

**Legal Responses to Domestic Violence in Canada and the United States:
Comparing Specialized DV Courts**

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Abstract

Domestic violence is a pressing issue in both Canada and the United States. In recognition of the problems with traditional legal approaches to this social problem, extensive legislative, administrative and judicial reforms have occurred since the 1970s and 1980s in both countries. Reforms have included the adoption of mandatory arrest, charging and prosecution laws and policies, the enactment of legislation providing civil remedies, and the creation of specialized Domestic Violence (DV) courts. One recent innovation that is relatively unique in the U.S. context is Integrated Domestic Violence (IDV) courts, where criminal matters are heard alongside family and civil matters in a one judge / one family model. This paper will explore New York's IDV courts as a possible model for adoption in Calgary, Alberta, a Canadian jurisdiction that has experienced some challenges in the interplay between its civil and criminal approaches to domestic violence. The paper situates DV and IDV courts within the broader context of legal responses to domestic violence, and discusses the rationales for and characteristics of these courts. Evaluations of the operations of these courts will also be considered with a view to developing criteria for determining whether New York's IDV courts can serve as a model for Calgary.

**Legal Approaches to Domestic Violence in Canada and the United States:
Comparing Specialized DV Courts
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I. Introduction

Domestic violence¹ is a pressing social policy issue in both Canada and the United States. In Canada, spousal violence accounts for more than half of all police-reported family violence, and over 10% of all police-reported violent crime.² The actual rates of domestic violence are much higher; a 2009 survey in Canada found that only 22% of victims of spousal violence reported the abuse to police.³ Alberta has one of the highest rates of domestic violence, with 8% of adults self-reporting as victims in 2009.⁴ Between 2000 and 2009, spousal homicides accounted for 16% of all solved homicides in Canada, and nearly half (47%) of all family-related homicides.⁵ In the U.S., the overall rate of domestic violence in 2008 was 2.6 victimizations per 1,000 persons aged 12 or older.⁶ That same year, 45% of female homicides in the U.S. were perpetrated by intimate partners.⁷ Over 200,000 people are victimized by domestic violence each year in

¹ The terms “intimate partner violence” and “spousal assault” are sometimes used as they are more specific to spousal violence (my specific interest) than either “domestic” or “family” violence. All of these terms fail to capture the gendered nature of spousal violence to the same degree as a term such as “wife assault”, although they are better at capturing same-sex spousal violence. In spite of its serious shortcomings, I will use the term “domestic violence” in this paper because of my focus on state responses through, *inter alia*, “domestic violence” courts. For a critical discussion of terminology see Joanne C. Minaker and Laureen Snider, “Husband Abuse: Equality with a Vengeance?” (2006) *Can. J. Criminology and Criminal Justice* 753.

² Canadian Centre for Justice Statistics, *Family Violence in Canada: A Statistical Profile* (Ottawa: Minister of Supply and Services, 2009) at 24 (*Family Violence in Canada 2009*).

³ Canadian Centre for Justice Statistics, *Family Violence in Canada: A Statistical Profile* (Ottawa: Minister of Supply and Services, 2011) at 11 (*Family Violence in Canada 2011*). This figure was down from 28% in 2004 (*ibid.*). Women are more likely to report to the police than men, although the decline in reporting from 2004 to 2009 was primarily among female victims (*ibid.*).

⁴ *Family Violence in Canada 2011, ibid.* at 9. Broken down by gender, 8.5% of women and 6.5% of men self-reported victimization. The national average was 6% overall.

⁵ *Ibid.* at 32. The rate of spousal homicides against women is about three to four times higher than the rate against men (*ibid.* at 33).

⁶ Shannan Catalano, Erica Smith, Howard Snyder, and Michael Rand, *Female Victims of Violence* (Bureau of Justice Statistics, 2009, NCJ 228356) at 1 (Catalano et al). Broken down by gender, there were 4.3 victimizations per 1,000 females age 12 or older, and 0.8 victimizations per 1,000 males age 12 or older. To compare these numbers to Canada, in 2007 the rate of police-reported spousal violence was 188 per 100,000, or 1.88 per 1,000 persons. Over 8 in 10 victims of police-reported spousal violence were female. See *Family Violence in Canada 2009, supra* at 24-25.

⁷ *Report of the Special Rapporteur on violence against women, its causes, and consequences on her visit to the United States of America*, A/HRC/17/26/Add.5 (6 June 2011) at para. 9 (*Report of the Special Rapporteur*). The rate of spousal homicide against women was twice that against men (*ibid.*).

New York State, and domestic violence cases make up 20% of the caseload of criminal courts.⁸ Underreporting of domestic violence is also a significant issue in the U.S.⁹

In addition to straining judicial and other government resources, domestic violence results in myriad health, safety, and other social and economic consequences for its victims.¹⁰ Certain populations in both countries are especially vulnerable to the harms of domestic violence. Although there are some arguments to the contrary,¹¹ women make up the vast majority of victims of domestic violence, and some women – indigenous women, racialized and immigrant women, women with disabilities, lesbians, young women, and poor women – face particular risks.¹² Domestic violence has been recognized as an urgent women’s equality issue both domestically and internationally.¹³

In recognition of the harms of domestic violence and the problems with traditional legal approaches to this social problem, there have been extensive legislative, administrative and judicial reforms since the 1970s and 1980s in both Canada and the United States. These reforms followed upon calls by women’s groups, shelters and anti-violence activists to treat domestic

⁸ Robyn Mazur and Liberty Aldrich, “What makes a domestic violence court work? Lessons from New York” (2003) 42 Judges J. 5 at 6.

⁹ *Report of the Special Rapporteur, supra* at para. 13. In both Canada and the U.S., underreporting is most acute amongst women who are most vulnerable to domestic violence and who experience social and economic inequality, such as immigrant and racialized women, women with disabilities, and lesbians. See *Report of the Special Rapporteur, ibid.* at paras. 54-55, 59-61; Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence-Achieving Equality* (Ottawa: Minister of Supply and Services, 1993) at **; Dianne Martin and Janet Mosher, “Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse” (1995), 8 Can. J. Women & L. 3; Jennifer Koshan and Wanda Wieggers, “Theorizing Civil Domestic Violence Legislation in the Context of Restructuring: A Tale of Two Provinces” (2007) 19 Can. J. Women & L. 145 at 167-168.

¹⁰ See e.g. *Report of the Special Rapporteur, ibid.* at para. 18-21.

¹¹ In Canada, see for example *Family Violence in Canada 2011, supra*, reporting on the 2009 General Social Survey (GSS). Like the 1999 and 2004 Surveys before it, the 2009 GSS reports similar self-reported rates of domestic violence amongst female and male respondents. However, the methodology of the GSS has been critiqued (see e.g. Walter DeKeseredy and Molly Dragiewicz, *Shifting Public Policy Direction: Gender-Focused Versus Bi-Directional Intimate Partner Violence* (Queen’s Printer for Ontario, 2009)), and the results contradict many other studies showing women to be the overwhelming victims of domestic violence (see e.g. see *Family Violence in Canada 2009, supra* at 25, which reported that in 2007, over 8 out of 10 victims of police-reported spousal violence were female, while 17% were male). The GSS itself found that females are more likely to suffer multiple incidents and more serious forms of domestic violence, and to sustain injuries (*Family Violence in Canada 2011, supra* at 9-10, 13). In the U.S., see Emily Sack, “Battered Women and the State”, *infra* at 1711-1713, for a discussion of this debate. The *Report of the Special Rapporteur, ibid.* at para. 8, notes that in 2008, the rate of intimate partner victimization for women in the U.S. was over five times the equivalent rate for men (citing Catalano et al, *supra*).

¹² In Canada see *Family Violence in Canada 2011, ibid.* at 11. See also the Canadian Panel on Violence Against Women, *supra* at 59. In the U.S., see *Report of the Special Rapporteur, ibid.* at paras. 50-52, 56, 62.

