behalf of Battered Women*, in *Sourcebook on Violence Against Women* 329 (Jeffrey L. Edleson et al. eds., 2000).

women and their cases move through our courthouses and offices without the criminal justice system fully understanding and addressing their reality. Working day after day with “messy, disorderly lives” is exhausting. But the Crossroads Program demonstrates that this effort is exactly what is needed.

#### *F. Victims of Psychological Battering*

Yet another problem we faced in reviewing applicants for the Crossroads Program was one we had anticipated in our development discussions. We had limited the criteria to include only victims of ongoing *physical* abuse. As discussed earlier, this was intentional—we wanted a clear way to prevent the program from degenerating to a point in which any person who claimed to be a “victim” of his or her partner’s unpleasant behavior would qualify for admission. To appropriately hold members of our community accountable for acts of domestic violence, we believed we had to draw the line somewhere.

One of the problems with this decision became evident soon after the Crossroads Program began. In meeting with our probation officer, we learned that “Emily” had been arrested when police officers responded to her boyfriend’s call for assistance. When the officers arrived, they heard thumping noises and the sound of muffled voices. They saw what appeared to be a struggle going on just inside the residence. A man was pressed against the front door with his arms up as if he was trying to protect his face.

A woman was hitting him. As the officers got closer they could see that Emily had hold of the man’s hair with her left hand and was striking him in the head, shoulders, and back with her right fist in a stabbing motion. Emily and her boyfriend fell away from the door and onto the stairs before officers could get inside. She was on top of him, still striking him. It took three officers to get her off of him. Strands of her boyfriend’s hair were in Emily’s fingernails. Her boyfriend had a visible bite on his left forearm.

An officer talked with Emily in the back of a squad car. Sobbing, she said that she’d been out with friends, without her boyfriend. She got home and had wanted to grab some things and leave before he arrived, but he got home before she could get away.

They started arguing. She said he tried to keep her from leaving. Then they started fighting. Emily said that they had lived together in the apartment for a year but were recently separated. They had been arguing a lot over the last month.



Emily told the officer that her boyfriend was mean and possessive; she was very afraid of him. She said that during the last couple of months he had become more possessive and “crazy.” Emily explained that “crazy” meant that he didn’t want her to go out anywhere. He just wanted her to go where he wanted to go. She explained that she had to tell him where she was going, who she was going with, and what she was doing.

She had left him several times before; he had threatened to kill her if she left again. Three weeks earlier, she had done so. This time he threatened to kill her ten-year-old daughter. She thought that he was obsessed with her. She told the police officer that he would not let her leave the home or their relationship. He had told her, “It’s not going to happen.”

Emily went on to tell the police officer that she had left her boyfriend for good almost a month earlier. Nevertheless, she had been returning for several days at a time since then because her boyfriend was adamant that she was to come back and not fight about it. He said, “I’ll hurt you if you don’t come back.”

Although Emily was aware that she could get a protection order against her boyfriend, she had chosen not to, saying that she was afraid he would hurt her more. In the past he had physically prevented her from leaving the apartment, saying, “I won’t let you go anywhere.”

Another police officer spoke with Emily’s boyfriend. He denied being possessive of Emily or threatening her in any way. Although he thought the violence between him and Emily was getting worse, he said that she would not hurt or injure him, other than what had happened that night.

Emily told our probation officer that her boyfriend had been stalking her for over two weeks prior to the incident. We also learned that Emily denied that her boyfriend had physically abused her. Her defense attorney had submitted her application to the Crossroads Program. In her application, Emily stated

There had never been any physical violence before in our relationship. I had gone out with friends that evening and he was angry that I had. He followed me to the bar and was harassing me to leave with him. I told him that our relationship was over. He left—came back yelled some more—then left again. When I came home he was angry and wanted to yell and I wanted to sleep. He didn’t let me.

Even though Emily claimed no physical abuse by her boyfriend, she acknowledged that her father had abused her when she was a child. She had been married before this current relationship. Her husband had abused her as well.

