Approximately fifty invited practitioners participated in the meeting. The core group selected each person to ensure a wide variety of backgrounds, professional experiences, and viewpoints. A number of agencies were represented, including the City Attorney's Office, Duluth Police Department, St. Louis County Sheriff's Department, Arrowhead Regional Corrections, Minnesota Sixth Judicial District court administration, and various advocacy organizations for women. The individuals attending from those agencies fulfilled both direct service and administrative functions. We also sought diversity in racial and ethnic backgrounds.

In light of our limited success in selecting and discussing issues in a logical, focused manner, we realized that obtaining the best thoughts of our colleagues would require great precision in planning. We carefully structured the format of the roundtable session and the topics for discussion. After extensive drafting and editing, we assembled and mailed packets containing three case examples,[50] discussion questions,[51] and a handout delineating our efforts to centralize victim safety.[52]

The discussion questions invited participants to consider the following:

- whether the offenders in the case examples were similarly situated, considering the motives for the use of violence, both the short-term and long-term effects of the violence, and the past patterns of violence used by each person.
- the effects of convicting and sentencing on the use of violence and future safety of each offender.
- the specifics of a possible prosecution policy, including when, if ever, distinctions among offenders should be made.

The handout on centralizing victim safety provided a basis for our discussions. It reviewed the three key components of the Duluth model: victim safety, offender accountability, and general deterrence. It also delineated the factors that must be addressed to fully incorporate victim safety into the framework of a prosecution policy. These include the pattern of abuse, power differentials in domestic relationships, the need to develop intervention measures

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[50]Cases A and B are included in Appendices 4 and 5. Case C ("John and Carol") is found in this monograph's introduction.

[51]The discussion questions are included in Appendix 3.

[52]The handout is included in Appendix 6.

based on the particulars of the case, the dangers to the victim when the system's response is fragmented, and both the victim's perception of danger and the presence of imminent danger.

After lunch, participants were directed to their assigned tables for the discussions. Each discussion group included a mix of agency representatives and perspectives. We also took care to separate participants from their supervisors so as to promote candid discussion. Core group members served as facilitators and note takers.

Fueled by after-lunch chocolates and coffee, the discussions began. Core group members heard an array of perspectives about the issues that had been at the crux of our own debates. All five roundtable groups agreed that the violence used by each of the women in the case examples differed from the violence she had experienced. Some groups discussed the disparate effects on women as well, including the loss of caregiving licenses and the scrutiny of social service agencies when children are involved. At least one group noted that the women in these cases might simply resolve to never again call the police for assistance—if they feel unable to rely on law enforcement for protection, they may conclude that using violence is the only way they can protect themselves.

The roundtable discussions both reflected and legitimated the variety of views and concerns expressed by core group members. A thought-provoking exercise for participants, the event was also a crossroads for Duluth practitioners: a place where different professional cultures and perspectives met. Additionally, it provided a check of the core group's compass as we continued on our way to a prosecution plan.

Yet questions remained. Advocates for battered women had been entirely validated in their view that the violence used by battered women was different from the violence they experienced. However, not everyone agreed about what role, if any, prosecutors should play in addressing the issue. Though practitioners from other parts of the system all wanted to maintain their own discretionary decision-making authority, many of them wanted to restrict or eliminate the exercise of discretion by prosecutors. Police officers should make decisions at the scene, police officers said. Probation officers should make decisions in recommending a sentence, probation officers said. The judges then have the final say at sentencing, everyone agreed.

What was the role of the prosecutor in all of this? Was our role strictly to get the conviction and move the file along to the next phase of processing? Were we limited to just being cogs in a wheel, grinding out "one-size-fits-all" justice? Would we undermine the efforts of law enforcement officers by not pursuing a conviction in every case? Would we be dropping the torch of intervention initiatives and letting down our community as well? Did equality of treatment as a value require pursuing the same convictions for battered women and their abusers but allow for variations in disposition only at sentencing? We needed to look more closely at equality as a principle in criminal law. We also needed to look more closely at our role in an adversarial criminal justice system.

VI. THE PRINCIPLE OF EQUALITY

> "Belief in equality—fairness—the view that unless there is a reason for it, recognized as sufficient by some identifiable criterion, one man should not be preferred to another, is a deep-rooted principle in human thought."
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> —Isaiah Berlin, *Equality as an Ideal*, in *Justice and Social Policy* 128, 149 (F. Olafson ed., 1961).

> "'Like cases' should be treated alike in the absence of strong reasons to the contrary, because unexplained disparities erode our society's professed ideal that all are equal before the law."
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> —*ABA Standards for Criminal Justice* 18-2.2 cmt at 70 (2nd ed. 1980).

Within the context of the criminal law's fluctuating and sometimes contradictory theories of punishment and broadly defined categories of crime, equality of treatment stands as an important principle. As stated in the *ABA Standards for Criminal Justice*, "[E]quality among the similarly situated is basic to the appearance of justice, and compelling reasons should therefore exist before disparate treatment of the equally blameworthy is tolerated."[53] Equality of treatment, however, should be viewed as a "side constraint" on the end purposes of the criminal justice system.[54] It is one of several principles juggled by criminal justice practitioners. "Equality is one value among many: the degree to which it is compatible with other ends depends on the concrete situation, and cannot be deduced from general laws of any kind; it is neither more nor less rational than any other ultimate principle."[55]

Equality cannot be established as a rigid goal because doing so can lead to unjust results. In the effort to treat like cases alike, dissimilar cases are also sometimes treated the same. Attempts to restrict judicial discretion in sentencing provide an example of this problem. In discussing guidelines for the judiciary, the *ABA Standards for Criminal Justice* comments on the need for discretion: "The

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[53]*ABA Standards for Criminal Justice* ch. 18, introductory cmt at 8 (2nd ed. 1980).

[54]*ABA Standards for Criminal Justice* 18–2.2 cmt at 67 (2nd ed. 1980).

[55]Isaiah Berlin, *Equality as an Ideal*, in *Justice and Social Policy* 128, 144 (F. Olafson ed., 1961).

goal of curtailing judicial discretion may be to assure that 'like cases' are treated more alike, but the greater probability is that it will result in highly dissimilar cases being lumped together for 'equal' treatment."[56] Regarding the development of sentencing codes that provide for the exercise of judicial discretion, the standards go on to state,

> To abandon this effort in the name either of sentencing equality or of making punishment "fair and certain" seems likely to produce a sadly ironic consequence. Although "like cases" might be treated more alike under such a legislative model of nondiscretionary sentencing, so also would "unlike cases." Highly dissimilar offenders (in terms of their relative culpability) would receive the same sentence. In the end, the effect would be to substitute one type of sentencing disparity—the similar treatment of dissimilar cases—for inequity that results when similar cases are treated dissimilarly. To call this equality is to mistake crudeness for equity.[57]

It can be argued that this outcome has been the result of the heightened criminalization of domestic violence in many communities throughout the United States. In Duluth, we originally focused on working with the criminal justice system to simply establish a response to domestic assault. As the Duluth model developed, consistency in this response became a desired byproduct. Adopting variations of the coordinated community response model, many jurisdictions have sought to replicate Duluth's consistent approach to community intervention in violent relationships. Unfortunately, the consistent treatment of cases resulting in predictable outcomes has led to a uniformity of treatment (in Duluth and elsewhere) not necessarily justified by the variety of situations and life circumstances presented as cases to practitioners in the criminal justice system.

As discussed above, domestic assault cases originate in an American criminal justice system that broadly defines its crimes.[58] For practitioners weighed down with heavy caseloads, "processing files" can become a greater, more immediate

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[56] *ABA Standards for Criminal Justice* ch. 18, introductory cmt at 6 (2nd ed. 1980).

[57] *ABA Standards for Criminal Justice* 18–2.1 cmt at 31 (2nd ed. 1980).

[58] See § IV of this monograph.

necessity than seeking justice.[59] In attempting to handle large volumes of cases efficiently and consistently, cases that are charged the same tend to be treated the same. Although equality of treatment remains a legitimate principle, the broad, injury-focused nature of crime categories masks the dissimilarities in domestic assault cases.