¹³ See *Report of the Special Rapporteur, ibid.*, Canadian Panel on Violence Against Women, *ibid.*, *Declaration on the Elimination of Violence against Women*; Committee on the Elimination of Discrimination Against Women, *General Recommendation 19*.

violence seriously,¹⁴ and by justice system personnel to develop strategies for dealing with the particular challenges of domestic violence cases.¹⁵ Reforms in both countries have included the adoption of mandatory arrest, charging and prosecution laws and policies, developments in the laws of bail, evidence and sentencing, and the enactment of civil protection remedies. Another legal approach to domestic violence that has been used in both countries involves civil rights claims seeking to hold government actors to account for their failure to respond to domestic and other forms of gender-based violence. Most recently, specialized domestic violence courts (“DV courts”) have been established in Canada and the U.S. as a response to the challenges presented by domestic violence cases.¹⁶ One innovation that is relatively unique in the American context¹⁷ is integrated domestic violence courts (“IDV courts”), where criminal matters are processed and heard alongside family and civil matters in a one judge / one family model.¹⁸

This paper will examine the most recent legal response to domestic violence in Canada and the U.S., DV courts, and determine whether, based on the U.S. experience, IDV courts should be advocated in Canada as part of a comprehensive approach to domestic violence. More specifically, New York City’s Integrated DV Courts will be explored as a possible model for

¹⁴ In the U.S., see Samantha Moore, *Two Decades of Specialized Domestic Violence Courts: A Review of the Literature* (New York: Center for Court Innovation, 2009) at 1; Donna Coker, “Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review” (2001) 4 *Buff. Crim. L. Rev.* 801 at 803; Deborah Epstein, “Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System” (1999) 11 *Yale J. L. & Feminism* 3; Emily Sack, “Battered Women and the State: The Struggle for the Future of Domestic Violence Policy” (2004) *Wis. L. Rev.* 1657 (“Battered Women and the State”); Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (2000). In Canada, see e.g. Dawn Currie, “Battered Women and the State: From the Failure of Theory to a Theory of Failure” (1990) 1(2) *Critical Criminology* 77; Frances Salvaggio, “K-Court: The Feminist Pursuit of an Interdisciplinary Approach to Domestic Violence” (2002) 8 *Appeal* 6. Some women were excluded from these efforts, however. See Jennifer Koshan, “Sounds of Silence: The Public/Private Dichotomy, Violence and Aboriginal Women”, in S. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) 87.

¹⁵ In the U.S., see Mazur and Aldrich, *supra* at 5-6, and in Canada, see Jane Ursel, Leslie M. Tutty and Janice Lemaistre, “The Verdict on Specialized Justice Responses to Domestic Violence”, in Jane Ursel, Leslie M. Tutty and Janice Lemaistre, eds., *What’s Law Got To Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: Cormorant Books, 2008) 272 at 275 (*What’s Law Got to Do With It?*). Both sets of authors are referring specifically to the role of judges and other personnel in the development of DV courts.

¹⁶ For overviews, see *What’s Law Got to Do With It?*, *ibid.* (with a number of essays on Canadian DV courts) and Sarah Picard-Fritsche, Melissa Labriola, Samantha Moore, Chris S. O’Sullivan and Michael Rempel, *A National Portrait of Domestic Violence Courts*, (New York: Center for Court Innovation, 2011) (providing an overview and analysis of DV courts in the U.S.).

¹⁷ An Integrated DV recently commenced operations in Toronto, Canada. See *infra* Part IIIId. This is the first IDV court in Canada.

¹⁸ See e.g. *A National Portrait of Domestic Violence Courts*, *supra* at 5.

adoption in Alberta, Canada, a jurisdiction that has experienced some difficulties in the interplay between its civil and criminal approaches to domestic violence.¹⁹

In terms of methodology, the project will involve analysis and comparison of primary sources (legislation, key cases and policies related to both civil and criminal systems, and DV / IDV court structures and processes) and secondary sources (relevant literature and evaluations relating to the different legal models and their responses to domestic violence). I also plan to conduct courtroom observations and interviews in New York with IDV court personnel, advocates for complainants and defendants, and other key stakeholders.²⁰ My observations and interviews in New York will complement similar data already gathered in Alberta pursuant to evaluations of civil domestic violence legislation and DV courts in which I participated.²¹

This paper will proceed as follows. First, I will provide an overview of the first wave of legal responses to domestic violence in the U.S. and Canada, along with some of the critiques of those responses. This part of the paper will lay the groundwork for examining specialized DV courts in the next section, including the rationales for those courts, their general characteristics, and the specific characteristics of IDV courts. I will then identify criteria drawn from the literature and evaluation of DV and IDV courts to be used in examining New York's IDV Courts. The final part of my paper exploring these courts as a model for Alberta will be completed after my courtroom observations and interviews are conducted.

II. Legal Responses to Domestic Violence

a. The Traditional Approach and the First Wave of Responses

It is now well known that the historical approach to domestic violence was largely one of ignorance. Women were considered to be the property of their husbands and to be subject to reasonable chastisement without intervention by the law. Although domestic violence was eventually recognized as a criminal matter, the enforcement of the criminal law continued to be

¹⁹ See Leslie Tutty, Jennifer Koshan, Deborah Jesso, and Kendra Nixon, *Alberta's Protection Against Family Violence Act: A Summative Evaluation* (Calgary: RESOLVE Alberta, 2005) (*PAFVA Evaluation Report*); Leslie Tutty, Jennifer Koshan, Deborah Jesso, Cindy Ogden, *Evaluation of the Calgary Specialized Domestic Violence Trial Court & Monitoring the First Appearance Court: Final Report* (Calgary: RESOLVE Alberta, 2011) (*Calgary Domestic Violence Court Evaluation Report*).

²⁰ At the time of writing, my research with human subjects has been approved by the University of Calgary and I am still awaiting final approval from NYU.

²¹ See the *PAFVA Evaluation Report*, *supra* and the *Calgary Domestic Violence Court Evaluation Report*, *supra*.

lackluster well into the 20th century.²² The public / private distinction is often invoked to explain this hands-off approach, but not all families were necessarily subject to the same level of deference.²³

In the 1970s and 1980s, women's groups in Canada and the U.S. lobbied for domestic violence to be treated seriously, with some success. Legal responses to the traditional deferential approach to domestic violence have taken place in both the civil and criminal justice realms. Alongside these legal reforms, the development of shelters, battered women's services, and treatment programs for batterers have also occurred.²⁴

In the criminal realm, one of the early reforms in both countries was the adoption of mandatory arrest, charging and prosecution laws and policies.²⁵ These laws and policies, sometimes referred to as "zero tolerance", were intended to respond to police and prosecutorial inaction and indifference to domestic violence matters, and instruct these state actors to arrest, charge and prosecute domestic violence cases where there are reasonable and probable grounds to do so.²⁶ Specialized police and prosecution units often developed alongside these laws and policies.²⁷ Other developments in the criminal law area include reforms to the laws of bail,²⁸ evidence²⁹ and sentencing.³⁰

²² For a discussion of the traditional approach to domestic violence, see e.g. Betsy Tsai, "The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation" (1999-2000), 68 *Fordham L. Rev.* 1285 at 1288-1290; Epstein, *supra* at 9-11; Koshan, "Sounds of Silence", *supra* at 89-90.

²³ Koshan, "Sounds of Silence", *ibid.*

²⁴ For a discussion of funding cuts in this area in Canada, see Marina Morrow, Olena Hankovsky, and Colleen Varcoe, "Women and Violence: The Effects of Dismantling the Welfare State" (2004) 24(3) *Critical Social Policy* 358 and Koshan and Wieggers, *supra* at 151-152. During this same period, the *Violence Against Women Act* provided new federal funding in the U.S. for, amongst other things, VAW programs and services. See *Report of the Special Rapporteur*, *supra* at para. 67.