Under a great deal of pressure from her boyfriend's psychologically abusive behavior, Emily had finally "snapped." She could hardly have been a more sympathetic defendant, but she simply didn't fit our criteria for admission into the Crossroads Program. Believing in the importance of holding to the criteria we had created, we reluctantly chose to not admit her.

Emily's case represents the downside of any efforts that are made by prosecutors to address the particular circumstances of certain battered defendants. While some receive the benefits of specialized consideration, others don't. The issues of stalking and psychological battering ideally would be addressed in any prosecution policy dealing with victims of ongoing abuse who assault their abusers. So far, the Duluth policy has not been modified to encompass these situations. However, as we have grown more confident in our consideration of the cases coming before us, it is a change that we are likely to make. In Emily's case, we did reduce the charge against her because of the mitigating circumstances present, but a conviction and sentence resulted from the incident.

#### *G. The Problem of Motives*

"I originally thought that she was a candidate since there is evidence of past abuse and she is willing to participate in the program. I did a 180-degree turn when I learned that she was assaultive."

—Duluth city prosecutor

"She was clearly the aggressor in this incident. I don't see inequity in the relationship. It was clearly an unprovoked attack."

—Another Duluth city prosecutor

"What we have focused on is the motive . . . 'good' motive versus 'bad' motive. It concerns me that we may be turning this into a class issue."

—Still another Duluth city prosecutor

"I don't think it's fair to consider the candidate's appearance, the way she talks, or the fact that she comes across as a 'tough' person."

—Duluth battered women's advocate

All comments made at a core group meeting discussing "Megan," the applicant whose case is described below.

In creating the criteria we would use for admitting applicants into the Crossroads Program, prosecutors had insisted that a consideration of motives was

appropriate. Advocates for battered women had objected to the idea that some motives would be acceptable and others not. We prevailed, however, basing our decision on two key factors. First, motives traditionally are considered in charging and sentencing decisions in the criminal justice system. Second, we believed that looking at the motives of the defendant was consistent with our purpose in examining the circumstances surrounding the use of violence. The circumstances involved the history and nature of the relationship. Looking at motives meant looking at the *reasons* a woman had used violence. Wouldn't her reasons be related to the violence she had experienced?

A case that came to us for review very early on illustrated a problem that can arise when prosecutors look at a defendant's motives. "Megan" and her boyfriend had been arrested when she had called 911 for assistance one morning. When officers arrived they observed that she was crying uncontrollably and appeared very upset. She said that her boyfriend had beaten her up and would not leave her house. Megan was carrying her three-year-old daughter, who had been present in the home through the entire incident.

Megan told a police officer that she and her boyfriend had been dating for about ten months and living together for the past few of them. They had gone to a bar the night before. They got home and continued drinking all night. They didn't go to sleep at all. She was in the living room and heard her boyfriend say to their friends, "She's like my sister." Megan explained that his sister is a "druggie, a bad druggie." This made her upset. She went into the kitchen and said, "Don't you ever call me like your sister." She then slapped her boyfriend in the face. She said she slapped his left cheek with her right hand and his right cheek with her left hand simultaneously. He denied comparing her to his sister.

Megan said, "Everything went out of control." Her boyfriend began to punch her in the head with his fists. She was holding her daughter, who their friends grabbed from her arms. He pushed her into the table. A friend restrained him and Megan went into the living room to call 911. Her boyfriend grabbed the phone and threw it, breaking it.

Megan had abrasions and swelling on her left and right forehead, in the area of her hairline, and her left-hand knuckles were bloody. Her right hand was swollen near one of her knuckles. She was later diagnosed at a hospital with a stress fracture. She also had a bruised right forearm.

Megan said she initiated the physical contact by slapping him in the face but

that she had punched him in self-defense. She said that this was the third time her boyfriend had assaulted her. The last time she thought he had broken her ribs; she was treated at the hospital. She thought he could seriously injure her or kill her.

Police officers found Megan's boyfriend outside lying in the snow with a very bloody face. He said he had run out the back door because he was afraid he would be arrested for assault. He had a cut on his face that was bleeding heavily and had blood inside his mouth. He had scratches on his left shoulder and bruising and scratches along the left side of his face. His right eye was swollen and appeared to be turning black and blue. He also had a small scratch on one of the knuckles on his right hand.