In fact, as noted by both battered women's activists and social scientists, cases involving victims of ongoing abuse who use violence against their abusers are not the same in many important respects.[60] These differences, discussed throughout this monograph, can be viewed in light of well-established mitigating factors employed by decision makers in the criminal justice system. The *ABA Standards for Criminal Justice* discusses these factors in the areas of both prosecutorial and judicial decision making. Citing several model codes, the second edition of the book discusses the existence of "soft variables" that should be considered by a just system in allocating punishment.[61] These soft variables often include the offender's intention, capacity for responsibility, state of mind, and motivation.[62]

> Other examples can be given of "soft variables" that, although not amounting to legal defenses, merit recognition at sentencing: the wife who responds belatedly to a vicious beating and murders her husband, the feeble-minded defendant whose mental capacity is just above the margin necessary to consider him or her legally responsible for personal actions, the defendant who commits an armed robbery to obtain necessities for the family, the youth just days older than the maximum age of eligibility for more lenient juvenile court treatment. In each case, the common denominator is the existence of factors that may diminish the culpability of the

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[59]*See* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197 (1988). *See also ABA Standards for Criminal Justice* 18–2.1 cmt at 28 (2nd ed. 1980) ("The competitive realities of plea bargaining, the pressure of the prosecutor's caseload, and the limited number of cases that the individual prosecutor encounters understandably lead the prosecutor to focus more on securing a conviction than on achieving equity among similarly situated offenders.")

[60]Dasgupta, *supra* note 20; Hamberger & Guse, *supra* note 20; Kimmel, *supra* note 25; Saunders, *supra* note 25.

[61]*ABA Standards for Criminal Justice* 18–2.1 cmt at 29–31 (2nd ed. 1980). *See also* Nat'l District Attorneys Association, *National Prosecution Standards* 68.1 (2nd ed. 1991) (factors for prosecutors to consider in negotiating plea agreements).

[62]*ABA Standards for Criminal Justice* 18–2.1 cmt at 30 (2nd ed. 1980).

defendant but are inadequate to excuse the conduct in question.[63]

In addition to examinations of diminished culpability and relative blameworthiness, the general recognition of mitigating factors has traditionally played a central role for decision-makers in the criminal justice system. Concerning sentencing, the ABA standards cite five general areas:

> Generically, mitigating factors tend to cluster around five central themes: (1) the amount of harm caused or intended by the offender, (2) the existence of inciting factors, (3) the nature of any prior criminal record or other evidence suggesting future recidivism, (4) the likely effect of imprisonment upon the defendant or the defendant's family, and (5) the assistance, if any, rendered to law enforcement authorities.[64]

The general criteria applied to the sentencing principles of the standards delineate examples of mitigating factors relating to the offender's intent, volition, and motivation:

> (A) the offender did not contemplate that his or her conduct would cause or threaten serious bodily harm or fear, or the offender exercised caution to avoid such consequences;
> (B) the offender acted under strong provocation, or other circumstances in the relationship between the offender and the victim were extenuating;
> (C) the offender played a minor or passive role in the crime or participated under circumstances of coercion or duress;
> (D) the offender because of youthful age or any physical or mental impairment lacked substantial capacity for judgment when the offense was committed; or
> (E) other substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense.[65]

These examples allow judicial decision makers to consider concepts of provocation, coercion, duress, and extenuating circumstances in the relationship between the offender and victim. Although the specific circumstances surrounding the incident, viewed in light of the relationship itself, may not meet the legal requirements necessary to successfully maintain defenses of provocation, coercion, or duress, the standards clearly contemplate their relevant consideration.

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[63] *Id.* at 30–31.

[64] *Id.* at 39.

[65] *ABA Standards for Criminal Justice* 18–3.2 (2nd ed. 1980). *See also ABA Standards for Criminal Justice* 18–6.3 cmt at 224–25 (3rd ed. 1994) (additional discussion of mitigating factors).

Such mitigating factors are typically present in cases in which battered women assault their partners. A significant number of battered women use violence in an attempt to control or stop the abuse they have experienced.[66] Whether or not provocation, coercion, or duress can be established in specific cases as legal defenses to charges of assault, the extenuating circumstances in battering relationships mitigate the blameworthiness of battered women. Battered women experience the violence of their abusers in a way that produces ongoing fear, intimidation, and a loss of personal autonomy. In contrast, the retaliatory violence of battered women neither seems intended to produce the same debilitating consequences nor actually does so.[67]

Thus, a key question in considering cases in which battered women use violence against their abusive partners involves relative blameworthiness. Are battered women equally blameworthy when they use retaliatory violence in response to the abuse they have experienced? The ABA standards suggest that when the circumstances of the relationship and the extent of harm are factored into the analysis, they are not.

There is an even bigger question, however. For many months of our work, the core group struggled with the question of whether a just system can treat similar cases differently and still be just. After months of unsuccessfully grappling with this question, some members finally realized that the wrong question had been asked. The real question was "Can a just system treat dissimilar cases the same and still be just?" The group concluded that the Duluth system's treatment of cases was *too* similar. Equal treatment of cases arising out of the same broadly defined crime categories had failed to address the widely disparate situations and defendants in those cases.

In summary, equality as a principle does not require the identical treatment of battered women who use violence and their abusers. Justice remains the fundamental goal in each case; equality is an important principle to be considered in achieving that goal. The above discussion has focused on sentencing as an example of how the principle of equality is properly applied. But what about

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[66]Dasgupta, *supra* note 20, at 202; Hamberger & Guse, *supra* note 20, at 1302, 1321; Kimmel, *supra* note 25, at 1351; Saunders, *supra* note 25, at 1433–35.

[67]Dasgupta, *supra* note 20, at 209–10; Hamberger & Guse, *supra* note 20, at 1302, 1322; Kimmel, *supra* note 25, at 1355–56; Saunders, *supra* note 25, at 1436–38.

prosecutors and the charging and other decisions they alone make? The next section of this monograph examines the role of the prosecutor in the American criminal justice system. Closely examining this role is crucial to understanding the relationship between justice and equality in cases in which battered women use illegal violence.

VII. THE ROLE OF THE PROSECUTOR IN AN ADVERSARIAL SYSTEM

> "I can't think of a better job than to be a prosecutor. It's an absolutely amazing opportunity. It's a luxury of a lifetime to be able to pursue only those things that are right. You are unencumbered by the bad ideas of a client who is paying you money. You are only encumbered by your own desire to do the right thing and to make sure that justice is done."
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> —Stephen Trott, Address to J. Frank Coakley National Symposium on Crime (May 1987), *quoted in* John J. Douglass, *Ethical Issues in Prosecution* 31 (1988).

What is the right thing for a prosecutor to do when a battered woman is charged with assaulting her abuser? How can a prosecutor make sure that justice is done? Just as it was helpful for us as practitioners to look more expansively at the legal context in which we functioned, so too it was critical to closely examine the role of the American prosecutor as it is defined and structured within that context.

A. The Prosecutor As a Minister of Justice

> "The primary responsibility of prosecution is to see that justice is accomplished."
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> —National District Attorneys Association, *National Prosecution Standards* 1.1 (2nd ed. 1991).

Prosecutors are the central figures within the American criminal justice system[68] and they are often regarded as its most powerful figures.[69]

> The prosecutor is the most dominant figure in the American criminal justice system. The prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer immunity from prosecution. The prosecutor, in short, holds the power to invoke or deny punishment.[70]

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[68] *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987); Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 Am. Crim. L. Rev. 473, 474 (1976); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 768 (1996).

[69] Misner, *supra* note 68, at 718; Bubany & Skillern, *supra* note 68, at 477.

[70] Bennett L. Gershman, *Prosecutorial Misconduct* 4–3 (2nd ed. 2003).

In fulfilling this role, the prosecutor is often referred to as a "minister of justice."[71] This term reflects the quasi-judicial role that prosecutors play in the American criminal justice system. Though the activities of prosecutors take place within an adversarial setting, they are obligated "to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public."[72] Rule 1.3 of the *National Prosecution Standards* emphasizes the importance of enforcing the rights of the public:

> The prosecutor should at all times be zealous in the need to protect the rights of individuals, but must place the rights of society in a paramount position in exercising prosecutorial discretion in individual cases and in the approach to the larger issues of improving the law and making the law conform to the needs of society.[73]

The *ABA Standards for Criminal Justice* state that, in addition to being an advocate, the prosecutor also functions as an administrator of justice.[74]

> The prosecutor may also be characterized as an administrator of justice, since the prosecutor acts as a decision maker on a broad policy level and presides over a wide range of cases as director of public prosecutions. The prosecutor also has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused, as well as deciding whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice.[75]

Reflecting this broad role for prosecutors, the ABA standards state that "[t]he duty of the prosecutor is to seek justice, not merely to convict."[76] Similarly, the Commentary to Standard 25 of the *National Prosecution Standards* states, in part, "It has long been recognized that the responsibility of the prosecutor goes beyond simply seeking indictment and conviction. The duty of the prosecutor is to seek justice, not merely to obtain a conviction."[77] One commentator has stated that in fulfilling this duty, "[p]rosecutors, more than other lawyers, must have a strong

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[71] *ABA Standards for Criminal Justice* 3–1.2 cmt at 5 (3rd ed. 1993).