²⁵ In Canada, mandatory charging and prosecution policies were adopted by all provinces and territories in the 1980s. See Trevor Brown, *Charging and Prosecution Policies in Cases of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses* (Ottawa: Dept. of Justice, 2000). In Alberta, police and prosecution policy guidelines were first adopted in 1985, and were revised in the 1990s. See *Domestic Violence Handbook For Police and Crown Prosecutors in Alberta* (Alberta Justice, 2008) at 13-15. In the U.S., these reforms occurred during the same time period. Mandatory arrest was generally achieved via legislation, and no-drop prosecution as a matter of policy. See Sack, "Battered Women and the State", *supra* at 1668-1674. In New York, new mandatory arrest laws were adopted in the *Family Protection and Domestic Violence Intervention Act*, L 1994, chs 222, 224.

²⁶ See Sack, *ibid.* at 1668-1674, Koshan, "Sounds of Silence", *supra* at 92-93.

²⁷ See Sack, *ibid.* at 1673; Tsai, *supra* at 1291.

²⁸ Need cites.

²⁹ In Canada, see *R. v. K.G.B.*, 1993 SCC (allowing videotaped statements to be used in spousal abuse cases); *R. v. D.S.F.*, 1999 ONCA (allowing evidence regarding the domestic violence context to be introduced). Need U.S. cites, also cite to developments in the admissibility of BWS evidence.

³⁰ In Canada, see s.718.2 of the *Criminal Code*, RSC 1985, c.C-46 (treating the spousal context as an aggravating factor in sentencing for crimes of violence). Need U.S. cites.

In the civil realm, legislation providing for civil protection orders has also been a major development.³¹ Protection orders are typically available on an *ex parte* basis, and usually prohibit contact between the applicant and respondent and restrict the respondent's ability to attend at particular places such as the family home, the applicant's workplace, and the children's school. Enforcement of protection orders is handled by the police, and may result in contempt or criminal sanctions against respondents who violate such orders.³² Both countries have also seen the use of tort law remedies in domestic violence cases,³³ as well as civil rights claims seeking to hold government actors to account for their responses (or lack thereof) to domestic and other forms of gender-based violence.³⁴

Several problems with this first wave of responses to domestic violence have been identified. One strand of critique relates to the focus on criminal reforms rather than more structural reforms, and decries the appropriation of women's law reforms efforts by the state to implement a law and order agenda.³⁵ Other critiques relate to the ways in which these reforms have been implemented. For example, police bound by zero tolerance laws or policies have sometimes responded by arresting and laying charges against victims who were trying to defend themselves, the so-called "dual arrest" problem.³⁶ Zero tolerance laws and policies have also been enforced more aggressively against marginalized men and women, in particular those who

³¹ In Canada, see e.g. Alberta's *Protection Against Family Violence Act*, RSA 2000, c. P-27 (*PAFVA*), which provides for emergency and longer term protection orders. In the U.S., see e.g. New York's *Family Court Act* and *Domestic Relations Law*, both of which make provision for temporary and final protection orders. The federal *Violence Against Women Act*, Pub L. No. 103-322, 108 Stat. 1902 (1994), as revised, also deals with protection orders, namely their recognition in other states, funding for service of protection orders, and sanctions for violations of these orders. See Epstein, *supra* at 12. The civil remedy against perpetrators in the *Violence Against Women Act*, 42 U.S.C. §13981, was struck down as unconstitutional on federalism grounds in *United States v Morrison*, 529 U.S. 598 (2000). For an analysis see Julie Goldscheid, "The Civil Rights Remedy of the 1994 Violence against Women Act: Struck Down but Not Ruled Out" (2005-2006), 39 *Fam. L.Q.* 157.

³² See Koshan and Wieggers, *supra* at 152-154; Sack, "Battered Women and the State", *supra* at 1667.

³³ In Canada, see e.g. *Mooney v British Columbia (Attorney General)*, 2001 BCSC 419, aff'd 2004 BCCA 402 (Donald, J.A. dissenting); leave to appeal dismissed [2004] SCCA No. 428, and see Elizabeth Sheehy, "Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know About Male Violence Against Women or from *Jane Doe to Bonnie Mooney*" (2006) 17 *CJWL* 97. In the U.S., see Jennifer Wriggens, "Domestic Violence Torts" (2001), 75 *S. Cal. L. Rev.* 121.

³⁴ In Canada, see e.g. *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, [1998] OJ No 2681, 74 OR (2d) 225 (Div Ct), leave to appeal dismissed [1991] OJ No 3673 (CA). In the U.S., see e.g. *Castle Rock v Gonzales*, 545 U.S. 748, 125 S Ct 2796 (2005); *Jessica Lenahan (Gonzales) et al v United States*, Case 12.626, Report No. 80/11 (Inter-American Commission on Human Rights, August 17, 2011), and see the cases discussed in Julie Goldscheid, "Advancing Equality In Domestic Violence Law Reform" (2002-2003), 11 *Am. U. J. Gender Soc. Pol'y & L.* 417 at note 14. Human rights remedies against private actors (e.g. employers and landlords) are also an option (Goldscheid, *ibid* at 424-425).

³⁵ In Canada, see Koshan and Wieggers, *supra* at 167, citing the work of Comack and Balfour, Currie, Martin and Mosher, and Snider. In the U.S., see e.g. Coker, *supra*; Sack, "Battered Women and the State", *supra*.

³⁶ See e.g. Koshan and Wieggers, *ibid.* at 167; Sack, *ibid.* at 1680.

are racialized, indigenous, and poor.³⁷ Although such laws and policies were enacted to ensure that victims would not be pressured into avoiding or dropping charges, victims have had little autonomy under the new approach, and may avoid calling the police altogether or face sanctions for failing to cooperate with the prosecution. This has been a particular concern for women marginalized by race, immigration and economic status, and sexual orientation.³⁸ The same problems of over-enforcement have also occurred with respect to civil protection orders, resulting in mutual orders of protection.³⁹ Conversely, under-enforcement of both criminal zero tolerance laws and policies and of violations of civil protection orders have also been documented.⁴⁰

At the level of the courts, charging and prosecution policies often resulted in increased caseloads without the resources to handle the increase.⁴¹ Further, judges continued to approach domestic violence cases the same way they traditionally had, as these early reforms were not aimed at their level.⁴² As noted by Susan Keilitz, “courts have been the last of the justice system components to engage in institutional reform to improve the justice system’s impact on domestic violence.”⁴³

The problems with the early reforms in the area of domestic violence reflect the importance of ensuring that the enactment of laws intended to be responsive to a social problem is followed by an approach to implementation that is also responsive to those concerns.⁴⁴ This was recently made clear by the Inter-American Commission of Human Rights in the case of *Jessica Lenahan (Gonzales)*,⁴⁵ which found that the United States had failed to use due diligence

³⁷ See e.g. Koshan and Wieggers, *ibid.*, Sack, *ibid.* at 1677; Coker, *supra* at 807-811.

³⁸ See e.g. Martin and Mosher, *supra*; Koshan and Wieggers, *ibid.* at 167-168; Sack, *ibid.* at 1679, Epstein, *supra* at 17-18.

³⁹ Sack, *ibid.* at 1682-1684. Mutual protection orders have not been a major issue in Canada. See Koshan and Wieggers, *ibid.* at 169.

⁴⁰ Koshan and Wieggers, *ibid.* at 168; Coker, *supra*.

⁴¹ See e.g. Moore, *supra* at 1; Susan Keilitz, *Specialization of Domestic Violence Case Management in Courts: A National Survey* (National Institute of Justice, 2004) at 9-3.

⁴² See Tsai, *supra* at 1290; Wolf, Aldrich and Moore, *supra* at 2-3.

