

ONE FAMILY, ONE JUDGE, TEN LAWYERS: THE NEED FOR ATTORNEY TRAINING IN THE NEW YORK INTEGRATED DOMESTIC VIOLENCE COURTS

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[†] Syracuse University College of Law, J.D. Candidate 2019. I wish to thank my faculty advisor Professor Emily Brown for her guidance, as well as the judges, clerks, and professionals with whom I worked with and received crucial information regarding this topic. This Note is dedicated to my mother, Linda, and to all those who work as advocates. Their selfless and tireless advocacy to protect and assist victims of domestic violence inspires me.

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INTRODUCTION

A woman, *LL*, is severely beaten by her husband somewhere in New York State. Her husband, *TT*, is the father of her one-year-old daughter. *TT* is arrested and arraigned before a city court judge and charged with multiple felony and misdemeanors, including stalking in the second degree (a class E felony),¹ criminal possession of a weapon in the third degree (a class D felony),² criminal contempt in the second degree (a class A misdemeanor),³ and endangering the welfare of a child (a class A misdemeanor).⁴ The prosecutor is present at the arraignment and the city court judge appoints counsel to *TT* based on his indigency. Assigned to the case is the city court assistant district attorney: Lawyer One. Assigned defense attorney for *TT*: Lawyer Two.

The case is transferred to the county's integrated domestic violence (IDV) court⁵ because the criminal incident involves domestic violence. A new assistant district attorney is assigned to IDV court: Lawyer Three. The IDV court receives a letter from the defense attorney in city court requesting to relieve him from the assignment, as he does not practice in family law matters. The IDV court judge relieves the attorney. The IDV court judge assigns a new defense attorney to *TT*, making sure the new attorney accepts both felonies and misdemeanors. Second assigned defense attorney for *TT*: Lawyer Four. However, the newly assigned defense attorney does not handle family law matters either. A family law attorney is assigned to *TT*. Family attorney for *TT*: Lawyer Five. *LL* is assigned a family law attorney in IDV court. Family attorney for *LL*: Lawyer Six. *LL* and *TT*'s daughter is assigned an "attorney for the child." Daughter's attorney: Lawyer Seven. In addition, *SS* intends to divorce *TT*. The court may assign counsel to represent indigent parties only for issues relating to custody, parenting time, and child support.⁶ Neither *SS* nor *TT* may retain counsel for the remaining matrimonial matter since

1. See N.Y. PENAL LAW § 120.55 (McKinney 2009).

2. See N.Y. PENAL LAW § 265.02 (McKinney 2017).

3. See N.Y. PENAL LAW § 215.50 (McKinney 2010).

4. See N.Y. PENAL LAW § 260.10 (McKinney 2017).

5. IDV court is a supreme court, which has concurrent jurisdiction to hear family court matters arising under the Family Court Act. The purpose of IDV court is to hear all related matters generated by a criminal matter stemming from an incident of domestic violence. See *Integrated Domestic Violence Courts: Key Principles*, NYCOURTS.GOV, <https://www.nycourts.gov/ip/domesticviolence/keyprinciples.shtml> (last updated Aug. 3, 2006) [hereinafter *Key Principles*].

6. *Family Court Representation*, NYS OFF. INDIGENT LEGAL SERVS., <https://www.ils.ny.gov/content/family-court-representation> (last visited Mar. 17, 2019).

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they qualified for and accepted assigned counsel. Thus, *LL* must represent herself in all other matrimonial matters. *TT* must also represent himself in the divorce.

This hypothetical web of attorney interactions and complex procedures is not too far off from a typical family case file in a New York IDV court.

Domestic violence remains a pervasive, stigmatized, and frustrating issue for lawmakers, leaders, and the public. The overall homicide level in New York City has significantly decreased over the past twenty-five years, but the rate of domestic violence homicides remains staggeringly high.⁷ Intimate party homicides in New York State increased twenty-two percent from 2015 to 2016.⁸ In 2016, almost half of all female homicide victims aged sixteen and older in New York State were killed by an intimate partner, compared to four percent of male homicide victims.⁹

New York's response to this crisis includes the creation of specialized domestic violence problem-solving courts, which allows criminal and civil legal issues involving a single family to be resolved in one court by the same judge, thereby eliminating what might be a fragmented judicial adjudication.¹⁰ It is also intended to relieve the parties of the burdens and costs of having multiple actions pending in different courts.¹¹ However, studies challenge the efficacy of the IDV court system by suggesting little change has occurred since its implementation.¹² Statistics indicate that the average IDV court proceeding was longer than prior systems and—perhaps more troubling—the results are the same, suggesting inefficient procedure.¹³

Despite these statistics, the dynamics in IDV courts are

7. James C. McKinley, Jr. & Ashley Southall, *Domestic Abuse Killings Climb as Murders Drop, Frustrating New York Officials*, N.Y. TIMES (Nov. 29, 2016), <http://www.nytimes.com/2016/11/29/nyregion/domestic-abuse-killings-new-york-city.html>.

8. OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, NEW YORK STATE DOMESTIC VIOLENCE DASHBOARD 2016, at 1 (Oct. 2017), <https://opdv.ny.gov/statistics/nydata/2016/2016-dv-dashboard.pdf>.

9. *Id.* at 2.

10. *Key Principles*, *supra* note 5.

11. *Integrated Domestic Violence Courts: Goals*, NYCOURTS.GOV, <https://www.nycourts.gov/ip/domesticviolence/goals.shtml> (last visited Mar. 17, 2019).

12. Erika J. Rickard, *Civil Protection Orders in Integrated Domestic Violence Court: An Empirical Study 3* (Mar. 09, 2011) (unpublished manuscript) (on file with Harvard University), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:4772900>.

13. *Id.* This case study focused on the New York State IDV courts and analyzed how quickly a civil protective order was granted. *See id.* By looking at both IDV and civil matrimonial courts, the author concluded that the data suggested “domestic violence survivors spend more time in IDV court, only to receive the same outcomes as they would under the traditional model.” *Id.*

fundamentally different than in criminal courts. The core of domestic violence is the abuser's power and control over the victim.¹⁴ Victims, often dealing with low self-esteem before and after being abused, have a clash of competing interests that are normally not present in a criminal court.¹⁵ Already traumatized by the abuse, victims run the risk of being re-victimized by aggressive defense tactics, prosecutors not abiding by their wishes, or simply having to repeat their story to multiple lawyers assigned to the case.¹⁶ The victim's goals, such as protection and accountability of her¹⁷ batterer, can easily get muddled or lost in a courtroom filled with lawyers and bureaucratic hurdles.

Thus, a possible explanation for the statistical phenomenon is that by combining civil and criminal matters into one court, there are simply too many lawyers with little training in domestic violence matters. In practice, there may not actually be a difference from the prior non-specialized courts.¹⁸ This Note identifies the holistic, therapeutic nature of the IDV court system and explains how it is at risk. The recent settlement in *Hurrell-Harring v. New York*, involving the violation of indigent defendants' constitutional rights due to inadequacies of representation,¹⁹ suggests that the problem seen in IDV courts extends to New York's overall public defense system.²⁰

This Note argues that the promise of IDV court as a therapeutic, problem-solving jurisprudence is undermined by lawyers' lack of domestic violence training, coupled with an unwillingness to practice in both criminal and family matters.²¹ Specifically, lawyers are often

14. See, e.g., *Abuse Defined: What is Domestic Violence?*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/is-this-abuse/abuse-defined/> (last visited Apr. 11, 2019).

15. See Jennifer Koshan, *Investigating Integrated Domestic Violence Courts: Lessons from New York*, 51 OSGOODE HALL L.J. 989, 1012 (2014). Regarding these competing interests, the author explains: "Even if we assume that most cases in the IDV courts will involve relationships that have broken down, this does not necessarily translate into an assumption that the victim will wish to pursue criminal charges." *Id.*

16. See *id.* at 1008–09.

17. For purposes of this Note, the victim will have a female-gendered pronoun. But it is important to acknowledge that "[d]omestic violence does not discriminate. Anyone of any race, age, sexual orientation, religion or gender can be a victim—or perpetrator—of domestic violence." *Id.*

18. See Rickard, *supra* note 12.

19. 930 N.E.2d 217, 220 (N.Y. 2010).

20. See *Settlement Begins Historic Reformation of Public Defense in New York State*, NYCLU (Oct. 21, 2014), <https://www.nyclu.org/en/press-releases/settlement-begins-historic-reformation-public-defense-new-york-state>.

21. See Koshan, *supra* note 15, at 1023; Anat Maytal, Note, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197, 223 (2008).

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inadequately trained in the sensitive and complex interests involved with domestic violence proceedings. This lack of training runs the risk of compromising a victim's road to recovery.

