

Domestic Violence Courts: Emerging Ambiguities within the American Legal System

Shifting Paradigms of DV Prosecution

Domestic violence courts are a new kind of specialized court that has gained popularity in the last decade or so as a means of using the court system to cure societal ills. The traditional function of the courts in the American criminal justice system is to prosecute criminal violations of the law and to act as a safeguard for the rights of the accused. In the past twenty years or so, the legal system has tapped into new potentials. It is wielding its authority to move beyond its traditional domain of criminal law and the prosecution of violators and in doing so has caused the actors within to question not only the role of the court but the very idea of what it means to be criminal. In domestic violence court, one prosecutor at the Suffolk County District Attorney's office where I interned for three months over the summer once told me that many of the defendants are not criminals but simply ordinary people who have committed criminal acts.

Before these issues were being played out in court, the state tried remedying them through welfare programs (Kandaswamy 2010). However, with the decline of the welfare state, the focus was shifted. Originally helping to improve the lives of women who suffered from domestic violence through societal reform projects which aimed at closing the gender gap, the priority is not on punishing those who engage in household violence. The political agenda shifted to greater emphasis on upholding law and order. This came at the price of being able to help the victims directly, something there is little room for in criminal legal proceedings. If these courts are to succeed in achieving actual wellbeing, we are going to need a more thorough understanding of the subtleties of our legal system.

The reason that our system, in its attempts to remedy domestic violence, can no longer direct attention to the victims is because, traditionally, ADAs operate, along with numerous other actors, within an adversarial system. This is characterized by opposing parties: the prosecution who represents the people's best interest, and the defense who represents the defendant. The victim is largely absent from these proceedings. The system was meant to tease out the truth through different forces in opposition to each other so that no one would be falsely accused. After all, the American judicial system is meant to protect the rights of the accused. In fact, traditionally, neither the court, nor any of its actors have a responsibility to protect the victim. Things have begun to change. Specialized courts like DV courts are breaking down the adversarial system.

This is evidenced by the numerous contradictions that now exist. A recent example is the reform of the

Questions of expertise aside, should courts be meddling in these matters? This new paradigm is slowly abandoning long-held norms about the purpose of criminal prosecution and the responsibilities of the courts themselves.

A History of Domestic Violence Courts

Domestic violence courts have emerged in the last twenty years as a response to a new recognition of domestic violence as a social problem in today's society. For the majority of Western history, male-female relations grew out of a patriarchal and hierarchal tradition of male dominance. Real social recognition of domestic violence as a societal issue would not come until the Battered Women's Movement, which was a spin-off of the rise of feminism in the 1960s and 1970s (Doak 2011). Much later, in the 1990s, legal recognition of domestic violence would result in the birth of domestic violence courts, a new type of specialized court part that is just one of many courts that make up what are known as problem-solving courts (Mirchandani 2005). Theories backing these courts are comprehensive of the new role that they envision for legal proceedings, in which it is believed that they can cure societal ills. Therapeutic jurisprudence and restorative justice are examples of legal approaches of procedural justice that make up problem solving courts (King 2000). However, they are changing the way the American legal system works. Many of these approaches to criminal justice conflict with the adversarial nature of our legal system.

The Battered Women's Movement and the Failure of the Welfare State

Domestic violence is a phenomenon that spans across many cultures and societies. When looked at cross-culturally, domestic violence is an issue of gender inequality. This can easily be

vulnerability (Raphael 2000). This was confirmed in the 1990s by studies that showed that welfare recipients are more vulnerable to domestic violence. One such study stated that 60% of welfare recipients are domestic violence victims (Kandaswamy 2010).

In 1996, the same year as the first domestic violence court opened, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act. That act undid decades of welfare legislation. It took the form of welfare reform that would no longer pander to undeserving citizens who took advantage of the state. Stricter mandates and greater exclusions from aid were all part of the act, making it even harder for welfare recipients to get help (Kandaswamy 2010). But as programs to help women became rarer and more studies published claims that domestic violence and welfare are related, feminists pressed the state to act.

The rise of feminism in the U.S. allowed women to get together and address their societal grievances for the first time and attempt to remedy them. First, this led to battered women shelters and then to state and national legislation pertaining to women who suffer from domestic violence (Doak 2011). But as welfare programs dwindled the organized feminists were making calls for reform. They wanted domestic violence, previously a private, in-home phenomenon to be addressed as a public issue to be properly dealt with by the state. In 1994, the Federal Violence against Women Act gave federal civil right protections to female victims of domestic violence. It was actually part of the Violent Crime Control and Law Enforcement Act of 1994 which made sweeping reforms aimed at increasing the effectiveness of our criminal justice system (Kandaswamy 2010). In the same year, New York State passed the Family Protection and Domestic Violence Intervention Act, which established mandatory arrest policies for felony cases, a registry for court-ordered orders of protection, so that police could identify any individuals violating an order of protection when they were called to an incident and a domestic

violence incident report in which police add more information such as victim, offender and other important information.

These state reforms changed the focus of combating domestic violence. They deal primarily with the individual crime, not the overarching issue of patriarchal oppression. The focus has entirely shifted from helping women to punishing offenders. Given our adversarial legal system and the court's inability to address the victim's needs, this was a major divergence from past efforts to reform. Two years after the largest reforms, the first domestic violence court was established in Brooklyn, New York.