⁴³ Keilitz, *supra* at 9-3. See also Epstein, *supra* at 13, noting that judges and the executive have “lagged far behind” the legislative branch on domestic violence issues.

⁴⁴ Of course, there is debate about whether criminal laws in particular can ever be progressive. For a description of this debate see e.g. Jane Ursel, “The Possibilities of Criminal Justice Intervention in Domestic Violence: A Canadian Case Study” (1996-1997) 8 *Current Issues Crim. Just.* 263.

⁴⁵ *Jessica Lenahan (Gonzales) et al v United States*, *supra*. Lenahan’s three daughters were killed after being taken by her ex-husband, and after she made numerous pleas to the local police to enforce a protection order against him. Lenahan’s claims were dismissed domestically. See *Castle Rock v Gonzales*, 545 U.S. 748, 125 S Ct 2796 (2005, Stevens and Ginsburg JJ. dissenting).

in implementing domestic violence laws, in violation of the rights of Lenahan and her children under the *American Declaration of the Rights and Duties of Man*.⁴⁶ The lack of systemic and structural changes flowing from the first wave of domestic violence reforms was a challenge that required further response, leading to the development of specialized DV courts.

III. Specialized Domestic Violence Courts

a. Rationales for Specialized Domestic Violence Courts

Specialized DV courts began to develop in the 1990s in the U.S.⁴⁷ and Canada.⁴⁸ Different explanations have been put forward for the development of DV courts in both countries. First, it has been argued that the first wave of domestic violence reforms led to a large increase in the volume of such cases and a resultant burden on the criminal courts, and that the rationale for specialized DV courts was largely one of efficiency.⁴⁹ In keeping with this rationale, many sources note the involvement of particular judges or groups of judges and other justice personnel in the development of DV courts, working alongside other justice system and community actors.⁵⁰ The development of DV courts is also said to have occurred in response to critiques of the impacts that the early reforms had on the parties, and more generally, in response to the unique and complex nature of domestic violence cases and difficulties in the ways they had traditionally been handled by the courts and other justice personnel.⁵¹ For example, it is noted that the part of the impetus for DV courts in New York and Ontario was the failings of the justice

⁴⁶ O.A.S. Res. XXX (1948).

⁴⁷ Donald E. Shelton, *The Current State of DV Courts in the United States, 2007* (National Center for State Courts, 2007) at 7, notes the influence of funding under the *Violence Against Women Act*, 42 USC 3796 et seq. on the development of DV courts in the US. Funding for court programs became available in 2000. See, however, Sack, *Creating A Domestic Violence Court*, *infra* at 36, who argues that DV courts can be created “without substantial additional resources or funding.”

⁴⁸ See Leslie Tutty, Jane Ursel and Fiona Douglas, “Specialized Domestic Violence Courts: A Comparison of Models” in *What's Law Got To Do with It?*, *supra*, 69 at 80.

⁴⁹ See Moore, *supra* at 1, Keilitz, *supra* at 9-3. This rationale is specifically mentioned in relation to New York’s plan for DV courts in Tsai, *supra* at 1300. At the time of her article, Tsai was the DV Resource Coordinator for the Administrative Judge of the Criminal Court of York, Judy Harris Kluger (*ibid.* at 1285).

⁵⁰ In the U.S., see Mazur and Aldrich, *supra* at 5-6, who note the role of “system insiders” and DV advocates in the development of DV courts. See also Robert V. Wolf, Liberty Aldrich and Samantha Moore, *Planning a Domestic Violence Court: The New York State Experience* (New York, NY: Center for Court Innovation, 2004), at 3, noting the role of a particular judge, Judith Kaye, in the development of New York’s specialized DV courts. In Canada, see Ursel, Tutty and Lemaistre, “The Verdict on Specialized Justice Responses to DV”, *supra* at 275, who note the role of judges as “agents of change” in the area of specialized DV courts.

⁵¹ Jane Ursel, Leslie M. Tutty and Janice Lemaistre, “The Justice System Response to DV: Debates, Discussions and Dialogues”, in *What's Law Got To Do with It?*, *supra*, 1 at 12; Keilitz, *supra* at 9-3; Tsai, *supra* at 1296.

systems in those jurisdictions that led to particular incidents of spousal homicide.⁵² Specialized DV courts soon came to be seen as part of the program of “problem solving” or “therapeutic” courts, which deal with complex issues such as addictions, mental health and domestic violence that wind up in the criminal arena.⁵³ According to one author, the situation of DV courts in the broader context of problem solving courts and the movement associated with those courts has helped to provide legitimacy to DV courts.⁵⁴

At the same time, arguments were made against the development of specialized DV courts. Some critics expressed concerns about problem solving courts more generally and their departure from the traditional adversarial model of justice.⁵⁵ Others raised concerns that the involvement of judges in the planning and implementation of DV courts would compromise their objectivity and neutrality.⁵⁶ Quite candidly, the Hon. Donald E. Shelton has stated that “aside from the publicly stated reasons”, reluctance over DV courts may have arisen “from the dominance of men in the judiciary”.⁵⁷ Shelton notes that the early resistance to DV courts amongst the judiciary had dissipated by the 2000s, perhaps in part because of the influence of a growing body of women judges.⁵⁸

Today, there appears to be broad consensus that the primary goals of DV courts are victim safety and offender accountability.⁵⁹ Other related goals of DV courts discussed in the literature include providing a coordinated and collaborative response to domestic violence,

⁵² See Wolf, Aldrich and Moore, *supra* at 3, referring to the Brooklyn Felony DV court and the murder of Galina Komar by her intimate partner, Benito Oliver, in Brooklyn on February 12, 1996, and Myrna Dawson and Ronit Dinovitzer, “Specialized Justice: From Prosecution to Sentencing in a Toronto Domestic Violence Court”, in Jane Ursel, Leslie M. Tutty and Janice Lemaistre, eds., *What's Law Got To Do with It? supra*, 120 at 120, referring to the murder of Arlene May by her estranged intimate partner.

⁵³ Moore, *supra* at 1; Wolf, Aldrich and Moore, *supra* at 5; Tsai; *supra* at 1294-1296; Judith S. Kaye and Susan K. Knipps, “Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach” (1999-2000) 27 *W. St. U. L. Rev.* 1.

⁵⁴ Moore, *ibid.*

⁵⁵ Shelton, *supra* at 7-8. Similarly, it was argued that domestic violence cases should be treated the same as other cases of assault in order to ensure an equality of approach. This argument is interesting, as the battered women’s movement in the 1970s and 1980s argued that the problem was that DV cases were not being treated the same (i.e. as seriously) as other forms of assault or interpersonal violence.

⁵⁶ Shelton, *supra* at 8, Moore, *supra*.

⁵⁷ Shelton, *ibid.* at 8. See also Eve S. Buzawa and Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response*, 3rd ed. Thousand Oaks, CA: Sage Publications Inc., 2003) at 248, who note the “strong antivictim bias” of court personnel.

⁵⁸ Shelton, *ibid.* at 8, 15.