It is also the position of this Note that New York State, including bar associations and court personnel, must mandate lawyers who practice in IDV court to be trained in domestic violence, as well as cross trained in the criminal law and family legal issues. With the lack of trained attorneys, IDV court risks taking the form of a criminal jurisprudence, challenging the fundamental purpose of its entire system.²² An integral part of ensuring that IDV court jurisprudence objectives are met must be through training and education for judges and courtroom personnel, and this training must be extended to the representing attorneys. Thus, IDV court must be recognized as a fundamentally different adversarial system, with unique practice models, requiring this specialized training.

Part I of this Note will discuss the nation's history and response to domestic violence and the formation of New York's specialized domestic violence courts. Part II will explain New York's constitutionally-mandated requirements of attorney representation, its shortcomings in recent years, the different methods of assigning counsel, as well as the cultures of local practice and the prosecutor's role in IDV court. Part III will discuss the numerous issues in IDV court arising from a lack of attorney training. Lastly, Part IV describes the need and importance of mandatory training for all lawyers practicing in IDV court and draws comparisons to other programs that require or urge such training.

I. HISTORY OF THE COURT'S APPROACH TO DOMESTIC VIOLENCE AND THE FORMATION OF THE NEW YORK IDV COURTS

A. *Evolution of the Legal Procedures of Domestic Violence*

The past few decades have shown that there has been a major shift in public sentiment regarding domestic violence.²³ However, it is nearly impossible to completely shake off the scars and rippling effects of the longstanding approval and tolerance of wife beating in the United States.²⁴ Even in 2018, senior aides to U.S. President Donald Trump

22. See *Key Principles*, *supra* note 5.

23. See generally ROBERT WOLF ET AL., *CTR. FOR CT. INNOVATION, PLANNING A DOMESTIC VIOLENCE COURT* (2004), <https://www.courtinnovation.org/sites/default/files/dvplanningdiary.pdf> (discussing development of domestic violence courts in response to public demands for victim safety and perpetrator accountability).

24. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1661.

knew about the multiple domestic violence allegations against a top White House staffer, but consistently defended him, both before and after his resignation.²⁵

Up to the 1970s, wife beating and “chastisement” were norms in society, not legitimized as criminal acts, but perceived as a “private matter between the husband and wife in which the state should not intrude.”²⁶ Domestic violence cases were considered noncriminal, so police officers deprioritized domestic violence by not responding to calls and infrequently arresting batterers.²⁷ In addition, “[t]here was certainly little incentive for prosecutors to pursue domestic violence cases, which were traditionally low-prestige and unlikely to have a high conviction rate”²⁸ Prosecutors often avoided prosecution of domestic violence offenders by either dropping the case or requiring the offender to complete self-help programs (what we now refer to as batterers’ intervention programs).²⁹

By the 1980s, public sentiment shifted away from the inherent tolerance of domestic violence, which triggered support of broad, aggressive policies in courtrooms and police stations.³⁰ Strict arrest and prosecution protocols in domestic violence incidences were created as a result of pressure from battered women advocates and an increasing numbers of civil cases.³¹ The efforts of the advocacy groups amounted to three broad changes in domestic violence policies for police officers and the court system: civil orders of protection, mandatory arrests, and no-drop policies for prosecutors.³²

Orders of protection, civil remedies synonymous with “stay-away” orders, are available in all U.S. states in varying forms.³³ In New York, there are “full” and “partial” orders of protections that are granted on a temporary or permanent basis, which tells the defendant to refrain from

25. Kaitlan Collins et al., *White House Officials Knew About Porter’s Abuse Allegations and Scrambled to Protect Him*, CNN (Feb. 8, 2018, 2:29 PM), <https://www.cnn.com/2018/02/07/politics/rob-porter-white-house-who-knew/index.html>.

26. Sack, *supra* note 24, at 1662.

27. *Id.* at 1663.

28. *Id.* at 1665.

29. *Id.* at 1664.

30. Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1497–98 (2008).

31. Sack, *supra* note 24, at 1668–69.

32. *Id.* at 1667–69; *see also* Goldfarb, *supra* note 30, at 1497–98.

33. *See* Sack, *supra* note 24, at 1667; *see also* Lauren K. Williams, Note, *The Use of Mediation as a Complement to the Integrated Domestic Violence Courts of New York*, 13 CARDOZO J. CONFLICT RESOL. 713, 718 (2012).

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certain types of behaviors.³⁴ Temporary orders of protection may often be acquired the same day the order is sought, and in almost all cases, without notifying the affected party.³⁵ Violation of an order of protection can amount to a class A misdemeanor or class E felony.³⁶ Orders of protection are effective and frequently-used tools for protecting victims.³⁷

Mandatory arrest and no-drop policies, both facets of criminal law, “can shield victims from direct responsibility for decisions to arrest and to prosecute by camouflaging, but not requiring, victim cooperation.”³⁸ Prompted by New York’s Family Protection and Domestic Violence Intervention Act of 1994, mandatory arrest policies were set in place requiring police officers to arrest offenders when there is probable cause to believe domestic violence occurred, such as signs of injury or a weapon on the scene which implicate the obligation to arrest.³⁹ In addition, police officers began receiving comprehensive training in domestic violence.⁴⁰ No-drop policies were also implemented, requiring prosecutors to pursue prosecution of batterers (sometimes despite the victim’s wishes).⁴¹ Many New York prosecutors in the 1990s “began placing more emphasis on domestic violence by developing teams that specialized in family violence cases.”⁴² The public policy, morality, and efficacy of such mandatory arrests and no-drop policies in addressing domestic violence are debated issues.⁴³ Concerns include the possible infringement of victim autonomy and that these policies may potentially jeopardize the victim’s long-term safety and ability to heal by having to relive the event

34. See N.Y. FAM. CT. ACT §§ 841–842 (McKinney 2010). The orders of protection, whether temporary or final, are valid only for so long as the proceeding is continued before the court. See FAM. CT. ACT § 842. Furthermore, final orders of protection do not mean that the order will have life-long effect; the term is designated by the court. See *id.*

35. N.Y. FAM. CT. ACT § 828(3) (McKinney 2010); see also Elizabeth L. MacDowell, *When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism*, 20 TEX. J. WOMEN & L. 95, 108 (2011). There is a legal burden that the filing party must meet for the stay-away, including that the defendant has committed a crime against her (i.e., stalking). See FAM. CT. ACT § 828(1)(a). The reason why orders are temporary is to afford the individual whom the order is against the opportunity for due process. See *id.* § 828(1)(b).

36. See N.Y. PENAL LAW §§ 215.50–215.51 (McKinney 2010); Williams, *supra* note 33, at 718.

37. See FAM. CT. ACT § 842.

38. MacDowell, *supra* note 35, at 106.

39. See N.Y. CRIM. PROC. § 140.10(4) (McKinney 2004); WOLF ET AL., *supra* note 23, at 2; see also Jessica Dayton, Note, *The Silencing of a Woman’s Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN’S L.J. 281, 282 (2003).

40. WOLF ET AL., *supra* note 23, at 2.

41. Williams, *supra* note 33, at 719.

42. WOLF ET AL., *supra* note 23, at 2.

43. MacDowell, *supra* note 35, at 100 n.12.

through criminal prosecution.⁴⁴ Despite these overarching policy issues, by the mid-1990s, New York State—as well as the United States as a whole—had developed a robust arsenal of strategies to address domestic violence.⁴⁵

B. Formation of Specialized Domestic Violence Courts

Attention from the public demanded increased training of prosecutors and police officers.⁴⁶ This placed pressure on the New York court system to do the same within its own ranks.⁴⁷ “Without the understanding of judges, many of the new policies, including mandatory arrest, seemed pointless.”⁴⁸ Judges were subjective and wildly inconsistent.⁴⁹ In the mid-1990s, Chief Judge Judith Kaye of the New York Court of Appeals, a pioneer of domestic violence awareness in the judicial arena, began planning an experimental court solely focused on domestic violence.⁵⁰ Then, court reform was expedited in 1996 when, tragically, a Brooklyn man stalked and killed his girlfriend.⁵¹ Three weeks earlier, the man had his bail reduced by a Brooklyn Criminal Court judge despite violating two orders of protection.⁵²

New York’s first specialized domestic violence court opened in Brooklyn in 1996 and only handled felonies.⁵³ The biggest challenge the court faced in implementing the innovative court system was the complexities and dynamics of intimate relationships which resulted in a clash of interests, a core issue that remains today.⁵⁴ Planners of the new court took a “problem-solving” approach that had already been developed

44. *Id.* at 115; see also Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 562 n.56 (1999).

45. WOLF ET AL., *supra* note 23, at 2.

46. *Id.*

47. *Id.*

48. *Id.* at 3.

49. *Id.* (“‘Everything depended on who the judge was,’ says Wanda Lucibello, chief of the Special Victims Bureau in the Brooklyn District Attorney’s Office. ‘The popular culture from the bench was that “If the victim is not ready to go forward, and she isn’t willing to participate in the prosecution, then why are you wasting the resources of the court?”’”).

