Got Justice? Options for Prosecutors When Battered Women Fight Back

by

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N | C | D | B | W NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN

Working for justice for victims of battering charged with crimes

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Options for Prosecutors
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for the
National Clearinghouse for the
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Got Justice? Options for Prosecutors When Battered Women Fight Back

INTRODUCTION

You're in your office getting ready to go to court. But before you can leave, another stack of case files lands on your desk for yet one more upcoming court date. You glance through them to get an idea of what you're going to be dealing with. One file, a domestic assault, stands out. You've seen this kind of case before:

Police officers respond to the home of Joe and Shirley. Joe called 911, reporting that Shirley had assaulted him. He was pacing and agitated. Shirley was in a bedroom. Joe said that he had been watching a football game when Shirley yelled to turn the TV down. As he leaned forward to grab the remote, he felt a sharp blow to the back of his head. He was knocked face forward to the floor. As he looked up he saw a coffee mug had landed on the floor by his head. Officers observed a small cut on the back of Joe's head with fresh blood coming from it. They also could feel a welt about the size of a quarter and saw that the area was continuing to swell.

In the couple's bedroom, Shirley was sobbing, her face was red, and she was shaking. There was no evidence of physical injury to her. She said that she and Joe had argued through dinner. She was clearing up afterward and Joe yelled that he wanted some coffee. She yelled back that he could get it himself and to turn the TV down. When Joe yelled that she was no good and worthless, she got mad and just snapped. She had a mug in her hand that she was drying with a dishtowel, and she threw it at him. She wasn't sure if it hit him or the back of his chair. She told officers she was fed up. She and Joe have been married for 36 years. She said that during that time, he has intimidated and threatened her regularly. She said he has physically injured her at least a half a dozen times. Shirley says that she is afraid that Joe will seriously harm or kill her. Officers placed Shirley under arrest for assaulting Joe.

Your prosecutor's office has a no-drop policy for domestic violence cases. The standard disposition is a conviction and sentence. But you think this case is different from cases in which batterers are the defendants. You question whether the standard disposition would be just. Can you make a distinction in this case? Can you treat Shirley and her actions differently? If so, how do you determine what a just result would be in Shirley's case? And how do you

determine a just result in cases in which you don't yet have an idea whether the defendant is a victim of ongoing abuse? What should you do as a prosecutor to ensure that justice is done in cases in which battered women[1] use violence against their abusers?

You've got to go to court now — you're out the door. But when you return, Shirley's file will be there on your desk waiting for you.

This practice piece offers some ideas and suggestions for prosecutors who are seeking just results in these problematic cases. Every community is unique. However, these ideas and suggestions address what we have in common. By design, this piece is brief. (That's the intent, anyway.) It doesn't address every nuance of the issue of what prosecutors can or should do when battered women fight back. For a more detailed discussion, with additional references, see the monograph *At a Crossroads: Developing Duluth's Prosecution Response to Battered Women Who Fight Back*, listed in the Additional Resources section. See also "When Battered Women Fight Back: A Template for Prosecutors" (Appendix 1) and *Crossroads Program Prosecution Guidelines and Evaluation Guidelines for Probation Officers and Prosecutors* (Appendix 2).

We'll first look at theory — whether we can make distinctions in these cases. In thinking this issue through, we need to review our role as prosecutors within the larger context of the criminal justice system. We need to revisit and better understand the authority that we have to make distinctions among our cases, and then consider how to exercise our discretion in light of it.

Second, we'll look at practice — how we can treat cases differently when battered women fight back. We'll see that we need to better understand the cases we are dealing with and that we need other people to help us make changes in how we work. We need to listen to battered women's advocates; listen some more; gather information for our case files; collaborate with other practitioners; write policies; train others; and continue to learn through these experiences.

For those of us who work within a coordinated community response (CCR), the interagency activities suggested above are the normal, everyday tasks that make the CCR approach successful. It's simply a matter of applying this strategy to the issue of battered women who fight back. For those who don't work within a

[1]This piece focuses on women and/or people who identify as women because statistics show that they disproportionately experience abuse and battering as victims. Policies should be drafted in gender-neutral terms, however. See Appendix 2 for an example of such a policy.

CCR, the suggestions in this practice piece can still serve to improve our system's response. In every community, it's going to involve working with other agencies.

THEORY — Can we make distinctions when battered women fight back?

What makes this issue especially challenging (but also very interesting) is the need to revisit our role as prosecutors. It's not just a matter of *how* to treat cases differently, it's a question of *whether* we should treat them differently. Most of us work in offices in which our caseloads are very large, if not overwhelming at times. Our court systems experience the same. We seldom have the luxury of time to carefully ponder each file as much as we might like. As a result, it seems more fair to default to the mode of treating everyone the same who is charged the same. Our formal or informal policies and practices usually support this approach, as well. Plus, most of us have agreed to take domestic violence cases seriously as part of our jobs, just as our society now takes the issue seriously. Shouldn't everyone who commits a domestic assault be held equally accountable? Isn't an assault an assault? More than most areas, it is necessary for us to revisit our role as prosecutors to figure out what we should do.

KEY FEATURES OF THE CRIMINAL JUSTICE SYSTEM

But before we do so, it's worth stepping back to take a look at some of the key features of the criminal justice system within which we work and to consider their effects on our case files involving battered women who fight back. Our context is that we work in a criminal justice system whose purpose is to prevent harm to society. The aim of criminal law is "to make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable."[2] This is accomplished through the criminal law's primary objective: punishment.