⁵⁹ See e.g. Wolf, Aldrich and Moore, *supra* at 1; Kaye and Knipps, *supra* at 6-7; Keilitz, *supra* at 9-5 – 9-6; Richard R. Peterson, *Manhattan’s Specialized Domestic Violence Court. Research Brief No. 7* (New York, NY: New York City Criminal Justice Agency, Inc., 2004); *A National Portrait of Domestic Violence Courts*, *supra* at iv; Carolyn Turgeon, “Bridging Theory and Practice: A Roundtable on Court Responses to DV” (2008) 1:2 *Journal of Court Innovation* 345 at 353; Ursel, Tutty and Lemaistre, “The Verdict”, *supra* at 277, 278.

informed and consistent decision-making, and provision of victim services.⁶⁰ Efficiency is still seen as a goal of DV courts as well.⁶¹ There is some debate in the literature about the rehabilitative aspect of DV courts, with some authors suggesting that unlike other problem solving courts, rehabilitation should not be seen a goal because of conflicting evidence on whether batterer treatment programs actually work.⁶² Others argue that reducing recidivism and providing deterrence are valid goals of DV courts.⁶³ Deterrence has both individual and more general components in the domestic violence context,⁶⁴ and some authors emphasize that in addition to their impact on the individual parties, DV courts also have (or should aim to have) societal impacts on perceptions and norms surrounding domestic violence.⁶⁵

A couple of other observations are in order as part of this review of the literature on DV courts. First, the rights and interests of accused persons do not tend to have a very prominent place in the literature, and their concerns are not generally highlighted as one of the rationales for DV courts (beyond references to the advantages of batterer treatment programs).⁶⁶ Second, and relatedly, the concerns raised by commentators about the impact of the first wave of domestic violence reforms on persons who are racialized, poor, disabled, indigenous, and GLBT are also largely absent from the literature on DV courts, especially the institutional literature.⁶⁷ Although some of the literature does mention particular services that have been developed for members of disadvantaged groups who engage with DV courts, the needs and concerns of such groups are typically not discussed in terms of the rationales underlying specialized DV courts or the impacts of such courts. This is perhaps not surprising in light of the fact that, unlike the first wave of

⁶⁰ Moore, *supra* at 3; Keilitz, *supra* at 9-3 to 9-4; *A National Portrait of Domestic Violence Courts*, *ibid.* at vi.

⁶¹ Moore, *ibid.* at 3; *A National Portrait of Domestic Violence Courts*, *ibid.* at iv.

⁶² See e.g. Wolf, Aldrich and Moore, *supra* at 11; *A National Portrait of Domestic Violence Courts*, *ibid.* at vi (reporting that only 19% of New York DV courts found rehabilitation to be extremely important, compared to 53% of DV courts in other states). See also Shelton, *supra* at 8, who argues that unlike other problem solving courts, DV courts tend to focus on victims' issues (e.g. safety) more than rehabilitation of offenders.

⁶³ Moore, *supra* at 3, Shelton, *ibid.* at 10-11.

⁶⁴ See e.g. Billie Lee Dunford-Jackson, Loretta Frederick, Barbara Hart, Meredith Hofford, "Unified Family Courts: How Will They Serve Victims of Domestic Violence" (1998-1999) 32 *Fam. L.Q.* 131 at 137.

⁶⁵ See Turgeon, *supra* at 367; Dunford-Jackson et al, *ibid.*; Salvaggio, *supra* at para. 34. Tsai, *supra* at 1303, describes the Dade County Domestic Violence Court in Florida as a good example of a court focused on the community's role in combatting domestic violence, with judges required to participate in community programs.

⁶⁶ A couple of sources do flag due process concerns as important. See Wolf, Aldrich and Moore, *supra* at 2; Dunford-Jackson et al, *supra* at 134-5.

⁶⁷ I am referring here to articles by judges, evaluations by institutional organizations, etc. For an exception, see Martha Wade Steketee, Lynn S. Levey, and Susan L. Keilitz, *Implementing an Integrated Domestic Violence Court: Systemic Change in the District of Columbia* (Williamsburg, Va.: National Center for State Courts, 2000) at 9, describing the impact that judicial responses may have on disadvantaged groups in the context of an evaluation of an IDV court.

domestic violence reforms, DV courts seem to have been advocated by institutional actors more so than advocates for battered women.⁶⁸ The problem is likely deeper than that, however, when one considers arguments that the criminal justice system is fundamentally punitive, disproportionate in its effects on disadvantaged men and women, and unable to achieve positive social change.⁶⁹ While I have also been quite skeptical of the justice system in the domestic violence context,⁷⁰ I am persuaded by the argument that as long as victims continue to turn to the justice system for relief, it is an arena worthy of reform efforts.⁷¹ This does not mean that the concerns raised above should be ignored, however. I will return to this issue in Part IV.

b. Specialized DV Courts in the U.S.

As of 2009, there were over 200 specialized DV courts in the U.S.⁷² There is a broad diversity of courts in terms of their context (urban or rural communities), jurisdiction (civil and / or criminal, felony or misdemeanor charges, first appearance or trial court), scope (intimate partner violence or domestic and family violence more broadly), and approach (diversion of low risk offenders / vigorous prosecution).⁷³ In her report on Best Practices for DV Courts, Emily Sack identified a number of models: (1) Civil Protection Order Courts, (2) Criminal DV Courts, and (3) DV Courts with Related Caseloads, the latter with 3 subcategories: (a) Integrated DV Courts, (b) Unified Family Courts, and (c) Coordinated Courts.⁷⁴ Most of the literature seems to use the terminology “DV Courts” to refer to Criminal DV Courts, even though Civil Protection Order

⁶⁸ Some authors, e.g. Shelton, *supra* at 6, 21 note the role of women’s groups in the development of DV courts, however there is no general consensus that feminist or battered women’s activists were the ones calling for this particular reform. In Canada, the relative silence of the women’s movement in this area may be the result of funding cuts experienced by women’s groups in the late 1980s and 1990s. See Koshan and Wieggers, *supra* at 151.

⁶⁹ See Minaker and Snider, *supra*. See also Coker, *supra*. Neither of these articles deals specifically with DV courts, however.

⁷⁰ See e.g. “Sounds of Silence”, *supra*; Koshan and Wieggers, *supra*.

⁷¹ For a discussion of this position see Ursel, “The Possibilities of Criminal Justice Intervention in Domestic Violence”, *supra*.

⁷² Center for Court Innovation, *A National Compendium of Domestic Violence Courts* (New York: Center for Court Innovation, 2009); Moore, *supra* at 1.

⁷³ Keilitz, *supra* at 9-3; Moore, *ibid.* at 2; Tutty et al, “The Verdict”, *supra* at 275, 278. One study notes that this diversity is unique to DV courts when compared to other problem solving courts, which “have a more clearly delineated structure and widely shared set of core goals, policies and practices”. See *A National Portrait of Domestic Violence Courts*, *supra* at ix.

⁷⁴ Emily Sack, *Creating a Domestic Violence Court: Guidelines and Best Practices* (San Francisco: Family Violence Prevention Fund, 2002) at 24-29.

Courts are said to be most common in the U.S.⁷⁵ My interest is primarily in (1) Criminal DV Courts, which I will continue to refer to as “DV Courts” here, and (2) Integrated DV Courts.

The first DV court in New York was established in Brooklyn in 1996, handling felony cases with a specialized judge and prosecutors, specialized staffing, and community partnerships.⁷⁶ There are now over sixty DV courts in the state of New York.⁷⁷ While there is diversity in the structure and operations of DV courts, they typically consist of dedicated courtrooms where criminal matters related to domestic violence are dealt with on a separate calendar from other criminal cases by dedicated judges and specialized prosecutors who have been trained on domestic violence issues.⁷⁸ New York’s DV courts also employ staff providing services to victims and defendants and a Resource Coordinator who liaises with these staff. Victim Advocates seek to promote victim participation in the process by providing information, services, and referrals. Defendant Monitors oversee defendants’ compliance with orders of protection, treatment programs, and other court-ordered conditions of release or sentence. Defendant compliance is dealt with in a special part of the DV court, before which the defendant must appear every 30 days, and non-compliance may result in continued prosecution or the imposition of further sanctions.⁷⁹ The focus of the New York DV courts on compliance is said to indicate this system’s “strong emphasis on defendant accountability.”⁸⁰ Information technology is also used by DV courts in New York to facilitate information sharing between different levels of court and with justice and community agencies involved in particular cases.⁸¹

⁷⁵ See Shelton, *supra* at 12. Specialized Civil Protection Order Courts are unheard of in Canada, where applications for such orders are typically made in front of Magistrates, Justices of the Peace or in Family Courts, all of which hear matters outside the DV context as well. See Karen Busby, Jennifer Koshan and Wanda Wieggers, “Civil Domestic Violence Legislation in the Prairie Provinces: A Comparative Legal Analysis”, in *What's Law Got To Do with It?*, *supra*, 197 at 207.