50. WOLF ET AL., *supra* note 23, at 3.

51. *Id.* See generally Matthew Purdy & Don Van Natta, Jr., *Before the Murder, A Judicial Journey; An Abusive Union, a Testy Judge And a Chaotic System That Failed*, N.Y. TIMES (Mar. 14, 1996), www.nytimes.com/1996/03/14/nyregion/before-murder-judicial-journey-abusive-union-testy-judge-chaotic-system-that.html (detailing the story of a fatal domestic violence case in Brooklyn).

52. WOLF ET AL., *supra* note 23, at 3.

53. *Id.* at 1.

54. *Id.* at 3.

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in New York's drug courts.⁵⁵ The planners' main objectives in its implementation were immediacy, intensive monitoring, coordination, and specialized staff.⁵⁶ The court developed procedures to ensure enforcement of court orders, such as orders of protection.⁵⁷ Batterers' intervention programs were regulated to assure their effectiveness.⁵⁸ Services increased for victims, including assigning a domestic violence advocate early in the proceedings.⁵⁹ The success in the court system was apparent when, eight years into its implementation, no victim linked to an open case was killed.⁶⁰

C. New York's IDV Court and Its Goals

Despite the success of adjudicating felonies in a specialized domestic violence court, the New York court system was still fractured regarding domestic violence.⁶¹ New York families often appeared in multiple courts—supreme court, family court, and criminal court—in front of multiple judges, for the same overarching issues.⁶² Chief Judge Kaye wanted to rid the court system of the byzantine aspects of New York jurisprudence, and in 2001, announced the formation of IDV court.⁶³ As explained in her 2001 State of the Judiciary Address:

These new courts—based on a One Family/One Judge concept—will allow a single Judge, instead of several, to hear related matters involving domestic violence victims and their families and ensure that appropriate services are promptly provided. In establishing these courts, our goals are both to remove unnecessary burdens for these families and to continue the incremental progress we have made . . . to simplify our court structure so that we can better serve not just a finite number of families in crisis but all New Yorkers.⁶⁴

55. *Id.* at 5; see also John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 278 (2000) (discussing the founding of New York's drug courts specializing in a problem-solving approach to addiction); Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. ST. U.L. REV. 1, 2 (1999) (internal footnote omitted) ("Part of a broader movement that has been called 'problem solving justice,' these new models differ from traditional responses in several significant ways.").

56. WOLF ET AL., *supra* note 23, at 5–6.

57. *Id.* at 8–9.

58. *Id.* at 9.

59. *Id.* at 12.

60. *Id.* at 17.

61. See WOLF ET AL., *supra* note 23, at 19.

62. See N.Y. FAM. CT. ACT § 812 (McKinney 2010).

63. JUDITH S. KAYE, THE STATE OF THE JUDICIARY 6 (2001), www.nycourts.gov/admin/stateofjudiciary/soj2001.pdf.

64. *Id.*

The constitutionality of IDV court was upheld in *People v. Correa*.⁶⁵ There, the Court of Appeals stated that the formation of IDV courts was within the constitutional and statutory power of the Chief Judge and Chief Administrative Judge.⁶⁶

IDV court, simply put, streamlines domestic violence proceedings by combining civil and criminal cases involving a single family to be handled by a single judge.⁶⁷ IDV court not only combines civil protection applications and criminal matters, but also other issues that families may face, including divorce, child custody, visitation, and child support.⁶⁸

The origin of an IDV court proceeding is a criminal arrest.⁶⁹ After arrest, the defendant is arraigned in court—i.e., town, village, or city court.⁷⁰ The case is processed and entered into the data system.⁷¹ Court staff check the New York State Domestic Violence Registry, the Family Court Database, and the Matrimonial Database, and if there is an overlapping matter the case is transferred to IDV court.⁷² When the first court was assigned in the Bronx, it was a massive logistical and technological feat in determining which cases overlapped.⁷³

Certain types of felony offenses are not transferred to the IDV court, and transfer is limited for family court matters as well.⁷⁴ On a typical day in IDV court, judges observe a plethora of matters regarding numerous families. Cases can range from stalking and harassment, to petit larceny and criminal contempt. In 2016, New York operated forty-one IDV courts.⁷⁵

IDV courts are intended to depart from traditional adversarial models of jurisprudence to a more clinical “problem-solving” approach

65. 933 N.E.2d 705, 711 (N.Y. 2010).

66. *Id.*

67. Liberty Aldrich & Judy Harris Kluger, *New York’s One-Judge-One-Family Response to Family Violence*, 61 JUV. & FAM. CT. J. 77, 78 (2010).

68. *Id.* at 79.

69. See Daniel D. Angiolillo, *The Integrated Domestic Violence Court: New York’s Successful Experience*, in *LAWYER’S MANUAL ON DOMESTIC VIOLENCE, REPRESENTING THE VICTIM 152* (Mary Rothwell Davis, Dorchen A. Leidholt, & Charlotte A. Waston eds., 6th ed. 2015), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/DV-Lawyers-Manual-Book.pdf>.

70. *Id.*

71. *Id.*

72. *Id.*

73. See CTR. FOR CT. INNOVATION, *INTEGRATED DOMESTIC VIOLENCE COURTS: KEY PRINCIPLES* 2 (2006), https://www.courtinnovation.org/sites/default/files/documents/IDV_FACT_SHEET.pdf.

74. Angiolillo, *supra* note 69, at 155.

75. OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, *supra* note 8, at 3.

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to jurisprudence, also referred to as “therapeutic jurisprudence.”⁷⁶ “A wide range of social services for victims are integrated into . . . [IDV courts], and comprehensive information from social science professionals is provided to the judge, whose decisions can then take into account the larger picture of the victims’ situation and needs.”⁷⁷ The goals in this type of therapeutic jurisprudence are to bring “a practical, healing vision into the justice system, [and] to address the totality of what a domestic violence victim needs to be safe.”⁷⁸ Thus, a driving force behind IDV court is to prove and expand extra-legal support for victims.⁷⁹

In sum, “IDV courts are specifically designed to promote: victim safety and defendant accountability; informed judicial decision making; consistent handling of all matters involving the same family; efficient use of court resources; and a concentration of social services that include domestic violence . . . victim advocacy agencies.”⁸⁰ It is a significant departure from the typical atmosphere of a criminal proceeding.

II. ROLES OF ATTORNEY REPRESENTATION IN IDV COURTS

IDV courts have many stakeholders: the judge, clerks, court officers, interpreters, defense, prosecution, attorneys for the child, child welfare, and probation.⁸¹ IDV court judges and staff receive extensive training in handling domestic violence proceedings and their nuances, and advocates are ever-present in an IDV courtroom.⁸² However, proponents of the system who have promulgated guidelines for IDV courts have not addressed the duties and ethical obligations of adversarial attorneys involved in the proceedings.

A. Right to Counsel

As domestic violence proceedings often involve indigent parties with constitutional rights to counsel, it is relevant to discuss New York’s laws regarding the constitutional right to legal representation. The Sixth Amendment of the U.S. Constitution guarantees a criminal defendant the

76. Rebecca Fialk & Tamara Mitchel, *Jurisprudence: Due Process Concerns for the Underrepresented Domestic Violence Victim*, 13 *BUFF. WOMEN’S L.J.* 171, 172–73 (2004).

77. *Id.*

78. *Id.* at 173.

79. *Id.*

80. *CTR. FOR CT. INNOVATION*, *supra* note 73, at 1.

81. DANIELLE MALANGONE, *CTR. FOR CT. INNOVATION, INTEGRATED PROCEDURAL JUSTICE IN DOMESTIC VIOLENCE CASES* 1 (2016), http://www.courtinnovation.org/sites/default/files/documents/DVFactSheet_August2016_IntegratingPJinDVCases.pdf.

82. *See id.* at 2.

right to have assistance of counsel.⁸³ In *Gideon v. Wainwright*, the Supreme Court held that indigent defendants must have access to representation in order to ensure a fair trial.⁸⁴ Two years later, the New York Court of Appeals made it clear that this right extended to non-felonies in addition to felonies, and also required that defendants be explicitly told of their right to an attorney and, if they cannot afford counsel, that one will be appointed to them.⁸⁵

Family court proceedings have rights to counsel in addition to criminal proceedings. In 1972, the New York Court of Appeals ruled “an indigent parent, faced with the loss of a child’s society, as well as the possibility of criminal charges, is entitled to the assistance of counsel.”⁸⁶ Currently, these cases involve child custody and visitation, abuse and neglect, foster care placement and review, termination of parental rights, adoption, paternity, and family offense (domestic violence) proceedings.⁸⁷

B. Assigned Counsel Program and Public Defender’s Office

The organizations that coordinate and provide representation for indigent defendants may differ in structure. The counties in New York State organize their public indigent defense programs in one of three general ways: a public defender’s office, an assigned counsel program, or by contract.⁸⁸ A public defender’s office is staffed with salaried attorneys employed by the government.⁸⁹ An assigned counsel program—a more traditional practice—assigns private attorneys on a case-by-case basis.⁹⁰ In addition to these two functions, counties can contract with private attorneys or firms to take a set number of cases, generally for a flat fee.⁹¹

83. U.S. CONST. amend. VI, cl. 7.

84. 372 U.S. 335, 344 (1963).