Theories of punishment

Two main theories of punishment predominate — rehabilitation and retribution. Rehabilitation fits the punishment to the criminal; retribution fits it to the crime. Rehabilitation is characterized by its focus on the offender, not the offense. The emphasis is on improving the criminal's life, not actual punishment. In contrast,

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

retribution focuses on the offense that was committed, not the offender. It reflects the consensus of society that the community is right and the criminal has acted in the wrong.

Let's apply both theories of punishment to Shirley's case to see if we, as prosecutors, can make a distinction in her situation. First, the rehabilitation theory invites us to focus on Shirley as an offender and to fit the punishment to her as an individual. Under this theory, Shirley is different from offenders who have used violence to establish a pattern of control over their partners. Like many battered women, Shirley's use of violence seems to be in reaction to the battering that she has experienced. It appears that Shirley's use of violence would stop if Joe stopped using violence against her. Improving her life justifies a different, less harsh treatment of her.

Under the retribution theory of punishment, we focus on the offense that Shirley committed, not Shirley herself. It then becomes necessary to examine the nature of the crime itself. Though the criminal charge of assault against Shirley may be the same as that brought against a batterer, the context appears to be completely different. Let's look at Shirley's motivations for her actions, as well as the results and consequences of her use of violence. Did Shirley act in a way that was designed to establish a pattern of control over Joe? Was she trying to control her immediate situation, or was she trying to control him? When she threw the coffee mug was she acting preemptively, anticipating abuse? And what were the results and consequences of her actions? Was Joe made afraid of Shirley, or was Shirley still afraid of Joe? It appears that Shirley's act of violence failed to produce the same enduring fear that Joe's earlier actions had produced in her. The nature of Shirley's offense is different, justifying a different treatment for her.

Consequently, both the rehabilitation and retribution theories of punishment provide prosecutors with the ability to view acts of domestic violence committed by batterers and ongoing victims as different from each other, despite the similarity in criminal charges. The goal of preventing harm to society can be accomplished under either theory without treating all defendants exactly the same. When it comes to violent domestic relationships, we have to acknowledge that preventing harm means more than just looking at one incident in isolation. Under either theory we have to look at the context, the relationship itself, to arrive at a just result that will prevent further harm to both people. If the outcome of Shirley's case is used by Joe as a means to further his control and abuse, then we haven't prevented harm.

Crime categories

But what about the fact that Shirley is charged with domestic assault, just as a batterer is charged? Doesn't it mean that she is similarly situated? Our office has adopted a no-drop policy for domestic violence cases; shouldn't it apply to Shirley's case? Why are battered women charged with the same offense as batterers? To answer this question, let's consider another aspect of the criminal law that affects our domestic violence cases. As many commentators have noted, American criminal law draws categories and defines crimes very generally. The categories "tend to be broad and inclusive, often sweeping within a single category conduct ranging from the virtually insignificant to acts of the gravest culpability."[3] "No legislative omniscience can predict and appoint consequences for the infinite variety of detailed facts which human conduct continually presents."[4] Because crime categories are broad, "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 laws do not possess.'"[5] Without such precise legislated distinctions, practitioners in the American criminal justice system by necessity maintain significant discretion in the processing of their cases. It then becomes "necessary to preserve discretion in some dispositional decision maker in order that the evident moral distinctions . . . 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 feebleminded as well."[6]

Assault is a crime defined broadly in our legal system. A wide range of actions can produce a wide range of results, all defined as assault. In addition to broadly defining this crime, most American jurisdictions classify assault in an injury- and incident-focused manner. Legislative distinctions are based on the degree of physical injury caused, not the context in which the violence occurred. The result is a focus on bodily harm, not on the overall harm produced. Likewise, the distinctions focus on the specific incident, not the context in which the incident occurred. This focus on the incident and the degree of injury fails

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[3] *ABA Standards for Criminal Justice* 18–2.1 cmt. at 28 (2nd ed. 1980).
[4] Roscoe Pound, *Criminal Justice in America* 36 (1930).
[5] Franklin 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).
[6] *ABA Standards for Criminal Justice* ch. 18, introductory cmt at 7 (2nd ed. 1980).

to account for the nature of battering, which relies on both patterns of behavior and contextual meaning for its impact.

Applying these observations to Shirley's case file, we see that her charge of domestic assault is the same as the charge against a batterer because our American system of criminal law defines crimes broadly. But though she is charged the same, this doesn't mean that she is similarly situated. Because the classification system used is injury- and incident- focused, the charge itself doesn't incorporate the context within which Shirley acted. Because the context in which Shirley experiences abuse is not articulated in the rubric defining the crime of assault, it can easily become invisible to us as prosecutors. But a consideration of that context is necessary to fulfill the purpose of the criminal law — to prevent harm.

ROLE OF PROSECUTORS

From this perspective let's next review the nature of our role as prosecutors. Two key features define our role. As the central figures within the American criminal justice system we are, first, ministers of justice, and second, discretionary decision makers. "The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth."[7] "The duty of the prosecutor is to seek justice, not merely to convict."[8] In fulfilling this quasi-judicial role, "[p]rosecutors, more than other lawyers, must have a strong personal sense of justice and be morally autonomous."[9] 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."[10]

Over time, though, it is possible for us as prosecutors to see our primary responsibility as obtaining convictions. In this mindset, a conviction equals justice. This can result from our institutional posture and orientation, resulting in selective influences on us. For example, we seldom have an opportunity to speak directly with defendants (or their family or friends) because they are usually represented by defense attorneys. Instead, victims and police officers can come to be regarded as "clients."[11] Adding to this is the "super-adversary

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[7] National District Attorneys Association, *National Prosecution Standards* 1-1.1 (3rd ed. 2009).
[8] *ABA Standards for Criminal Justice* 3–1.2(c) (3rd ed. 1993).
[9] Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197, 257 (1988).
[10] Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 Fordham Urb. L. J. 513, 521 (1993).
[11] Fisher, *supra note* 8, at 208-09. See also Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary*

posture" of criminal defense attorneys and the "special license to use truth-defeating trial tactics" given to them.[12]