⁷⁶ Mazur and Aldrich, *supra* at 6.

⁷⁷ *National Compendium of Domestic Violence Courts*, *supra* at 6-10.

⁷⁸ Moore, *supra* at 1; *A National Portrait of Domestic Violence Courts*, *ibid.* at iv; Tsai, *supra* at 1300. Although some states have enacted specific offences related to domestic violence (see Shelton, *supra* at 14), in New York it is the general Penal Code offences of assault, stalking etc. that apply. See *NY Penal Code* § 120.

⁷⁹ See Tsai, *ibid.* at 1300-1302.

⁸⁰ Tsai, *ibid.* at 1302. She notes that this is relatively unique amongst the courts she compared in her study (at 1324).

⁸¹ Tsai, *ibid.* at 1301-1302.

c. Specialized DV Courts in Canada

In Canada, the first DV Court was implemented in Winnipeg, Manitoba in 1990,⁸² and there are now dozens of DV courts across the country, most of them in Ontario. They are somewhat less diverse than their U.S. counterparts, in that DV courts in Canada are almost exclusively criminal, operate at the provincial court level, and are limited to hearing matters over which that court has jurisdiction (i.e. summary conviction matters and some indictable offences).⁸³ While there are no DV courts at the superior court level, some provinces use a system of vertical prosecutions, whereby specialized or dedicated prosecutors follow cases through higher levels of court.⁸⁴ Canadian DV courts are more likely than DV courts in the U.S. to use a system of rotating judges rather than dedicated judges,⁸⁵ in part because of concerns about judicial neutrality.⁸⁶ Specialized prosecution, police and probation services are typically associated with DV courts in Canada, and many courts adopt a dual approach of early intervention / diversion for low risk offenders, and vigorous prosecution for serious repeat offenders.⁸⁷ Like the U.S., many Canadian DV courts rely heavily on batterers' treatment programs, although it is less common in Canada for DV courts to engage in judicial monitoring of offenders once they commence their programs or probation.⁸⁸ Some authors attribute this to the level of resources needed to monitor cases, and suggest that monitoring is more feasible in small jurisdictions.⁸⁹ This is not in keeping with the U.S. experience, however, where judicial monitoring is widespread even in urban settings.⁹⁰

⁸² See Jane Ussel and Christine Hagyard, "The Winnipeg Family Violence Court" in *What's Law Got to Do With It?*, *supra*, 95; Jane Ussel; "A Progress Report on the Family Violence Court in Winnipeg" (1992), 21 Man. L.J. 100.

⁸³ Tutty, Ussel and Douglas, "Specialized DV Courts: A Comparison of Models", *supra* at 73-74, 80-82. As noted earlier, there are no dedicated Civil Protection Order Courts in Canada, although some jurisdictions, such as Saskatchewan, have specialized personnel hearing such cases. See Busby, Koshan and Wieggers, *supra* at 207.

⁸⁴ Tutty, Ussel and Douglas, *ibid.* at 74.

⁸⁵ *Ibid.* at 83. In the U.S., the survey conducted for *A National Portrait of Domestic Violence Courts*, *supra* at viii, indicated that "many stakeholders emphasized the importance of having a dedicated and experienced judge ... to achieve a consistent and predictable approach to the adjudication of DV cases."

⁸⁶ This concern is usually raised by defence counsel. See Epstein, *supra* at 45-46. She also notes that in the U.S., some DV courts have begun to rotate judges out after a particular period of dedicated time in order to reduce judicial burnout. For responses to the allegation of compromised neutrality, see Epstein, *ibid.* at 46-47; Levey, Steketee, and Keilitz, *supra* at 7.

⁸⁷ Tutty et al, *Calgary DV Court Evaluation Report*, *supra* at 20. Batterers programs are widely used by many DV courts in the U.S. See *A National Portrait of Domestic Violence Courts*, *supra* at vii, reporting that 34% of DV courts surveyed use such programs as their primary response for 75-100% of offenders. See also Sack, *Creating a Domestic Violence Court*, *supra* at 46, discussing the use of batterers programs by the Westchester, NY IDV Court.

⁸⁸ Tutty, Ussel and Douglas, *supra* at 72.

⁸⁹ *Ibid.* at 74-5, noting the Yukon Territory DV Court's engagement in judicial monitoring.

⁹⁰ See e.g. the descriptions of DV courts in New York by Mazur and Aldrich, *supra* at 7; Wolf, Aldrich and Moore, *supra* at 6; and Tsai, *supra* at 1300-1302.

In the province of Alberta, the first DV court was established in Calgary in 2000,⁹¹ with the input of the judiciary, police services, the prosecutors' office, probation, the defence bar, and community agencies.⁹² Initially, the Court dealt only with docket matters (bail hearings, pleas and sentencing) until a trial component was added in 2005.⁹³ Although the Calgary DV Court handles all kinds of family violence, including child and elder abuse, spousal violence cases form the predominant share of the caseload. Judges sit in the Court on a rotating basis, and it is served by specialized police, prosecutors, probation officers, and domestic court caseworkers (providing information, support and linkages to services to victims). The Calgary DV Court uses an approach whereby those deemed to be low risk offenders are given the option of entering into a peace bond, entering treatment, and having their charges withdrawn if they accept responsibility for the offence.⁹⁴ Peace bonds may contain other conditions as well, such as no contact provisions, and compliance is monitored by probation officers rather than judges. The Calgary DV Court also involves collaboration and coordination between the various justice system and community players. Victims have access to legal representation through a non-profit agency, as well as to services such as counselling and a safe visitation centre for children. Accused persons are eligible for a fast-tracked Legal Aid process, and a dedicated Legal Aid lawyer is attached to the Court.⁹⁵

d. Integrated DV Courts

IDV courts share some of the same characteristics of DV courts, but hear both civil and criminal matters. According to the New York State Courts website:

Dedicated to the “one family - one judge” model, IDV Courts respond to a historic problem in the court system, which requires domestic violence victims and their families to appear in different courts before multiple judges, often located in different parts of a county, to address their legal issues. By connecting one judge with one family, *IDV Courts aim to provide more informed judicial decision-making and greater consistency in court orders, while reducing*

⁹¹ Edmonton, Alberta's other major city, developed a DV Court in 2001 that originally dealt with trials only, but now operates as a full DV court. See Tutty, Ursel and Douglas, *supra* at 81-83.

⁹² Tutty et al, *Calgary DV Court Evaluation Report, supra* at 1.

⁹³ This two stage level of development has allowed for evaluation of the different components of the court over time. See Sack, *Creating a Domestic Violence Court, supra* at 39-40, on the benefits of a phase-in approach.

⁹⁴ This is a relatively unique model, in that other DV courts diverting low risk offenders often require a guilty plea or adjourn the matter until the treatment program is completed.

⁹⁵ Tutty et al, *Calgary DV Court Evaluation Report, supra* at 40-43.