He described to a police officer what had happened that morning. He said that he and Megan and several of their friends had been up partying all night. While in the kitchen talking with Megan, he commented, "I hope you don't turn out like my sister." Megan was very angry; an argument ensued. Suddenly Megan hit him in the right eye with her fist. He said that she hit him approximately four or five times in the face. Each time she hit him, he said he would back off and then walk up to her and say, "Go ahead, do it again." Eventually, to stop her, he grabbed her and threw her down onto the kitchen table. She continued to swing her fists at him. He said that he then hit Megan with an open hand on top of her head a couple of times. He then backed away and Megan said, "I'm calling the cops."

An advocate visited Megan while she was still in jail. She said she didn't want to see her boyfriend again, even in court. She said she was very afraid of him. She thought the mark on his face was made by her ring when she put her hands up to protect her face. She said she had welts on her head from his punches.

Megan later spoke with the Crossroads Program probation officer. She said that she wasn't afraid of her boyfriend but had decided not to pursue a relationship with him. She admitted to the incident, stating that she did slap him and that she reacted in anger. In her evaluation, the probation officer stated

This defendant fits the criteria for entry into the Crossroads Program; however, she may not fit the standard participant profile. Although she has not been charged with previous assaultive behavior, nor does she admit to it, she presents herself as a participant in the violence. This relationship is volatile and abusive on both sides.

We had a long, drawn-out meeting with our probation officer to discuss Megan's application. As probation had advised us, she fit the criteria. However,

more than in other cases, we couldn't help but focus on her motives. Did Megan assault her boyfriend because he had beaten her in the past? Or instead, was it purely her boyfriend's insult that prompted her behavior? She had admitted to probation and police that she had reacted in anger.

This led the prosecutors in our evaluation meeting down a path we hadn't been before. We began to discuss the concept of "nexus." Should we require a nexus—a link—between the physical abuse experienced by a battered woman and her conduct? We hadn't clearly addressed the possibility in our prosecution policy. Or is it enough that she be the victim of physical abuse by her partner, without our trying to second-guess exactly why she did what she did in the incident?

In Megan's case, we were troubled. She seemed to be reacting principally to her boyfriend's words, not to his abuse. Should she receive treatment that a typical male defendant wouldn't receive if he'd reacted the same way to an insult from his female partner? It was unthinkable for us to take the position that an assault is somehow all right if a defendant has been ridiculed or disparaged.

This case epitomized our worst fears about the program we had created. In Megan's case and others like it, were we making distinctions that shouldn't be made? Were we headed in the wrong direction?

It was clear to us in discussing Megan's case that she could aptly be described as a "tough" individual. Because she didn't fit the idealized profile of a downtrodden battered woman, it was tempting to discount the complete reality of her life. She had grown up in a violent home; she had lived with violence as an adult. Violence was a pattern imprinted on her life, a tool for survival.

Finally, we as prosecutors realized that our nexus idea wasn't such a good one. To require a nexus between the physical abuse experienced and that engaged in was just another way of moving toward a "self-defense lite" program. Were we really just wanting to expand traditional definitions of self-defense with the Crossroads Program? Or were we willing to embrace within its parameters those without defenses, even the "tough" women we found ourselves not liking very much?

After an extremely long, exhausting, and engaging debate, Megan was admitted. Not surprisingly, she was a difficult participant, reluctant to attend her education group sessions. Since then, she has been involved in relationships with other abusive men, but has not been charged with assault. As to looking at

motives, we still consider them, but cautiously. Megan's case provided a difficult but valuable learning experience.

#### *H. The Severity of the Assault*

In addition to the challenges of considering a defendant's motives, our views concerning the severity of the incident were tested during the first year of the Crossroads Program. How severe could an assault be for us to still admit a defendant? We faced this issue as we met to discuss "Nancy's" case.