Zealous advocacy on our part in obtaining convictions has also resulted from progressive arrest policies and the system-wide intervention initiatives that have been adopted by many communities to address the problem of domestic violence. These initiatives are designed to achieve a consistency in response and to express community condemnation of domestic violence. But in contrast with the arrest of a batterer, the dynamics shift when a battered woman is arrested. Often, no defense attorney is involved when she seeks an expedient resolution and simply pleads guilty at arraignment so that she can get back to her job and deal with childcare issues. Unlike her abusive partner, she isn't a "squeaky wheel" that "gets the grease" from a defense attorney and the rest of the court system. And unlike her partner, she has not been conditioned by society to believe that she is entitled to use violence in her home under any circumstances, let alone to establish a pattern of control over her partner.

The issues that battered women bring with them to court become our issues as prosecutors. More than in other types of cases, we must carefully consider our role. We must decide whether we "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."[13]

For us to be something more than simply a cog in the wheel of the criminal justice system requires that we examine more closely the concept of justice. Theoreticians agree that the three core principles of justice are equality, respect for rights, and desert. They are manifested in the prosecutor's duty to seek justice through promoting equality, procedural justice, and substantive justice. Typically, the problem of overzealousness can result when substantive justice is pursued without regard to the constraints of equality and procedural justice. However, for battered women defendants it can be argued that overzealousness also results when equality is pursued without regard to substantive justice.

A solution is to embrace our quasi-judicial role by becoming zealous advocates for justice, not simply advocates zealously obtaining convictions. Seeking justice becomes a direction for the exercise of our advocacy, not a check upon it. As prosecutors we represent the public interest. "Zealous advocacy must be on

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System, 1992 BYU L. Rev. 669, 690.

[12] Fisher, *supra note* 9, at 210-11. See also Melilli, *supra note* 11, at 691.

[13] Melilli, *supra note* 11, at 702.

behalf of the client's interest, and the only legitimate interest of the prosecutor's client is assuring that justice is done. . . . 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."[14] As the only legitimate interest of our client, justice requires us to exercise discretion with an eye toward the principle of equality — treating similar cases in a similar manner. Consequently, it is necessary to review more closely the second key feature of our role as prosecutors: we are discretionary decision makers.

Discretion provides an important and necessary tool for carrying out our quasi-judicial role. It can be viewed as the key to functioning as a minister of justice. "The prosecutor's great discretionary power is the cardinal fact of professional life."[15] This power is expansive, due in part to the broad categories of conduct defined as criminal. Additionally, the criminal justice system itself is characterized by its administrative aspects. The exercise of discretion is prevalent by all of its practitioners, including prosecutors, because the "core of administration is flexible discretion."[16]

For example, both Standard 4-3.1 of the *National Prosecution Standards* and Standard 3-3.8 of the ABA standards for the prosecution function promote the use of discretion regarding noncriminal dispositions of cases. Standard 4-3.1 states, in part, that "The prosecutor should, within the exercise of his or her discretion, determine whether diversion of an offender to a treatment alternative best serves the interests of justice."[17] Standard 3-3.9(b) of the ABA standards addresses the use of discretion in charging, confirming that a prosecutor is not required to charge all cases in which sufficient evidence exists to support a conviction. Some of the mitigating elements that can be considered include reasonable doubt regarding the offender's guilt, the extent of harm caused by the offense, and the disproportion of the authorized punishment in relation to the offense or offender.

The comment to Standard 3-3.9 states that differences in circumstances, the motives behind or pressures upon an offender, and many other mitigating factors may also be considered. The comment to the standard continues by

[14] Melilli, *supra note* 11, at 698-99.
[15] Fisher, *supra note* 9, at 204.
[16] Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427, 428 (1960).
[17] Nat'l District Attorneys Association, *supra note* 7, 4-3.1.

stating, in part, "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."[18]

Similarly, Standard 5-3.1 of the National Prosecution Standards outlines factors that prosecutors should consider in negotiating plea agreements. Among the factors of particular interest to us in thinking through the issue of battered women who fight back are the nature of the offense; possible mitigating circumstances; the age, background, and criminal history of the defendant; willingness to accept responsibility for the crime; and undue hardship caused to the defendant. As a result, both the *National Prosecution Standards* and the ABA standards affirm our authority to differentiate among our cases. Distinctions may be made in charging as well as in negotiating pleas. These distinctions can result in noncriminal dispositions, even when the evidence itself may support convictions.

Let's apply these mitigating factors to Shirley's case. The complicated dynamic of her relationship with Joe suggests that, as in the situations of many battered women, possible doubts may be raised about her guilt. When the full context of Shirley's relationship with Joe is considered, establishing a bright line between guilt and innocence can be difficult. Evidence concerning self-defense, provocation, and duress could raise doubts about Shirley's guilt, even though it may be unclear whether her actions satisfy the legal requirements for successfully maintaining these defenses.

Let's look also at the extent of harm caused by Shirley in this case. What was Shirley trying to accomplish? Is Joe afraid of her as a result of what she did? Has Joe's personal autonomy been compromised by Shirley? Next looking at the resulting circumstances, did Shirley's violence make her more or less vulnerable? Is she more dangerous or less dangerous than Joe? Is Shirley *in* more danger or less danger than Joe? Comparing Shirley's circumstances and the extent of harm she caused to those of Joe can reveal distinct differences between the situations of each. Both the *National Prosecution Standards* and the ABA standards affirm our authority as prosecutors to make a distinction in Shirley's case in seeking justice.

