

AT A CROSSROADS:

*Developing Duluth's Prosecution Response
to Battered Women Who Fight Back*



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Chief Prosecutor
City Attorney's Office
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Preface

This monograph tells the story of how city prosecutors, battered women's advocates, and other practitioners in Duluth's criminal justice system came together to address the unique issues presented by domestic violence defendants who are also battered women. As a prosecutor in the Duluth City Attorney's Office, I had become painfully aware of the way our system's efforts compromised the safety of the battered women defendants we prosecuted. Our conviction rate wasn't the issue. Instead, our concern focused on public safety—the safety of all concerned. My co-workers and I knew we had to do something different, but we didn't know what or how. So without fully realizing what we were getting into, our office obtained grant funding to deal with the problem once and for all. An interesting and exhausting year and a half later, we had developed a new prosecution policy and a new program—the Crossroads Program.

I know this monograph is long; it's definitely longer than what I wanted to write, and it's most likely longer than what you want to read. But the issue we were grappling with had a life of its own, one that didn't fit our timetables. As hard as we tried, it resisted an easy, neat resolution. I have intentionally included many details of our struggles because I know that the viewpoints and perspectives that emerged in our discussions are not unique to Duluth.

None of us took lightly the issue of battered women who use violence. Our discussions were intense. Looking back, we think this was partly because all of the complex issues that arise in domestic violence intervention work seem to be encapsulated in this one area.

For example, questions about a battered woman's culpability immediately come up, as well as who, if anyone, is responsible for intervening. Issues of gender—men's and women's roles and our society's expectations—are always present in cases in which battered women use physical force. We had seemingly never-ending debates about these issues and more. There was just no simple way to get around it. During the process, we learned a lot about ourselves, both good and bad. Just like us, you'll probably find yourself somewhere in these issues and in the pages of this monograph.

Just as there was no simple way to discuss the issues, there has been no simple way to write about them. But I hope our story will save you some time and energy in learning how to deal fairly with the battered women who use violence in your community. To that end I have included a discussion of the legal principles that arise for prosecutors in deciding how to handle these cases. Duluth's domestic violence intervention efforts are examined with interest by others as they develop policies and procedures in their own communities. I wanted to make sure we had done the right thing in creating the Crossroads Program, so

I've anchored the description of our work in the traditional legal theories and principles underlying our American criminal justice system.

If you are an advocate for battered women, don't skip over the legal analysis developed in this monograph. I've tried to write it in a way that is understandable and interesting to me and to other prosecutors as well as to people who are not lawyers. The time is always right for prosecutors and other criminal justice practitioners to better understand the realities of battered women's lives. So too, more than twenty-five years into the battered women's movement, it's time for advocates to better understand the professional working realities of the prosecutors they want to influence.

My biggest fear as we struggled to create the Crossroads Program was that we would end up with something that wasn't just. To make sure this didn't happen, we considered the various ways people use violence (or the threat of violence): to defend themselves, to control their immediate circumstances, to maintain their autonomy, or to dominate and control others. We had to think carefully about this continuum of the uses of violence and how it "fit" within the structure of our legal system and within the definitions of the crimes we prosecute.

You may be reading this preface through a lens that presumes that our work was a "giveaway" for women—something special for women that came at the expense of men. If so, I invite you to read this monograph through a different lens, one that permits your thinking to be shaped by the real-life experiences of both the residents of our communities and the criminal justice practitioners who serve them. That's the way of looking at this issue that we had to embrace before we could even start to think fairly about our cases, let alone do anything that was meaningful.

From that perspective, this monograph also offers a firsthand look at how institutional change can occur in the criminal justice system. Over the years, thousands of criminal justice practitioners and battered women's advocates have traveled to Duluth from all over the world to learn about the "Duluth model," the nation's first coordinated community response to domestic violence. These visitors have been able to get a glimpse of both the successful and problematic features of our efforts. In reading this monograph, you'll get an insider's look at both how the Duluth model works in practice and how our local criminal justice system has changed as a result.

A hallmark of the Duluth model is that it brings together the relevant people to work collaboratively on a problem. Another is that it centers our debates on the lives of real people. You'll see both of these occur in this account of the creation of the Crossroads Program.

In Duluth, it happened to be prosecutors who first took on the issue of battered women who use violence, though it didn't necessarily need to be. There were advantages to this approach, however. Our central position in the criminal justice system gave us many opportunities to influence the policies and procedures of practitioners in other agencies.

The day-to-day contact we had with others throughout our court system helped make this possible.

In fact, our work in creating a prosecution policy inevitably led to changes in other parts of our criminal justice system. As we worked, we saw the need to revisit the language of our police department's mandatory arrest policy. This was controversial; it was an established policy even battered women's advocates were reluctant to change. But eventually, after much discussion, changes were made. I have written about these developments, but additional analysis can be found in Ellen Pence's afterword.

I also discuss issues of self-defense throughout the monograph. Though the Crossroads Program was intended for defendants *not* acting in self-defense, this legal concept—and its limitations—loomed large in all of our discussions. After the program was established, battered women's advocates made efforts to deal directly with this issue. Trainings for defense attorneys resulted, as did an ongoing examination of the legal definition of self-defense and how it affects the lives of battered women and the cases in which they become involved.

The concept of advocacy for battered women was itself revisited. As prosecutors, police, and probation officers struggled to rethink our roles in the criminal justice system and to understand the effects of our work on people in our community, we increasingly saw a need for greater advocacy for battered women as defendants. Many of us have concluded that criminal justice practitioners have a duty and responsibility to intervene in the violent relationships that exist in our community, with or without the encouragement, support, or prodding of battered women's advocates. But in the Crossroads Program we've learned that our work will never realize its full potential in promoting public safety without a concurrent commitment by advocates to unequivocally advocate for the women of our community, not just assist them. We've made efforts in Duluth to rethink the state of advocacy both nationally and locally, but it remains a difficult issue.

In her afterword, Ellen Pence discusses the way the development of the Crossroads Program exemplifies the principles that guide the coordinated community response in Duluth and identifies the elements necessary to successfully promote change within community institutions. I have prosecuted cases in a system that for many years has been the object of reform efforts by community groups. However, my work in facilitating the creation of the Crossroads Program has given me a new appreciation for how difficult it is to accomplish genuine change in the criminal justice system.

When I started to deal with this problem, I longed to read something that would help me figure out what to do. I realize that I have now written that very document. I hope the story of our experiences will be helpful to the work you do in your community. Our work has definitely transformed us as practitioners and advocates. Even more important, we think it's made a difference in the safety of the women and men in our community.

I. INTRODUCTION

crossroad *n.* **1.** A road that intersects another road. **2. Plural. a.** A place where two or more roads meet. **b.** A place where different cultures meet. **c.** A crucial point or place.

—*The American Heritage Dictionary of the English Language* 316 (1969).

Since the late 1970s, activists for battered women have worked toward reforming the criminal justice system. In recent years domestic violence has taken center stage in American society as a significant social problem. Throughout the United States, numerous reform efforts have been designed and implemented to better coordinate the responses of criminal justice agencies to domestic violence in local communities.

These reforms have often been based on the widely known “Duluth model.” Originating in Duluth, Minnesota, this model is the nation’s first community-organized criminal justice reform effort aimed at the problem of domestic violence. Based on the goals of victim safety, offender accountability, and general deterrence, the model coordinates the activities of criminal justice and community agencies through an independent, community-based intervention project.