[72] *Id.*

[73] Nat'l District Attorneys Association, *National Prosecution Standards* 1.3 (2nd ed. 1991).

[74] *ABA Standards for Criminal Justice*, *supra* note 71, Standard 3–1.2(b).

[75] *ABA Standards for Criminal Justice*, *supra* note 71, 3–1.2 cmt at 5.

[76] *ABA Standards for Criminal Justice*, *supra* note 71, 3–1.2(c).

[77] Nat'l District Attorneys Association, *supra* note 73, 25.1 cmt at 91.

personal sense of justice and be morally autonomous."[78] Another commentator has argued that, in making charging decisions, the prosecutor "functions almost literally as a gatekeeper of justice with the obligation to prevent an injustice before the system, if left to its own devices, miscarries."[79]

Though the prosecutor's role as a minister of justice is both frequently and clearly stated in professional canons of conduct, little has been written to explain the specifics of this role.[80] Traditional definitions have focused more upon the personal virtue of individual prosecutors than upon quasi-judicial values themselves.[81] Numerous concerns have been raised, however, regarding the perceived or actual overzealousness on the part of prosecutors. "[O]verzealousness is manifested in a distorted, though technically proper, exercise of permissible discretion where the prosecutor unduly prefers penal severity over other potential goals."[82] This mindset is one in which a conviction equals justice.

> Gradually, the prosecutor can come to view his or her primary obligation as obtaining convictions. The admonitional obligation to "seek justice" is forgotten, not because it is ignored, but because prosecutors equate it with obtaining convictions.
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> This phenomenon of emphasizing convictions has been labeled "conviction psychology," and it is not merely a theoretical model.[83]

Conviction psychology results from the prosecutor's institutional posture and orientation. The structure of the criminal justice system itself encourages selective influences. For example, prosecutors seldom have an opportunity to speak directly with defendants because they are usually represented by defense attorneys. Victims and police officers can be known directly; they can come to be regarded as "clients." The consequence of this structural aspect of the criminal justice system is that a prosecutor

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[78]Fisher, *supra* note 59, at 257.

[79]Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 Fordham Urb. L. J. 513, 521 (1993).

[80]Fisher, *supra* note 59, at 218.

[81]*Id.* at 219.

[82]*Id.* at 200.

[83]Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. Rev. 669, 690.

> is constantly exposed to victims, police officers, civilian witnesses, probation officers and others who can graphically establish that the defendant deserves punishment, and who have no reason to be concerned with competing values of justice. At the same time, the prosecutor is normally isolated from those—the defendant, his family and friends, and often, his witnesses—who might arouse the prosecutor's empathy or stimulate concern for treating him fairly. A system which denies the prosecutor access to the defendant in this way is not structured to foster the prosecutor's devotion to "impartial justice."[84]

Other factors that contribute to perceived or actual overzealousness of prosecutors include the "super-adversary posture" of criminal defense attorneys and the "special license to use truth-defeating trial tactics" given to them.[85]

1. The Prosecutor As a Minister of Justice When Battered Women Use Responsive Violence

However, as with all aspects of domestic violence intervention, these dynamics manifest themselves differently in the typical domestic assault case in which a batterer has been charged. Though a "super-adversary posture" may be adopted by the defense attorney, few prosecutors are likely to be labeled as "overzealous" in their actions, at least by battered women's activists and advocates. Due to evidentiary problems resulting from the victim's reluctance or fear of testifying, the opposite problem frequently exists. A prosecutor can, in fact, be quite isolated from a domestic assault victim who fears both her abuser and the system that is seeking to intervene on her behalf.

If a battered woman is arrested, the dynamics shift further. Often, no defense attorney is involved in the case at all, especially when she seeks an expedient, early resolution inconsistent with traditional adversarial tactics of criminal defense attorneys. Battered women frequently plead guilty at arraignment, faced with the immediate pressures of childcare, family, and employment responsibilities. The ramifications of an assault conviction on a woman's record are either unseen or too distant on the horizon to be fully considered.

Even when a battered woman seeks legal representation for the criminal charges facing her, "the squeaky wheel gets the grease"—that is, battered women

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[84]Fisher, *supra* note 59, at 208–09.

[85]*Id.* at 210–11. See also Melilli, *supra* note 83, at 691.

and their cases compete with many others in the courtroom for the attention of busy system practitioners, including defense attorneys. And unlike their abusive partners, battered women typically are not "squeaky wheels." Society has not conditioned them to believe that they are entitled to use violence in their homes under any circumstances, let alone to establish a pattern of control over the lives of their male partners.

Battered women may be seeking empathy and, perhaps, mercy—not society's justification for their behavior. Immediate, practical concerns also prevail, even though a defense attorney may represent her. The childcare and family issues are still there, her employment schedule is still an issue. Combined, these factors play a major role in persuading a battered woman to resolve her criminal case quickly, though often with long-term negative consequences.

The issues that battered women bring with them to court become the prosecutor's issues. More carefully than in other types of cases, prosecutors must consider their role.

> Ultimately, the question prosecutors must ask themselves is whether they wish to function as ministers of justice, or merely as ministers of process. For many prosecutors, functioning merely as a cog in the criminal justice system is quite simply an inadequate return on their commitment. Trusting solely in the criminal justice system to protect the innocent—in the face of convincing evidence of that system's inability to do so in all cases—is too great a concession to the adversary model of behavior, a model that takes its origin and justification from the very different circumstances of the lawyer representing a private client.[86]

In considering whether prosecutors function as true ministers of justice or simply as ministers of process in cases involving battered women charged with assaulting their partners, an additional factor promotes concerns about overzealousness. Arrests of battered women tend to occur in communities in which pro-arrest domestic violence policies have been adopted. Though these policies were originally intended to apply to situations involving batterers, an unintended consequence has been that significant numbers of battered women have been arrested for their use of responsive or retaliatory violence.

Communities with progressive arrest policies have often adopted system-wide initiatives designed to achieve consistency in response and to express community condemnation of domestic violence. They reinforce official

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[86]Melilli, *supra* note 83, at 702.

intolerance of domestic violence through criminal justice system and individual agency policies, procedures, and protocols. What is the proper approach in such communities for a prosecutor who desires to be a minister of justice, not simply a minister of process? Criminal justice practitioners, including prosecutors, can lean toward overzealousness in dealing with battered women defendants as a result of their communities' official recognition and condemnation of domestic violence. Isn't a "get tough" approach what the community has said it wants? And isn't consistency in the application of that approach entirely defensible, as well as just?

As mentioned earlier in this monograph, these questions plagued the core group members who were prosecutors and police and probation officers. Consequently, discussion of these issues dominated most meetings during the first year. No prosecutor or other agency practitioner wanted to be motivated by sexism in the handling of domestic violence cases. Initially, continued similar treatment of these cases seemed to offer the best defense against such an accusation. However, we came to a painful, even agonizing recognition: our highly valued, hard-won consistency had been achieved at a price. This price was etched in the faces of the battered women we had met in the course of our work. In our not wanting to be motivated by sexism in the handling of cases, sexism had in fact resulted. In the name of consistency, we had limited our discretion—but discretion was what was needed to produce truly just results. The admonition of one commentator was particularly relevant: "Indeed, one of the greatest dangers to the accomplishment of justice is the failure of prosecutors to accept the extent and significance of their discretion."[87]

2. The Prosecutor As a Zealous Advocate for Justice

To accomplish justice, prosecutors must function in a quasi-judicial role. Theoreticians agree that the three core principles of justice are equality, respect for rights, and desert. These three principles are manifested in the prosecutor's duty to seek justice through promoting equality, procedural justice, and substantive justice.[88]

Another commentator has delineated tensions that arise when prosecutors are required to "punish" in pursuing substantive justice and at the same time to

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[87]Melilli, *supra* note 83, at 704.