*the number of court appearances. In addition, these courts offer enhanced services to victims and help to ensure offender accountability.*⁹⁶

Like DV courts more generally, IDV courts thus appear to focus on the goals of victim safety and offender accountability. In addition, there is an access to justice component to these courts in that they seek to minimize the number of court appearances (and associated costs) that victims and offenders are required to undertake in order to obtain the broad sorts of relief required in domestic violence situations.⁹⁷ The goal of increasing consistency in court orders and avoiding hearings in multiple courts is also related to institutional efficiency considerations.⁹⁸ Other goals of IDV courts include informed judicial decision-making, connection to services and resources, a reduction in inefficiency for litigants and elimination of conflicting orders, and coordination and collaboration among criminal justice, child welfare, and community agencies offering services and assistance.⁹⁹ Buzawa and Buzawa argue that true integration requires “an administrative commitment from all agencies to successfully deflect competing demands for scarce resources, to avoid acting unilaterally, and to inculcate ... a real passion for addressing the problems presented” by DV cases.¹⁰⁰ The physical layout and location of IDV courts may also be a focus, related to the goal of safety.¹⁰¹

Of the more than sixty DV courts in the state of New York, over half are IDV courts.¹⁰² In the ten year period between 2001 and 2011, IDV courts in New York reportedly dealt with over 113,500 cases and 22,000 families.¹⁰³ New York IDV courts operate as a part of the

⁹⁶ Office of Policy and Planning, New York State Courts, “Integrated Domestic Violence Courts”, on-line: <http://www.nycourts.gov/courts/problem_solving/idv/home.shtml> (emphasis added). This webpage is part of the “Problem Solving Courts” website. See also Epstein, *supra* at 23-28, who notes that IDV courts are intended to address problems arising out of different intake processes and failed coordination of orders amongst different courts.

⁹⁷ See Melissa Breger, Lee Elkins, and Jane Fosbinder, *New York Law of Domestic Violence*, vol. 1, 2d ed. (Thomson/West, 2010/11 suppl.) at §1:6; Epstein, *supra* at 29 (referring to the “one-stop shopping” aspect of IDV courts). For a discussion of access to justice in DV courts more broadly, see Keilitz, *supra* at 6.

⁹⁸ See “Integrated Domestic Violence Courts”, *supra*; *People v. Correa*, 15 N.Y.3d 213 (2010, Court of Appeals). This case affirms the jurisdiction of the Chief Judge to establish IDV courts at the Supreme Court level and to handle misdemeanor as well as felony charges under Article VI of the New York Constitution, which established a unified court system in New York, and gave the Chief Judge authority to administer the system.

⁹⁹ “Integrated Domestic Violence Courts: Mission and Goals”, on-line: <http://www.nycourts.gov/courts/problem_solving/idv/mission_goals.shtml>. Here too, due process concerns and the rights and service / program needs of the accused are not mentioned as goals.

¹⁰⁰ Buzawa and Buzawa, *supra* at 252.

¹⁰¹ Epstein, *supra* at 33. See also Sack, *Creating a Domestic Violence Court*, *supra* at 37-38.

¹⁰² *National Compendium of Domestic Violence Courts*, *supra* at 6-10. The Bronx IDV Court, which opened in 2001, was the first of its kind in New York. See *New York Law of Domestic Violence*, *supra*, §1:6.

¹⁰³ “Integrated Domestic Violence Courts”, *supra*.

Supreme Court,¹⁰⁴ and can hear both felony and misdemeanor charges as well as matters handled by the Family Court (e.g. custody, child support, victim protection orders, victim restitution) and Supreme Court (e.g. matrimonial issues).¹⁰⁵ Cases are eligible for IDV courts in New York where they have been commenced and are pending in two out of three forums (criminal, Family and Supreme courts), involve criminal charges and a party or witness in one of the other courts.¹⁰⁶ Cases identified for transfer to IDV courts are screened within five days to determine if the transfer will promote the administration of justice (which is not defined in the materials available). If so, transfer to an IDV court is made, where the cases are consolidated but proceed according to the rules of the court where the action was originally commenced.¹⁰⁷

Very little specific information is available about the development or operations of New York City's IDV Courts (in Manhattan, the Bronx and Brooklyn), which will be the focus of my research. The Courts appear to be operated by dedicated judges, clerks, and court attorneys.¹⁰⁸ If they follow the model of other IDV courts in New York state, they would also be expected to have the following components: planning and technical assistance by a local working group of stakeholders, legal representation for all litigants, judicial monitoring of offenders in both criminal and family cases, intensive domestic violence training for judicial and non-judicial personnel, use of specialized technology to ensure relevant information flows, courthouse safety for victims and children, confidentiality of court records and proceedings, victim advocates who provide safety planning, counselling and linkages to services, and interagency collaboration with stakeholder agencies, organizations, and service providers.¹⁰⁹ It appears that the New York IDV courts do not integrate case intake into their operations, as some other IDV Courts do.¹¹⁰

¹⁰⁴ See e.g. New York State Unified Court System, NYS Supreme Court, Criminal term, NY County 1st JD, on-line: <<http://www.nycourts.gov/courts/1jd/criminal/courtrooms.shtml#idv>>, referring to New York County's IDV Court.

¹⁰⁵ *New York Law of Domestic Violence*, *supra*, §1:6, *Correa*, *supra*.

¹⁰⁶ In New York, criminal charges related to domestic violence can be heard by either family or criminal courts. See *New York Law of Domestic Violence*, *ibid.*, §1:4 and the *Family Protection and Domestic Violence Intervention Act*, L 1994, chs 222, 224.

¹⁰⁷ *New York Law of Domestic Violence*, *ibid.*, §§1:6, 1:13, and Part 141 of the Rules of the Chief Administrator of the Courts, cited in *Correa*, *supra*.

¹⁰⁸ See New York State Unified Court System, NYS Supreme Court, Criminal term, NY County 1st JD, on-line: <<http://www.nycourts.gov/courts/1jd/criminal/courtrooms.shtml#idv>> (Manhattan IDV Court). No information is available on-line about the IDV Courts in the Bronx and Brooklyn.

¹⁰⁹ See "Integrated Domestic Violence Courts: Key Principles", on-line: <http://www.nycourts.gov/courts/problem_solving/idv/key_principles.shtml>. It is unclear if independent victim advocates are involved in the New York City IDV courts, as they are in Westchester, NY. See Sack, *Creating A Domestic Violence Court*, *supra* at 47.

¹¹⁰ See Epstein, *supra* at 28, who argues that "until intake and case processing of civil and criminal cases are integrated into a single, coordinated system, the problems inherent in today's justice system cannot be resolved

In the Canadian context, an IDV Court opened in Toronto in June, 2011. The IDV Court is a pilot project, and involves a one judge / one family model for both criminal and family law matters (except divorce, property and child protection) where there has been a criminal charge in the domestic violence context.¹¹¹ The Toronto IDV Court, which operates at the provincial court level, developed following discussions with justice sector participants, and is said to be aimed at “a more integrated and holistic approach to families experiencing domestic violence, increased consistency between family and criminal court orders and quicker resolutions of the judicial proceedings.”¹¹² Like IDV courts in the U.S., the Toronto IDV Court also aims to “increase accountability of the accused and enhance the complainant’s safety.”¹¹³ The Court has a Community Resource Coordinator to assist parties in obtaining community services, and legal aid and victim assistance may be available to qualifying parties. Participation in the IDV Court is voluntary, with consent of all parties (including the Crown) required before cases are transferred there. The Toronto IDV Court can make temporary and final orders (the latter on consent of the parties), hear bail applications, and accept guilty pleas, but it will not hear trials. Accordingly, if a family and/or criminal matter cannot be resolved without a trial, the cases will return to their regular courts.¹¹⁴ Because the Toronto IDV Court is so new, there has been little opportunity to observe its operations, rendering the New York IDV Courts a more useful model for examination at this point in time.

One challenge that the Toronto IDV Court exemplifies with respect to the implementation of IDV courts in Canada is that of divided jurisdiction over the issues that arise in DV cases.¹¹⁵ In Alberta for example, summary conviction criminal matters are heard in provincial court (criminal division), child custody, protection and support issues and civil protection order matters are heard in provincial court (family division), indictable offences may be heard in superior courts, and divorce and matrimonial property matters are heard in superior courts. There are Unified Family Courts in some Canadian jurisdictions that handle both

effectively.” At the time of her article, only 3 IDV courts took such an approach (in the District of Columbia, Florida and Hawaii (*ibid.*)).

