

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. Outside of a domestic violence court, that statement may not make much sense. However, within the confines of the court, long-held ideologies about what is criminal, the function of the courts themselves and approaches for prosecuting violations of the law are changing. The purpose of this paper is to explore the phenomenon of domestic violence courts, including their origin and role within society as well as their broad implications for the American legal system and to begin to shed light on many of the ambiguities that they embody and therein, the need for new scholarly work that will benefit our overall understanding of these courts.

The unwilling pioneers of these bold new courts are the prosecutors. Today, the prosecutor who is assigned to domestic violence courts, finds himself thrown into the complicated domain of family and intimate relations. The typical ADA in the Suffolk County domestic violence court has a larger case load than any other ADA in the bureau. With no

specialized training he or she has to figure out how to prosecute cases that the state has decided would best be played out in court. More often than not, the ADA will make offers that entail some kind of rehabilitation or restorative justice in exchange for dismissals or pleas to lesser charges. Because of the intimate relationships involved, they are extremely emotional courts. For a plethora of reasons, complaining witnesses often become uncooperative, which makes prosecution even more difficult. In order to do their jobs, they are left with great amounts of discretion. Unfortunately, this comes at the price of limited power.

With the line between what is criminal and what is not being continuously blurred, the prosecution of domestic violence court cases is very unlike the prosecution of other criminal cases that assistant district attorneys are used to working on. Although local governments are taking responsibility for dealing with all kinds of domestic violence “crimes”, the prosecutor is the one who becomes burdened. He finds himself in court, every day, with a larger than is normal case load, working and negotiating with all kinds of actors within the court. In most scenarios, victims or complaining witnesses to incidents, victim’s advocates, judges and defense attorneys must all be dealt with and spoken to in order to properly handle a case. The prosecutor’s mission is to uphold the law of his county and to prosecute people who have committed crimes. Ultimately, his responsibility is to *the people*. But how is he to do his job when he no longer knows what is best for the people he serves? In fact, it is not as much a matter of what is best for the people as what is his role in protecting the people. Everyone has a different role to play in society and everyone applies different forms of expertise. Being that their role is no longer as simple as to prosecute those who have offended the law, the purpose as well as the expertise that ADAs in DV courts bring to the table has been thrown into question.

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. Defense attorneys are meant to hinder the prosecution of their clients. However, today they accept rehabilitation and treatment offers before trials, which could be understood to be an admission of guilt. Theoretically, they can be charged with ineffective assistance of counsel for taking many of

those pleas. Yet they do, even though prosecutors generally have little to no evidence to back up the accusations of victims and therefore don't have a strong enough case to fully prosecute. So with their hands tied, they make offers, not just out of a desire to do good, but for strategic, practicality purposes.

The purpose of this paper is to begin to look at how exactly prosecutors assigned to domestic violence courts navigate these strange new domains. In all of this, it seems as if they are making a concerted effort, in conjunction with the local government to do good and to help these people who do not easily fit into the label of criminal but have broken the law nonetheless. It is no easy job and definitely not an appealing one. In many cases, these prosecutors are taking responsibility for these people. They are giving them a second chance in which the law and normal legal repercussions are suspended before they are branded as criminals and punished accordingly.

A new, very subtle expertise is forming and embodied by ADAs in domestic violence courts all over the country. But as they become more adept at their role in DV courts, it raises new questions. In most specialized court parts, there is very little litigation. There is still plenty of legal maneuvering and strategy involved but even this takes on a new form. ADAs are using their legal expertise, acquired over the length of a legal career or at least a legal education and doing something that not all lawyers get the opportunity to do. This is using legal skills to do *social* good. And in doing so, their experience in DV court is crafting a new expertise, in which they can properly maneuver within these strange courts that combine law and attempts to do societal good. Whether they can be successful or not is going to be very important for our society. It not only begs questions about the efficacy of legal techniques but questions the need for other forms of expertise that actors within the court are taking on. After all, what is the need

for a domestic violence expertise if those who are only versed in legal technique can, with a little trial and error, do their jobs for them.