85. *People v. Witek*, 207 N.E.2d 358, 361 (N.Y. 1965) (quoting *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963)); see also N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., CRITERIA AND PROCEDURES FOR DETERMINING ASSIGNED COUNSEL ELIGIBILITY 2 (2016), <https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Eligibility%20Standards/Eligibility%20Criteria%20and%20Procedures%20FINAL%20FULL%20April%204%202016.pdf>.

86. *In re Ella B.*, 285 N.E.2d 288, 290 (N.Y. 1972).

87. *Family Court Representation*, *supra* note 6; see also N.Y. FAM. CT. ACT § 262 (McKinney 2008).

88. See Alissa Pollitz Worden et al., *A Patchwork of Policies: Justice, Due Process, and Public Defense Across American States*, 74 ALB. L. REV. 1423, 1431 (2010).

89. See *id.*

90. *Id.*

91. *Id.* For example, the Hiscock Legal Aid Society.

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Counties always have at least two of these independent programs as conflicts may arise in a case.⁹² For instance, Onondaga County has two⁹³ general programs to assist indigent clients: the Onondaga County Bar Association Assigned Counsel Program, Inc. (the “Assigned Counsel Program”) and the Hiscock Legal Aid Society.⁹⁴ The Assigned Counsel Program consists of “panel attorneys” where attorneys must complete an application process to get on the panel.⁹⁵ Once on the panel, the attorneys handle criminal matters and are compensated by submitting vouchers for payment to the county.⁹⁶ In Onondaga County, Hiscock Legal Aid Society has a contract with the county to provide family services.⁹⁷ However, when a conflict arises in a family matter (which happens often in IDV court—there is usually a conflict in representation between the victim and abuser), the Assigned Counsel Program assigns an attorney.⁹⁸

Arguments in favor of an assigned counsel program include the belief that such a system improves the quality of the defense by increasing the number of more experienced attorneys.⁹⁹ Additionally, there is a normalized lawyer-client relationship providing greater client satisfaction, and it is more efficient.¹⁰⁰ Alternatively, arguments in favor of a public defender system include that more effective services may be provided because public defenders are “specialists,” centralization promotes efficiency (it facilitates access to legal assistance through

92. *Id.*

93. There are other programs in Onondaga County that provide legal services to indigent clients, such as the Volunteer Lawyers Project (VLP). *See* VOLUNTEER LAWS. PROJECT ONONDAGA COUNTY, INC., <https://www.onvlp.org/> (last visited Apr. 23, 2019). VLP’s funding is mainly based on grants, including the Emergency Solutions Grant (ESG) from the U.S. Department of Housing and Urban Development and administered by the City of Syracuse. *See* DEP’T OF NEIGHBORHOOD & BUS. DEV., CITY OF SYRACUSE, CONSOLIDATED ANNUAL PERFORMANCE AND EVALUATION REPORT (CAPER) FOR PROGRAM YEAR 43 (2017–2018), at 31 (2018), http://www.syr.gov.net/uploadedFiles/Departments/Neighborhood_and_Business_Development/Content/City%20of%20Syracuse_Year%2043%20CAPER_08.27.2018.pdf.

94. Douglass Dowty, *Longtime Onondaga Co. Lawyer Taking over Taxpayer-Funded Criminal Defense Program*, SYRACUSE.COM (Dec. 23, 2016), http://www.syracuse.com/crime/index.ssf/2016/12/longtime_onondaga_co_lawyer_taking_over_taxpayer-funded_criminal_defense_program.html.

95. *See, e.g., In re Smith v. Tormey*, 975 N.E.2d 470, 471 (N.Y. 2012) (discussing Onondaga County’s Assigned Counsel Program and how panel attorneys are compensated).

96. *Id.*

97. *See History*, HISCOCK LEGAL AID SOC’Y, <https://hlalaw.org/about/> (last visited Mar. 17, 2019).

98. *See Smith*, 975 N.E.2d at 471.

99. Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 369–70 (1991).

100. *Id.* at 370.

highly visible offices), and attorneys are not tempted to adopt specific tactics to increase fees (unlike private attorneys).¹⁰¹ Nonetheless, major shortcomings in each program evolved in New York and came to a head in the mid-2000s.

C. Ineffectiveness of Counsel

Despite progressive policies regarding the constitutional right to counsel, “widespread, systemic obstacles to fulfilling the constitutional right to counsel for indigent defendants . . . persisted in New York State.”¹⁰² In 2006, a report from the Commission on the Future of Indigent Defense Services found that New York’s indigent defense services failed to satisfy the state’s constitutional and statutory obligations.¹⁰³ Shortly after the report was issued, a class action lawsuit was filed in state court.¹⁰⁴

Hurrell-Harring was comprised of a class of indigent criminal defendants who had been represented in five counties: Onondaga and Ontario County (assigned counsel programs), Washington and Schuyler County (public defender’s offices), and Suffolk County (Legal Aid Society).¹⁰⁵ The plaintiffs asserted that they were left unrepresented or underrepresented during their proceedings.¹⁰⁶ After lengthy litigation, the New York Court of Appeals ruled that the Appellate Division, Third Department erred in granting New York State’s motion to dismiss, holding that “the complaint states a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*.”¹⁰⁷ Further, the court clearly laid blame upon the entire system, rather than individual attorneys, stating:

[I]n one or more of the five counties at issue[,] the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions, not by reason of the personal failings and poor professional

101. *Id.*

102. *Criminal Defense Trials*, NYS OFF. INDIGENT LEGAL SERVS., <http://www.ils.ny.gov/node/58> (last visited Mar. 17, 2019).

103. COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 15 (2006), https://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

104. *See Hurrell-Harring v. New York*, 930 N.E.2d 217, 219 (N.Y. 2010).

105. Amended Class Action Complaint at 8–11, *Hurrell-Harring v. New York*, 2008 Misc. LEXIS 5479, at *1 (N.Y. Sup. Ct. Aug. 1, 2008) (No. 8866-07).

106. *Hurrell-Harring*, 930 N.E.2d at 222; *see also* Andrew W. Koster, *Right to Council: Court of Appeals of New York*, 27 *TOURO L. REV.* 709, 709 (2011).

107. *Id.* at 225.

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decisions of individual attorneys.¹⁰⁸

A settlement was subsequently reached in 2010 that mandated sweeping reforms to the indigent defense system in the five counties, but the settlement had statewide effects.¹⁰⁹ The Assigned Counsel Program Standards Committee was established for oversight¹¹⁰ and the counties were ordered to implement quality improvement, caseload relief, increased services at arraignment, and uniform indigency eligibility guidelines—requirements that were seemingly basic, but that New York had nevertheless lacked statewide until then.¹¹¹

State funding for indigent legal services was drastically increased.¹¹² The settlement also mandated the creation of the New York State Office of Indigent Legal Services, which, amongst many new duties, distributes state funds to counties for its legal representation programs.¹¹³ Prior to the settlement, the indigent representation programs were easy targets for slashing attorney fees and reducing overall costs, but at an additional price.¹¹⁴ In Onondaga County, panel attorneys often had their time reduced by officials.¹¹⁵ This inevitably compromised legal representation,¹¹⁶ as the case of *Hurrell-Harring* so aptly portrayed.

Although the grievances expressed in the 2006 report and *Hurrell-Harring* were particularly addressed at the adequacy of representation in criminal matters, it was essentially inseparable from the programs

108. *Id.* at 226.

109. *See generally* Stipulation and Order of Settlement, *Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Sup. Ct. Oct. 21, 2014) (noting the description of reforms to be implemented by the relevant counties to be monitored by the New York State Office of Indigent Legal Services and the New York State Indigent Legal Services Board).

110. *Assigned Counsel Program Standards Committee*, NYS OFF. INDIGENT LEGAL SERVS., <https://www.ils.ny.gov/content/assigned-counsel-program-standards-committee> (last visited Mar. 18, 2019).

111. *Id.*; *see also* N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., *supra* note 85, at 5.

112. For example, Onondaga County went from a budget of roughly five million to ten million dollars. Douglass Dowty, *Onondaga County's budget to provide free lawyers for poor doubles to \$10 million*, SYRACUSE.COM (Dec. 1, 2016), https://www.syracuse.com/crime/2016/12/onondaga_cos_budget_to_pay_free_lawyers_for_poor_doubles_to_10_million.html.

113. *See* NYS OFF. INDIGENT LEGAL SERVS., <https://www.ils.ny.gov/> (last visited Mar. 18, 2019).

114. N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., IMPLEMENTING THE *HURRELL-HARRING V. THE STATE OF NEW YORK* SETTLEMENT: 2017 UPDATE 6 (Oct. 30, 2017), <https://www.ils.ny.gov/files/Hurrell-Harring/2017%20Update%20Quality%20and%20Counsel%20at%20Arraignment%20Plans%20FINAL%20103017.pdf>.