[88]Fisher, *supra* note 59, at 236–37.

promote equality and procedural justice. According to this view, overzealousness can result when punishment is pursued without regard to the latter constraints.[89] For battered women defendants, however, it can be argued that overzealousness also results when equality is pursued without regard to substantive justice.

To resolve the conflicting demands of their quasi-judicial role, prosecutors must be committed to accepted moral values and to a moral reasoning process.[90]

> What, then, should we require of prosecutors? Ethical theorists generally agree on the core moral virtues, which include truthfulness, benevolence, trustworthiness, moral autonomy, moral courage and finally, "justness." Of these qualities, the last three are especially important here. "Justness," of course, requires loyalty to the three values defined above: equality, respect for rights and desert. "Moral autonomy" means that a prosecutor is "regularly disposed to do his *own* moral thinking . . . and then, in turn, to *act* upon his considered judgment"; "moral courage" requires that he be willing to endure substantial hardship for obeying his conscience.[91]

Of course, one substantial hardship that can arise while prosecuting battered women defendants is the accusation of favoring women at the expense of the interests of men. Even the most considered analysis of the differences in the use of violence by battered women and their abusive male partners does not necessarily prevent unjust criticism when policies are changed. Despite the core group's careful consideration of the complex issues in these cases, the accusation of favoritism toward women was leveled at members on more than one occasion, although not as often as anticipated.

A legal scholar offers a different view of the prosecutor's role as a minister of justice: zealous advocacy exists not in opposition to the principles of equality and procedural fairness but is instead the *means* for achieving justice.

> But even if one assumes that the prosecutor is primarily a zealous advocate, there is still a question as to the identity of the prosecutor's client. Prosecutors do not have individual, identifiable clients. They are lawyers for the state. As such, prosecutors represent the public interest. Prosecutors represent the interests of society as a whole, including the interests of defendants as members of that society. But without direction from a specific client, the prosecutor must make the client's decisions;

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[89] *Id.* at 238.

[90] *Id.* at 240.

[91] *Id.* at 239.

the prosecutor must define the public interest in specific cases.

> If prosecutors truly accept their obligation to define the public interest they represent, the apparent conflict between zealous advocacy on behalf of the state and "seeking justice" disappears. Neither the state nor the public interest is served if the innocent are convicted. Thus, prosecutors who indiscriminately seek convictions violate not only the "seek justice" prong of their ethical obligation; they violate the "zealous advocacy" prong as well. Zealous advocacy must be on behalf of the client's interest, and the only legitimate interest of the prosecutor's client is assuring that justice is done. . . .
>
> In truth, the prosecutor is instructed to "seek justice," not as a check upon his or her advocacy, but rather as a direction for its exercise. The prosecutor is commanded, by virtue of the interests he or she represents, to discriminate among those who may suffer the consequences of formal criminal accusation and possible conviction. The prosecutor, like it or not, determines the fate of many individuals accused of crimes, and thus, the conscientious prosecutor is the best protection against unjust accusations and convictions.[92]

The conscientious prosecutor of domestic violence offenders is thus commanded by the public interest to "discriminate" in assuring that justice is done. But are "unjust accusations and convictions" faced only by "the innocent"? What about battered women who use violence against their abusers without any credible claim of self-defense? What is just in these situations? As the only legitimate interest of the prosecutor's client, justice requires the prosecutor to exercise discretion with an eye toward the principle of equality—"treating similar cases in a similar fashion."[93] A closer look at the prosecutor's discretionary role, then, is needed.

B. The Prosecutor As a Discretionary Decision Maker

> "The prosecutor's great discretionary power is the cardinal fact of professional life."
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> —Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197, 204 (1988).

Accomplishing justice is the principal goal for prosecutors, who can be viewed as skilled adversaries exercising quasi-judicial functions.[94] Discretion

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[92]Melilli, *supra* note 83, at 698–99.

[93]Fisher, *supra* note 59, at 236.

[94]Melilli, *supra* note 83, at 702.

provides an important and necessary tool for carrying out this quasi-judicial role. It is, in fact, the key to functioning as a minister of justice.

For criminal justice practitioners, discretion can be defined as "the power to consider all circumstances and then determine whether any legal action is to be taken."[95] It is

> an authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgment and conscience. It is an idea of morals, belonging to the twilight zone between law and morals.[96]

Another scholar has stated that "a public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction."[97] Simply put, discretion is "the power of free decision."[98]

The power of the prosecutor is expansive.[99] Commentators agree that broad discretion is invested in prosecutors for a number of reasons. Among them are overcriminalization and overlapping provisions in criminal codes; economic limitations on prosecutorial resources; and the severity of criminal sanctions in the United States, including mandatory minimum sentencing provisions.[100] Additionally, broad categories of conduct defined as criminal "without adequately distinguishing significant degrees of severity" contribute to the extensive discretionary power of prosecutors.[101]

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[95]Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427 (1960).

[96]Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. Rev. 925, 926 (1960).

[97]Kenneth C. Davis, *Discretionary Justice: A Preliminary Inquiry* 4 (1969).

[98]John A. Lundquist, Comment, *Prosecutorial Discretion—A Re-evaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse*, 21 DePaul L. Rev. 485, 486 (1971).

[99]Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 Am. J. Comp. L. 532 (1970).

[100]Sidney I. Lezak & Maureen Leonard, *The Prosecutor's Discretion: Out of the Closet—Not Out of Control*, 63 Or. L. Rev. 247, 248–52 (1984); Misner, *supra* note 68, at 742.

[101]James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1567–68 (1981). See also §IVof this monograph, which discusses broad categories of crimes and their impact on domestic violence cases.

A prosecutor exercises discretion within the larger context of the criminal justice system. Discretion throughout the system itself is pervasive.

> There is more recognizable discretion in the field of crime control, including that part of its broad sweep which lawyers call "criminal law," than in any other field in which law regulates conduct. Moreover, that discretion exists at the inception of a criminal matter and persists to the end.[102]

The criminal justice system in particular is characterized by its administrative aspects. Discretion exercised by its practitioners is prevalent because the "core of administration is flexible discretion."[103]

The ABA standards for the prosecution function promote the use of discretion regarding noncriminal dispositions of cases. Standard 3-3.8 states that

> (a) The prosecutor should consider in appropriate cases the availability of noncriminal disposition, formal or informal, in deciding whether to press criminal charges which would otherwise be supported by probable cause; especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition.
> (b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.[104]

Similarly, Standard 44.1 of the *National Prosecution Standards* states, in part, that "[t]he prosecutor should, within the exercise of his discretion, determine whether diversion of an offender to a treatment alternative best serves the interests of justice."[105]

Further, the ABA standards confirm that a prosecutor is not required to charge all cases in which sufficient evidence exists to support a conviction. Standard 3-3.9(b) states that

> (b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

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[102]Breitel, *supra* note 95, at 428.

[103]*Id.* at 428.

[104]*ABA Standards for Criminal Justice*, *supra* note 71, 3–3.8.

[105]Nat'l District Attorneys Association, *supra* note 73, 44.1.

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) reluctance of the victim to testify;

(vi) cooperation of the accused in the apprehension or conviction of others; and

(vii) availability and likelihood of prosecution by another jurisdiction.[106]

This formulation is viewed by at least one legal scholar as "a satisfactory collation of mitigating elements which may move a conscientious prosecutor to block or ameliorate the full force of a penal law."[107] The comment to Standard 3-3.9 itself states that

> Nor is it desirable that the prosecutor prosecute all crimes at the highest degree available. Crimes are necessarily defined in broad terms that encompass situations of greatly differing gravity. Differences in the circumstances under which a crime took place, the motives behind or pressures upon the defendant, mitigating factors in the situation, the defendant's age, prior record, general background, and role in the offense, and a host of other particular factors require that the prosecutor view the whole range of possible charges as a set of tools from which to carefully select the proper instrument to bring the charges warranted by the evidence.
>
> In exercising discretion in this way, the prosecutor is not neglecting his or her public duty or discriminating among offenders. The public interest is best served and evenhanded justice best dispensed, not by the unseeing or mechanical application of the "letter of the law," but by a flexible and individualized application of its norms through the exercise of a prosecutor's thoughtful discretion.[108]

1. The Prosecutor's Discretion and Battered Women Who Use Violence

The unique dynamics of violent domestic relationships can be factored into the charging considerations delineated in Standard 3-3.9. The most common

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[106]*ABA Standards for Criminal Justice, supra* note 71, 3–3.9(b). *See also* Nat'l District Attorneys Association, *supra* note 73, 43.6.