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[18] ABA Standards for Criminal Justice, *supra note* 8, 3–3.9 cmt at 73-74.

Many commentators have concluded that the exercise of discretion is not only inevitable, but desirable. Roscoe Pound has stated that "[t]he effective individualizing agency in the administration of justice is discretion."[19] Rules cannot be created that will effectively address every possible circumstance in life. Instead, principles must be employed. "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."[20] Discretion is a principle; so is equality. Pound acknowledged 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."[21]

We see, then, that neither discretion or equality are rules in our American criminal justice system. Instead, they are principles that establish starting points from which we can arrive at a determination. Neither principle is the end result and neither prescribes an end result. Instead, the end result — the goal — is justice. As one commentator has pointed out, "Equal justice under law" expresses the essence of our legal system. However, the phrase can be misleading because "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. . . . And we should accept the consequences 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."[22]

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[19] Roscoe Pound, *Discretion, Dispensation, and Mitigation: The Problem of the Individual Special Case*, 35 N. Y. U. L. Rev. 925 (1960).
[20] *Id.* at 927.
[21] *Id.* at 925.
[22] H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 Mich. L. Rev. 1145-46 (1973).

As a result, it is clear that a "maturity of law" is needed when battered women are charged with assaulting their abusers. Resulting from nationwide initiatives promoting community intervention in violent domestic relationships, bright-line arrest policies are now common. Designed to effectuate the arrests of batterers, the policies cast a wide net that has included women who have used responsive violence. As arrest policies have required modification, so too will our no-drop prosecution policies.

SELECTIVE PROSECUTION

But before we look at the policy and practice changes that are needed in our work, let's briefly review the area of law regarding selective prosecution. If we make distinctions in our cases, could we unintentionally subject our actions to selective prosecution claims by batterers? The expansive discretionary authority of prosecutors has been repeatedly upheld by appellate courts, which have also recognized that this authority is ill-suited to judicial review.[23] "Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by 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 this decision."[24] The focus of appellate review is to "keep the exercise of this important discretionary power of the prosecutor free of improper motivation."[25]

The review of prosecutorial decision making is based on the equal protection clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment. They express the principle of equality by requiring similar individuals to be treated in a similar manner by the government. This guarantee has been consistently qualified by both the Supreme Court and other federal courts in their decisions, however, 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."[26] Absolute identity of treatment is not required.[27] "Dissimilar treatment reasonably accorded persons dissimilarly situated does not

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[23] *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961); *Wayte v. United States*, 470 U.S. 598 (1985); *Newman v. United States*, 382 F. 2d 479 (D.C. Cir. 1967).
[24] *Newman*, 382 F.2d at 481-82.
[25] Uviller, *supra note* 22, at 1152.
[26] *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940).
[27] *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 237 (1954).

implicate the equality demand of the Fifth Amendment."[28] Instead, 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.[29]

When applied to the actions of prosecutors, the equal protection guarantee prohibits the abuse of discretion. Originating in *Yick Wo v. Hopkins*,[30] the selective enforcement doctrine was extended to prosecutors in *Oyler v. Boles.*[31] In *Oyler*, the United States Supreme Court did not prohibit all conscious selectivity in enforcement. Rather, a claim of selective prosecution must be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[32] The elements of a claim require proof of both a discriminatory effect and a discriminatory purpose. In applying the elements, a presumption is made that the prosecutor acted in good faith, motivated by proper considerations.[33] A heavy burden must be met by a defendant in making a prima facie showing of selective prosecution.[34] Many courts apply a clearly erroneous standard of review to such claims.[35]

In proving the first element, that of a discriminatory effect, there must be proof that other persons similarly situated were not prosecuted. To determine this, all relevant factors must be examined.[36] Defendants "are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them."[37]

To prove the second element, that of a discriminatory purpose, it must be proved that the decision to prosecute involved a discriminatory selection based upon an arbitrary, invidious, or impermissible consideration. Examples include the above-mentioned classifications of race and religion and can also include

[28] *United States v. Bell*, 506 F.2d 207, 222 (D.C. Cir. 1974).
[29] Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949).
[30] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
[31] *Oyler v. Boles*, 368 U.S. 448 (1962).
[32] *Id.* at 456.
[33] *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *U.S. v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997).
[34] *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).
[35] Rebecca M. Chattin, *Prosecutorial Discretion, in §II, Preliminary Proceedings, Criminal Procedure Project*, 84 Geo. L.J. 887, 899 (1996).
[36] *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).
[37] *Olvis*, 97 F.3d at 744.

sex. Because some jurisdictions do not consider gender-based distinctions to be invidious or arbitrary, a rational basis test is used rather than a strict scrutiny test.[38]

A classification must be considered in light of legitimate law enforcement objectives, and not reviewed only in the abstract.[39] A classification is considered to be arbitrary only if "people have been classified according to criteria which are clearly irrelevant to law enforcement purposes."[40] The prosecutor may choose to focus on the central interests which the law is intended to protect.[41]

Could Joe raise a selective prosecution claim if he is charged in a future incident and Shirley hasn't been fully prosecuted in this incident? It appears that such a claim would not be likely to succeed. Applying the elements of a selective prosecution claim to Shirley and Joe's situation, we see that, first, the parties are not similarly situated. The fact-focused test discussed above allows us to conclude that the differing circumstances between Shirley and Joe result in distinguishable legitimate prosecutorial factors leading to different decisions about them. Context is crucial; regardless of gender, ongoing victims like Shirley are not at all similarly situated to their abusive partners.

Second, a classification distinguishing Shirley from Joe is not arbitrary. Rather, it is clearly relevant to the purposes of law enforcement. Since the purpose of the criminal law (and assault statutes specifically) is to prevent harm, prosecutors can legitimately focus greater attention on those perpetrators, like Joe, who are *not* ongoing victims of abuse.

