

**At a Crossroads:  
Developing Duluth's Prosecution  
Response to Battered Women  
Who Fight Back**

Mary Asmus, Chief Prosecutor  
City Attorney's Office  
Duluth, MN

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**AT A CROSSROADS:  
Developing Duluth's Prosecution  
Response to Battered  
Women Who Fight Back**

By Mary E. Asmus

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**OVERVIEW**

**PROBLEM**

**LEGAL THEORY**

**PROCESS USED**

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**DRAFTING THE POLICY**

**IMPLEMENTING THE POLICY**

**CONSIDERING THE CASES**

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**THE PROBLEM**

Battered women who fight back wasn't the social problem that most coordinated community criminal justice responses were created to address.

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Most coordinated community criminal justice responses are designed to address battering, not responsive violence used by battered women.

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**LEGAL THEORY OF THE CROSSROADS PROGRAM**

1. Purpose of the Criminal Law
2. How Crimes are Classified
3. Role of the Prosecutor
4. Discretion and Equality

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**1. Purpose of the Criminal Law**

- Prevent harm to society
- Main objective is punishment



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“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).

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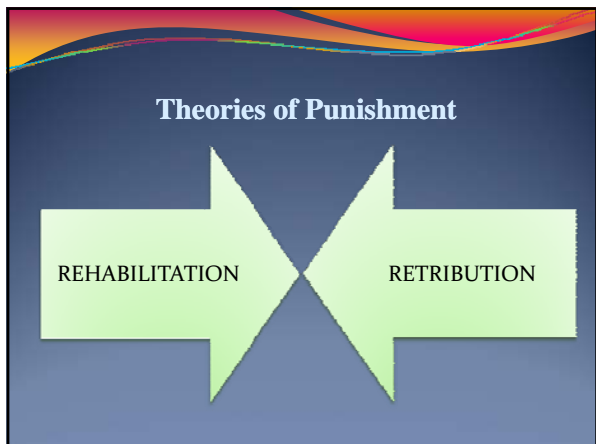
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### REHABILITATION

- FITS THE PUNISHMENT TO THE CRIMINAL
- FOCUSES ON THE OFFENDER
- EMPHASIS IS ON IMPROVING THE CRIMINAL'S LIFE, NOT ACTUAL PUNISHMENT

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### RETRIBUTION

- FITS THE PUNISHMENT TO THE CRIME
- FOCUSES ON THE OFFENSE
- OPERATES FROM A CONSENSUS MODEL OF SOCIETY – THE COMMUNITY IS ACTING IN THE RIGHT; THE CRIMINAL IS ACTING IN THE WRONG

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**2. How Crimes are Classified in American Criminal Law**

- Broad categories
- Incident focused
- Injury focused

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**3. Role of the Prosecutor in an Adversarial System**

- Minister of justice
- Discretionary decision maker

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**THE PROSECUTOR AS A MINISTER OF JUSTICE**

**“The primary responsibility of prosecution is to see that justice is accomplished.”**

National District Attorneys Association, *National Prosecution Standards* 1.1 (2<sup>nd</sup> ed. 1991).

**“The duty of the prosecutor is to seek justice, not merely to convict.”**

ABA Standards for Criminal Justice 3-1.2(c) (3<sup>rd</sup> ed. 1993)

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**QUESTION**

Can a just system treat similar cases differently and still be just?

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**THE REAL QUESTION**

Can a just system treat dissimilar cases the same and still be just?

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**THE PROSECUTOR AS A DISCRETIONARY DECISION MAKER**

**“The prosecutor’s great discretionary power is the cardinal fact of professional life.”**

Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197, 204 (1988)

**Discretion is “the power to consider all circumstances and then determine whether any legal action is to be taken.”**

Charles D. Breitell, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427 (1960)

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**The prosecutor’s discretionary power is expansive because of:**

- Over criminalization
- Overlapping provisions in criminal codes
- Economic limitations on prosecutorial resources
- Severity of criminal sanctions in the United States (including mandatory minimums)
- Broad categories of conduct defined as criminal

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**“The prosecutor should, within the exercise of his discretion, determine whether diversion of an offender to a treatment alternative best serves the interests of justice.”**

Nat’l District Attorneys Association, *National Prosecution Standards* 44.1 (2<sup>nd</sup> ed. 1991)

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**Mitigating factors can be considered under the National Prosecution Standards and the ABA Standards:**

- Reasonable doubt that the accused is guilty
- Extent of harm caused by the offense
- Differences in the circumstances under which a crime took place
- Motives behind or pressures upon the defendant

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**4. Discretion and Equality**

**“The effective individualizing agency in the administration of justice is discretion.”**

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

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

Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 25 N.Y.U. L. Rev. 925 at 927 (1960)

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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.”

Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 25 N.Y.U. L. Rev. 925 at 927 (1960)

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**DISCRETION AND EQUALITY ARE:**

- Principles, not rules
  - Starting points
  - Not the end result

THE END RESULT → THE GOAL → IS JUSTICE

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**SELECTIVE PROSECUTION**

**I. Expansive discretionary authority of prosecutors upheld by appellate courts**

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**Discretionary Authority:**

- Ill -suited to judicial review
- Prosecutors are not rubber stamps
- Objective is to keep it free from improper motivation

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“To say that the United States Attorney must literally treat every offender alike is to delegate him an impossible task; of course this concept would negate discretion. Myriad factors can enter into the prosecutor’s decision. Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges...

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

Newman v. United States, 382 F.2d 479, 481-482 (D.C.Cir. 1967)

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SELECTIVE PROSECUTION

**II. Equal protection guarantee prohibits abuse of discretion**

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**Equal Protection:**

- Equal protection clause of Fourteenth Amendment and due process clause of Fifth Amendment
- Requires similar individuals to be treated in similar manner by the government

*“The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”*  
*Tigner v. State of Texas, 310 U.S. 141, 147 (1940)*

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Selective prosecution claim must be “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.”

*Oyler v. Boles, 368 U.S. 448, 456 (1962)*

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ELEMENTS OF SELECTIVE PROSECUTION CLAIM

I. **Discriminatory effect** (others similarly situated have not been prosecuted)

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**Discriminatory Effect:**

Defendants “are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them.”

*United States v. Olvis*, 97 F.3d. 739, 744 (4<sup>th</sup> Cir. 1996)

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ELEMENTS OF SELECTIVE PROSECUTION CLAIM

II. **Discriminatory purpose** (decision involved a discriminatory selection based upon an arbitrary consideration)

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**Discriminatory Purpose:**

- Examples can include classifications such as race, religion or sex
- Gender classifications not always considered arbitrary
- Examine the classification as it relates to legitimate law enforcement objectives
- Classification is arbitrary only if the classification criteria are clearly irrelevant to law enforcement purposes
- The central interest which the law is intended to protect can be the focus
- Prosecutor can focus on the most substantial or serious violations or those of greater legitimate public concern

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**“I can’t think of a better job than to be a prosecutor. It’s an absolutely amazing opportunity. It’s a luxury of a lifetime to be able to pursue only those things that are right. You are unencumbered by the bad ideas of a client who is paying you money. You are only encumbered by your own desire to do the right thing and to make sure that justice is done.”**

Stephen Trott, Address to J. Frank Coakley National Symposium on Crime (May 1987), quoted in John J. Douglass, *Ethical Issues in Prosecution* 31 (1988)

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

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

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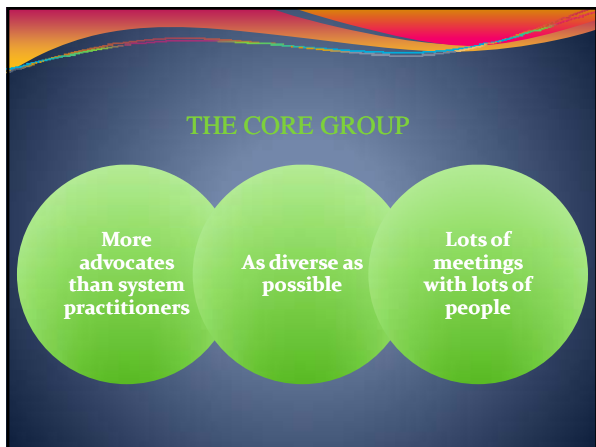
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### DRAFTING THE POLICY

I. Determining the Disposition

- Dismiss / defer / stay adjudication / convict
- Unintended consequences

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**II. Creating the Criteria**

- Initial consideration
  - History as a victim
  - History of using violence
- Factors for admission
  - Criminal history
  - Severity of the incident
  - Nature of the admission
  - Views of the complainant
  - Circumstances
  - Motive
  - Willingness to participate

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**IMPLEMENTING THE POLICY**

- Memorandum of understanding
- Early identification of cases
- Probation procedures
- Application form
- Education groups
- Meetings – judges, defense attorneys, probation, police
- Alcohol use

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**CONSIDERING THE CASES**

- Input from probation
- Self-defense
- Establishing victimization
- Need for advocacy
- Psychological battering
- The problem of motives
- Severity of the assault
- Length of the program
- “Crossroads” as a way of thinking

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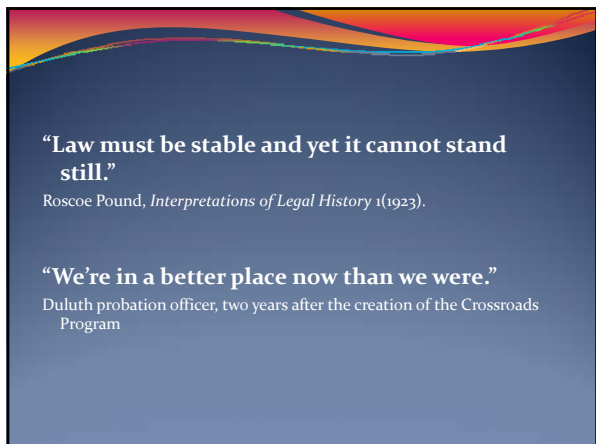
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