A key aspect of the Duluth model is the development of policies and procedures to better protect domestic abuse victims and to provide consistent, predictable outcomes. For example, in March, 1981, after an extensive experiment the previous year, the Duluth Police Department became the first law enforcement agency in the United States to adopt a mandatory arrest policy for domestic violence cases. The policy states that if visible injuries are observed, officers must arrest a perpetrator upon establishing probable cause to believe an assault occurred.¹ Designed as the initial point of intervention for criminal justice agencies in Duluth’s coordinated community response to domestic violence, this policy has offered greater protection in succeeding years to many women battered by their husbands or male partners. It was followed by other initiatives such as “no-drop” prosecution policies, probation procedures, and sentencing guidelines. These changes, instituted to enhance the safety of battered women, have been

¹Duluth Police Department Manual, General Order 230.01.

studied and adopted throughout the nation by local communities seeking to replicate or adapt the Duluth model.

However, there has been an unintended consequence of these reform efforts in Duluth and elsewhere: battered women have found themselves arrested, prosecuted, and sentenced along with the batterers for whom the policies were intended. Of even greater concern to battered women's activists, women who have used violence in response to ongoing physical and emotional abuse by their violent partners are among those lawfully arrested under Duluth's mandatory arrest policy and other similar policies. The resulting court cases involving battered women as defendants have raised perplexing questions for prosecutors in the Duluth City Attorney's Office and elsewhere.

For years we have pondered the many issues raised by these criminal cases. We knew what we wanted to accomplish in a typical domestic violence case. It wasn't hard to figure out that justice had something to do with holding a batterer accountable for his behavior and, we hoped, providing some safety for his victim in the process. The biggest problem we faced was how to accomplish these objectives.

But in cases involving charges against the battered women partners of these men, it wasn't so obvious. When it came to these cases, we didn't even know what we thought was a right outcome, let alone how to get there. Questions plagued us over the years as cases involving battered women arrested for assaulting their partners landed in file folders on our desks. What does it mean to protect the victim in these cases? How can the victim of the incident and the victim of ongoing abuse both be protected? Do they both *need* to be protected? What does it mean to hold the offender accountable in such cases? And how does holding a battered woman accountable for her own illegal use of violence affect her safety in a violent relationship characterized by ongoing patterns of physical and emotional abuse? We also wondered, what is fair in these cases? What does justice mean in a case in which a battered woman uses violence against an abuser who the criminal justice system has (at best) imperfectly held accountable for his own assaultive acts?

In early years it was enough for us to achieve some success in the technical aspects of prosecuting “run of the mill” defendants (often, but not always, men).² We didn’t have time to pay much attention to the small but significant number of battered women coming through our courthouse doors as defendants for assaulting their abusive partners. Duluth is a small city, with proportionately fewer resources devoted to the operation of its criminal justice system. As a result, the “McJustice”³ mode for processing criminal cases has been in evidence here, just as it has in many larger cities. In cases involving battered women as defendants, this approach seemed to be merely the result of our no-drop prosecution policy and limited system resources.

At some point, however, we could no longer avoid acknowledging the unique aspects of cases involving battered women defendants. We had shared our concerns about this particularly difficult and troublesome aspect of Duluth’s domestic violence intervention efforts with advocates for battered women. Through day-to-day contact and conversations, both advocates and prosecutors had come to realize that the myriad issues raised when battered women were arrested both demanded and deserved closer analysis.

With the support of advocates, the time was right for the City Attorney’s Office to apply for Violence Against Women Act S.T.O.P. grant funding through the Minnesota Department of Corrections to develop a prosecution plan for these cases. Delighted to receive funding, but unaware of the obstacles that lay ahead, we set out on the path to a prosecution plan. Like Carol in the following scenario, we were at a crucial point or place, a crossroads.

²See Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 Hamline L. Rev. 115 (1991).

³Thanks to my former fellow prosecutor Tony Blodgett for coining this term some years ago upon learning that a “drive-thru” installation for the payment of parking tickets had been constructed outside the Duluth courthouse. I am using the term more broadly, just as he did since that day. To us, “McJustice” means a “one-size-fits-all” approach to the processing of criminal cases.

*Case scenario: Carol*⁴

On a March night, Duluth police officers were dispatched to a local motel room to deal with a domestic situation. At the door, they could hear a female voice yelling obscenities and what sounded like someone being hit or slapped. John, who was bleeding heavily from the mouth and nose, answered their knock. He had cuts and abrasions around his cheek and on his arm. His wife, Carol, had no visible signs of injury. The officers observed that she was highly intoxicated. John told the officers, "I took a beating." He said that Carol had been punching him. Asked how many times he had been hit, John said, "What does it matter, I took a beating."

Carol said that she had been beaten by John for most of their thirty-four-year marriage and she had had enough. She said she had not been assaulted in this incident, however. Carol's right knuckles were bloody and appeared to be swollen and bruised. After being told that she would be arrested, Carol stated, "Well, he slapped me across the face." There were no marks on her face. When John heard that his wife was under arrest, he said, "I deny everything. She didn't hit me. I fell against the door." In the squad car, Carol said, "He's beaten me for years and I'm not going to take it anymore."

Two weeks later, Carol wrote a statement to her attorney describing the incident in detail. She stated that she had an adult foster care license. She said that she took care of her mother and another woman in her home, work that required her attention twenty-four hours a day, seven days a week. To get away from home responsibilities for a while, Carol and John had decided to spend a night at a motel. Friends picked them up that evening and they went to the All-American Club for dinner and dancing. John was drinking steadily throughout the day and evening.

Back at the motel, John and Carol began to argue. From experience Carol knew that she had to get away from him. She grabbed her coat, purse, and car keys and left the room. John, dressed only in his undershorts, came running down the hall after her and out through the lobby, shouting for her not to go. He got to the car at the same time she did and jumped into the passenger seat, refusing to get out or let her go.

⁴Taken from a case file prosecuted by the Duluth City Attorney's Office. The names of those involved have been changed.

Carol went back to the room and locked John out. Eventually, she let him in the room and he slapped her face. She tried to leave the room again, but he wouldn't let her out. He pushed Carol to the floor and held her down, saying that she couldn't go anywhere. She struggled with him and got away, but again John stood in front of the door and wouldn't let her out.

John pushed Carol to the bed ten to fifteen times; twice she called for help. Carol struggled with him and bit his arm. Finally, he let her go. Then once again he ran and stood in front of the door. By that time Carol was so upset that she was hitting him on the chest. He stumbled and fell against the bathroom door frame and hit his nose, which started to bleed. The police arrived. Carol said she didn't want to make things any worse by telling them what had happened. She couldn't believe that they were taking her to jail. She said, "I don't believe this. He's been doing this to me for almost thirty-four years and I'm the one going to jail." She admitted swearing at the officers.

In a later statement to Carol's attorney, John said that his wife had been under a great deal of stress in her job and with her mother. He said that Carol just went "nuts" and that he did, too. He tried to restrain her on the bed and she was fighting with him. He admitted that to calm her down, he "hit her first." He said this seemed to enrage her even more. Carol slapped him a couple of times in response to his blows to her. She escaped from the room, but eventually, he persuaded her to come back. The argument continued.

He said that he begged the police not to arrest his wife and that he was not the "victim" of domestic assault. "I just want my wife to love me again and get back to normal . . . this court thing will not help us at all." John claimed that he and Carol have a loving relationship but that he has a problem with drinking. He acknowledged abusing Carol in the past but said that he hadn't actively abused her in seventeen years. He stated that they have been trying hard to "put their marriage right." John said that he slapped Carol first and that she was just reacting to his aggression toward her.