Nancy and her husband were both arrested by Duluth police officers when their five-year-old son called 911 for help. The officer who spoke with Nancy noted that she was crying, upset, and limping. Nancy said she had spent the day cleaning the house "from top to bottom." When her husband got home he began yelling at her because dinner wasn't ready. Nancy said she became angry, having spent all day cleaning, so she started yelling back. At that point her husband began kicking her repeatedly in the rear, as well as in her leg, making her ankle hurt. She said her husband had also pulled her hair and grabbed her by the back of her neck, pushing her down to the floor. When she tried to call the police he ripped the phone off the wall. Their son then ran to the neighbor's house to call for help. The officer talking to Nancy ran her hand through Nancy's hair. Large clumps of hair came out easily, without pulling.

Nancy's husband said that he came home from work and asked about dinner. A short time later, Nancy started yelling at him and asked where he had been, accusing him of having an affair. He noticed his wife had been drinking and asked her how much she'd had. He said that Nancy then grabbed a knife out of a drawer and came after him, lunging, and that he ducked out of the way. He had a small cut on his shoulder from which there was no drawn blood. He also had a scratch on his neck with blood around it. To the officer it looked as though neither cut came from the blade of a knife. Nancy's husband also said that she hit him in the eye with her fist. There was a small amount of swelling, but no redness or bruising to the area. The knife was found behind a couch. There was no blood on it.

Another officer spoke with their five-year-old son. The boy saw his mother and father fighting. He said his parents did a lot of yelling at each other and some pushing and shoving went on. At one point he saw his mother grab a knife and cut his father's neck with it. He said he then went into his room and started watching cartoons and didn't see anything else. He said his mother and father argue and

fight a lot and it really bothers him.

Nancy spoke with an advocate shortly after the incident. She said the day before it happened she had told her husband she wanted a divorce. She had called an attorney and her husband had told her that he would see to it that she would not get their three kids.

Nancy was later interviewed by the probation officer for the Crossroads Program. The probation officer learned that their eight-year marriage had a history of violence and that her husband had previously been arrested for assaulting her. Nancy admitted having assaulted her husband on previous occasions but no charges had been filed. She told probation that she had hit her husband on the head with a frying pan during this incident. Although she had also hit him with a knife, it left a scratch rather than a cut, as the flat part of the blade came in contact with his neck. She said she was washing dishes at the time—it had not been her intent to stab him.

She felt her actions were in self-defense as he had begun assaulting her. However, she admitted to probation that she had other options, such as leaving the house. Instead she chose to strike back. Nancy felt she was standing up for herself. Her husband had become violent and she didn't want to take it anymore.

Nancy's case became problematic for prosecutors as we reviewed the file and met with our probation officer. Red flags went up for us when we saw the photographs of her husband's bloody neck. The incident by definition was more serious because a weapon had been involved. Though life-threatening injuries had not resulted for Nancy's husband, in our view the incident represented a dangerous situation.

Nancy was otherwise a qualified applicant for the Crossroads Program. A clear history of ongoing physical abuse by her husband existed. After a lengthy discussion with probation and advocates, we admitted her. Unfortunately, though Nancy attended the women's education group, she reoffended during the deferral period. Ultimately, a conviction was entered against her, though prosecutors opted to reduce the charge.

Nancy's situation illustrates the web of difficulties in which many battered women find themselves when they continue to use violence. Marital, financial, and childcare obligations can become a straitjacket constricting their choices.

Nancy's case also highlights some of the issues that arise when the legal principles discussed in this monograph are applied to crimes of greater violence.

The Crossroads Program was created specifically for misdemeanor assault offenders, not those charged with felony-level offenses—such as those involving a weapon or resulting in serious or permanent injury.

Yet the concepts discussed at length in this monograph still apply. For example, the more serious the assault, the more likely that the retribution theory of punishment will influence the handling of a case. Society rightly has a stake in punishing wrongdoers, simply because their actions are wrong. Public safety is furthered through reaffirming society's standards of conduct.

But as this monograph has discussed at length, even under the retribution theory of punishment the offense itself is not the same as that committed by a batterer. Under the more widely accepted rehabilitation theory, the offenders themselves are quite different. Consequently, distinctions can still be made that will further justice, even in serious assault cases involving battered women as defendants.