115. *Id.*

116. *Id.*

providing family court representation as well.¹¹⁷ These deficiencies included “excessive caseloads, insufficient salaries for attorneys and support staff, inadequate office facilities, lack of sufficient funding for training, investigation, expert witnesses, social work, and support staff, as well as a marked disparity in resources between public legal services providers and local social services and law enforcement agencies.”¹¹⁸ Since *Hurrell-Harring*, improvements to the family court representation program include contracting with institutional providers to handle family law cases, adding social workers, and establishing specialized panels of assigned counsel with family-law specific qualifications.¹¹⁹

But *Hurrell-Harring* presents a legal conundrum for the IDV court: what exactly is constitutionally required, in terms of training, from an attorney who represents a client in a domestic violence matter? Scholars have raised due process issues for the underrepresented domestic violence victim, addressing the conflicting interests of victims and prosecutors and the victim’s potential lack of autonomy.¹²⁰ Further, it has been suggested that there are ethical concerns in not being well versed in the intricacies of domestic violence, possibly affecting the victim (and batterer) in IDV court.¹²¹ Regardless of this ongoing scholarly discussion regarding these ethical considerations, *Hurrell-Harring* exposed New York State’s underlying troubles with its public defense system.

D. Local Practices

As *Hurrell-Harring* depicted, the public defense programs failed their clients in many aspects. Aside from constitutional issues, and despite recent improvements to the quality and accessibility of assigned counsel in criminal and family court, local practice norms provide another layer of impediment in providing trained lawyers in IDV court.

As previously mentioned, IDV court is a new and different jurisprudence that does not fit within the mold of a criminal court. With this new system came trained judges and specialized staff members.¹²² However, the same specialized level of expertise in domestic violence was not mirrored in the local bar. This is particularly evident regarding defense attorneys that do not (and perhaps will not) practice family law, and vice versa.

117. COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., *supra* note 103, at 20 n.33.

118. *Family Court Representation*, *supra* note 6.

119. *Id.*

120. Fialk & Mitchel, *supra* note 76, at 177.

121. *Id.* at 209.

122. MALANGONE, *supra* note 81.

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A possible explanation for the lack of specialized domestic violence attorneys may be due to local practice norms, where practitioners are unyielding to expand their expertise, and further, are not required or even urged to do so.¹²³ Studies indicate that the local culture can largely impact lawyering.¹²⁴ “A component of a local lawyering culture may be a ‘shared mental model,’ essentially “‘rules of thumb’” that seem to arise spontaneously and supplant the exercise of discretion in the mass processing of cases.”¹²⁵ In particular, studies have shown that criminal defense attorneys rely on “‘shared norms and folkways’ they learn in an environment replete with repetition.”¹²⁶ For family lawyers, “repeated interactions with other lawyers create patterns of practice and expectations. Social practices were reinforced through informal etiquette and the interdependence of those who worked together over time.”¹²⁷ Further, practice organizations—such as law firms, not-for-profit organizations, and governmental entities—unite into communities of practice and develop their own lawyering cultures.¹²⁸

Criminal and family legal issues frequently overlap for a single individual, and it is most obvious in IDV court. Lawyers are not forced to be practitioners—or experts—in multiple jurisprudences. However, IDV courts have created a new jurisprudence—domestic violence jurisprudence—in that there is a requirement that both criminal and family law issues be adequately addressed for a client. In other words, all cases in IDV court must contain a criminal charge and a family matter.¹²⁹ It seems logical that the court would require lawyers to be competent in both areas of law to represent the parties.

Unfortunately, that requirement is not often met.¹³⁰ Although criminal law is very different from family law, at least a basic practice of both jurisprudences would enable a lawyer to fully comprehend the

123. See Fialk & Mitchel, *supra* note 76, at 208.

124. Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture and Place*, 18 CLINICAL L. REV. 183, 209–10 (2011).

125. *Id.* at 212. In fact, the historical origin of the phrase “rule of thumb” referred to the English common law’s tolerance of wife-beating. See Stephanie Shapiro, *The Misunderstood ‘Rule of Thumb’ Misconception: Many Feminists for Years Thought the Phrase “Rule of Thumb” Referred to British Common Law’s Tolerance of Wife-Beating*, BALT. SUN (Apr. 17, 1998), <https://www.baltimoresun.com/news/bs-xpm-1998-04-17-1998107056-story.html>. The width of the rod that a husband used to beat his wife could not exceed the width of his thumb. *Id.*

126. McNeal, *supra* note 124, at 216.

127. *Id.* at 217.

128. *Id.*

129. N.Y. COMP. CODES R. & REGS. tit. 22, § 41.1(a)(1) (2018).

130. See Koshan, *supra* note 15, at 1023.

implications and interconnections of the law.¹³¹ In turn, this would likely better protect and enhance legal advice to clients in cases involving domestic violence.¹³²

III. ENSURING ACCOUNTABILITY: LACK OF ATTORNEY TRAINING UNDERMINES THE GOALS OF THE IDV COURTS

Attorneys are major stakeholders in IDV court proceedings. As scholars and this Note have addressed, accountability of the batterer and victim safety are at the forefront of the IDV Court proceedings.¹³³ However, it is interesting—and telling—that there is little or no mention of the role of the victim’s attorney in much of the current writing regarding the IDV courts.¹³⁴

It is also telling that not many states have followed New York State’s footsteps by adopting the institution of the IDV court.¹³⁵ One reason may be that states are reluctant to form statewide courts to address domestic violence because of potential courtroom bias concerns and pushback from judges.¹³⁶ Another explanation may be that states are simply fund-deficient and cannot incorporate this separate jurisdiction.¹³⁷ Another massive hurdle that still ails New York State’s system is that there is a lack of lawyers who are adequately trained, or are even willing to be trained, in domestic violence matters.¹³⁸

131. Aimee Pingenot Key, *Divorce and Domestic Violence: When Family Law Meets Criminal Law*, GPSOLO, July/Aug. 2015, at 30, 33.

132. *Id.*

133. See CTR. FOR CT. INNOVATION, *supra* note 73, at 1; Kathryn Gillespie Wellman, *Taking the Next Step in the Legal Response to Domestic Violence: The Need to Reexamine Specialized Domestic Violence Courts from a Victim Perspective*, 24 COLUM. J. GENDER & L. 444, 473 (2013); Maytal, *supra* note 21, at 229.

134. Fialk & Mitchel, *supra* note 76, at 208.

135. See OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, *supra* note 8, at 3. The data collected identified forty-one IDV courts and forty-one specialized domestic violence courts in New York State in 2016. *Id.* Compare to a study conducted in 2009 where sixty-three total specialized domestic violence courts (both IDV and criminal) were identified in New York, but only thirty-four in California, fourteen in Florida, thirteen in Michigan, eleven in North Carolina, and a remaining seventy-four courts distributed amongst twenty-seven states and Guam, with eighteen states having no specialized courts. MELISSA LABRIOLA ET AL., CTR. FOR CT. INNOVATION, A NATIONAL PORTRAIT OF DOMESTIC VIOLENCE COURTS, at v (2009), www.courtinnovation.org/sites/default/files/national_portrait.pdf. A fraction of these states have, in particular, the IDV court system. *Id.*

136. See Maytal, *supra* note 21.

137. *Id.*

138. See *id.*; see also Koshan, *supra* note 15, at 1023.

A. The Necessity of Training

Training is necessary because of the drastic differences between domestic violence proceedings and the typical adversarial proceedings. As explained:

The abuser is likely to be confident, assertive, calm and “in control.” He puts on a good appearance in court. Conversely, the victim is likely to be frightened, shaken, nervous, uncertain and often depressed. Knowing that the abuser has successfully managed to manipulate others to maintain control, the victim realistically fears the abuser can also manipulate the legal system; consequently, the victim may appear paranoid when she is merely fearful that the abuser will again be successful in the manipulation of those around him.¹³⁹

Thus, attorneys ought to be trained to identify and be aware of these types of issues. But the inherent lack of this type of training fundamentally compromises the goals of the IDV court.

In New York, the system lacks any mandatory training programs for lawyers who practice in the IDV courts.¹⁴⁰ The system is also silent as to any suggested or mandated requirements for defense attorneys handling family matters in conjunction with the criminal matter.¹⁴¹ Because of the inherent lack of resources and funds that may disincentivize lawyers to become “domestic violence specialists,” judges may be left with no other choice than to accept lawyers who are available to handle such cases, such as public defenders or assigned counsel. Facing a finite number of able-bodied lawyers, a judge will likely quickly yield to a lawyer who only practices within his or her expertise.

However, without this training, the multitude of nuances that domestic violence proceedings present may be missed by attorneys, suggesting that parties may receive a lesser quality of representation.¹⁴² Such nuances require that attorneys be “trauma informed,” meaning that lawyers must understand how trauma affects victims, and take that into consideration when serving their clients.¹⁴³ Chief Judge Kaye’s premise of forming the IDV courts was to approach domestic violence proceedings with a sensitivity and understanding of a traumatic

139. Nancy S. Erickson, *The Role of the Law Guardian in a Custody Case Involving Domestic Violence*, 27 *FORDHAM URB. L.J.* 817, 832 (2000) (internal footnote omitted).

