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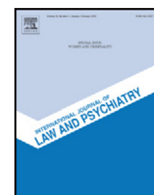

Enforcer, manager or leader? The judicial role in family violence courts

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ABSTRACT

Judicial supervision of offenders is an important component of many family violence courts. Skepticism concerning the ability of offenders to reform and a desire to protect victims has led to some judges to use supervision as a form of deterrence. Supervision is also used to hold offenders accountable for following court orders. Some family violence courts apply processes used in drug courts, such as rewards and sanctions, to promote offender rehabilitation. This article suggests that while protection and support of victims should be the prime concern of family violence courts, a form of judging that engages offenders in the development and implementation of solutions for their problems and supports their implementation is more likely to promote their positive behavioral change than other approaches to judicial supervision. The approach to judging proposed in this article draws from therapeutic jurisprudence, feminist theory, transformational leadership and solution-focused brief therapy principles.

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1. Introduction

The principal focus of family violence courts is to enhance the safety and wellbeing of victims and to hold offenders accountable for their behavior.[1] There are various models of family violence courts. Most include several of the following elements: the issue of protection orders in favour of victims; the provision of court, treatment and welfare related support services for victims; a coordinated approach to the detection and prosecution of family violence cases through the cooperation of justice and community agencies; expeditious trial processes for family violence cases; unified jurisdiction to deal with criminal, civil and family law aspects of family violence cases; and courts ordering offenders to participate in treatment programs often while subject to judicial monitoring. Family violence courts are commonly classified as problem-solving courts and are also part of the broader "non-adversarial justice" movement.[2]

This article discusses the different approaches to judging in family violence courts and the principles underlying them. It focuses on the practice of judicial monitoring, that is, regular appearances by offenders before a judge or magistrate. Judicial monitoring can have different goals depending on the context, including achieving enforcement, ensuring victim safety, promoting offender accountability and/or promoting offender motivation to engage in positive behavioral change while supporting them through the process. The judging practices of each family violence court are informed by which particular goals it adopts.

This article suggests that some approaches to judicial monitoring have been largely ineffective as they have been unduly restrictive in their goals and practices. A holistic model of judicial monitoring that is directed to all of the previously mentioned goals is proposed in this article. That model incorporates principles taken from therapeutic jurisprudence, transformational leadership theory and feminist accounts of family violence. Accordingly, the article outlines a range of practices that judicial officers can use to enhance judging effectiveness in family violence courts. Some of these principles have wider application beyond family violence cases to problem-solving courts generally. The article is written for an international audience but is strongly informed by our Australian perspective.

2. Judicial monitoring: Purpose, styles and influences

Judicial monitoring of offenders is considered to be best practice in family violence courts in the United States.[3] However, it is only used in two jurisdictions in Australia – South Australia and Western Australia – and in a more attenuated form than in the United States.

Judicial monitoring properly takes place in the context of a holistic, coordinated community and court-based response to the problem of family violence and is not seen as substitute for other forms of interventions in family violence cases, including safety plans, arrest

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[1] Donald E. Shelton, *The Current State of Domestic Violence Courts in the United States*, 2007, http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=173, 10.

[2] Michael S. King, Arie Freiberg, Becky Batagol and Ross Hyams, Non-Adversarial Justice 140 (2009).

[3] Robyn Mazur and Liberty Aldritch, *What Makes a Domestic Violence Court Work? Lessons from New York*, 42(2) Judges Journal 5 (2003); Michael Rempel, Melissa Labriola and Robert C. Davis, *Does Judicial Monitoring Deter Domestic Violence Recidivism? Results of a Quasi-Experimental Comparison in the Bronx*, 14(2) Violence Against Women 185, 186 (2008).

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policies, victim support services, educational perpetrator programs, and therapeutic work.[4] Judicial monitoring is presented in this article as an addition to existing community and criminal justice programs that would operate in conjunction with other services. Courts should choose a form of judicial monitoring that best fits with existing local family violence interventions.

Research suggesting that family violence perpetrator treatment programs are ineffective has led many courts to focus on promoting accountability of perpetrators so that they encourage perpetrators to abstain from offending and to otherwise comply with court orders. Family violence courts which adopt this approach generally refrain from reference to rehabilitation as an express goal.[5] The principle of deterrence – using the coercive powers of the court – to compel compliance has been a dominant influence in the practice of judicial monitoring in many domestic violence courts. This approach readily leads to a focus on the deficiencies of the offender and how they can be kept in check.

This section of the article begins by discussing the influence of therapeutic jurisprudence on the practice of judicial monitoring in family violence courts. It then canvasses available research into the use of judicial monitoring in the family violence court context and finishes by examining various forms of judicial monitoring that are used by family violence courts. These issues are explored in order to better understand the tenets of the approach to judicial monitoring proposed in this article.

2.1. Therapeutic jurisprudence

Therapeutic jurisprudence has been an influence on family violence courts. It examines the effect of laws, legal processes and legal actors (such as judicial officers and lawyers) on the wellbeing of those involved.[6] It uses findings from the social sciences to suggest reforms to the way that laws, legal processes and legal actors operate to minimise negative effects on wellbeing and to promote positive effects — particularly when associated with justice system goals such as the prevention and resolution of conflict, supporting victims, and the rehabilitation of offenders.