Let's think for a moment about the hesitance we may feel as prosecutors in making these distinctions. Where does it come from? Our legal system and the professional rules under which we function clearly support our authority to do so. But at the core of our reluctance may be a concern that drawing such distinctions could be characterized as sexism — giving women "a break" at the expense of men. But we need to remember that we live and work in a gendered society in which women disproportionately are the victims of ongoing physical abuse. Our prosecution policies and decisions are not based on the gender of the individuals involved. Instead, they are based on the

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[38] *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).
[39] 4 Wayne R. LaFave et al., *Criminal Procedure* 52 (2nd ed. 1999).
[40] Daniel J. Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. Ill. L. F. 88, 110.
[41] *Id.* at 118.

circumstances of the relative situations. It is a legitimate prosecutorial focus to treat batterers differently than those who are battered.

PRACTICE — How we can treat cases differently when battered women fight back

We've seen above that as prosecutors we are called on to be ministers of justice, not simply advocates for one side. Often, a conviction can mean justice, but not always. Cases in which battered women use responsive violence challenge us as prosecutors to look beyond convictions as a primary measure of our efforts to provide safety. They call us to examine the larger picture of what justice really means. With this in mind we can next look at some options for how to better address the issue of battered women who fight back. This is going to involve working with other practitioners around us in our system and in our community.

First, we need to listen to the battered women's advocates in our communities, and then listen some more. This issue of battered women getting arrested is often quite emotional for advocates who have worked closely with many women over the years. They have directly or vicariously experienced both the apparent and real injustices that battered women come up against when they find themselves involved with the criminal justice system as defendants or victims.

Some advocates can better articulate the reality of the lives of battered women than others. Either way, we need to stop talking long enough to listen to them. We need to let the reality of battered women's lives transform our thinking about our case files. Without the voices of battered women in our ears, we won't get it right.

As we have seen, seeking justice is not only about proving a case at trial, it's about achieving a fair outcome. We can't figure out what's fair if we don't understand the context. And we won't understand the context if we don't have the information that we need. Battered women's advocates can help us to determine what information we need to make better decisions.

Gathering the needed information

Having spent time listening to advocates and learning about battered women's lived reality, we can begin to identify what information we need, as well as how to gather it. As with any assault case, we start with a specific incident. We want to know exactly what both Shirley and Joe did or did not do. Can we prove the elements of the offense? Can self-defense possibly be raised? We also want to

know the motives for their actions. What was Shirley trying to accomplish? Was she trying to intimidate Joe? Was she seeking to exert power over him, to control him in the relationship? Was she afraid of him? Or was she responding to years of his abuse?

Yet unless we also look at the larger context of the relationship, we won't have enough information to address the safety needs of both people. To achieve a just result, we first need to determine who is most afraid in the relationship and who most needs to be protected. We can begin by looking at the history of Shirley's victimization by Joe, her criminal history and history of violent behavior, and the circumstances surrounding her use of violence.

Most of us don't have case files that contain this information. What we have isn't necessarily what we need, let alone what we want. The policies, procedures, and work practices of our agencies and the agencies we work with have determined what information is contained in our files.

It's up to us to decide what we need and want to know, and then figure out the ways in which we can obtain it. For example, because law enforcement officers are trained observers, police reports provide some of the best information that we will receive in a case. Their immediate responses to domestic calls also mean that victims of ongoing abuse may provide more detailed information about the relationship and the circumstances of the assault than they would later to other practitioners. Consequently, officers can gather much of the additional information that we will eventually need to reach good decisions about our cases.

In addition to the reports of the incident, prior police reports and calls for assistance can provide helpful information, as can our own files. Has either person been prosecuted before? Has either person taken out a protection order? Has Shirley worked with a battered women's advocate? Can that advocate provide background information? Can statements be obtained from friends, family, and neighbors around her? Defense attorneys knowledgeable about the dynamics of violent relationships can sometimes provide this information as well.

Reviewing options

When we have as much of this information as possible, we can review our options. These include offering a plea to the charged offense or to a lesser charge, offering a stay for dismissal with conditions, filing an outright dismissal, or proceeding to trial. To obtain a just result, we need to consider what impact

a conviction for Shirley will have on her safety in the relationship. And as the victim in the incident, what will make Joe safer? Will he be made safer if we convict Shirley? Or will he be safer if he stops using violence against her? How does holding Shirley accountable further safety for Joe (specific deterrence)? What message is given to the community about the use of violence in domestic relationships (general deterrence)? The prosecutor who wants to achieve a just response will inevitably face questions like these.

Just as Shirley's actions took place within a context, so too there is a context in which our prosecution efforts take place. How is our work shaped by the institutional structures around us? How do the institutional policies, practices, and procedures of our offices, as well as those of the criminal justice agencies that we work with (like police and probation), determine what information we will eventually have in our files? What do we need to do to change this?

Changing policies and practices

To better account for the reality of battered women who fight back against their abusers, we need to reconstruct the work practices of our criminal justice agencies (no small task). Let's start with our own offices. In many communities, prosecutors have been encouraged to adopt no-drop prosecution policies. Intended for cases involving battering, such policies don't work well when applied to cases of battered women using responsive violence. Policies with a more nuanced approach better address the contextualized nature of battering relationships and make a tailored response more possible.

To develop these policies, prosecutors need to work with and receive the support of other local criminal justice agencies and battered women's advocates. In communities that use a CCR approach, these partners can provide suggestions for the creation of our prosecution policies. Ideally, this input will guide us in creating policies and procedures that better reflect the reality of ongoing violent domestic relationships.