Several friends of the family provided statements to Carol's attorney. Julie stated that she has known Carol all her life. She said that she knew there were marital problems between Carol and John. She remembered once being at a "Mr. Qwik Wrench" party at which John shoved Carol to the floor when she tried to stop him from driving drunk. On another occasion she saw large bruises on

Carol's arms. Julie said that Carol is not a violent person. She had never seen any indications that Carol had abused John in the past.

Anna also gave a statement to Carol's attorney. She said that she has known Carol and John for about twenty years. She said that John is a wonderful person, but when he's drinking he gets abusive to Carol. Anna said that she personally knows of at least six times when John was abusive to Carol while they were her neighbors. Once Carol came to her and showed her bruises on her arms. Anna also knows that John struck Carol in the face. She said that it doesn't seem like Carol to attack John; she suspects that John must have done something abusive to Carol first and that Carol might have been responding in self-defense. Anna said that Carol has borne the brunt of abuse by John when he has been drinking. Carol has always taken the abuse. Anna thinks that they wouldn't have these problems if alcohol were not a part of their relationship.

II. THE PROCESS WE USED: DULUTH'S CORE GROUP AND ITS ACTIVITIES

As the first step of our journey, the City Attorney's Office established an interagency core group of practitioners who began to meet regularly to tackle the problem of battered women arrested for using violence. As is true for dealing with any aspect of domestic violence intervention, the prosecutors and staff recognized that a clear understanding of the dynamics of abuse was essential in creating a fair prosecution plan. From experience we knew that any changes in prosecution policy would generate a ripple effect throughout the rest of our criminal justice system. Clearly, interagency input was needed.

A. Composition and Structure of the Core Group

"The meeting of two personalities is like the contact of two chemical substances: if there is any reaction, both are transformed."

—Carl Gustav Jung, *Modern Man in Search of a Soul* 57 (1939).

The core group was comprised of representatives of the City Attorney's Office, the Duluth Police Department, Arrowhead Regional Corrections (probation), the Women's Coalition (women's shelter), and the Domestic Abuse Intervention Project (DAIP). The advocacy organizations represented provided direct individual advocacy for battered women (Women's Coalition) as well as leadership in instituting systems change (DAIP).

The group's composition was predominately white and female. Advocates for battered women represented the single largest constituency; of them, most were white. More advocates were Native American than were African American. One advocate was an older woman. We made ongoing efforts to increase the representation of nonwhite core group members.⁵

The core group brought to the table widely varying personal experiences, professional backgrounds, and expertise. Some members were formerly battered women who had themselves used violence against their abusers. Others were advocates for women who had used violence either in self-defense or in retaliation

⁵ Duluth's population is about ninety-six percent white. Native American residents represent slightly over two percent of the population, and African American residents represent less than one percent.

for abuse. Still others were practitioners who had arrested such women, had prosecuted them, or had worked with them during their probation.

Some agencies were represented by their leaders or supervisory personnel; most also assigned direct service staff as core group members. Personalities of the core group members also varied, ranging from strong willed and assertive to thoughtful, quiet, and introspective. These positional and personality differences both contributed to and reflected power differences among the core group members. They existed between system practitioners and advocates as well as among the different agencies represented. Within individual agencies, power differences at least in part defined the relationships between supervisory and direct service employees. In our view, the value of obtaining a range of practitioner perspectives outweighed the difficulties associated with pulling together such a diverse group. We addressed the power imbalances inherent in creating a group like ours in at least two ways.

First, the City Attorney's Office sought more advocacy representatives than criminal justice practitioners. Though on more than one occasion system practitioners privately commented that they felt "outnumbered," this approach promoted a greater participation by advocates. Prosecutors realized that unless the voices of battered women were clearly heard through their advocates, the ultimate goal of enhancing safety for ongoing victims could never be fully realized.

Second, there was no core group "membership" roster. Many original core group members remained throughout the two years of development and implementation of the prosecution plan. Others left because of shifting work responsibilities or new employment. Some members started attending partway into the process at the request of existing participants. These members offered the rest of the group the benefit of specialized experience such as facilitating education groups for battered women who use violence or working in the alcohol/drug dependency field.

When the prosecution plan was first being implemented, the meetings were further opened to any affected practitioner. For example, all probation officers who conducted pre-sentence investigations in misdemeanor domestic violence cases were encouraged to attend.

As described above, Duluth's coordinated community response had years earlier resulted in written policies, procedures, and cooperative work agreements among our criminal justice agencies. These activities were initiated and overseen

by the DAIP, a community-based legal advocacy organization. The extensive substantive and procedural changes in Duluth's approach to domestic violence had resulted in a spectrum of changes in the working relationships among practitioners. Some of these relationships had been strengthened as a result of the DAIP's institutional advocacy efforts. Others reflected the strain that often accompanies the process of ongoing change.

Each criminal justice agency represented in the core group had established independent working relationships and agreements with the DAIP. Acting as an umbrella organization, the DAIP had initiated institutional change and monitored the resulting activities of the system.⁶

The initiatives of the prosecutors in the City Attorney's Office do not reflect an approach to domestic violence intervention "commandeered" by prosecutors as system representatives. We didn't see ourselves as our city's real or imagined leaders in the struggle against domestic violence.

Rather, in developing a prosecution plan that addressed battered women as defendants, we pulled together practitioners throughout the criminal justice system to build on existing working relationships. Prosecutors assumed a leadership role in the core group activities and resulting policy development because the end product was to be a prosecution plan. The advocacy-driven intervention efforts on behalf of battered women in Duluth provided the larger context of our work.

B. Overview of the Core Group's Activities

1. The Advocates' Perspectives

"Where is the justice for battered women? *Where is the justice?*"

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

⁶See Ellen Pence, Coordinated Community Response to Domestic Assault Cases: A Guide for Policy Development (Madeline Duprey, Coral McDonnell, Michael Paymar, Kate Regan, and Jim Soderberg, eds., 2001) (available by contacting Minnesota Program Development, Inc., Domestic Abuse Intervention Project, www.duluth-model.org; *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (Melanie F. Shepard & Ellen L. Pence eds., 1999); Ellen Pence, *The Duluth Domestic Abuse Intervention Project: Toward a Coordinated Community Response to Domestic Abuse*, 6 Hamline L. Rev. 247 (1983).

In addition to having no formal membership roster, the core group began its activities without a formal agenda. The group met approximately every two weeks. Early meetings were characterized by conflict, misunderstanding, and emotional monologues. Though working relationships already existed, both the process and the issue itself tested the patience of all of us. Prosecutors had naively expected that there would first be some discussion of the issues but that a prosecution policy would be drafted within a couple of months.

Such was not the case. Issues raised in the meetings were fragmented; achieving clarity was difficult, if not impossible, for most core group members. Years of advocates' pent-up frustration resulted in biting critiques of the criminal justice system. They expressed their frustration with the system's inability to effectively hold the abusers of battered women accountable. If batterers were held accountable, women wouldn't *need* to use violence, would they? "*Do something about the men,*" they said.

Advocates were also convinced that many women, because they were battered, were actually engaging in self-defense, but that police, prosecutors, and others were either untrained or unwilling to see it as such. A third concern was the effect of a conviction on a woman's employment. Was it fair for so many women to be convicted of assault when it meant losing caregiving licenses and the jobs that went with them? After all, such a conviction never stopped a man from doing construction work. The basic inequity and injustice of it all was the advocates' central theme.

2. The System Practitioners' Perspectives

"[T]he power to be lenient is the power to discriminate."