The expertise and legal technique that the prosecutors embody are important because, applied to the court system as a whole, you can define legal form. According to Annelise Riles, legal form has social consequences (2011). Thus, it follows that manipulation of law in the court system, like what is being done in problem-solving courts will also have social implications. However, it is more complicated. This stems from a formalist understanding of law. Riles contends with this understanding, saying that we cannot be completely constrained by law and legal form. Legal form and the technique that lawyers end up using are much more complex. Given the ambiguities of legal form in DV courts, this creates many questions and uncertainties that should be examined. For example, how are ADAs limited or not limited by their own legal technique that they are fashioning in these courts themselves? And, if their legal tools can redefine the ends they seek (Dewey 1998), then how will placing domestic violence issues under the court's jurisdiction instead of welfare programs change the outcome we want to see?

The prosecutor's role, at least traditionally, is not to protect or heal the defendant but to bring his crimes to the light and recommend the appropriate sentence. The prosecutor's responsibility lies with the best interest of the people of their jurisdiction, not the defendant. Is it now assumed that a method of therapeutic jurisprudence towards the defendant is in the people's best interest instead of advocating traditional forms of sentencing? The existence of the court is to defend the rights of the accused yet problem-solving courts were created with an emphasis on curing societal ills (Mirchandani 2005). This exposes an interesting contradiction. Curing societal ills can still be understood to be in the best interest of the people. There is a shifting paradigm in which criminal legal proceedings have taken over for the failure of the welfare state.

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 understood in a traditionally patriarchic-run society such as America. The widely accepted model for gender inequality leading to domestic violence is economic inequality. (Levinson

1989) Although there are variations within this model, violence at home can be specifically linked to two factors. They are control of the fruits of labor and control over domestic decision making. Obviously, when distribution of the means of wealth is skewed, one spouse is very limited and in a vulnerable position. Similarly, domestic decision making speaks to the authority within the house. It is all about control. But, as stated above, only recently, with the rise of feminist movements, has the U.S. begun to acknowledge the issue of domestic violence.

For years before the rise of the feminist movement, the state tried to eliminate gender inequality through welfare programs. Ideally, these programs would help poor mothers and women in abusive relationships to escape those conditions and make a real effort to gain independence from their abuser (Mink 1998). However, not only did welfare end up being harmful in itself, American society eventually adopted a negative attitude towards it. When reforms of exclusionary rules to welfare allowed black women and other working class women of minorities to be eligible, many people, grounded in racist beliefs and stereotypes, began to view welfare as helping undeserving women. They thought that they should have been working to earn their own money (Kandaswamy 2010). Welfare was seen as degenerative to American society because it hindered two of its most sacred traditions: work and marriage.

Ironically, welfare became a form of domestic violence in itself. Governed by the state, welfare recipients could not work and were very limited in their spending ability (White 2001). Although the state was trying to free women from one form of abuse, it seemed to exert just as much control over women as an abusive partner did. So not only was welfare looked down upon in American society, causing stress and humiliation among its recipients, it was not actually doing much to help them. For example, women in welfare tend to be single mothers. They are more likely to suffer from gender inequality that spawns domestic violence based on their

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 according to the rule of the land? Or, in other words, is the nature of the state to remain neutral or is it to advance some social good? (Amatrudo 2009). When the U.S. adopted the first drug court in Florida in 1989 (Nolan, 2003), the court took an ideological stance. It adopted policy that allowed it to go beyond punitive measures and to create a sphere in which it could influence drug offenders in the hopes of rehabilitating them on a grand scale in the hopes that they could eventually end drug problems in their jurisdictions. The 2000 Resolution of the Conference of Chief Justices and the Conference of State Court Administrators called for a broad integration of problem-solving courts and justice. Justice in these courts is not simply upholding the law, but trying to curb societal grievances for good.

How the state aims to punish is equally compelling for understanding its ideals and, therein, its agenda (Amatrudo 2009). Domestic violence courts, like all problem-solving courts,

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

proceedings and how they can be combined and manipulated for success. Like problem-solving courts, it need not deal with law in a traditional sense. Instead it can be creative, also like problem-solving courts. Some would rename it the Comprehensive Justice Movement because of how it places emphasis on justice as the desired outcome without as much concern for the law. Emotion plays a large role in these types of courts. Overlooking the abundance of emotions that one can find within any domestic violence court, specialized courts in general have a high level of emotion because of the way they seek to resolve dispute. Any type of mediation requires an adept understanding and manipulation of emotion between parties involved. Non-adversarial courts require new communicative techniques and interpersonal skills above the application of the law.