[107]H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 Mich. L. Rev. 1145, 1150 (1973).

[108]*ABA Standards for Criminal Justice, supra* note 71, 3–3.9 cmt at 73–74.

reason battered women use violence against their partners is to protect themselves. Two women interviewed as part of a study of thirty-two women were typical.

> Patricia, an African American mother of three, said, "I'd actually fistfight him. I fought him when he came after me. I just wanted to get him off [of] me." Patty summarized the sentiments of many of the women: "I felt that I needed to protect myself . . . . I was like, get him away from me before I die. I needed to save myself and it [being violent] did work."[109]

An examination of the dynamics of these relationships reveals that reasonable doubts can sometimes be raised about the guilt of accused battered women. When considering the full context of battering relationships, establishing a bright line between guilt and innocence is often difficult. Evidence concerning self-defense, provocation, and duress can raise doubts about a battered woman's guilt, even if it is unclear whether the legal requirements for successfully maintaining these defenses have been satisfied.

Considering the extent of harm caused by the retaliatory actions of a battered woman can also provide the basis for the proper exercise of prosecutorial discretion. A prosecutor can ask, What is she trying to accomplish? Is her abusive partner afraid as a result of her actions? Has she compromised his personal autonomy? Closely related are questions concerning the resulting circumstances: Did her violence make her more or less vulnerable? Is she more dangerous or less dangerous than her batterer? Is she *in* more danger or less danger than her batterer? Evaluating the extent of harm resulting from the actions of a battered woman toward her abuser can reveal distinct differences when compared with the harm caused by her abuser. Consequently, the ABA standards affirm the prosecutor's authority to make distinctions in cases. These distinctions can result in noncriminal dispositions, even when the evidence itself may support convictions.

2. The Prosecutor's Discretion and Equality

Most commentators have concluded that discretion is not only inevitable, but desirable. According to Pound, "[t]he effective individualizing agency in the administration of justice is discretion."[110] Conceding the simplicity of relying on

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[109]Dasgupta, *supra* note 20, at 211.

[110]Pound, *supra* note 96, at 925.

rules, he points out the problem with doing so:

> But the life of today is too complex and its circumstances are too varied and too variable to make possible, in practice, reduction to rules of everything with which the regime of justice according to law must deal. The maturity of law relies habitually upon principles—authoritatively declared and established starting points for reasoning—as its everyday instrument. . . .
>
> All legal systems which have endured have had to develop, by experience, principles of exercise of discretion.[111]

Equality is another such principle. Commenting on the tension between equality and discretion, Pound acknowledges that difficulties arise

> . . . because of logical conflict between dispensation and mitigation, on the one hand, and the principle of equality before the law, on the other hand. But a principle, if established by a legal precept, is not therefore a rule. It is a starting point for reasoning in arriving at a determination, not a fixed prescribing of an exact result.[112]

Consequently, neither equality nor discretion exist as rules in the American criminal justice system. Rather, they are principles that establish starting points from which to arrive at a determination. They are not themselves the end result and they do not prescribe an end result. The end result—the goal—is justice.

This view is supported by numerous legal scholars. One writer puts it this way:

> At first encounter, the widely supported brief for uniformity in the enforcement of the criminal laws appears to need little argumentation. To most, the proposition "Equal justice under law," chiseled on the courthouse pediment, is both elegant and self-evident. Indeed, this slogan expresses for many the quintessence of the American system of justice. Yet, the phrase is fundamentally deceptive. While wide or irrational disparities in treatment are deplorable, equality in the sense of uniformity in result is neither the fact nor the ideal in the system of justice. A given piece of human behavior, described grossly by statute as a crime, does not and should not generate an automatic and standardized response from police, juries, or judges. Nor should we expect an undiscriminated prosecutorial reflex. To some degree, justice requires regard for the differentiating characteristics of a particular crime or criminal. . . .
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> From the decision to arrest through the choice of sentence,

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[111] *Id.* at 927.

[112] *Id.* at 925.

> particular circumstances of the offense and individual characteristics of the offender should exert influence, as indeed they do when the opportunity occurs. And we should accept the consequence of a reasonable disparity in result for superficially similar crimes in the interest of the flexibility inherent in justice.
>
> Among those entrusted with critical discretionary options in the American system of criminal justice, the public prosecutor occupies a pre-eminent place.[113]

Echoing this view, another commentator has stated that discretion "permits a prosecutor in dealing with individual cases to consider special facts and circumstances not taken into account by the applicable rules."[114]

Thus, there is "a competing tension between the need in prosecutorial decision making for certainty, consistency, and absence of arbitrariness on the one hand, and the need for flexibility, sensitivity, and adaptability on the other. The problem is to design the system so as to reach an acceptable balance between the two sets of values."[115] There is a need for a "maturity of law" that relies upon established principles to reason through a problem and make a determination.

3. A "Maturity of Law" and Battered Women Who Use Violence

A "maturity of law" is especially needed in the area of battered women charged with assaulting their abusers. As a result of nationwide initiatives promoting community intervention in violent domestic relationships, bright-line arrest policies now are increasingly common. Designed originally to effectuate the arrests of batterers, these policies have cast a wide net, one that frequently has included battered women who use responsive violence. The parallel "no-drop" policies adopted by many prosecutors' offices have resulted in a rigid consistency of treatment. Many battered women have felt the brunt of that inflexible consistency. One scholar issues this warning:

> It is, of course, possible to maintain a kind of consistency in prosecutorial decision-making by treating everyone alike; in effect, by eliminating discretion. The result would be a rigid and mechanistic system of prosecution. Amelioration would be accomplished, if at all, by

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[113]Uviller, *supra* note 107, at 1145–46.

[114]Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. Rev. 1, 2 (1971).

[115]*Id.* at 3–4.

> some other agency; the judiciary, perhaps, or the executive. Such a system appears on its face clearly undesirable, inflicting injury upon many individuals by unwarranted prosecution. Consistency in prosecution is surely a virtue, but it should not be attained by a sacrifice of the subtleties that are a requisite feature of decision-making of any decent quality.[116]

A primary feature of a maturity of law is flexibility, exercised through discretionary decision making. A "tolerable consistency"[117] should result, not an intolerable one. In Duluth, as elsewhere, the struggle to develop a criminal justice response to domestic violence had produced a consistency which featured intolerable aspects when applied to battered women who used retaliatory violence. On the face of it, consistent treatment had seemed to everyone to obviously be right. Isn't an assault an assault? The broadly framed charge itself seemed to require consistent handling of all cases.

We did not realize at the time that we were participating in the maturing of the coordinated community response we had worked so hard to develop. The group members who were advocates for battered women urged those of us who were practitioners to see our cases differently. We came to understand, as one legal scholar writes, that

> In its most elementary form, consistent and even handed treatment means that individuals in like circumstances will be treated alike. Contrariwise, cases involving operatively different circumstances, *i.e.*, distinguishable cases, will be treated differently. Although different decisions in apparently similar fact situations may seem inconsistent, they may be reconcilable if there are elements present in each situation that justify differentiation. Two cases may be indistinguishable to the outsider but appear quite different to the prosecutor making the decisions. This disparity is created by the fact that the prosecutor's judgment may be influenced by non-apparent, unarticulated, difficult-to-weigh factors. The challenge for him and for the system is to articulate the factors taken into account by him, sometimes intuitively, in exercising his discretion.[118]

Our challenge was to articulate factors that would be taken into account by prosecutors and to make sure that those factors justified differentiation of cases

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[116] *Id.* at 5.

[117] *Id.* at 7 and 57.

[118] *Id.* at 4.

involving ongoing victims of domestic violence who retaliated against their abusers. Many meetings were devoted to this issue. But first, we needed to look at one more road sign. What did the courts have to say about the differentiation of our cases? Were there warnings of possible pitfalls on the path ahead? Or would appellate decisions concerning the problem of selective prosecution provide us instead with further directions for our journey?

VIII. EQUALITY REVISITED: SELECTIVE PROSECUTION AND BATTERED WOMEN WHO USE VIOLENCE

"What's good for the goose is good for the gander."
— Irish proverb

Throughout the course of our work, the core group's system practitioners remained sensitive to potential accusations of sexism. Would claims of favoritism be leveled if we created a policy to address the circumstances of battered women arrested for assaulting their violent partners? Worse yet, would we unintentionally subject our actions to selective prosecution claims by batterers? We realized that a review of this area of the law would be helpful in our final evaluation of the issue before we drafted a policy.