—Kenneth C. Davis, *Discretionary Justice: A Preliminary Inquiry*
170 (1969).

System practitioners, though sympathetic to the advocates' stinging (and well-founded) criticisms, grappled with concerns we faced as representatives of the criminal justice system. These concerns centered first on the principle of equality of treatment for those charged with crimes. Shouldn't people charged with the same crimes be treated the same? If we start making exceptions for one group, won't everyone else expect it, too? Will others in the system think this is just special treatment for women? Is it?

A second concern was consistency. A hallmark of the Duluth model had long been the consistency achieved by the criminal justice system in its treatment of domestic violence offenders. Practitioners had demonstrated that through the leadership and coordination of the DAIP, uniform, consistent results could be achieved and sustained. Were we now being asked to throw those gains aside? We had genuine, gut-level fears about the effects of a change in practice on the rest of the system. Would all the protections for domestic violence victims now be undone? Would we someday look back and see our work as the thread that unraveled our entire community response to domestic violence? These concerns weighed heavily on us.

Core group meetings became a crossroads, a place where different cultures (legal and advocacy) met. Though we frequently clashed, we considered the issues too crucial to abandon our effort. As several early meetings ended in frustration but no progress, some of us determined that the complexity of the issues necessitated that we divide them up for discussion. Most core group members realized that meaningful discussion of the particulars of a prosecution policy could not occur until we fully discussed and, we hoped, reached a consensus about why such a policy was needed.

Consequently, the rationale for a new policy became our focus for many months. At last, exhausted by our discussions and never fully able to reach complete consensus, we moved on to intense debate about the specifics of a policy itself and, later, about implementation issues.

The remainder of this monograph consists of a detailed analysis of both the legal issues we faced and the way we finally developed and implemented a prosecution plan for battered women who use illegal violence. No issue has ever engaged us as advocates and practitioners quite like this one.

III. THE PURPOSE OF THE CRIMINAL LAW AND ITS APPLICATION TO DOMESTIC VIOLENCE CASES

“The purpose of modern penology is not to avenge or adjust every wrong or every violation. The purpose is to attain a measure of social protection and the rehabilitation of the wrongdoer. Woven into these purposes are elements of retribution and deterrence.”

—Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427, 430-31 (1960).

During the first few meetings of the core group, the battle lines were drawn. In deliberating the “why” of a policy designed to address battered women who use violence, we needed to step back—back to a place where we could take an unobstructed look at where we had come from and, we hoped, where we were headed. We needed to start again at the beginning and find some road signs that would guide us along the way. Setting aside the pressures of heavy caseloads and the apparent expectations and demands of our community, we needed to reacquaint ourselves with why we were doing what we did. We needed to study the purpose of the criminal law and figure out how it applied to the cases and to the people we encountered in our work every day.

A. Theories of Punishment

We based our discussions on the understanding that the principal goal of the criminal law is to prevent harm to society. Criminal law seeks “to make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable.”⁷ Specifically, criminal law aims to prevent injury to the health, safety, morals, and welfare of the public. These purposes are accomplished through the criminal law’s main objective: punishment. Rather than rewarding good conduct, the inherently negative nature of the criminal law is designed “to influence human conduct away from the undesirable and toward the desirable.”⁸

At least six theories of punishment support this primary objective of the criminal law. They reflect two philosophies on the best way to protect society: one

⁷1 Wayne R. LaFave, *Substantive Criminal Law* 36 (2nd ed. 2003).

⁸*Id.* at 37.

fits the punishment to the crime; the other fits it to the criminal.⁹ Rehabilitation, which focuses on the offender, seeks to reform the person convicted of a crime so that he or she will not need or wish to continue in criminal activity. The emphasis of this theory is the improvement of the criminal's life, not actual punishment.

In contrast, the theories of deterrence (specific and general), restraint, education, and retribution focus on the offense. Specific deterrence, or prevention, holds that the unpleasant experience of being punished will deter a criminal from committing more crimes; general deterrence holds that the punishment of individual violators will deter others from committing similar crimes. Restraint theorizes that the community can protect itself from dangerous individuals by isolating them from the rest of society. The education theory contends that public awareness of the punishment of criminals will result in society's greater understanding and observation of the distinctions between good and bad conduct.¹⁰ As stated in the *American Bar Association Standards for Criminal Justice*, "The criminal law must function as an educational and socially cohesive force whose purposes are not exhausted simply by the deterrence of potential offenders."¹¹

Finally, the retribution theory of punishment asserts that "it is only fitting and just that one who has caused harm to others should himself suffer for it."¹² Also called the "just deserts" concept of punishment, this theory, once rejected, has gained new ground as a response to the shortcomings of the rehabilitative model of punishment.¹³ Retribution acknowledges the importance of restoring peace of mind to both the victim and the general public, repressing the criminal tendencies of others, maintaining respect for the law, and suppressing acts of private vengeance.¹⁴ One commentator describes the "just deserts" theory of punishment:

⁹*Id.* at 45.

¹⁰*Id.* at 40.

¹¹*ABA Standards for Criminal Justice* 18–2.2 cmt. at 63 (2nd ed. 1980).

¹² LaFave, *supra* note 7, at 41. *See also* Edward M. Wise, *The Concept of Desert*, 33 Wayne L. Rev. 1343 (1987).

¹³ *See, e.g.,* Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 Wis. L. Rev. 781; Paul H. Robinson and John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453 (1997).

¹⁴ LaFave, *supra* note 7, at 41–42.

The offender may justly be subjected to certain deprivations because he deserves it; and he deserves it because he has engaged in wrongful conduct—conduct that does or threatens injury and that is prohibited by law. The penalty is thus not just a means of crime prevention but a merited response to the actor's deed, “rectifying the balance” in the Kantian sense and expressing moral reprobation of the actor for the wrong.¹⁵

For years commentators have advocated for and debated the merits of each theory of punishment, to the exclusion of the others. In recent years, however, it has generally been agreed that each theory reasonably could and should be applied in at least some types of cases.¹⁶ Consequently, questions arise about how these theories relate to each other and about their relative priority. Because the thinking of members of society and criminal justice practitioners can fluctuate according to the situation, various theories predominate in various types of cases.

Where, for example, a son, after thoughtfully taking out insurance on his mother's life, places a time bomb in her suitcase just before she boards a plane, which device succeeds in killing the mother and all forty-two others aboard the plane, we almost all feel that he deserves a severe punishment, and we reach this result with little reflection about influencing future conduct. Likewise, when a less serious crime is involved and it was committed by a young person who might be effectively reformed, the rehabilitation theory rightly assumes primary importance.¹⁷

During the twentieth century, society's response to criminal behavior shifted from deterrence and retribution to rehabilitation. Developments in criminology, psychology, and psychiatry reinforced the objective of positively influencing future conduct of offenders. However, the often indefensible disparities in sentencing resulting from the application of the rehabilitation theory revived interest in retribution as an option. Appealing to fears of the apparent or actual unraveling of the social and moral fabric of our communities, the theory “operates from a consensus model of society where the community . . . is acting in the right” and “the criminal is acting in the wrong.”¹⁸

¹⁵A. von Hirsch, *Doing Justice* 51 (1976).

¹⁶1 LaFave, *supra* note 7, at 43.

¹⁷*Id.* at 44.

¹⁸*Id.* at 46 (quoting Philip Bean, *Punishment* 17 (1981)).