However, we can't reconstruct our criminal justice system's work practices to account for the reality of battered women's experiences unless we understand those experiences. We think we know their reality from reading police reports, and yet most of us don't know it as we should. Here again, battered women's advocates can play a crucial role in educating practitioners about this reality. Advocates can compile anonymous case examples illustrating the context of violence, the results of arrest and prosecution, and what those events meant to the battered women involved and specifically to their safety. They may want to interview individual battered women or talk with them in focus groups. This

information can powerfully illustrate both the need for changes in our policies and procedures as well as suggest some of what those changes should be and how agencies can coordinate to create them.

The need for more detailed information about both the incident between Joe and Shirley and the history of their relationship means that police policy and procedures will likely need revision. Take a look at the arrest policy your law enforcement agency uses: does it incorporate predominant aggressor language, or simply primary or dominant aggressor concepts? Predominant aggressor language both invites and requires arresting officers to look closely at the context in which violence was used in the incident. In addition, accurate self-defense determinations by law enforcement rely upon officers' knowledge of the contextual use of violence, threats, and intimidation. Not surprisingly, implementing changes in law enforcement policy will result in a need for detailed training for officers in effective ways to document an incident, the history of violence in the relationship, and risk factors associated with the possibility of future violence. If we want the crucial information that officers can give us for our files, then we should be prepared to work with them to write policies and procedures and provide training for them.

Similarly, our prosecution policies and procedures will need to be structured to incorporate the use of the greater amount of information that we will be receiving from our officers. How will we evaluate the additional information in Shirley's file? What is the framework for making these decisions? What options for resolving the case will our analysis of the incident and of the context lead us to consider? Thinking through these policy development questions with battered women's advocates and other practitioners in our communities will help to resolve these issues.

But to make these changes in prosecution and police policies and procedures truly effective, we need to collaborate with probation officers and battered women's advocates to expand their roles as well. Both can provide contextual information at key stages as our cases move through the system. As is the case with police, modifications in work practices will be necessary, along with training in gathering and using information about the history of violence in relationships.

For example, probation officers can offer critical information and supervision resources to prosecutors seeking just results for the battered women who become defendants in our case files. Pre-sentence investigations or pre-plea assessments are employed in some jurisdictions to provide prosecutors with the contextual information necessary to implement a nuanced prosecution policy.

As with law enforcement, we need to be prepared and willing to assist in drafting policies and training probation officers in new ways to approach this aspect of their work.

All of the suggestions in this piece will require extensive interagency collaboration to become reality. For those of us working in communities with CCRs, the structure to make these things happen is already built in. But whether we work within a CCR or not, here are three CCR-type, tried-and-true methods: First, remember to work in small groups of as-needed practitioners, never in large groups. If we reserve the large-group experience for celebratory events, we will avoid messy fights and conflicts that don't need to occur. Second, start where you can. If many doors are closed, work with what you have and more doors will eventually open. Third, don't forget to bring cookies to your meetings. When you're trying to collaborate with others and talk about changing their work practices as well as your own, cookies can really help to set a calm, friendly tone. So many meetings in this world would have gone better with cookies.

CONCLUSION

Battered women don't live and act in a vacuum, and when we're handling their cases, neither should we. We function as ministers of justice in a criminal justice system that seeks to prevent harm to society. We have the authority to exercise discretion in making legitimate distinctions about the cases that we prosecute.

We've seen that it's all about context. We can better understand the context in which battered women have acted by developing and gathering more extensive information through collaborating with other criminal justice agencies and community partners, such as law enforcement and probation officers and battered women's advocates.

The policy and procedure changes across agencies needed for this aspect of our domestic violence response can result from building and enhancing our working relationships among individuals and agencies. These working relationships provide the foundation for recreating our work processes to better account for the reality of battered women's experiences. This deeper understanding of the experience of battered women in ongoing abusive relationships can lead to a more thoughtful analysis of their case files. Though handling cases like Shirley's still won't be easy, we will be better able to tailor our responses to prevent harm and to fulfill our role as ministers of justice.

ADDITIONAL RESOURCES

1. Mary E. Asmus, *At a Crossroads: Developing Duluth's Prosecution Response to Battered Women Who Fight Back*, a monograph detailing the process that one community used to address this issue. Available as a download at bwjp.org and at dvturningpoints.com. Much of the material in this practice piece has been drawn from this monograph.
2. Jeffrey P. Greipp, Toolsi Gowin Meisner, & Douglas J. Miles, *Intimate Partner Violence Victims Charged with Crimes: Justice and Accountability for Victims of Battering Who Use Violence Against their Batterers*, (2010 by AEquitas: The Prosecutors' Resource on Violence Against Women) available at http://www.aequitasresource.org/Intimate_Partner_Violence.pdf
3. National Clearinghouse for the Defense of Battered Women, ncdbw.org.
4. Domestic Abuse Intervention Programs, theduluthmodel.org.
5. Battered Women's Justice Project, bwjp.org.
6. Praxis International, praxisinternational.org.
7. Domestic Violence Turning Points, dvturningpoints.com.