A. The Prosecutor's Discretion and Selective Prosecution

As cited in the previous section, many commentators have supported and encouraged prosecutors in the full exercise of their discretionary decision-making authority. However, some have carefully delineated the disadvantages associated with this power and have argued for its "decent restraint."[119] The primary disadvantage centers on the realization that discretion permits prosecutors, at the worst extreme, to choose people to prosecute, not simply cases. "In effect, the consequence of unbridled prosecutorial discretion is that the state's attorney has the power to choose his cases, and, thus, can choose his defendants."[120]

Despite these concerns, the expansive discretionary authority of prosecutors has been repeatedly upheld by appellate courts. The case decisions reflect separation of powers considerations as well as the recognition that

> the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to

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[119]Vorenberg, *supra* note 101. *See also* James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 Duke L.J. 651.

[120]Lundquist, *supra* note 98, at 501. *See also* Uviller, *supra* note 107, at 1147; Lezak & Leonard, *supra* note 100, at 255–56; LaFave, *supra* note 99, at 535–36; Melilli, *supra* note 83, at 673.

undertake.[121]

In affirming that a court cannot compel the prosecution of a complaint, the discretionary role of a prosecutor in considering charges has been outlined.

> It by no means follows, however, that the duty to prosecute follows automatically from the presentation of a complaint. The United States Attorney is not a rubber stamp. His problems are not solved by the strict application of an inflexible formula. Rather, their solution calls for the exercise of judgment. . . .
>
> There are a number of elements in the equation, and all of them must be carefully considered. Paramount among them is a determination that a prosecution will promote the ends of justice, instill respect for the law, and advance the cause of ordered liberty. . . .
>
> Other considerations are the likelihood of conviction, turning on choice of a strong case to test uncertain law, the degree of criminality, the weight of the evidence, the credibility of witnesses, precedent, policy, the climate of public opinion, timing, and the relative gravity of the offense. . . .
>
> Still other factors are the relative importance of the offense compared with the competing demands of other cases on the time and resources of investigation, prosecution and trial. All of these and numerous other intangible and imponderable factors must be carefully weighed and considered by the conscientious United States Attorney in deciding whether or not to prosecute.[122]

Another often quoted example of judicial deference to prosecutorial discretion is found in *Newman v. United States*:

> Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.[123]

The court in *Newman* further affirmed the limits of judicial review:

> To say that the United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task; of course this concept would negate discretion. Myriad factors can enter into the prosecutor's decision. Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by

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[121] *Wayte v. United States*, 470 U.S. 598, 607 (1985). *See also* Rebecca M. Chattin, *Prosecutorial Discretion, in §II, Preliminary Proceedings, Criminal Procedure Project*, 84 Geo. L.J. 887 (1996).

[122] *Pugach v. Klein*, 193 F. Supp. 630, 634–35 (S.D.N.Y. 1961).

[123] *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

> law, duty or tradition to treat them the same as to charges. On the contrary, he is expected to exercise discretion and common sense to the end that if, for example, one is a young first offender and the other older, with a criminal record, or one played a lesser and the other a dominant role, one the instigator and the other a follower, the prosecutor can and should take such factors into account; no court has any jurisdiction to inquire into or review his decision.[124]

According to one commentator, the ethical objective is "to keep the exercise of this important discretionary power of the prosecutor free of improper motivation."[125] This objective has been the focus of appellate review, as well.

The equal protection clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment provide the foundation for the review of prosecutorial decision making. Expressing the principle of equality, the clauses require similar individuals to be treated in a similar manner by the government.[126] However, the Supreme Court has consistently qualified this guarantee in its decisions by noting that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[127] Absolute identity of treatment is not required.[128] "Dissimilar treatment reasonably accorded persons dissimilarly situated does not implicate the equality demand of the Fifth Amendment."[129] In fact, equal protection guarantees not only that similar people will be dealt with in a similar manner, but also that people of different circumstances will not be treated as if they were the same.[130]

Applied to the actions of prosecutors, the equal protection guarantee prohibits the abuse of discretion. Originating in *Yick Wo v. Hopkins*,[131] the doctrine of

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[124]*Id.* at 481–82.

[125]Uviller, *supra* note 107, at 1152.

[126]Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* §18.2 (3rd ed. 1999).

[127]*Tigner v. State of Texas*, 310 U.S. 141, 147 (1940).

[128]*Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 237 (1954).

[129]*United States v. Bell*, 506 F.2d 207, 222 (D.C. Cir. 1974).

[130]Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949).

[131]*Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

selective enforcement was extended to prosecutors in *Oyler v. Boles.*[132] However, the United States Supreme Court in *Oyler* stated that the "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."[133] Rather, a selective prosecution claim must be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[134]

The court went on to outline the elements of a selective prosecution claim. These elements have been employed in succeeding cases.[135] In applying the elements, there is a presumption that the prosecutor acted in good faith, motivated by proper considerations.[136] A defendant must meet a heavy burden in making a prima facie showing of selective prosecution.[137] Additionally, most courts apply a clearly erroneous standard of review to discriminatory prosecution claims.[138]

The elements require proof of both a discriminatory effect and a discriminatory purpose. First, there must be proof that other persons similarly situated were not prosecuted. A court must examine all relevant factors to determine whether others are similarly situated.[139] Defendants "are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them."[140]

Second, it must be proved that the decision to prosecute involved a discriminatory selection based upon an arbitrary, invidious, or impermissible

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[132]*Oyler v. Boles*, 368 U.S. 448 (1962).

[133]*Id.* at 456.

[134]*Id.*

[135]*Wayte v. United States*, 470 U.S. 598 (1985).

[136]*United States v. Armstrong*, 517 U.S. 456, 464 (1996); *U.S. v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997).

[137]*United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

[138]Chattin, *supra* note 121, at 899.

[139]*United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996); *Ah Sin v. Wittman*, 198 U.S. 500, 507–08 (1905); *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 946 (D.C. Cir. 1982); *United States v. Aguilar*, 883 F.2d 662, 706–08 (9th Cir. 1989).

[140]*Olvis*, 97 F.3d at 744.

consideration. Examples of unjustifiable standards can include classifications such as race, religion, or sex. Interestingly, some courts do not consider distinctions based on gender to be invidious or arbitrary. As a result, a strict scrutiny test is not used. Instead, in these cases, a rational basis for the selection simply needs to be shown.[141]

According to one commentary, the classification "cannot be looked at only in the abstract. Rather, it must be examined as it relates to legitimate law enforcement objectives."[142] A classification is arbitrary only if "people have been classified according to criteria which are clearly irrelevant to law enforcement purposes."[143] The central interests which the law is intended to protect can be the focus for the prosecutor.[144] It is "clearly permissible to concentrate upon gross or substantial violations of a statute or those violations which involve that part of the proscribed conduct which is most serious or of greater legitimate public concern."[145]

For example, in *United States v. Silien*,[146] Haitian immigrants and marriage arrangers were convicted of conspiracy to violate United States immigration laws. The court held that the putative wives of the Haitians were not similarly situated because they "can themselves be seen as victims rather than as culpable perpetrators"[147] of the marriage fraud. As a result, even though the Haitians and arrangers were prosecuted and the wives were not, the decision was not discriminatory.

Similarly, in *State v. Harris*,[148] a father was found guilty of incest by having sexual intercourse with his adopted daughter. The father argued that the State's

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[141]*City of Minneapolis v. Buschette*, 240 N.W.2d 500, 505 (Minn. 1976); *U.S. v. Wilson*, 342 A.2d 27, 30 (D.C. App. 1975).

[142]4 Wayne R. LaFave et al., *Criminal Procedure* 52 (2nd ed. 1999).

[143]Daniel J. Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. Ill. L. F. 88, 110.

[144]*Id.* at 118.

[145]4 LaFave et al., *supra* note 142, at 54.

[146]*United States v. Silien*, 825 F.2d 320 (11th Cir. 1987).

[147]*Id.* at 322.

[148]*State v. Harris*, 983 P.2d 881 (Mont. 1999).

failure to prosecute his daughter constituted disparate treatment of members of the same class. The court found that there was no violation of equal protection.