B. Theories of Punishment and Domestic Violence Cases

Domestic violence, of course, has occurred (and flourished) throughout the duration of the debates among scholars regarding which theory of punishment is best. During most of the twentieth century battering was accepted, if not condoned. Only in the late 1970s did acts of domestic assault become criminalized through the application of existing criminal laws. Reflecting a perspective most closely aligned with the retribution theory of punishment, society declared domestic violence to be morally wrong through the application of its criminal law.

Yet batterers, subject for the first time to the criminal law and its objective of punishment, were instead met at the door of American courthouses by the face of the rehabilitation model. Harm to victims and the rest of society would be prevented through “fixing” the abuser. Though society had finally declared domestic violence to be wrong, the criminalization of domestic violence occurred at a time when reformation of the individual seemed within reach of the criminal justice system.

As a result, in many communities counseling or therapy for batterers has been the logical expression of this objective. The desire to change behavior, not actually punish it, has prevailed. The emphasis on rehabilitation fit well with the wishes of many individual battered women. Whether out of a desire to preserve family relationships or to fulfill society’s expectations, the majority of battered women wanted to see the abuse end, their abusers reformed, and their relationships left intact. This has explained the popularity of civil protection orders, offering no-contact and counseling provisions, as a source of help to victims. Rehabilitation’s dominance in the latter part of the twentieth century was also convenient for the criminal justice system and taxpayers: the sheer volume of domestic violence cases coming into criminal courts resulted in executed jail time being limited to repeat offenders and recalcitrant probationers.¹⁹ The criminalization of what once was condoned legal behavior produced a “crime wave” of epidemic proportions.

¹⁹In a March 15, 1998, telephone interview with Ellen Pence, co-founder of the Domestic Abuse Intervention Project, she estimated that approximately one of every fifteen men living in Duluth had attended men’s nonviolence education groups.

As batterers made their way through the courtroom, probation office, and men's groups, their victims took notice of the system's effects on their partners. In rare cases, abusive men made significant positive changes. Other men didn't change at all and the abuse continued. Still others changed for the worse, increasing their use of violence, or at least of abusive, controlling behaviors. Though many women were safer during the court and probation process, we had a sense that justice was not being done, a sense that is still with us. Reliance on the rehabilitative philosophy of punishment has muffled the community's voice of moral authority declaring domestic violence to be wrong. Instead, in this era it is more likely to be treated as a dysfunctional behavior, the moral equation distant on the horizon.

C. Theories of Punishment and Battered Women Who Use Violence

During the process of criminalizing domestic abuse, acts of retaliatory domestic violence by ongoing victims also were subject to heightened criminalization. However, the increasing numbers of arrests of battered women have featured a particularly ironic twist. Advocates for battered women have seen the criminal justice system work with unusual precision in holding battered women accountable for using illegal violence against their abusers.

This uncharacteristic efficiency stands out against the backdrop of the system's relative ineffectiveness in holding batterers accountable for their behavior. The same statutes, case decisions, and procedural rules which readily come to the assistance of a batterer seeking to evade responsibility for his actions also act as a barrier to the battered woman who has sought safety from an ineffectual system, and so takes matters into her own hands, only to find herself charged with a crime. Consequently, any discussion of what justice really means in cases of domestic violence committed by victims of battering must be viewed within the larger context of the system's often unsatisfactory attempts to confront the use of violence by batterers.

Should the rehabilitative model of punishment be applied to victims of ongoing abuse as it has been to their perpetrators? Notions of equality in treatment of offenders suggest that uniform application of this theory is appropriate. Efforts to "rehabilitate" battered women who use violence would also be entirely consistent with the theory of punishment that generally guided criminal justice practitioners during the late twentieth century. Practical considerations prevail as

well. If batterers themselves have been less than enthusiastic participants in their own reformation, battered women appear to be a group that can be voted most likely to succeed. Readily (too readily, according to many advocates) acknowledging blame and wrongdoing when confronted by the system with their use of illegal violence, battered women as a class of criminal defendants would seem to be a probation officer's dream, an "easy fix."

However, a major problem in applying the rehabilitation theory is presented by the context in which battered women use violence. Reacting to repeated acts of violence by their partners, society's constraints on their economic and emotional independence, and the criminal justice system's inadequate efforts to control their abusers, many battered women who use illegal violence do so out of fear, frustration, and relatively few other options. Their use of violence would likely cease if their victimization ceased. Therefore, reforming battered women who use violence first necessitates reforming their abusive partners. As discussed above, that objective has achieved only limited success by the criminal justice system.

One solution to this dilemma would be to reexamine the retribution theory in light of the relatively recent criminalization of domestic violence. The time seems ripe to employ the moral authority of the community in condemning domestic abuse. However, the reality of the situation reveals societal ambivalence. On one hand, most would agree that domestic violence is wrong. On the other, the pervasiveness of the problem suggests that to commit an act of domestic violence is not necessarily to violate society's norms. Whether a shift to a retribution model of punishment for acts of domestic abuse is ever embraced by the criminal justice system, it is clear that the system must consistently and effectively hold batterers accountable to deter their victims from using responsive violence. Though not the focus of this monograph, this issue continually loomed large in the background of every meaningful discussion within the core group.

If a retribution model of punishment were to be adopted for batterers making their way through the criminal justice system, would it also be necessary to adopt the model when considering battered women who use violence? Under the retribution theory, the punishment is to fit the crime. Thus examining the nature of the crime becomes necessary. Although a criminal charge of assault may be brought against an ongoing victim as well as against a batterer, the contexts of each person's use of violence are often completely different. To understand these

differences, the motivations for the violence and its results and consequences must be examined.

An assaultive act committed by a batterer may appear to be spontaneous or idiosyncratic if viewed as only an isolated incident. However, linked together, such incidents establish a coercive pattern in which a batterer establishes control over his partner.²⁰ The consequences of this behavior include instilling long-term fear in her.

This effect is deep enough to instigate changes in women's conduct on a more or less permanent basis. For example, abused women speak of walking on eggshells around their partners, suffering persistent anxiety, experiencing debilitating stress and paralyzing fear, modifying their habits and movements, and so on. They seem to focus much of their daily activities on avoiding their partners' next outbursts of violence.²¹

As a result,

[b]attering can thus be defined as acts that intimidate, isolate, and deny victims personal power and establish the abuser's control over them. Incidents and issues that apparently trigger conflict situations are therefore of little significance.²²

In contrast, a study of thirty-two women ordered to attend groups for using violence revealed that the overwhelming reason most women assaulted their partners was to protect themselves.²³ Though some of their violence could be characterized as self-defense, other violent acts were preemptive, motivated by anticipated abuse.²⁴ Battered women also use violence against their abusive partners in an instrumental manner—to resolve conflicts or to control the

²⁰Shamita Das Dasgupta, *Just Like Men? A Critical View of Violence by Women, Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* 195, 199 (Melanie F. Shepard & Ellen L. Pence eds., 1999). See also L. Kevin Hamberger & Clare E. Guse, *Men's and Women's Use of Intimate Partner Violence, Clinical Samples*, 8 *Violence Against Women* 1301 (2002).

²¹Dasgupta, *supra* note 20, at 213.

²²*Id.* at 200.

²³*Id.* at 211.

²⁴*Id.* at 205.

immediate surroundings.²⁵ An example cited in the study was hitting and shoving by a sixteen-year-old mother who sought to make her husband stay home with her rather than routinely going out with his friends.²⁶

Interestingly, none of the women in the study thought that their use of violence had produced ongoing fear in their partners, nor did they think that it had successfully controlled their behaviors. In fact, ten men interviewed as part of the study denied that the use of violence by their female partners had produced in them any significant or prolonged fear for their safety.²⁷ Instead, violence by women often led to even more abusive behavior by their male partners. The men's aggressiveness seemed to result from their greater size and strength.²⁸

In examining the differing contexts surrounding the use of violence, cultural factors cannot be ignored.