140. *See* Fialk & Mitchel, *supra* note 76, at 208.

141. *See id.*

142. *See* Koshan, *supra* note 15, at 1023. Jennifer Koshan discusses her observations of the Manhattan IDV Court, noting the need for “broader training on domestic violence issues.” *Id.*

143. *See* KAYE, *supra* note 63, at 5–6.

situation.¹⁴⁴ Lawyers who lack this training risk undermining the program in its entirety because typical tactics used in a conventional criminal setting may re-victimize the victim and contradict the therapeutic setting.¹⁴⁵

In IDV court, the batterer often “attempts to exert his control over the victim through threats and by pressuring the victim not to cooperate with prosecution.”¹⁴⁶ The defense counsel “can be the instigator of this pressure.”¹⁴⁷ There is also a concern amongst defense attorneys of potential judicial biases.¹⁴⁸ The Criminal Defense Bar has argued that “judicial education about family abuse and extended tenure on a calendar devoted to such cases creates a pro-victim, anti-defense bias.”¹⁴⁹ In a typical adversarial proceeding prior to the formation of the specialized domestic violence courts, this argument may have had merit. But if this argument were true for the IDV courts, it would delegitimize its entire objective. The purpose of the IDV court is not to weaken the rights of the defendant, but to enhance victim safety and resources.¹⁵⁰ These purposes must be balanced with notions of equity for each party.

What is unspoken, although wildly apparent in IDV court, is not necessarily the defense attorney’s lack of resources enabling him to extend his or her services to the family law aspect of the proceeding, but rather, the unwillingness to practice in other areas of the law.¹⁵¹ As explained earlier, local practices have a pronounced effect on the cultures and norms of a legal community.¹⁵² The formation of the IDV court challenges these norms by combining civil and criminal matters.¹⁵³ Lawyers are not rising to the occasion to practice in a new type of specialized domestic violence practice, nor does it appear that the courts are requiring it.¹⁵⁴ If the State required attorneys to take Continued Learning Education (CLE) seminars in the area of domestic violence before being on the assigned counsel panel list, it would be beneficial.

144. *See id.*

145. *See* Koshan, *supra* note 15, at 1008–09.

146. Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 394 (2001).

147. *Id.*

148. Maytal, *supra* note 21, at 226.

149. *Id.*

150. *Id.* at 229.

151. *See* Koshan, *supra* note 15, at 1023; Maytal, *supra* note 21.

152. McNeal, *supra* note 124, at 209–12.

153. *See* Aldrich & Kluger, *supra* note 67.

154. *See* Fialk & Mitchel, *supra* note 76, at 208.

B. The Role of the Prosecutor

The victim's emotional attachment to the offender often presents hurdles in a proceeding. In particular, prosecutors are placed in difficult situations in IDV court when the victim does not want to participate in the proceedings.¹⁵⁵ There is an inherent conflict of interest, sometimes built into the tension and uncooperativeness between victims and prosecutors.¹⁵⁶ Consider these points:

Prosecutors litigating the criminal case perform investigative, bureaucratic, administrative[,] and political functions. Prosecutors do not have an identity of interest with the victim, do not advocate on behalf of the victim, and in fact, may decide to prosecute the criminal case without the cooperation of the victim. Prosecutors represent the State in the prosecution of the criminal case and are often unavailable to the victim. More importantly, prosecutors have no responsibility of confidentiality to the victim that exists in a lawyer-client relationship. Thus, any communications that the victim has with the prosecutor or the prosecutor's representatives are not protected by the attorney-client privilege.¹⁵⁷

Due process concerns of the victim arise on the basis of coercive government tactics as well as her batterer.¹⁵⁸ "Even well-meaning therapeutic jurisprudence and the cadre of professionals may not always have an identity of interest with the victim and the [IDV court] advocates have no responsibility of confidentiality that exist in a[n] attorney-client relationship."¹⁵⁹ A means by which training could be provided to both criminal law attorneys and the district attorney's office may address these concerns.

Additionally, plea bargains often disproportionately favor the abuser.¹⁶⁰ In cases where the victim is unwilling to testify against her abuser, the prosecutor will rarely prosecute, which leads to increased plea bargaining.¹⁶¹ Increased incidents of plea bargaining run the risk of losing a main objective of domestic violence proceedings—offender accountability.¹⁶² For example, a prosecutor may offer the offender a lesser charge of harassment in the second degree, a mere violation,¹⁶³

155. Kirsch, *supra* note 146, at 386.

156. Fialk & Mitchel, *supra* note 76, at 175.

157. *Id.*

158. *Id.* at 218.

159. *Id.*

160. Kirsch, *supra* note 146, at 391.

161. *See id.*

162. *See* CTR. FOR CT. INNOVATION, *supra* note 73, at 1.

163. *See* N.Y. PENAL LAW § 240.26 (McKinney 2017).

from a charge of criminal contempt in the second degree, a class A misdemeanor.¹⁶⁴ Of course the possibilities of reduced pleas are endless, but this illustrates a potential concern of reducing the accountability of the offender.

C. Competing Objectives of Lawyers

IDV court does not adequately address the fundamentally different objectives of lawyers who practice in the civil and criminal aspects of the trial. Without adequate training, having multiple attorneys represent each party may undermine the holistic approach to domestic violence proceedings.¹⁶⁵ Victims may have to repeat their story multiple times, resulting in possible re-victimization.¹⁶⁶ These problems may be exacerbated for marginalized women and in turn affect their children.¹⁶⁷

IDV court also presents opportunities for attorneys to manipulate the court's docket calendar to their client's advantage. For example, a matrimonial attorney may—and can—influence the court to stall the family matter and push forward the criminal matter.¹⁶⁸ A possible incentive may be so that her client is not found guilty on neglect charges that may influence the outcome of child custody or support.

These courtroom tactics that may be acceptable in other jurisdictions run the risk of undermining the objectives of the IDV court system. A victim may want to pursue the prosecution of her offender, but if the offender is sent to jail, the family lawyer may not prevail on obtaining any meaningful child support.¹⁶⁹ If a victim does not want to pursue prosecution of the offender and is uncooperative with the prosecutor, a plea to a lesser charge may be offered.¹⁷⁰ Having multiple lawyers with multiple interests risks transforming the IDV court experience into a horse-trading environment, defeating its purpose.

The interests of the victims play a perplexing role in the IDV court,

164. N.Y. PENAL LAW § 215.50 (McKinney 2010).

165. Koshan, *supra* note 115, at 1008.

166. *Id.* at 1008–09.

167. *Id.* at 1009.

168. This information was obtained during an in-person interview with a local clerk in January 2018. The interviewee wishes to remain anonymous.

169. See Dana Harrington Conner, *Financial Freedom: Women, Money and Domestic Abuse*, 20 WILLIAM & MARY J. RACE, GENDER, & SOC'Y 339, 357, 369–70 (2014) (discussing how women may return to their abuser due to financial constraints and also choose legal alternatives to criminal prosecution based on financial reasons); Nancy Salamone, *Domestic Violence and Financial Dependency*, FORBES (Sept. 2, 2010, 12:00 PM), <https://www.forbes.com/2010/09/02/women-money-domestic-violence-forbes-woman-net-worth-personal-finance.html#4f377aba1047>.

170. See *supra* notes 160–64 and accompanying text.

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which is why training is so crucial in effective domestic violence lawyering. With the presence of an often manipulative and powerful abuser, specialized training must be provided to attorneys to recognize troubling factors and possible cognitive bias that may affect the decisions of their clients, which may prevent the victim from following counsel's advice to her detriment.

IV. PROPOSAL: DOMESTIC VIOLENCE AND CRIMINAL-FAMILY CROSS TRAINING

Only attorneys fully versed in the dynamics of domestic violence can help achieve the maximum benefits that IDV court seeks to obtain for the victim. Admittedly, this argument runs the risk of overstating the purpose of IDV courts. The court is not on the side of the victim—IDV was designed to facilitate the process and provide a one-judge-one-court system to both the defendant and victim so that contrary results do not occur.¹⁷¹ However, it is the opinion of this author that because lawyers who represent the parties play an integral and interactive role with the victim, education for lawyers designed to ensure domestic violence awareness must be implemented.