### *I. Delays in Processing Cases*

Immediately after beginning the Crossroads Program, we experienced delays in considering applicants. We had carefully planned our process for evaluating cases; we wanted to deal with each in an orderly, efficient manner. This turned out to be a naive expectation, particularly considering that the development of the program itself had been anything but orderly and efficient.

Repeatedly, we found ourselves rescheduling pretrial court dates for the applicants under review. Often the delays were due to incomplete information about the physical abuse experienced by a candidate. In many other cases, women were reluctant to cooperate with the evaluation process. Whether out of anger or distrust for the criminal justice system or simply not enough time or energy to cope with the application process, some women were slow to make appointments with probation and some did not show up for the interview. In any event, the process was dragging out much too long in too many cases for prosecutors, probation, and the rest of the core group.

This problem was partially alleviated as we gained greater experience in applying the agreed-upon criteria to the cases before us. Including battered women's advocates in our discussions helped us in a number of cases, as well. However, delays remained a continuing problem. Their persistence seemed to reflect both the difficulty in understanding the issues concerning battered women



who use violence against their abusers and the serial challenges facing criminal justice practitioners attempting to alter their work practices accordingly.

### *J. Length of the Program*

“There’s concern that this program will be viewed as ‘women versus men’—with women being treated differently in the court system. What we are actually doing is treating batterers differently than those who are battered.”

—Duluth battered women’s advocate, at a core group meeting

Initially, it had been of paramount importance to system practitioners that any education component of the Crossroads Program be of the same duration as the men’s education program already in place. There were few debates about this assumption. Requiring the same number of education groups for men and women seemed to provide a buffer for us against claims of discrimination or selective prosecution.

Problems with this approach surfaced during the first year of the program. Some of the partners of Crossroads participants attending the education group took inordinate interest in the system’s controls over the women. For example, “Nancy’s” husband maintained constant contact with the City Attorney’s Office, keeping abreast of all requirements imposed on her. Another woman’s partner prevented her from attending group, then made sure her absence was reported. In these situations, the requirements of the Crossroads Program seemed to serve as yet one more way that an abusive man could get his partner into trouble. At times, system practitioners felt as though the men were using them as tools to maintain control of their partners.

In other cases, attending the education group offered women some protection. Especially for women who responded to the ideas discussed and the opportunities to learn from other women, the group meetings became a sort of safe haven. Women who completed the twenty-six groups were welcome to continue attending, although frequently their partners made it impossible for them to do so. If they had let on to their partners that they enjoyed the classes, they would have been prevented from attending.

The core group discussed these concerns in our ongoing meetings. Remarkably, it was a system practitioner, a probation officer, who suggested

reexamining the twenty-six week requirement we had imposed. Always engaged and often argumentative in our core group meetings, he had at one time only reluctantly supported the prosecution policy we had created. Now he was suggesting a seemingly radical change. The advocate who facilitated the women's education group jumped on the possibility. We then discussed several options. One was to leave the program at twenty-six weeks. Another was to shorten the program to twelve weeks. A third was to leave the time indeterminate, with a minimum of six sessions required. Under this scenario, the group facilitators would determine the appropriate duration of a woman's participation. If she was safer attending the group, she would stay. If she was less safe, she could leave. After discussing the issue on several occasions, we chose the third, most flexible option.

Our ability to collectively tailor the program requirements was a direct result of the intensive core group experience we had been through. Unimaginable earlier, it reflects the many hours as core group members that we had devoted to both articulating our thoughts and concerns and letting others air theirs. Most of us had our thinking transformed by this process. The modification of the program requirements also illustrates the fluid nature of our endeavor. We hadn't created an inflexible program. Instead, we were on a path that was a continuing process.

#### *K. "Crossroads" As a Way of Thinking*

"We need to keep in mind that the key to evaluating the program and examining changes is to ask the question, 'Is the woman safer?'"

—Duluth battered women's advocate, at a core group meeting

As we worked with our criteria to consider the cases before us, we encountered all of the issues described above, as well as many more. Some problems made us question our admission criteria; others challenged the way we were implementing the program. Over time, it became more and more clear that what we had really created was a *way of thinking* about our cases. The grueling development phase we had endured had seemed to necessitate the creation of a formal program. Broadening our thinking about how our cases could be handled had been the most difficult part of what we had accomplished. In retrospect, we realize that we needed the safety net of the constraints imposed by our program and its rules.