[I]ntimate violence does not occur in a vacuum. It is nested within the sociocultural context of a nation and is maintained, as well as supported, by its structures. Religion, law, art, socialization patterns, education, economy, gender roles, and belief systems of a society legitimize men's violence toward women and simultaneously ensure that women assume responsibility for the abuse they suffer. It is the web of institutional, social, and cultural support for abuse that transforms male violence against women from incidental violence to battering and carries it from the realm of personal to the political.²⁹

As a result, though criminal charges of assault may be identical when brought against a batterer and against a battered woman, the nature of the crime itself differs when viewed within its larger cultural context.

In summary, under both the rehabilitative and retribution theories of punishment, the use of violence by ongoing victims of abuse can be viewed as different from the violence used by batterers. Under the rehabilitative theory, the offenders are different. Battered women as offenders often use violence only in

²⁵*Id.* at 210. See also Michael S. Kimmel, "Gender Symmetry" in *Domestic Violence*, 8 *Violence Against Women* 1332, 1355–56 (2002); Daniel G. Saunders, *Are Physical Assaults by Wives and Girlfriends a Major Social Problem?*, 8 *Violence Against Women* 1424, 1433–35 (2002).

²⁶Dasgupta, *supra* note 20, at 210–11.

²⁷*Id.* at 209–10.

²⁸*Id.* at 210.

²⁹*Id.* at 200.

response to the violence initiated against them. Their violence is in reaction to the battering they have experienced. The aims of rehabilitation justify a different, less harsh, treatment of them.

Under the retribution theory, the offenses of battered women are different from those of batterers. Violent acts committed by battered women against their abusers fail to produce the same enduring fear that resulted from their partners' actions toward them. Consequently, either theory provides the criminal justice practitioner with the ability to view acts of violence committed by batterers and ongoing victims as different from each other, despite the similarity in criminal charges. The criminal law's goal of preventing harm to society can thus be accomplished under either theory of punishment, without treating all defendants exactly the same.

However, in the domestic violence cases processed by system practitioners in the core group, all defendants were being charged the same. Batterers were charged with domestic assault, and so were battered women. Despite the different theories of punishment underlying the criminal law's goal of public safety, shouldn't identical charges result in identical outcomes? Before proceeding further on the path to a prosecution plan, we needed to pause and consider why battered women were usually charged with the same offenses as their abusers. We needed to consider how crimes are defined in American criminal law and the consequences of those definitions for battered women.

IV. HOW CRIMES ARE CLASSIFIED IN AMERICAN CRIMINAL LAW AND THE CONSEQUENCES FOR BATTERED WOMEN

“Law is something more than an aggregate of rules. Hence enforcement of law is much more than applying to definite detailed states of fact the pre-appointed definite detailed consequences. Law must govern life, and the very essence of life is change. No legislative omniscience can predict and appoint consequences for the infinite variety of detailed facts which human conduct continually presents.”

—Roscoe Pound, *Criminal Justice in America* 36 (1930).

A. Broad Categories of Crimes

In stepping back to look at the bigger picture, the core group observed that American criminal law draws categories and defines crimes very generally. Categories of crime “tend to be broad and inclusive, often sweeping within a single category conduct ranging from the virtually insignificant to acts of the gravest culpability.”³⁰

[A] wide continuum of culpable conduct can be subsumed under most penal offenses. The \$10 bribe paid to a police officer not to issue a parking ticket is vastly different in significance from the \$10,000 payment made to a high public official. Similarly, a wide gulf separates the theft of a bicycle with a zip gun from the robbery of a bank with a submachine gun. Yet it is the nature of penal statutes to sweep broadly, and cases as diverse as the foregoing can be included under the same definitional rubric. Thus, it is necessary to preserve discretion in some dispositional decision maker in order that the evident moral distinctions between these cases not be slighted. To create a system that cannot respond to the broad range of events and circumstances that frequently coexist within any legal category is to make justice not only blind but feeble-minded as well.³¹

Because of the broad nature of crime categories, “any system that attaches a single sanction or even a limited range of sanctions to a particular offense would have to begin by redefining offenses ‘with a morally persuasive precision that present

³⁰ABA *Standards for Criminal Justice* 18–2.1 cmt. at 28 (2nd ed. 1980).

³¹ABA *Standards for Criminal Justice* ch. 18, introductory cmt at 7 (2nd ed. 1980).

laws do not possess.”³² Without such precise legislated distinctions, practitioners in the American criminal justice system by necessity maintain significant discretion in the processing of cases.

Even within the single area of assault cases, a wide range of behaviors can be fit into one category. Minnesota statutes provide an example. The misdemeanor crime of assault in the fifth degree is defined in the following manner:

Whoever does any of the following commits an assault and is guilty of a misdemeanor:

- (1) commits an act with intent to cause fear in another of immediate bodily harm or death;
- or
- (2) intentionally inflicts or attempts to inflict bodily harm upon another.³³

“Bodily harm” is defined as “physical pain or injury, illness, or any impairment of physical condition.”³⁴

In practice, a wide range of actions can produce a wide range of results, all charged as assault in the fifth degree. An assault can occur even without physical injury. For example, in *City of St. Paul v. Myles*,³⁵ the defendant, stopped for operating a vehicle with a noisy exhaust system, shouted obscenities at police officers as they looked into his vehicle to determine the identity of his passenger. He “cocked his arm, formed a fist, and swung at one of the officers.”³⁶ The swing was blocked by an assisting officer. Myles’ assault conviction was upheld.

In contrast, another case decision describes a different type of conduct, also charged as assault in the fifth degree. In *McConnell v. City of Mankato*,³⁷

An eight-year-old child testified that he was bouncing up and down the steps inside his home while appellant, his babysitter, spoke on the

³²Franklin E. Zimring, *A Consumer’s Guide to Sentencing Reform—Making the Punishment Fit the Crime*, in *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary*, pt. 13, 95th Cong., 1st Sess. 9423, 9426 (1977), quoted in *ABA Standards for Criminal Justice* 18–2.1 cmt at 28 (2nd ed. 1980).

³³Minn. Stat. §609.224 Subdivision 1 (2002).

³⁴Minn. Stat. §609.02 Subdivision 7 (2002).

³⁵*City of St. Paul v. Myles*, 218 N.W.2d 697 (Minn. 1974).

³⁶*Id.* at 697.

³⁷*McConnell v. City of Mankato*, 456 N.W.2d 278 (Minn. Ct. App. 1990).

telephone. According to the child, appellant told him to stop and then pushed or threw him down the steps. At trial, the child testified:

I was jumping down the steps one by one, and
[appellant] heard me and told me to get back up the
stairs and she grabbed me right by the shirt and
threw me down the steps.

The child also testified that after the fall, he had trouble walking and that his ankle hurt. Medical testimony showed that the child had fractured his ankle.³⁸

The Minnesota Court of Appeals held that the evidence was sufficient to support a conviction for fifth-degree assault.