A. Domestic Violence Jurisprudence: A Recognized Practice

The legal community must recognize this new type of jurisprudence: domestic violence jurisprudence. IDV courts are built on the principle of accountability to litigants and the larger community.¹⁷² Proponents of reexamining IDV courts claim that there should be more attention paid to the victim's perspective on the proceedings, for example, increasing narrative processes and engaging the victim herself in future evaluation efforts.¹⁷³ Without the attorneys being required to train in domestic violence proceedings,¹⁷⁴ it is difficult to comprehend how IDV court is different from a typical criminal or family court. The absence of specialized legal representation for the parties suggests that the IDV court is a way to integrate the victim's civil matters into a template of criminal jurisprudence.¹⁷⁵ IDV court must be recognized as a fundamentally different adversarial system, with unique practice models that require

171. See SARAH PICARD-FRITSCHÉ ET AL., CTR. FOR COURT INNOVATION, THE ERIE COUNTY INTEGRATED DOMESTIC VIOLENCE COURT: POLICIES, PRACTICES, AND IMPACTS 1 (2011), https://www.courtinnovation.org/sites/default/files/documents/Erie_IDV.pdf; Aldrich & Kluger, *supra* note 67.

172. Wellman, *supra* note 133.

173. *Id.* at 473–74.

174. See Fialk & Mitchel, *supra* note 76, at 208.

175. *Id.*

specific, mandated training.

The striking absence of specialized legal representation for victims in IDV courts suggests that a template of criminal jurisprudence is used amongst practitioners.¹⁷⁶ The nature of victim autonomy in IDV court may present potential quandaries for her counsel.¹⁷⁷ As Rebecca Fialk and Tamara Mitchel explained:

When the victim chooses a course of legal action that appears overwhelmingly to promote the perpetrator's abusive ends over her own welfare, her attorney may have justifiable concerns about the outcome of successfully advocating for his course in court. The lawyer's understanding of domestic violence may lead her to question exactly whose interests their client is promoting. In such situations, how does the attorney "know" what the victim truly wants? In such situations, how does the victim's attorney discern, let alone "preserve and foster," their client's autonomy?¹⁷⁸

The IDV court system cannot risk having an attorney not trained in identifying such critical issues of domestic violence. The added ethical considerations of an attorney in an IDV court proceeding cannot be overstated.

B. Where Domestic Violence Training is Mandated and Its Similarities with IDV Court

A program exists in New York that statutorily requires having its practicing attorneys formally trained in domestic violence.¹⁷⁹ Such attorneys are called "attorneys for the child" (AFC) who represent minors in family court proceedings.¹⁸⁰

The AFC program "is the governmental office responsible for maintaining a list of attorneys qualified to represent children, and as such, seeks to provide the highest quality legal services to children involved in the judicial system."¹⁸¹ These attorneys are charged with protecting a child's best interests and helping to express the child's wishes.¹⁸² AFCs do not assume the role of a social worker, psychologist, or advocate;

176. *Id.*

177. *Id.* at 211–12.

178. *Id.*

179. *See* N.Y. COMP. CODES R. & REGS. tit. 22, §7.2(a) (2018).

180. *Id.*

181. *Attorneys for Children Program*, N.Y. ST. SUP. CT. APP. DIV. SEC. JUD. DEP'T, <http://www.courts.state.ny.us/courts/ad2/AttorneyforChildHome.shtml> (last visited Aug. 13, 2018).

182. *See id.*; *see also* Diane Somberg, Comment, *Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law*, 19 *TOURO L. REV.* 529, 534 (2003).

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instead, just like the attorneys for the parties, the AFC's job is to represent the child's position in the current matter before the court.¹⁸³ Previously called "law guardians,"¹⁸⁴ AFCs are not to be confused with "a guardian ad litem, a forensics expert, a social worker or finder of fact. A law guardian is an attorney for the child, but the law guardian's role may be different from the role of an attorney for an adult."¹⁸⁵

The Chief Administrator of Courts is responsible for the designation process of AFCs.¹⁸⁶ To apply to be an AFC, specific education and training is required.¹⁸⁷ Established by the Chief Administrator, these training requirements "shall consist, as appropriate, of substantive issues pertaining to each category of appointment—including applicable law, procedures, and ethics—as well as explications of the rules and procedures."¹⁸⁸

AFCs are also required to complete domestic violence training.¹⁸⁹ Section 249-b of the New York Family Court Act proscribes that the Chief Administer shall:

provide for the development of training programs with the input of and in consultation with the state office for the prevention of domestic violence. Such training programs must include the dynamics of domestic violence and its effect on victims and on children, and the relationship between such dynamics and the issues considered by the court, including, but not limited to, custody, visitation and child support.¹⁹⁰

183. N.Y. STATE SUPREME COURT, APPELLATE DIV., 4TH DEP'T, ATTORNEYS FOR CHILDREN PROGRAM, ETHICS FOR ATTORNEYS FOR CHILDREN 1 (2017), <https://www.nycourts.gov/courts/ad4/AFC/AFC-ethics.pdf>.

184. Gary Port, *The Child's Lawyer—The Role of the Law Guardian (Now Called "Attorney for the Child")*, PORT & SAVA ATT'YS L. (Mar. 22, 2009), <http://nydivorcefacts.com/2009/03/22/the-childs-lawyer-the-role-of-the-law-guardian/>.

185. Erickson, *supra* note 139, at 818 (emphasis omitted). A guardian ad litem is someone, who is often, but not necessarily, a lawyer, who the Judge assigns to a person who cannot come to court or protect their rights, such as children or incapacitated persons. *See Guardians Ad Litem*, NYCOURTS.GOV, <http://www.nycourts.gov/courthelp/guardianship/GAL.shtml> (last visited Mar. 18, 2019).

186. N.Y. FAM. CT. ACT § 249-b(b) (McKinney 2008); *see also New York State Profile, NAT'L JUV. DEFENDER CTR.*, <http://njdc.info/practice-policy-resources/state-profiles/newyork/> (last visited Mar. 18, 2019) (detailing the juvenile indigent defense delivery system in New York).

187. FAM. CT. ACT § 249-b(a)(3); N.Y. COMP. CODES R. & REGS. tit. 22, § 36.3(b) (2018); *see, e.g.*, TRACEY M. HAMILTON, ATTORNEYS FOR CHILDREN PROGRAM: ADMINISTRATIVE HANDBOOK FOR ATTORNEYS FOR CHILDREN 16 (2018), <https://www.nycourts.gov/courts/ad4/AFC/handbook.pdf>.

188. COMP. CODES R. & REGS. tit. 22, § 36.3(b).

189. *See* FAM. CT. ACT § 249-b(a)(2); COMP. CODES R. & REGS. tit. 22, § 36.3(b).

190. FAM. CT. ACT § 249-b(a)(2).

The policy reasons as to why domestic violence training is a prerequisite to being a law guardian are equivalent to the reasons given in this Note. The legislative Memorandum in Support of the bill that became Chapter 85 of the 1996 Laws of New York, which required judges in child custody cases to consider domestic violence when determining the best interests of the child, acknowledged the many concerns of children involved with domestic violence.¹⁹¹ These concerns require the appointment of an attorney for the child who is adequately trained in addressing these factors, including the harm to children who witness abuse or reside in a violent home, and the risks of the child being abused by the abuser, intergenerational violence, and abuser manipulation of the legal system.¹⁹²

There are many similarities in the type of trauma children experience when facing family and legal proceedings to an adult victim in IDV court.¹⁹³ Therefore, similar training in domestic violence would be useful in terms of assuring offender accountability and victim protection. The interests of the victim and abuser are analogous with the experience of a child whose parent is a domestic violence perpetrator, including emotional trauma experienced by the victim.¹⁹⁴ The legislature has expressed its interest in protecting the child in domestic violence legal proceedings by adequately training its lawyers.¹⁹⁵ This requirement should be extended to, and would be beneficial to, the attorneys representing victims in related matters in IDV court.

C. Judges are Provided Domestic Violence Training

Judges in the IDV court are provided extensive training on the complexities and nuances of domestic violence proceedings.¹⁹⁶ This training should be required for the attorneys. Judges from all of the IDV courts regularly meet to discuss training tactics and court planning.¹⁹⁷

191. See Act of May 21, 1996, ch. 85, § 2, 1996 N.Y. Sess. Laws 120, 121–23 (McKinney) (codified as amended at N.Y. DOM. REL. LAW § 240 (McKinney 2010)); Legislative Memorandum of Assemb. Weinstein, ch. 85, 1996 N.Y. Sess. Laws 120.

192. See Erickson, *supra* note 139, at 829–32.

193. See Mellissa M. Stiles, *Witnessing Domestic Violence: The Effect on Children*, 66 AM. FAM. PHYSICIAN 2052, 2052 (2002); see also *Intimate Partner Violence: Effects*, NCTSN, <https://www.nctsn.org/what-is-child-trauma/trauma-types/domestic-violence/effects> (last visited Apr. 23, 2019) (discussing immediate and long-term effects of children witnessing domestic violence, which includes: increased anxiety, worry of safety, physical health programs, behavioral problems, etc.).

194. See Stiles, *supra* note 193.

195. See FAM. CT. ACT § 249-b(a)(2).

196. CTR. FOR CT. INNOVATION, *supra* note 73.

197. *Id.*

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Judges “learn from their peers in operational IDV courts, meet in small groups to discuss their unique issues in strategies for planning and implementation, as well as learn about the dynamics of domestic violence through multi-media presentations and scenarios.”¹⁹⁸ These regional meetings welcome non-judicial staff, including attorneys, but it is apparent that many lawyers do not choose to participate.