ABOUT THE AUTHOR

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APPENDIX 1

WHEN BATTERED WOMEN FIGHT BACK: A TEMPLATE FOR PROSECUTORS		
Prosecutor's case file	This incident	Context
What do you want to know?	- Her actions What did she say/do? - Her motives/reasons Why did she say/do this? - His actions What did he say/do? - His motives/reasons Why did he say/do this? - The severity of the incident	- Her criminal history - Her history of violent behavior - Her history of victimization by him - The circumstances surrounding the use of violence
Why do you want to know this?	- To understand details of current incident - To know whether the elements of the offense can be proved - To determine whether actions were self- defense	- To determine who is most afraid in the relationship - To determine who most needs to be protected/greatest safety needs - To help determine the overall most just result
Why can you look at this?	- *National Prosecution Standards* 1-1.1	- *National Prosecution Standards* 1-1.1 and 5-3.1
How do you obtain this?	- Police reports - Later statements from defendant and witnesses	- Court records - Office records (prosecutor's office) - Law enforcement records and reports (prior reports, calls for assistance - Statements from her/him/family/friends/ neighbors - Information from battered women's advocates - Information from defense attorney
What are your options?	- Plea to charged offense - Plea to lesser charge - Stay for dismissal w/conditions - Dismiss - Trial	- Impact on her safety in the relationship - Impact on his safety in the relationship - Specific deterrence - General deterrence
What may be needed to develop system policy/ procedure changes?	- Changes in arrest policy language: primary/dominant/predominant aggressor - Changes in police documentation of incident and risk factors - Changes in prosecution policy	- In what context should policy/procedure changes be developed? - Prosecution collaboration with police, battered women's advocates, and probation
What may be needed to implement system policy/procedure changes?	Police training: - Determining self-defense - Determining primary/ dominant/ predominant aggressor - Interviewing skills - Risk factors - Recording history of violence, etc.	- Training for battered women's advocates - Training for prosecutors - Training for probation officers - Training for defense attorneys

Appendix 2

This appendix, *Crossroads Program Prosecution Guidelines* and *Evaluation Guidelines for Probation Officers and Prosecutors*, is an excerpt from *The Duluth Blueprint for Safety* chapter on prosecution. These guidelines are an example of how one community has sought to address the problem of battered women who fight back.

On January 29, 2015, the City of Duluth, Minnesota and six criminal justice agencies announced the adoption of a new collective domestic violence policy. The Blueprint for Safety strengthens the city's Duluth Model coordinated community response to domestic violence cases.

> *The Duluth Blueprint for Safety* can be found at https://www.theduluthmodel.org/duluth-blueprint-safety/
>
> The full chapter on prosecution can be found at https://www.theduluthmodel.org/wp-content/uploads/2017/03/6-Duluth-Prosecution-Chapter-5.pdf

Crossroads Program: Prosecution Guidelines

Introduction

The Crossroads Program is a program intended for victims of ongoing domestic abuse who are charged with criminal offenses against their partners. It is designed to provide participants an opportunity to address their use of violence within the larger context of their victimization. The program seeks to hold participants accountable without invoking the full ramifications of the criminal court process.

Definitions

The guidelines rely on the following definitions:

- A defendant is a person who is charged with a domestic-related offense and has a history of physical abuse by the complainant.
- A complainant is a person who is the victim of a domestic-related offense and has a history of physically abusing the defendant.
- A deferral is the agreement of the State and defendant to a stay of prosecution for a specified time period, after which criminal charges against the defendant will be dismissed if the defendant successfully completes the terms of the stay.

Goals

The goals of prosecution in these cases are:

- To protect the complainant from additional acts of violence committed by the defendant.
- To hold the defendant accountable for using violence without creating greater vulnerability to continued abuse.
- To deter either person from committing continued acts of violence against others.
- To create a general deterrence to domestic violence in the community.

Eligible Offenses

Domestic-related criminal charges, particularly assault or disorderly conduct, will be considered for deferral under this program.

Eligibility for Initial Consideration

- The defendant must have a history of physical abuse by the complainant.

- The defendant should not have any pending or previously deferred charges or convictions under any state laws or any local ordinances for:
    - assault
    - gross misdemeanor obstructing legal process

It is highly unlikely that an applicant would be fully reviewed for admission into the program with any pending or deferred charges or convictions noted above. A record of other violence may also preclude the defendant from full consideration.

- The defendant must submit a written application to the City Attorney's Office
- The defendant has not previously been admitted to the Crossroads program.

Factors Considered for Admission

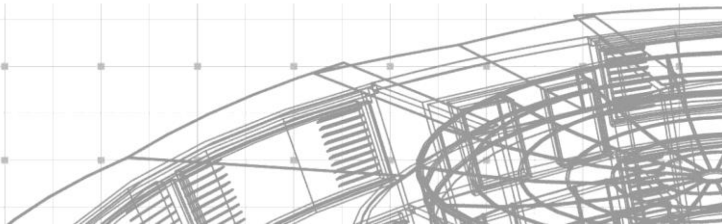
The prosecutor will review each case file and make a determination regarding admission into the program based on consideration of the following factors:

- the probation department's recommendation
- the defendant's criminal history
- the defendant's history of violent behavior
- the defendant's history of victimization by the complainant
- the severity of the incident
- the nature of the defendant's admission to the charged offense(s)
- the views of the complainant
- the circumstances surrounding the use of violence
- the motives for the use of violence
- the defendant's willingness to participate in recommended education and counseling programs

Deferral of Case

Upon admission into the Crossroads Program, the prosecutor will defer the criminal charge(s) against the defendant for an agreed-upon time period. Conditions of the deferral program may include, but not be limited to:

- full admission to the charged offense(s)
- successful completion of recommended education and counseling programs



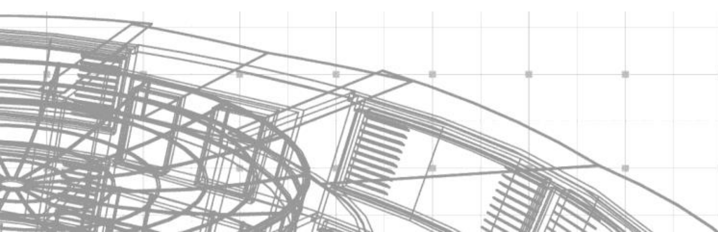
- no same or similar incidents
- restrictions on the use of alcohol

Reinstatement of Charges

The prosecutor may reinstate the criminal charge(s) at any time before the expiration of the deferral period if the defendant fails to comply with any of the conditions of the agreement.