Fifth-degree assault convictions were also upheld in *State v. O'Brien*.³⁹

Appellant, John Francis O'Brien, visited the Kandiyohi County Family Services office seeking an explanation for a reduction in his food stamp allotment. Appellant met with a case worker, Mary Hillstrom, and he became upset with her explanation of his case. He picked up the open case file on her desk and threw it, striking her face. Hillstrom screamed, and appellant lifted her desk and dumped the objects on it onto her lap and the floor. As appellant was leaving her office, another case worker, David Binnebose, confronted appellant at the doorway. Binnebose told appellant to leave and put his hand on appellant's arm. After some pushing appellant struck Binnebose with a closed fist, cutting his face.⁴⁰

Finally, a conviction for assault in the fifth degree was affirmed where a vehicle collision and ensuing argument resulted in one driver punching the other in the face, breaking his nose.⁴¹

Arrests by the Duluth Police Department under its mandatory arrest policy for domestic violence incidents also reveal a variety of fact situations constituting assault in the fifth degree. For example, in one incident report the responding officer immediately observed that the victim's right eye was swollen closed with a blue discoloration around it. He also noticed a lump on the right side of her head. She told him that after she and her husband had arrived home from a bar, he

³⁸*Id.* at 279.

³⁹*State v. O'Brien*, 352 N.W.2d 130 (Minn. Ct. App. 1984).

⁴⁰*Id.* at 130–1.

⁴¹*State v. Montanari*, 404 N.W.2d 394 (Minn. Ct. App. 1987).

suddenly began to “flip out,” punching her numerous times in the face and head. Her husband told her, “If you call the police, we’re through.”⁴²

In another case, officers arrived at a local hospital to speak with a woman who told them that her boyfriend, with whom she lived, had beaten her up. Officers saw and felt a bump on the side of her head as the victim winced in pain due to the sensitivity of the injury. She told them she had been out with her boyfriend at bars in the area. When they returned home, she started teasing him and, according to her written statement,

. . . he slapped me on the right side of my face open handed and I went in the front room and he came after me grabbed me by my hair and told me to go to bed. I said no, but he said get up now. So I did and I went in the bedroom and he counted to 3 and tore my clothes off me and said, now go call the cops. I went to get up and he said, hell no. He covered my face with a pillow and I started to cry. He said, don’t cry now, tough girl. Then he put his hands over my face and started talking to me, telling me it’s all my fault—if I didn’t do the things I do, he wouldn’t have to hit me.⁴³

The broad variety of behavior charged as fifth-degree assault in Minnesota reflects the broad definition of this crime. Because Minnesota lawmakers cannot legislatively distinguish between the variety of situations falling under the category of assault in the fifth degree, it is left to practitioners in the criminal justice system to discern the moral distinctions evident and not so evident in different fact scenarios and circumstances.

B. Injury-Focused Classification of Crimes

The core group recognized that Minnesota’s broad definition of assault in the fifth degree resulted in identical charges in many cases involving widely disparate behavior. Producing fear of immediate bodily harm in another could result in the same charge as the intentional infliction of significant bodily harm. Core group members had worked with situations and cases at all points along this continuum.

Another aspect of the definition and classification of crimes also became apparent. Minnesota, as many other states, had adopted an enhanced penalty

⁴²Arrest Report, Duluth Police Department, Courthouse, Duluth, Minn. (Oct. 24, 1998) (on file with the Duluth Police Department).

⁴³Arrest Report, Duluth Police Department, Courthouse, Duluth, Minn. (Nov. 22, 1998) (on file with the Duluth Police Department).

structure for repeat convicted offenders.⁴⁴ The basic categories of assaultive behavior, though, are based on distinctions in the degree of physical injury caused, not the context in which the violence occurred.⁴⁵ Likewise, the legislative distinctions focus specifically on bodily harm, not on the overall harm produced. As seen above, bodily harm is defined in terms of physical injury or impairment. The legislative distinctions thus focus on the incident, not the context. This focus fails to account for the nature of battering, which relies on both patterns of behavior and contextual meaning for its impact.

During the course of our work, we examined a number of case histories. Many of them illustrated the problematic results that can occur when distinctions are limited to the degree of bodily injury alone. One example is provided by a summary of an interview with “Sandy.”⁴⁶ Her story typifies the effects on both partners when the context of a battered woman’s actions goes unrecognized due to a broadly defined, injury-focused definition of assault. Because the context in which Sandy experiences abuse is not articulated in the rubric defining the crime of assault, it became invisible to the criminal justice practitioners who processed her case.

INTERVIEW WITH SANDY

First Incident of Violence

I used violence against my husband for the first time during a long argument a couple years back. My husband had been yelling at me and yelling at me. I turned around and pushed him and told him to get away from me. Then he threw me up against a wall, breaking my arm. As he drove me to the hospital, he kept repeating, “This is all your fault. You hit me.” I did not call the police or press charges, and he was not injured.

Second Incident of Violence

I used violence against my husband for the second time one evening when he had me trapped in my bedroom for over an hour. I had some money that he wanted to spend. I was thrown around the bedroom. I was pinned on the floor. I was pinned on the bed. I was thrown around.

⁴⁴Minn. Stat. §609.2242 Subdivisions 2 and 4 (2002); Minn. Stat. §609.2243 (2002).

⁴⁵Minn. Stat. §609.221 Subdivision 1 (2002); Minn. Stat. §609.223 Subdivision 1 (2002); Minn. Stat. §609.224 Subdivision 1 (2002).

⁴⁶This interview summary was prepared by the Domestic Abuse Intervention Project, 202 East Superior Street, Duluth, MN 55802.

Every time I went for the door, I was thrown away. Finally, he called me some awful, awful names, and I reached up and slapped him. The slapping diverted him long enough for me to get away. When he turned his head I ran out the door, got in the car, and drove away.

I'd thought about hitting him before, when he was being violent and threatening, but I held back because he is a lot stronger than I am. Even if I touched him slightly, I knew I'd be in a lot of trouble.

He reacted to my slapping him by screaming at me. He told me I was abusing him and that he was going to call the police. He stated that if he had to go to jail, so did I—as if I were responsible for his actions.

The Arrest

The police found and arrested me, but let me go a short while later. I was crying and clearly scared. I told them I was relieved to be locked up, because at least I was safe. Unfortunately, the police had to inform my husband that they were releasing me. Although they didn't tell him where I'd be, I knew my husband would be up all night getting angrier and angrier that they released me and that he didn't know where I was.

Following the Arrest

I was appointed a public defender. I don't remember whether I pleaded guilty or not, but I received one year of probation and had to attend women's nonviolence classes at the Damiano Center.

I did want the charges to be dismissed. But I'm arrested one night and I'm up all that night. I have to be in court first thing in the morning—I really wasn't thinking right. And I was trying to write up papers for an order for protection, and he was doing the same thing, because I abused him, you know.

I don't know why I didn't plead self-defense. I was tired and confused and didn't understand the process. Even if the attorney had suggested that defense, I don't know whether I would have pleaded self-defense. I did choose to slap him. That was my choice.

The Impact of Her Arrest

I've thought about never calling the police again. It's like, take it and be done with it, because then I don't have to spend time in jail. On the other hand, I can smack back and be guaranteed that I'm going to spend some time in jail where I'm going to be safe at least. But if I get arrested, I have to deal with social services again, and then my children get involved. Social services interfered a great deal in my life then. I know they didn't do the same thing to my husband when he was arrested—such as investigating his abilities as a father.

Both my husband's reaction to my arrest (using it against me) as well as the county's reaction (sending social services after me, and making the arrest and conviction procedure really complicated) makes me think

very hard about striking out at my husband again—even if I need to do it to protect myself, or to get out of a situation.

I think that arresting women in domestic assault cases often sends the message to women not to defend themselves. There's also a lot of social condemnation for being arrested, and women end up feeling more of that social condemnation than men.