If domestic violence cases were to be litigated via traditional means, cases would last forever because courts would be even more overburdened than they are now. Breaking down the adversarial system allows for new ideas and prosecution methods to be worked out. A whole discipline for conflict resolution, formally known as Alternative Dispute Resolution (ADR) is a means of acknowledging that there is an alternative to arguing in court (Singer 1994). It is not easy for lawyers to acknowledge because they are trained to think in adversarial ways. Arguing facts, the ability to debate both sides and the strategy inherent in court proceedings are all cornerstones to the expertise of law. ADR actually threatens this expertise. However, it seems more likely, at least when examining domestic violence courts, that lawyers will adapt ADR approaches, whether they are conscious of it or not. For example, plea-bargaining has become an informal method of negotiation that lawyers use all the time to avoid the troublesome restrictions and requirements of a trial (Alkon 2010). As courts become busier with the influx of cases, trials seem too burdensome. Lawyers will have to adapt, and so will their expertise.

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

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 courts. The interaction of many actors and the series of events that make up the prosecution of domestic violence cases is where new realities about domestic violence and the court system are being made and constantly reevaluated. But this paper and the need for further study that it advocates goes beyond the confines of the court. Ambiguities and contradictions found in the legal system and uncovered in DV court can only be explained by following deeper issues that are being played out outside of the court. Questions about how the seemingly social work being done by prosecutors should be evaluated by professionals in the actual field of social work must be addressed. Then there are those who are in charge of actually crafting and thinking about legal policy and reform. The American Bar Association and the National Institute of Justice are organizations in which people are thinking about these issues. Just as the lowly prosecutor is figuring out how to grapple with the realities of DV court, those who govern the legal field and legal policy in our country are asking questions about the court's role in domestic violence and the implications of problem-solving courts as a whole. The conclusions they reach will translate into future reform and legal action and ultimately affect us all.

Social Work

Earlier, I mentioned how prosecutors and court actors are now operating within the domain of family and intimate relations. So how do the masters of these domains evaluate what is going on in DV courts? Social workers, psychologists and perhaps most importantly victims

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 criminalization of domestic violence incidents, these actors are forced to deal with the courts more than ever before. Similar to how ADAs must become better versed in social work and treatment programs, social workers will need a better understanding of the criminal justice system and of legal proceedings (Danis 2003). Their work and understanding of how these issues should best be resolved, especially considering that they have been doing this work for far longer than most lawyers are very important to this study.

Governance of the Legal Field in the U.S.

Organizations like the American Bar Association (ABA), the National Institute of Justice (NIJ) and the Office of Violence against Women (OVW) do research and advocate for policies and future programs to address many of the issues that this paper advocates. The American Bar Association is a professional association of lawyers that provides continuing legal education, information about the law, and initiatives to improve the legal system for the public (<http://www.americanbar.org>). The ABA's Commission on Domestic Violence functions to increase knowledge about the law and launch initiatives to improve the legal system for the public dealing specifically with domestic violence. The NIJ and especially the OVW, research branches of the Justice Department are dedicated to increasing understanding and knowledge of crime and justice and do a lot domestic violence specific work in the form of funding research on intimate partner violence. Most of the NIJ's work deals with matters such as the prevalence of domestic violence and the success of DV courts (<http://nij.gov/>). The OVW not only develops programs to support victims but they draft policy to prevent further violence against women

(<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.

Conclusion: A New Domain of Humanity

In sum, this paper speaks to the many legal ambiguities and uncertainties that these courts embody. I first uncovered these issues while working in domestic violence court as an intern. Eventually, I became accustomed to the oddities of domestic violence court. Even now, with an infinitely greater understanding of the role of these courts in society and the questions they pose, I can identify many interesting phenomena that the literature does not seem to cover. The difference between the theoretical workings of these courts and the actual practice raises even more questions. For example, these courts are ideally supposed to be staffed with prosecutors who have some kind of domestic violence training but, at least in Suffolk County, they do not get any. It is the same with the judges, who do not always get training before they take the bench.

Another interesting issue is how, according to many scholars, treatment programs are court-mandated after ADAs succeed in getting guilty pleas (Danis 2003). As per my experience in DV court, it is very common for charges to be dropped or lowered to mere violations, which are not criminal, on the condition that the defendant completes some kind of treatment. Hence the notion that criminal repercussions are temporarily suspended or even dismissed in domestic violence courts. How the ADAs craft these offers define each of their unique ideologies for prosecuting these cases successfully. These are merely a few examples of differences between prosecuting DV cases in theory and practice. The differences generally make these cases even more difficult to deal with, but at the same time, they expose many interesting realizations about what is going on here.

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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