B. Selective Prosecution Claims and Domestic Violence Cases

Few case decisions have upheld claims of discriminatory prosecution.[149] This suggests that "backlash" claims which could be raised by batterers displeased with the discretionary decisions of prosecutors would not be likely to succeed. Such claims could potentially be raised in response to the implementation of guidelines (like those in Duluth) developed in response to the unique circumstances of ongoing victims of domestic violence. A review of the elements of a selective prosecution claim as applied to domestic violence cases reveals why such a claim is unlikely to succeed.

First, it must be demonstrated that others similarly situated have not been prosecuted. This first element of a selective prosecution claim would be very difficult to prove under the fact-focused test discussed above because the differing circumstances between ongoing victims and their batterers result in numerous distinguishable legitimate prosecutorial factors leading to different decisions concerning them. Just as discrimination does not exist in a vacuum,[150] neither does intimate violence. An examination of the context is crucial.[151] There is abundant evidence that ongoing victims of domestic violence, regardless of gender, are not at all similarly situated to their abusive partners.

Second, a prosecution policy differentiating violence used by ongoing victims of abuse from that used by batterers is not arbitrary. The classification is clearly relevant to the purposes of law enforcement. As previously discussed, the legitimate concern in the general application of the criminal law is preventing injury to the health, safety, morals, and welfare of the public.[152] The purpose of assault statutes specifically is to prevent bodily harm or the fear of it.[153] Under

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[149]Chattin, *supra* note 121, at 891; Gershman, *supra* note 70, §4:9; 4 LaFave et al., *supra* note 142, at 44.

[150]*United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996).

[151]Dasgupta, *supra* note 20, at 200.

[152]See §III of this monograph for a discussion of the purpose of the criminal law.

[153]See §IV of this monograph for a discussion of how crimes are classified.

either analysis, the public's serious concern about the problem of domestic violence results in a greater legitimate focus by prosecutors on those perpetrators who are *not* ongoing victims of abuse.

Further, despite the societal legitimization and cultural support that transforms male violence against women into battering, the policy itself is not ultimately based on gender. Rather, the distinctions it makes are based on the circumstances of the relative situations, not on the gender of the individuals involved. Consequently, the response to such anticipated allegations is also the practical one: the prosecution policy should be drafted in gender-neutral terms. Although historically, broad cultural support for battering ensures that ongoing victims of domestic abuse will most often be female, core group members recognized that male defendants could qualify for special consideration in a number of ways. Examples could include men who are ongoing victims in same-sex relationships and men with physical disabilities who are in heterosexual relationships. Men who were victimized as children by abusive mothers and who then commit retaliatory assaults against them could also receive special consideration.

We had ascertained that case law supports broad discretionary authority for prosecutors in their efforts to individualize justice. Rather than pressing for "decent restraint" of the prosecutor's discretion, activists for battered women were demanding the exercise of greater discretion by prosecutors in their communities. Both legal tradition and appellate decisions analyzing equal protection issues support that discretion.

It was now clear to us as prosecutors that the extensive discretion we exercise daily is a key feature of our role as ministers of justice. Situated within an adversarial system that defines criminal activity with a broad sweep, we realized that we were already invested with the necessary flexibility to temper its consequences. In fact, the system's design anticipates that we and other practitioners will do so. Failing to make appropriate distinctions among the situations and offenders we encounter does not further justice. Instead, justice—fairness[154]—demands that we discern the moral questions raised by the real-life stories in our case files.

Those moral distinctions had become evident to us during the many months

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[154]John Rawls, *A Theory of Justice* 3 (1971).

of our core group's work. We had received the benefit of our community's input on the dynamics of abusive relationships by working side by side with advocates for battered women and with our fellow practitioners. We were ready now to figure out how to *structure* the use of our discretion in ways that would promote both public safety and just results when battered women came before us as defendants. We were ready to start working on the specifics of a prosecution policy.

IX. DILEMMAS IN DRAFTING THE PROSECUTION POLICY

> "The existence of and adherence to uniform rules is a good and obviously necessary part of any true government of law but rules exist to govern actions and actions are concerned with particulars. Implementation must always leave room for us to adjust to the circumstances. The same idea holds for the art of crafting rules. We should go about doing that with a good strong sense of context and common sense, with a real and deeply considered appreciation for the balance of value judgments that any rule involves. . . . As it is in life, context is vital in the law."
>
> —Justice Sandra Day O'Connor, Address to Minnesota Women Lawyers (July 2001), *quoted in* Minnesota Lawyer, July 9, 2001, at 12.

As a core group we had carefully examined the context in which battered women use violence. We had developed a commonsense understanding of the issue by acknowledging the circumstances of battered women's lives. This understanding would now be put to the test. Could we apply it to the many policy decisions facing us? A balance of value judgments was needed at every step of our journey.

A. Determining the Disposition

> "Policy articulation does not create hard and fast rules within the administration of justice; it structures prosecutorial discretion so that criminal laws will be enforced effectively and even-handedly."
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> —Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 Am. U. L. Rev. 310, 374 (1978).

As we began to discuss the specifics of a prosecution policy, the first issue we faced was the type of case disposition to be offered to defendants. Throughout the months we had met, statements made by core group members who were not lawyers had reflected both misunderstandings and false assumptions concerning the various ways criminal cases could be resolved. Eventually, we realized that a shared knowledge of each disposition option was necessary. At the suggestion of a battered women's advocate, the City Attorney's Office prepared a chart that delineated each way a criminal case could be concluded in our system, along with its relevant features.

This chart outlined options available through Minnesota statutes and caselaw,

as well as those utilized routinely during years of local court practice. These seven options included a conviction for assault or disorderly conduct, a stay of imposition for such a conviction, a stay of adjudication, a conviction for assault or disorderly conduct under Duluth's city ordinances, a deferral of prosecution, dismissal, and a yet-to-be-determined option which would combine features of the others.

The core group then thoroughly reviewed these options and compared their features. This exercise provided at least two benefits. First, the non-lawyers among us acquired information and perspective about the legal system and the context in which individual case decisions are made. This greater understanding allowed them to provide much more meaningful input about each option's consequences for battered women than would otherwise have been possible. Second, the review assured the prosecutors in the group that all options were under consideration.

It quickly became apparent that the options best suited to the individual case needs of prosecutors were not necessarily those best suited to the long-term safety needs of battered women defendants. Advocates pushed for minimal system involvement. Prosecutors, in contrast, focused on the disposition options that allowed for the greatest control of defendants.

A seemingly middle-ground option was also problematic. A stay of adjudication had appeared, on its face, to present a perfect compromise. Under this type of resolution, prosecutors would obtain a factual basis from a defendant in court, on the record. The court would stay the acceptance of the plea so that no conviction would be entered if conditions of the stay were met. The defendant would then be placed on "probation" in the usual manner. Prosecutors believed that placing defendants on probation would offer two important features: the likelihood that they would be required to attend education groups and the certainty that their compliance with the conditions of the stay would be monitored. Advocates saw that the benefit to battered women was the possibility of completing the terms of the stay without a conviction being entered.

The major problem with a stay of adjudication concerned its development under Minnesota case decisions. Unrecognized in statutes or procedural rules, it

was a recent creation of Minnesota's appellate courts.[155] Apparently designed to address judicial concerns about prosecutorial actions only in very limited and exceptional cases, this newly created disposition had no track record in the Duluth court system. Further, questions had arisen about whether prosecutorial consent was needed for the court to adopt a stay of adjudication as a resolution of a case.[156] Because so many issues surrounded the use of violence by battered women and because a number of difficult questions remained, the prosecutors in the core group concluded that this new possible disposition would not ensure the consistency and flexibility that we needed. It thus appeared that a conviction would result no matter what disposition we chose to offer as a feature of the program.

However, during this time the social worker who oversaw our county's licensing of family daycare homes made a presentation to the core group. Confirming that the majority of applicants for licenses are women, she provided information about the effects of various convictions on a daycare provider's license. This information highlighted the difficulties for defendants in typical caregiving employment situations. As a result, we once again focused on disposition options that included the possibility of probation without an actual conviction if the defendant complied with the conditions of probation.

Up to this point, putting a defendant on probation without first obtaining a conviction hadn't seemed to be a possibility. Then a supervisory probation officer who was a key core group member surprised us. Although he had been resistant to making changes to the system, his participation in our debates and discussions had transformed his thinking. As a result, he offered to make probation assistance

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[155]*State v. Krotzer*, 548 N.W.2d 252 (Minn. 1996). *See also* Mark H. Zitzewitz, Comment, State v. Krotzer: *Inherent Judicial Authority—Going Where No Court Has Gone Before*, 81 Minn. L. Rev. 1049 (1997) (contending that the decision in *Krotzer* holding that a stay of adjudication was within the inherent judicial power of the trial court subverted the constitutional roles of both the legislature to define criminal conduct and establish penalties, and of the prosecutor to bring charges based on the exercise of his or her discretion).