The Impact of Her Violence on Her Husband

If I use violence against him, I can always expect some retribution. If I hit him, then he has to hit me. He has to push me because I hit him. What's a man supposed to do? In his mind he thinks he's hitting me because I hit him, when in fact, he had been hitting me and abusing me immediately before. He creates a justification for his own violence.

I didn't feel stronger after hitting my husband, and I know that he wasn't scared of me.

His Abuse

Six years into our relationship, I had an affair. The abuse began after that. He was abusive a couple times a month, on average. He had been arrested once for the abuse. Because of social services' reaction to the arrest, I'd never call the police again.

Her Explanation of Her Use of Violence

I used violence against my husband primarily as a way to protect myself and get out of a bad situation. It can be scary to call the police. For instance, I wonder what he will do if he is arrested. What will happen to my house? What will happen to my children? How will I live and support my family? Sometimes it seems better to try and stop the violence yourself, or you act out as a last recourse.

I also want to think I can stand up for myself and protect myself against his violence. Otherwise, I resign myself to thinking, Why bother? Just let him do whatever he wants, whenever he wants. And then I don't have to pay the consequences.

In my situation, it's hard to just leave. My husband always presumes that when I leave, I'm going to find someone to have sex with. So it complicates matters considerably when I leave. It's also hard for a woman to leave, because it appears that she's abandoning her children. So sometimes, leaving is not a desirable option at all.

But, in the end, I will own up to what I did. I did slap him. I felt that by slapping him, I could leave my house. So I slapped him. I don't think a woman should say that a man made her hit him. She made the choice, and it may well be the best choice at that time and in those circumstances. But nevertheless, she made the choice and should face the consequences.

(End of interview)

In this case, Sandy's treatment by the criminal justice system allowed and encouraged her husband to strengthen his position of control over her. Because the charge against Sandy was incident based, not context based, her arrest for slapping him was treated essentially the same as his battering, even though the effects of each person's behavior were quite different.

Case examples like Sandy's had demonstrated to the core group that the criminal law's goal of preventing harm to society was not necessarily achieved by treating Sandy the same as her battering husband. In fact, additional harm to Sandy from such equivalent treatment had resulted. Sandy herself says that women should face the consequences of their choices. But what are the appropriate consequences? And should prosecutors be among the decision makers exercising discretion to discern the moral distinctions arising from the different circumstances surrounding the violent actions of battered women? We struggled for answers.

V. MORE CORE GROUP ACTIVITIES: UNDERSTANDING THE CONTEXT OF VIOLENCE USED BY BATTERED WOMEN

The core group spent a number of months refining and examining the many issues raised when battered women use violence. Two threshold questions received a great deal of our attention. First, is the retaliatory or responsive violence used by battered women toward their abusers different from the violence they experience? And second, should the violent actions of battered women be viewed differently by prosecutors? To answer these questions, we continued to look at real-life cases. We also decided to hold discussions with our coworkers.

A. Case Studies

“There’s a lot of shame when you realize you used violence, you know you feel like an animal. . . . They look at you differently than they do a man. . . . I guess, where part of the shame comes in is that the people in the system don’t see the overall big picture. They only see that incident and then you look like you’re some kind of animal that you bit him.”

—“Heather,” a battered woman

One way that we grounded our debate on the first question was by studying actual case files. Prosecutors and advocates collaborated to piece together complete information about actual files the City Attorney’s Office had prosecuted. This information included current and prior police reports, calls for assistance, filings for orders for protection, and statements from battered women about the abuse they had experienced. Looking at the information assembled, it appeared that the violence the women had used was indeed different.

A second way we explored these differences was closely examining interviews with battered women who had used violence. We had access to lengthy summaries of approximately twenty such interviews. They had been conducted by researchers affiliated with the Domestic Abuse Intervention Project as part of a larger study of women who use violence.

Those interviewed had all used violence against their abusers, but not all had been arrested. White, Native American, African American, and Asian American women were interviewed; women from both Minnesota and a West Coast state were represented in the sample.

The interviews revealed that battered women use violence for a variety of reasons. Chief among them, not surprisingly, is the desire to protect themselves and their children. This violence could sometimes be characterized as self-defense. In other instances, the violence crossed the line into retaliation, or even into preemptive violence. In all cases, however, an examination of the context in which the violence occurred was crucial.

After we had considered Sandy's story,⁴⁷ we studied an interview with "Annie."⁴⁸ Annie had engaged in retaliatory violence since her first relationship, at age seventeen. The violence she initially used against her husband, an alcoholic, was in self-defense. Their fighting had continued for years. Annie became more and more violent, striking back harder and more often. Her husband wasn't frightened; his violence simply intensified. Annie said that the last time she had used violence was because she "had had enough." She thought to herself, "Why am I fighting like this? I'm getting as sick as he is." Annie's behavior included slamming a door and breaking her husband's foot after he chased her during a fight. On another occasion she had held a rifle to his face.

Annie provided several reasons for her use of violence. First was a recognition that she did not deserve to be battered. Second was an instinctive desire to protect her children when her husband was hurting them. She also thought of her violence as survival—she was afraid that he would kill her before he would let her go. She described how her violence had "built up" in reaction to abuse by her husband, including attempts to force her to have sex during labor and two days after her youngest child was born. Annie's husband had also forced sex when she had cervical cancer and was bleeding. A second surgery and eventual hysterectomy were necessary to repair the damage he had caused.

Annie's story illustrates some of the complex reasons why battered women use violence against their abusers. Seen in context, some of Annie's actions can be considered self-defense. Others can be considered retaliatory or preemptive. The effects of her use of violence are completely different, however, from the effects of her husband's violence against her.

⁴⁷See the previous section of this monograph.

⁴⁸The full summary of the interview with "Annie" is included in Appendix 2.

B. Interagency Roundtable Discussions

“When a woman strikes back, it’s usually in self-defense . . . it’s the end of the line. He uses violence for control. A woman doesn’t usually use violence to control a man. The motivation is different. She uses violence to stick up for herself or to make him stop. When we get out of the realm of self-defense, she chooses to use violence. It’s not excusable. But when a woman is in court for the first time for fighting back, she shouldn’t be treated the same as him.”

“There’s a big difference between a man and woman using violence. There’s inequity between them . . . he isn’t in imminent danger or fearful for his life.”

“If someone has been whacked around for thirty-four years, and finally strikes back, there should be different treatment.”

“What was John’s motive for violence? He used it to control Carol . . . for thirty-four years. He used violence to keep her from leaving. She used violence to get away. Carol used violence to control her own situation, not control someone else.”

“A person still needs to take responsibility for their behavior. We can’t just let a person off. They need some type of consequence . . . it isn’t fair for the victim of abuse to have the same consequence as the person who has abused her for years. This intervention could be an opportunity to get away from him or make some changes.”

—Duluth criminal justice practitioners, at roundtable discussions

As a core group, we had generally concluded that significant differences did, in fact, exist between the use of violence by battered women in abusive relationships and the violence they experienced. But would our fellow practitioners agree? And our second question still remained: should prosecutors treat the cases differently?

About six months into our efforts, we convened an interagency meeting with other practitioners in Duluth’s criminal justice system. The meeting was held at a local restaurant. This event featured a lunch⁴⁹ followed by small group roundtable discussions.

⁴⁹See Appendix 1, “Adventures in Policymaking: Miscellaneous Lessons from the Duluth Experience,” Section E, “The Importance of Being Fed.”