In practice, however, the realities of the lives of battered women who use violence defy any easy categorization. The real-life cases described in this section illustrate this point. Although we had drafted our policy in terms of guidelines, with few absolutes, we still labored to consider each case fairly. The cases and the women we were working with simply couldn't be neatly matched to our admission criteria.

Though the program itself was well defined, we eventually found ourselves bending both the program requirements and the factors we considered for admission. In a number of cases women didn't fit the criteria for the program. However, the core group process had sensitized us to the mitigating factors that existed in their situations. An "either-or" approach often didn't work; either admission to the program or full prosecution seemed to limit our options too severely. We were, in fact, seeing cases ranging along a continuum. A continuum of options, then, was needed to adequately address their situations.

This continuum ranged from outright dismissal of the case to full prosecution. The Crossroads Program had offered us one arrangement of options, but we found ourselves repeatedly looking at others that were not part of the official "package." The following case illustrates how our thinking as prosecutors changed over time.

"Olga" and her husband were both charged with assault in an incident that took place in front of their one-year-old son. Olga was interviewed by probation for possible participation in the Crossroads Program. When prosecutors and advocates met with the probation officer to consider her application, we learned that she was in a very vulnerable position. Originally from the Ukraine, Olga had been living in the United States for about six years. She did not hold a green card. As a result, she was unable to work and support herself.

Olga had been in a relationship with her husband for about two and a half years. They had married the month before the incident. Her husband had expressed his concern that she would flee to the Ukraine with their son and that he would never see him again. He had told her that he would gain custody of their son because he was Native American, and said, "If you died, no one would miss you."

Olga told our probation officer that her relationship with her husband had become increasingly abusive, both verbally and physically. A review of his criminal record revealed a pattern of assaultive behavior with previous victims as

well. About four months before the incident, Olga had obtained a protection order, which was later amended to allow them to live together. Because her husband was alcoholic, she did not trust him to care for their son properly if they separated and he had visitation. Olga's husband was currently on probation and was viewed by his probation officer as a high-risk domestic offender.

In the incident, both Olga and her husband agreed that she slapped him first on the head while they were in the car. Olga said that her husband grabbed her by the hair and punched her several times on the top of her head with a closed fist. At their home she tried to leave to call for help, but he blocked the doorway and wouldn't let her out. She started yelling at him and he grabbed her by the neck and face with both hands, put his mouth over hers, and blew air into it. She said she almost passed out because it was impossible to breathe.

Olga's husband begged her not to call the police, saying if she wanted to, she could punch him as many times as she wanted. She said she then struck her husband in the face three times with a closed fist. After that, she told him she was still going to go and call the police. She said her husband punched himself in the face with her fist once, causing an injury to her hand.

Olga went to the hospital where police officers met with her. They noticed a bump on her head with a fresh red spot. They also saw faint teeth marks around the sides of her mouth. In speaking with the attending physician, police officers learned that Olga had a fracture in her right hand. The doctor did not believe Olga's husband could have caused this injury by using her hand to punch himself in the face.

At the couple's home, officers observed that her husband had a slightly swollen, freshly bruising area to his right eye. He said that at no time did he attempt to strike or injure his wife. However, he said it was necessary for him to "restrain her." He thought that Olga might have injured herself when she was "wildly thrashing around out of control."

The responding police officers also spoke with some neighbors who witnessed part of the incident. They stated that they did not want to get involved, fearing retaliation by Olga's husband. They said he had caused several problems in the neighborhood in the past. They did say, though, that when the couple arrived home he parked the car, got out, yelled something about pulling his hair, and then appeared to slap his wife.

Olga explained her actions to probation by saying that she was angry and

afraid during the incident. When her husband told her to hit him, she did. In completing her written evaluation, the probation officer commented

[Olga] appears eligible for the Crossroads Program in that she meets all eligibility criteria. My recommendation, however, is that these charges be dismissed. It is apparent that [Olga's husband] is the abuser in this relationship and maintains a great deal of control over [Olga]. He has already caused [Olga] to miss court one day by taking away her keys; it is not difficult to predict what will happen when she needs to do programming.