[156]*State v. Foss*, 556 N.W.2d 540 (Minn. 1996); *State v. Cash*, 558 N.W.2d 735 (Minn. 1997); *State v. Thoma*, 569 N.W.2d 205 (Minn. Ct. App. 1997); *State v. Twiss*, 570 N.W.2d 487 (Minn. 1997); *State v. Prabhudail*, 602 N.W.2d 413 (Minn. Ct. App. 1999); *State v. Scaife*, 608 N.W.2d 163 (Minn. Ct. App. 2000); *State v. Leming*, 617 N.W.2d 587 (Minn. Ct. App. 2000); *State v. Ohrt*, 619 N.W.2d 790 (Minn. Ct. App. 2000); *State v. Hoelzel*, 621 N.W.2d 44 (Minn. Ct. App. 2000); *State v. Lattimer*, 624 N.W.2d 284 (Minn. Ct. App. 2001); *State v. Angotti*, 633 N.W.2d 554 (Minn. Ct. App. 2001); *State v. Pearson*, 637 N.W.2d 845 (Minn. 2002); *State v. Colby*, 657 N.W.2d 897 (Minn. Ct. App. 2003).

available in these cases—even without convictions.

This development allowed the core group, and especially its prosecutors, to look with greater interest at an option used locally. Many years of Duluth court practice had established the prosecutor's exclusive control over the option referred to as a deferral of prosecution. Under this option, the prosecution of cases had been deferred for a period of time, sometimes with specific agreed-upon conditions, sometimes not. More demanding requirements, such as education groups or counseling, usually had not been included in these conditions because of the great difficulty in monitoring compliance without the involvement of the probation office. In addition, a factual basis for the criminal charge was virtually never obtained from the defendant, leading to future difficulties in the prosecution of a case if the deferral conditions were not met.

With the offer of the probation office, one of the biggest problems with this option was eliminated. This shift in both thinking and practice for probation provided the impetus for a change in thinking and practice for prosecutors, as well. Deferral of prosecution now offered something to satisfy everyone in the core group: the battered woman defendant would not automatically be convicted, and the prosecutor could be assured that the conditions of the deferral would be monitored, including participation in an education group. Another advantage of this option became evident when an advocate pointed out that the most difficult period for an assault victim is the time between the offense and the resolution of the case. Whether or not she is still living with her assailant, she may well be feeling some combination of anger, hurt, anxiety, fear, and guilt. Because the defendants in the cases under discussion were also ongoing victims, the possibility of early resolution seemed to offer them an additional benefit.

A final concern for prosecutors was the lack of a factual basis traditionally associated with a deferral of prosecution under local court practice. We wanted to remedy this by requiring an admission of guilt for entry into the program. The core group debated this issue extensively, focusing on what form of admission should be required. Options discussed included a written or videotaped admission or an admission in court on the record. Advocates saw the requirement as a red flag and were understandably concerned about the possible use of the admission by batterers and social service agencies in family court proceedings. As a result, this issue proved to be one of the most contentious we had faced. Eventually, we reached consensus by agreeing to require an oral admission on the court record.

Advocates saw this as a concession necessary to avoid a conviction; prosecutors saw it as a measure necessary to avoid feeling "out on a limb" altogether.

To prosecutors, a deferral of prosecution unexpectedly now seemed to provide the most workable solution to the problem of what type of case disposition to offer in our program. Although consensus had been reached, prosecutors were uneasy with not getting a conviction. Advocates remained uncomfortable with the requirement of a factual basis from defendants. However, our mutual discomfort demonstrated to us that we had reached another milepost in our journey. The compromise we had warily reached allowed us to turn our attention to the next big hurdle: creating the criteria for admission to the program.

B. Creating the Criteria

> "It is easy enough to state the need for criteria, but it is quite another thing to articulate them in practice."
>
> —Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. Rev. 1, 8 (1971).

Not surprisingly, we engaged in many debates about the criteria for admission to the deferral program. These discussions took place over months of meetings, some highly charged. On one hand, the group's system practitioners frequently expressed a desire to adopt unambiguous criteria governing admission into the program. We knew our decisions would be challenged and tested, and we wanted clear criteria to protect and guide us. On the other hand, we shared a growing awareness that just as with everything else we had discussed, finding simple answers was impossible. We realized that we needed to embrace the ambiguity before us.

Finally, after a number of lengthy discussions, we decided on a two-step application process. We adopted relatively bright-line criteria for initial consideration for the program as a guide for interested battered women defendants and their attorneys. This screening would then be followed by a more in-depth evaluation. The prosecution guidelines we developed address both the initial consideration of applicants and our criteria for fully evaluating them.[157] The following subsections describe the issues we discussed and the reasoning

[157]The prosecution guidelines are included in Appendix 7.

underlying the criteria we selected.

1. Eligibility for Initial Consideration

In discussing initial eligibility, two areas quickly emerged as points of contention: the defendant's history as a victim and her history of using violence.

i. The defendant's history as a victim

> "Let's be honest and admit it: *The system hates women.* We're just not able to talk about some of these real issues."
>
> —Duluth battered women's advocate, at a core group meeting

We first considered the history of victimization that would be required of a defendant. To advocates, this program was being developed for battered women, and they defined battering as the full range of abusive behavior, including (but not limited to) physical assault. The Power and Control Wheel, conceptualized in Duluth years earlier, delineated many of the forms of abusive, controlling conduct experienced by battered women.[158] This concept of battering defined the victims for whom advocates sought the prosecution program.

To prosecutors and police and probation officers, this view was problematic. From our perspective, the advocates' expansive (but accurate) definition of battering provided numerous opportunities for distortion by inappropriate applicants. We all had worked with domestic assault cases in which male defendants claimed "emotional abuse" by their female partners as an explanation or justification for their own conduct. Were these violent men, then, victims of battering? How would we effectively limit the prosecution program to those defendants who most deserved our consideration? Would the program simply become a standard way of disposing of all domestic cases? In other words, how would we distinguish between those individual defendants who were genuine victims of battering and those who were simply "victims" of bad relationships?

For the system practitioners, a requirement of physical abuse was the obvious solution. These were the incidents to which our occupations and the criminal justice system itself had always directed our focus. To battered women's advocates, however, this missed the bigger picture—the reality of battering and its effects on victims. They pointed out that a battered woman is not necessarily a

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[158]See Appendix 8.

woman who has been physically assaulted. Nonetheless, in an effort to carefully limit the application of the program, the language we adopted requires the defendant to have experienced a history of physical abuse.

We also decided to require this physical abuse to have been committed by the complainant in the case under review. This restriction omitted consideration of physical abuse experienced by an applicant in other relationships. Advocates, however, knew from extensive experience in working with women that certain types of behavior related to being battered are carried over into new relationships. To them, it was only fair to include these women in the deferral program.

This possibility raised a significant "floodgate" issue for prosecutors and other system practitioners. Many scenarios came to mind. For example, it was common for each of us to deal with cases in which male defendants charged with domestic assault had grown up in severely dysfunctional, even abusive, homes. If a man is the victim of sexual abuse as a child, should he qualify for special treatment when he, as an adult, assaults his wife or girlfriend? Seeing a potential flood of cases, we adopted a bright-line requirement: to apply for the program a candidate must be the victim of physical abuse by the complainant in the current case. Although everyone viewed this as an imperfect compromise, it provided the limitation that prosecutors saw as necessary. By this means we could acknowledge the unique circumstances of battering relationships without condoning the use of violence generally.

ii. The defendant's history of using violence

"I know what works; I know what doesn't work. *This won't work.*"

—Probation officer, at a core group meeting

A second point of contention for the core group concerned the defendant's criminal history and history of using violence. Increasingly viewing the deferral program as designed for first offenders, probation officers insisted that an applicant should have no criminal history whatsoever; she should have a clean record. They reasoned that offenders and their attorneys would otherwise stretch the limits of eligibility for the program, as had happened over the years with diversion programs in the Duluth system. The probation officers were also concerned that creation of a new "niche" for cases would increase the number of arrests and consequently increase their caseloads, a view shared by a police department representative. Finally, probation officers considered any conviction,