IDV court judges have ample opportunity for trainings and there is robust support of such training in the judicial community.¹⁹⁹ The Office of the Statewide Coordinating Judge for Family Violence Cases (OFVC) “works together with the administrative judges and judges who handle family violence issues in our courts across the state, including the domestic violence (DV) courts and integrated domestic violence (IDV) courts, in an effort to refine practices and promote better and more consistent outcomes in these parts.”²⁰⁰ Directed at the time of this Note by the Hon. Deborah A. Kaplan, Administrative Justice, Supreme Court, Civil Branch, New York County, OFVC produces statewide and regional trainings in many facets of domestic violence.²⁰¹ Such trainings may include panel discussions on the roles of different stakeholders and breakout sessions, providing an opportunity for judges from around the state to discuss best practices in domestic violence matters for domestic violence and IDV judges.²⁰²

For example, in 2015 and 2016, OFVC provided two statewide Judicial Symposia on Domestic Violence in New York City.²⁰³ The two-day program included many sessions. For instance, the 2015 Symposium sessions included: (1) Trauma, Mental Health and High Conflict Separation; (2) Domestic Abuse in Later Life; and (3) Fairness and Bias in Domestic Violence Cases and Balancing a Life on the Scales of Justice: Health and Well-being in the Twenty-First Century.²⁰⁴ “There were also facilitated breakout sessions, providing an opportunity for judges from around the state to discuss best practices in domestic violence matters for DV and IDV judges.”²⁰⁵

There are also many domestic violence training materials available

198. *Id.*

199. *Id.*

200. OFFICE OF THE STATEWIDE COORDINATING JUDGE FOR FAMILY VIOLENCE CASES, FALL 2016 NEWSLETTER (2016) [hereinafter OFVC], <http://nycourts.gov/info/OFVC/Newletters/2016-Fall/index.html>.

201. *See id.*

202. *Id.*, *see also* CTR. FOR CT. INNOVATION, *supra* note 73.

203. *See* OFVC, *supra* note 200.

204. *Id.*

205. *Id.*

to practitioners in this area of the law. For instance, the New York State Bar Association provides CLE training programs for lawyers representing domestic violence victims.²⁰⁶ Courts and administrative personnel should require such training for attorneys who practice in IDV court. For jurisdictions with assigned counsel programs, the administrators could require panel-applicants to have a certain amount of CLE credits in domestic violence training. For a legal aid society, the contract with the county could be contingent on a certain number of lawyers receiving this training. This training, alongside the training of the judge, would maximize the benefits and goals of IDV court.

D. Raise the Age Legislation: The Similar Need for Criminal and Family Cross Training

In addition to domestic violence training, attorneys must be willing and able to practice in both criminal and family matters. Currently, similar criminal and family cross training efforts are being made by bar associations in other legal settings, such as juvenile adjudicatory proceedings.²⁰⁷

On April 10, 2017, Governor Andrew Cuomo signed into law the “Raise the Age” legislation, which increased the age of juvenile accountability from fifteen to seventeen years old.²⁰⁸ Prior to this legislation, New York remained one out of only two states that automatically prosecuted sixteen and seventeen-year-olds as adults (North Carolina is the last state).²⁰⁹ A major change is that most cases involving sixteen and seventeen-year-olds “will ultimately be heard in the Family Court, either originating there or being transferred there from the new Youth Part of the adult criminal court.”²¹⁰

Because most of these juvenile cases will originate in criminal court

206. See, e.g., *Training Program for Lawyers Representing Domestic Violence Victims*, N.Y. ST. BAR ASS’N (May 9, 2017), <https://www.nysba.org/store/events/registration.aspx?event=0ER8Z>.

207. This information was obtained during an in-person interview with a local attorney on Feb. 21, 2018. The interviewee wishes to remain anonymous.

208. Act of Apr. 10, 2017, ch. 59, pt. WWW, § 1, 2017 N.Y. Sess. Laws 434, 434 (McKinney) (codified at N.Y. CRIM. PROC. LAW § 1.20(44) (McKinney 2018)); see *Key Components of Legislation, RAISE AGE NY*, <http://raisetheageny.com/wp-content/uploads/2011/08/Raise-the-Age-Legislation-Summary-2017.pdf> (last visited Mar. 18, 2019); *Get the Facts, RAISE AGE NY*, <http://raisetheageny.com/get-the-facts> (last visited Mar. 18, 2019).

209. Erik Eckholm, *States Move Toward Treating 17-Year-Old Offenders as Juveniles, Not Adults*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/2016/05/14/us/states-move-to-treat-17-year-old-offenders-as-juveniles.html>.

210. See *Key Components of Legislation*, *supra* note 208.

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and subsequently be transferred to family court, officials are urging criminal attorneys to agree to practice in both areas.²¹¹ Recognizing that for both fiscal and practical reasons, not the least of which is the availability of continuous representation for the defendant, there is a need for panel attorneys to stay with their clients from start to finish.²¹² In some counties, the assigned counsel program will be starting a new program to get panel attorneys comfortable and up-to-speed in whichever area they are not comfortable.²¹³ Attorneys who only do civil matters can—if they are willing—get training in the area of criminal law (perhaps misdemeanors only, or preferably, both misdemeanors and certain types of felonies).²¹⁴ Conversely, criminal lawyers who are willing can be trained in family law.²¹⁵

Similar programs should be extended to, if not required for, attorneys who do not practice in both the criminal and civil aspects of IDV court. Not only would this decrease costs and increase efficiency of IDV court, it would also minimize the potential risks of revictimizing the victim.

E. Funding

Adequate funding must logically be provided in order to produce and require this training. Now is the critical moment in securing this funding—and it is possible. With the *Hurrell-Harring* settlement, counties have received millions of New York State dollars to revamp their indigent defense programs.²¹⁶ The State pledged five million dollars to Onondaga County (more than double the County's previous budget) and \$100 million will be spent statewide.²¹⁷ Currently, Onondaga County's Assigned Counsel Program has 170 lawyers who handle roughly 14,000 criminal cases a year.²¹⁸ So for panel attorneys who are paid per case,²¹⁹ a portion of these additional funds should be used to create financial incentives for IDV attorneys to attend training programs.

211. See, e.g., *Admitted Attorneys: Current Vacancies for Admitted Attorneys*, N.Y.C. L. DEP'T, <https://www1.nyc.gov/site/law/careers/current-vacancies-for-admitted-attorneys.page> (last visited Apr. 23, 2019). These job postings regarding Raise the Age initiatives stresses for applicants to have criminal as well as family law experience. See *id.*

212. See *supra* note 207.

213. See *supra* note 207.

214. See *supra* note 207.

215. See *supra* note 207.

216. Dowty, *supra* note 94.

217. *Id.*

218. *Id.*

219. *Id.*

For other states, however, it is understood that funding for domestic violence services, among other things, is often severely lacking.²²⁰ Despite that, some cities have demonstrated that funds can be procured for important causes such as domestic violence resources.²²¹ New York State remains a leading state in providing public services and resources.²²² And, in New York City, Mayor Bill de Blasio announced in May 2017 that the City will invest nearly seven million dollars to better address the needs of victims and to increase arrests of abusers.²²³ This spurs the hope that funds can be procured in other jurisdictions.

CONCLUSION

Chief Judge Kaye's vision and New York State's subsequent effort to address domestic violence in the judicial realm is significant and unparalleled in the United States. IDV court is an effective legal innovation in addressing the complexities of domestic violence and how best to adjudicate proceedings that are often marred with emotions and conflicting interests. But domestic violence jurisprudence is strikingly different from other traditional courts. In order to address this, the training that IDV judges are afforded must be extended to the attorney regularly practicing in IDV to get the same or similar training. As a result, and to fulfill the needs of this new jurisprudence, it is important for those charged with court reform to ensure that all of the practicing attorneys are trained in the intricacies of domestic violence. Such a focus on demanding the advancement of a lawyer's practice skills could in turn increase abuser accountability and victim safety, and potentially convince other states to adopt the system altogether.

220. See NAT'L NETWORK TO END DOMESTIC VIOLENCE, 11TH ANNUAL DOMESTIC VIOLENCE COUNTS REPORT 3, 17 (2016).

221. Ben Fractenberg, *City to Invest \$7M in Domestic Violence Reduction Services*, Mayor Says, DNAINFO (May 1, 2017), <https://www.dnainfo.com/new-york/20170501/civic-center/domestic-violence-bill-de-blasio-public-investment>.

222. See, e.g., GOV. ANDREW M. CUOMO, EXCELSIOR—EVER UPWARD, STATE OF THE STATE 2018, at 14 (Jan. 15, 2019), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2018-stateofthestatebook.pdf> (detailing the many services afforded to New York State citizens, emphasizing that New York is "the nation's beacon for social progress").

223. Fractenberg, *supra* note 221.