Olga's case was one that compelled prosecutors to look beyond the structure of the program we had created to the essence of our role as ministers of justice. What was a just result in Olga's case? What was a fair outcome? Because of Olga's immigration status, our decision would result in heightened consequences for her, her child, and her husband.

We couldn't just say "an assault is an assault." We had learned that not all assaults are created equal. Olga's husband had suffered some consequences for his behavior in the past. However, he demonstrated a pattern of threats and abuse toward his wife, despite the actions of the criminal justice system. Yes, she had initiated the physical aspects of this incident—an unwise move on her part. But Olga's history with her husband hadn't featured this before. As with many battered women, anger and frustration were at the heart of her motives.

We opted to do something that we hadn't done before. Placing Olga's case at a different point along the continuum of cases from those falling within the defined parameters of the program, we entered into a deferral agreement with her, but we didn't require her to complete the education groups. Instead, we required her to attend one session of a local support group for battered women. When Olga did so, we dismissed the charges against her.

Though the battered women's advocates in the core group found this requirement questionable (the groups should be voluntary, they rightly said), we wanted to link Olga to the people and organizations that, unlike the criminal justice system, could provide her more focused, long-term assistance and support. It worked. Through the support group, Olga met advocates and others who could help her in ways that her family members in the Ukraine could not.

Olga became the beneficiary of intense and faithful advocacy. Advocates stayed by her side during lengthy immigration and family court proceedings in which she finally received permanent resident status and a dissolution of her

marriage. Almost unrecognizable from her former self as a battered woman, Olga is now glowing in her newfound personal freedom and in her opportunity to remain in this country and support herself and her children. She appreciates the United States in a way that few of us who were born here do.

We like to think that at least in part, the happy ending to Olga's story was made possible by the creation of the Crossroads Program and the transformation of our thinking as prosecutors and probation officers. We have wondered, at times, what her life would be like today had we pursued a conviction against her. Though not all of our cases have resulted in such satisfying endings, we hope that we've made a difference in the lives of some women that we've met. They have certainly made a difference in ours. After all, our paths have intersected at a crucial point or place, a crossroads.

## XII. CONCLUSION

“Law must be stable and yet it cannot stand still.”

—Roscoe Pound, *Interpretations of Legal History* 1 (1923).

“We’re in a better place now than we were.”

—Duluth probation officer, two years after the creation of the Crossroads Program

“Equal justice under law” is a phrase chiseled both into courthouse pediments and into the consciousness of thoughtful prosecutors and the public they serve. As a hallmark of the American criminal justice system, the concept is worthy of the attention it receives. But what do we do when treating criminal defendants equally doesn’t seem to result in justice? What if just results don’t look particularly equal? This monograph has examined the dilemma in the context of a particular social issue, battered women who use responsive violence against their abusive partners.

In Duluth, this problem has led us on a long journey during which we have reevaluated our roles as practitioners and reconsidered the very nature of our daily work in the criminal justice system. We’ve taken time to study the road signs directing us: the purpose of the criminal law; the way in which it defines and classifies crimes; and the principles such as equality that guide the actions of practitioners. We’ve looked especially closely at the role of the prosecutor as a minister of justice exercising great discretion in an adversarial system. The insights we gained guided us as we drafted and implemented our prosecution policy.

It hasn’t been easy. Like any trip, it has involved fatigue, stress, and detours. But going someplace new is always both exhilarating and exhausting. We would have preferred to travel a path without obstacles. Instead, we found ourselves taking a more interesting and challenging route. If this monograph isn’t quite a road map, perhaps it is a guidebook describing what can be experienced along the way.

Like the battered women we’ve met, we stood at a crossroads, wondering which way to go. Cautiously, we took the road less traveled. Robert Frost’s well-known poem, in fact, became the “official” poem of the Crossroads Program.

Though we haven't yet arrived at the end of our journey, we think we've chosen the right direction.

Two roads diverged in a wood, and I—  
I took the one less traveled by,  
And that has made all the difference.

—from “The Road Not Taken” by Robert Frost