Therapeutic jurisprudence is not oriented towards the interests of any particular institution or group — such as offenders.[7] It has examined the effect of laws, legal processes and legal actors on the situation of both victims and perpetrators of family violence and suggested reforms.[8] For example, in relation to victims, Bruce Winick, who along with David Wexler first developed the concept of therapeutic jurisprudence, has suggested that family violence courts can act as advocates for victims by facilitating swift prosecution of charges and issue of protective orders and providing appropriate support services.[9] Winick has also emphasized the need for judicial officers, police and prosecutors to consider the situation and wishes of victims in making their decisions and to be trained in relation to the effects of family violence on victims, including children of the parties.[10]He has called for justice system professionals to be trained in the use of interpersonal skills such as listening and the expression of empathy in interacting with victims; and suggested that justice system professionals accord victims' voice, validation and respect.[11] Finally Winick has suggested the use of videotaped testimony in court in circumstances where a victim does not wish to confront the offender.[12]

The application of therapeutic jurisprudence principles to a family violence context should not be confused with the notion that a therapeutic "cure" for family violence is possible — it is not an attempt to reduce the causes of family violence to a medical condition or a defective personality.[13] Rather, the combination of therapeutic jurisprudence and feminist approaches engenders practices in family violence courts which recognise the socio-political context of family violence *and* which focus on the psychological needs of individual victims and offenders through the legal process.

Winick has also suggested that therapeutic jurisprudence can enhance rehabilitation outcomes concerning perpetrators by promoting motivational mechanisms.[14] He refers to research that coercion or paternalistic approaches promote resistance to behavioral change.[15] As an antidote, he suggests that courts could ask perpetrators to formulate their rehabilitation plans, could listen to them, express empathy for the offender's situation and exercise an ethic of care. He suggests that regular court review and a system of sanctions and rewards could be used to enhance perpetrator compliance.

One of the principal influences on therapeutic jurisprudence thought and practice relating to family violence courts and offenders is cognitive behavioral theory.[16] Beck's cognitive learning theory focuses on how people perceive and interpret situations in life.[17] It asserts that emotionally disturbed people's automatic thoughts that are exaggerations, unrealistic, mistaken, or distorted affect their perception and understanding of incidents. It refers to these thoughts as cognitive distortions. A cognitive behavioral approach sees problematic behavior to be the product of faulty thinking and perception and the remedy as challenging faulty thinking and changing the way people think about situations.[18]

Maruna and Mann point out that the term "cognitive distortion" has assumed a different meaning in the context of dealing with offenders.[19] Blumenthal, Gudjonsson and Burns define cognitive distortion as "attitudes and beliefs which offenders use to deny

[4] There are a number of well-known coordinated community and criminal justice based programs aimed at protecting women by reducing family violence. The most famous of these is "DAIP" the Domestic Abuse Intervention Project in Duluth, Minnesota which aims to ensure victim safety through ensuring that practitioners respond to family violence cases in a consistent manner that centralizes victim safety. See Ellen L. Pence and Coral McDonnell, *Developing Policies and Protocols in Duluth, Minnesota*, in Home Truths About Domestic Violence: Feminist Influences on Policy and Practice: A reader (Jalna Hanmer and Catherine Itzin eds., 2000), 249.

[5] Mazur and Aldritch, *supra* note 3; Robert V. Wolf, Liberty Aldrich and Samantha Moore, *Planning a Domestic Violence Court*, 7 (2005), http://www.courtinnovation.org/_uploads/documents/dvplanningdiary.pdf; Greg Berman and John Feinblatt, Good Courts: The Case for Problem Solving Justice 102 (2005).

[6] David B. Wexler, Therapeutic Jurisprudence: The Law as a Therapeutic Agent (1990) 4. For international resources on therapeutic jurisprudence, see the International Network on Therapeutic Jurisprudence at http://www.law.arizona.edu/depts/upr-intj. For Australian and New Zealand resources on therapeutic jurisprudence, see the Australasian Therapeutic Jurisprudence Clearinghouse via a link at: http://www.aija.org.au.

[7] The following suggest that therapeutic jurisprudence is offender-oriented but do not canvas the evidence for and against that proposition: Julie Stewart, *Specialist Domestic/Family Violence Courts Within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper 10, 5 and 35 (2005); Robyn Holder, *The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence*, 16 JJA 30, 37 (2006). For a critique of this view, see Michael S. King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligence Justice*, 32 Melb U. Law Rev. 1096, 1116–1117 (2008).

[8] For example, Leonore M. J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases* 1 Psychol. Pub. Pol'y & L.43 (1995); Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. Rev 33 (2000); Rebecca Fialk and Tamara Mitchel, *Jurisprudence: Due Process Concerns for the Underrepresented Domestic Violence Victim*, 13 Buff Women's L.J 171 (2004–2005).

[9] Winick, Applying the Law Therapeutically, *supra* note 8, at 41 and 60–67.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Dobash and Dobash are critical of the medicalised construction of the "battered woman" and the "violent man." They argue that this stance focuses too much on the individual and discounts the broader socio-political context of family violence. See R. Emerson Dobash and Russell P. Dobash, Women, Violence and Social Change 213–250 (1992). See also, Linda Gordon, Heroes of Their Own Lives: The Politics and History of Family Violence, Boston 1880–1960 5 (1988).

[14] Winick, Applying the Law Therapeutically, *supra* note 8, at 41–43.

[15] Winick, Applying the Law Therapeutically, *supra* note 8; Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 Vill. L. Rev. 1705 (1992).

[16] Simon, *supra* note 8.

[17] Aaron T. Beck, Cognitive Therapy and the Emotional Disorders (1989).

[18] Judith Milner and Steve Myers, Working With Violence: Policies and Practices in Risk Assessment and Management ch. 4 (2007).

[19] Shadd Maruna and Ruth E. Mann, *A Fundamental Attribution Error? Rethinking Cognitive Distortion*, 11 Leg. Crim. Psychol 155 (2006).

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