Dismissal of Charges

The prosecutor will dismiss the deferred criminal charge(s) if the defendant complies with all of the terms of the deferral agreement.



Crossroads Program: Evaluation Guidelines for Probation Officers and Prosecutors

Defendant's Criminal History

To be eligible for the Crossroads Program, the defendant should not have any pending or deferred charges or convictions under any state law or local ordinance for assault or gross misdemeanor obstructing legal process. In order to account for some rare situations in which a previous conviction would not compromise the intent of the program, the policy uses the words should not, rather than, must not. Typically a past conviction will result in immediate rejection from consideration. However, if the defendant makes a reasonable argument that a past conviction does not compromise the intent of the program, then the probation officer should proceed with the investigation. The interviewing probation officer should document all other convictions, arrests, and police incident reports involving the defendant. In doing so, the probation officer provides the prosecutor with a general picture of the scope and nature of any criminal activity in which the defendant has been involved. The intent of these guidelines is not to exclude people with a previous criminal history from this program but rather to exclude people who have a history of aggressive, abusive, and violent behavior. If the probation officer believes that a pattern of criminal activity indicates that the defendant does in fact have an ongoing problem with aggressive and violent behavior, the probation officer should recommend against acceptance into the program.

Defendant's History of Violent Behavior

In this category the probation officer will be documenting the history of violence that the defendant has used against his or her partner and the history of violence that the person has used in other situations not reflected in the criminal background check. The probation officer would obtain this information from interviews with the defendant and the complainant and from their statements. It would be expected that the defendant may have been violent more than once with this partner if both the relationship and the complainant's abuse have existed over an extended time period. However, if the defendant shows a pattern of widespread use of violence in many different relationships or circumstances, then the probation officer should recommend against admittance into the program.

Defendant's History of Victimization by the Complainant

The assumption of the Crossroads Program is that the defendant is being battered by the complainant, i.e., that the complainant has established a pattern of coercion and intimidation, threats, and the use of physical and/or sexual violence. Battering does not refer to isolated incidents of violence, nor for the purposes of this program does it refer to abuse which is exclusively psychological or emotional. The intent of the program is to protect the safety of both parties and to

avoid making victims of ongoing coercion, intimidation, and violence more vulnerable to this violence through the actions of the criminal justice system. With this primary purpose in mind the probation officer should review the defendant's documentation of assistance sought through visits to the shelter, calls to 911, affidavits from previously filed protection orders, and police reports or statements from others such as social workers, counselors, and family or friends. While the defendant is not required to document a severe pattern of high-risk violence, the probation officer must have strong indicators that there is definite pattern of battering by the complainant against the defendant.

Severity of the Incident

The Crossroads Programs addresses misdemeanor domestic-related criminal offenses. This limitation itself will exclude most serious assaults. However, occasionally a misdemeanor assault can be quite brutal in nature, or it can result in the infliction of severe harm to the victim. The probation officer should consider recommending against acceptance into the program in these cases.

Nature of the Defendant's Admission to the Charged Offense(s)

The applicant will not be required to make a written statement of admission but will be required to provide an oral statement to the probation officer. This statement must be sufficient to establish that he or she admits to committing the offense and admits to facts sufficient to support the criminal charges. This admission is one indication of a defendant's willingness to participate fully in recommended education and counseling. If the defendant describes a set of circumstances that the probation officer believes constitutes self-defense, the probation officer should document those statements and make a recommendation to the prosecutor that the case be further reviewed for either dismissal or alternative disposition. The program is not intended to be a substitute for the proper raising of self-defense in cases in which the defendant claims not to have committed a criminal act.

Views of the Complainant

The probation officer should contact the complainant and take a statement from him or her regarding the impact of offering a deferral on the complainant's ongoing safety. If the complainant feels that such a disposition of the case would compromise his or her safety, the probation officer should explore the reasons for the complainant's statement and convey this information to the prosecutor for consideration.

Circumstances Surrounding the Use of Violence

This program is intended to deal with a broad range of behaviors of victims of ongoing physical and/or sexual abuse, including the use of violence as a form of retaliation or as a means of coping with the violence used against them in intimate relationships. It is not intended to be used to resolve

assault cases in which there is no apparent link between the use of violence by the defendant and ongoing victimization by the complainant. If the complainant has not been engaging in intimidating, coercive, or physical abuse for an extended period of time, or if the incident itself was not related to the experience of previous violence, the probation officer should consider recommending against admittance into the program. This would mean that in cases where there has been a past history of abuse but no violence, threats or intimidation for a period of time, the defendant is not necessarily appropriate for this program.

Motives for the Use of Violence

In interviews with both the defendant and the complainant, the probation officer should try to establish the reasons the defendant used violence. It is not the intent of the City Attorney's Office to establish acceptable or unacceptable motives for an assault against a partner, even when that partner is engaging in ongoing acts of battering. However, it is the intent to exclude those applicants whose motives are the ongoing domination of their partners. If the probation officer finds that the defendant's motive tends to be inconsistent with the fairly broad scope of cases that this policy is intended to cover, then the probation officer should document this concern.

Defendant's Willingness to Participate in Recommended Education and Counseling Programs

This program is designed for defendants who are beginning to use violence against their batterers in ongoing abusive relationships. Defendants who are appropriate for the program are those who have not engaged in patterns of violence in other situations. The probation officer should expect to hear from the defendant a clear willingness to participate in recommended education and counseling. If a defendant does not express such a willingness, the traditional court process with its additional controls may be more appropriate.