Growth of Problem-Solving Courts

The creation of problem solving courts comes right down to one's belief in the proper role the state should play in today's society. Should the state be ideological, becoming an advocate for some stance and trying to attain some goal, or judicial, simply the arbiter of justice

try to address crimes that they believe have deeper roots in society. A lot of offenses that go to these courts have a revolving door occurrence in which there is a high rate of recidivism. The fear is that, without more court involvement, these offenders will never get the treatment they need and keep violating and being an overall burden on society. The existence of these specialized courts is an acknowledgment that traditional courts by addressing the symptoms and not the causes, have failed (Winick 2003).

The new courts are different from the old ones because they play an increased role and intervention in the lives of their defendants in order to get at the cause of the problem (Winick 2000). What better way to alleviate the cause of someone who beat his wife than to address control issues at court mandated domestic violence counseling? Problem-solving courts advocate for the population they deal with through an approach known as therapeutic jurisprudence, which is the integration of treatment services with judicial case processing and judicial intervention (Nolan 2003). In addition to therapeutic jurisprudence, another approach of these courts is restorative justice, a more informal movement meant to diverge from punitive measures and address the victims needs and increase their involvement while prosecuting cases (King 2008). Both approaches take the stance that the law can be used to promote wellbeing in society. Both have provided justification and theoretical backing for problem-solving courts.

Therapeutic jurisprudence and restorative justice contradict the traditionally adversarial nature of the American legal system. Previously, prosecutors and defense attorneys did not work together to promote wellbeing. On the contrary, they argued their case with the facts. Problem-solving courts are different because they represent non-adversarial justice, which deals with alternate methods of dispute resolution (King 2008). All of these methods make up the Comprehensive Law Movement, which encompass the different alternatives to traditional court

The Complications of Prosecuting DV Cases

Justifications for domestic violence courts aside, they are interesting if for no other reason than the fact that we have not quite figured out how we are supposed to handle these cases, even with all of our legal expertise and technique. Being new to processing these kinds of cases, our legal system is not set up to accommodate domestic violence. For example, we can only prosecute acute incidents which we can fully prove happened. This is troublesome because domestic violence is defined as more of an abusive relationship than specific incidents (Hartley, Ryan 1998). Abusive relationships in general are difficult to convey to jurors. After all, everyone has relationships but most people do not experience abusive ones so it will be hard for them to conceive of actual family or intimate relation violence.

Established procedure for the prosecution of more ordinary cases is irrelevant here on almost all levels of intervention. Beginning with the police, who were traditionally the gatekeepers of domestic violence, roles and procedure are blurred. With mandatory arrest and no-drop policies dominating criminal justice interventions today, there is really no longer a gatekeeper with the authority to choose whether people are charged or not (Hartman and Belknap 2003). People are charged automatically. Whether this works or not is heavily disputed. Our criminal justice system is also lacking a clear evaluation system to gauge the effectiveness of policies for domestic violence (Mears 2010). But whether it is effective or not, the courts today are flooded with domestic violence cases and the prosecutors must deal with them all according to their best judgment. Another interesting dilemma is that the issue in many of these cases, especially on misdemeanor cases is not whether the defendant committed the crime or not but what the fairest way to handle the case is (Alkon 2010). These are just some of the ambiguities

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about our attempts to prosecute domestic violence cases that our courts have exposed in recent years and that make up the crux of this study.

A Closer Look

Prosecutors, defense attorneys, judges, defendants, victims, victim's advocates, police officers, court officers and court clerks all pass through and interact within domestic violence

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advocates since they belong to both domains and are trained to have a unique, blended expertise (Wallace 1996), will have insight to add. When dealing with these kinds of issues, it is likely they act based on a different sets of assumptions and knowledge. With the rise of increased

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(<http://www.ovw.usdoj.gov/>). However, all of the organizations are asking questions about what the future of justice in the U.S. will look like and how to use the legal system to attain it, questions that are imperative to my study.

Domestic violence courts are characterized by ambiguities, misunderstandings and undrawn conclusions. There are no certainties when speaking about these new courts and how they will change the legal field. The agenda of these courts is not clear and even those handling the cases do not fully understand what is going on or what they are supposed to be doing. The actors, mostly lawyers, who have become complicit in this phenomenon, find themselves taking on new roles. Being at the mercy of the criminal justice system, these roles are usually contradictory or at least completely new to the ones they have been trained to undertake. There is definitely something going on here, on multiple levels that merits further study.

Beginning at the prosecutorial level, one can see that the work the ADAs in domestic violence court are doing is not only unusual but extremely compelling. They are using their legal technique as a tool to address societal ills. Law, here, becomes an incentive mechanism to make people reform. How they are using their legal technique in new ways, outside of the law, and justifying their actions can have huge implications for the American legal system, especially given today's overreliance on the court system. As time goes on, people are going to become more interested in resolving issues such as these via alternative methods of resolution, outside of traditional court systems (Singer 2004).

But there is an equally compelling perspective on these courts that has yet to be realized and that is that these courts could be seen as a new domain of humanity. Taking a step back, it can be seen that these courts, rising at least in part as a result of the failure of the welfare state, play a crucial role in bringing humanity to our society. This humanity, displaced from the welfare state is now shaking up the legal system in unexpected ways. Even though it is still unclear whether these courts are actually being effective, they seem to be beginning to eat away at our adversarial system. Are these sacrifices we are ready to make? We must at least first

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understand what is at risk, what the price is and what we are getting in return. Today, people refer to many aspects of the law as cumbersome and often see lawyers in a negative light. I think we can all agree though, that domestic violence is something that needs to be resolved. If lawyers in these courts, displaced from their original realm of expertise, are attempting to do real good, then their efforts are at least worth studying if not emulating.

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