¹¹¹ Ontario does not have civil domestic violence legislation, so that particular area is not within the court’s mandate.

¹¹² Ontario Court of Justice, “Integrated Domestic Violence Court (IDV Court)” on-line:

<<http://www.ontariocourts.on.ca/ocj/en/idvc/>>

¹¹³ Ontario Court of Justice, “Integrated Domestic Violence Court (IDV Court) Overview” on-line

<<http://www.ontariocourts.on.ca/ocj/en/idvc/brochure.htm>>

¹¹⁴ *Ibid.*

¹¹⁵ This is also an issue in the U.S. See Sack, *Creating a Domestic Violence Court*, *supra* at 33.

provincial and superior court matters,¹¹⁶ and the implementation of IDV courts in a way analogous to that undertaken in New York would require such unification. Failing the adoption of unified courts, Integrated DV courts could still be implemented at the level of either provincial or superior courts, combining the family and criminal matters heard at each level (as in Toronto). Because most criminal matters are heard at the provincial court level, integration at this level would likely be most worthy of consideration.

IV. Criteria for Exploring New York's IDV Court as a Model for Calgary, Alberta

There have been several evaluations of DV courts in Canada¹¹⁷ and the U.S.,¹¹⁸ but fewer evaluations of IDV courts.¹¹⁹ Because my research question relates to whether New York's IDV courts can serve as a model for Calgary, Alberta, my focus in this section will be on the evaluations of Calgary's DV court and Alberta's civil protection legislation and some of the challenges identified therein.¹²⁰ Those challenges will assist in identifying criteria for exploring New York's IDV courts as a model for this particular jurisdiction. I should state at the outset that my interest is in criteria that promote the needs and interests of victims, offenders and communities rather than institutional efficiency considerations.

The evaluation of the Calgary DV Court in 2011 reviewed case files from three time periods: before the DV court was established (1998-2000), during the docket only phase (2001-2004), and during the full DV court phase (2005-2008).¹²¹ The quantitative data included the following key results. In terms of demographics, men constituted the majority of persons accused of domestic violence related offences at 85.3% over all three phases, and victims were primarily

¹¹⁶ See Department of Justice Canada, *The Unified Family Court Summative Evaluation. Final Report* (Ottawa: DOJ, 2009). There are unified courts in some jurisdictions in Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, PEI, and Newfoundland / Labrador.

¹¹⁷ See e.g. *What's Law Got To Do With It?*, *supra*, including chapters on evaluations in Calgary, Edmonton, Winnipeg, Toronto, and the Yukon. See also Salvaggio, *supra* at para. 32, writing about an evaluation of Toronto's DV court by the Women's Court Watch Program.

¹¹⁸ See e.g. *A National Portrait of Domestic Violence Courts*, *supra*, evaluating DV courts in California, Florida, Illinois, New York and Washington; R.R. Peterson, *The Impact of Manhattan's Specialized Domestic Violence Court* (New York: New York City Criminal Justice Agency, Inc., 2004); Kelly Diffily, Kamala Mallik Kane, Lisa Newmark and Michael Rempel, *Specialized Felony Domestic Violence Courts: Lessons on Implementation and Impact from the Kings County* (Washington, D.C.: Urban Institute Justice Policy Center, 2001).

¹¹⁹ See e.g. Steketee, Levey, and Keilitz, *supra*, evaluating Washington D.C.'s IDV Court; and Sack, *Creating a DV Court*, *supra*, examining the IDV Court in Westchester, NY as a case study. The IDV courts in New York City do not appear to have been evaluated.

¹²⁰ I will also reference the literature and evaluations of other DV and IDV courts in this section.

¹²¹ See Tutty et al, *Calgary DV Court Evaluation Report*, *supra* at 2-4, 9-10.

women (81.6%).¹²² The ethnic background of accused persons was 67.3% Caucasian, 21.7% from ethnic minorities, and 11% Aboriginal, and the numbers for victims were very similar.¹²³ There were no significant changes over the three phases in these demographics. Importantly, Aboriginal persons were overrepresented as both victims and accused persons, given that they make up only about 3% of the population in Calgary.¹²⁴ This is not a development related to the development of the DV court, however.¹²⁵ Case statistics and dispositions did change over time with the implementation of the Calgary DV Court. Interestingly, victims were more likely to report the incident(s) in question to the police before (92.3%) than after (69%) specialization.¹²⁶ There was a small reduction in the number of cases with dual charges – from 6.3% before the DV Court to 4.8% after the Court was fully implemented.¹²⁷ Before the Court, only 43% of cases concluded without a trial; after the implementation of the docket DV court, this number jumped to 70%, which was roughly maintained after the trial court was implemented.¹²⁸ Correspondingly, there was a large increase in the number of cases resolved by way of peace bonds and guilty pleas following the introduction of the DV court.¹²⁹ There were fewer cases stayed for want of prosecution after specialization,¹³⁰ and a statistically significant increase in victims appearing at trial (from 20% before to 49.2% after the full DV court was implemented).¹³¹ In terms of recidivism (measured by new charges for domestic violence or breach of court orders within 2 years of the first incident), there was a decline from 34% before specialization to 26% following full implementation of the DV court. After specialization, most new charges were for breaches.¹³² Overall, the quantitative data show fairly positive outcomes after the implementation of Calgary's DV Court, and no unintended consequences are apparent.

¹²² *Ibid.* at 107.

¹²³ *Ibid.* at 110.

¹²⁴ *Ibid.* There is similar overrepresentation of Aboriginal people in other Canadian DV courts. See e.g. Tutty, Ursel, and Douglas, *supra* at 85-86.

¹²⁵ Cite to studies showing overrepresentation of Aboriginal people in CJ system more generally.

¹²⁶ Tutty et al, *Calgary DV Court Evaluation Report, supra* at 113. The authors suggest this may be due to more public awareness of domestic violence and the importance of involving police, but this is still a curious result.

**check makeup of "other" category

¹²⁷ *Ibid.* at 116. This is not a statistically significant change. There is no data comparing dual arrest rates before and after the implementation of zero tolerance policies in Alberta.

¹²⁸ *Ibid.* at 117.

¹²⁹ *Ibid.* at 117. As noted earlier, under the peace bond / diversion model, the accused accepts responsibility, charges are withdrawn, and treatment is ordered. The wishes of the victim are taken into account in this model. *Ibid.* at 7.

¹³⁰ *Ibid.* at 118.

¹³¹ *Ibid.* at 122. The authors conclude that this is likely a result of caseworker support of victims following specialization (at 125).

¹³² *Ibid.* at 124.

The evaluation of Calgary's DV Court also included interviews with men mandated to attend batterer treatment programs and justice and community stakeholders. The interviews with mandated men revealed both benefits and challenges of the Calgary DV Court and its approach. Many men were found to minimize their behavior and blame their partners, and felt that the system was biased against them and in favour of victims. That being said, they also had many positive comments about the way their cases had been handled by police and probation services. However, many men indicated confusion with the criminal justice system, particularly the differences amongst and the consequences of various sanctions. The majority of men, though concerned about having been forced into treatment, reported having learned some useful skills and having made changes to their behavior as a result. They also had suggestions for how batterer treatment programs could be improved.¹³³

Justice and community stakeholders indicated many benefits with Calgary's DV court. Its streamlined, expedient process, knowledgeable personnel, communication amongst players in the criminal justice system, and continuum of services for victims and offenders were seen to fill gaps in and improve upon the previous criminal justice system approach.¹³⁴ Several concerns and challenges were also raised, however, including struggles to meet the increased volume of cases, issues with buy-in (especially from defence counsel), the perception that dual charging was a problem (seen to flow from lack of police discretion and expertise), a lack of communication between the criminal and civil justice systems (leading to conflicting decisions that may have affected victims' safety), the perception that the peace bond approach constituted a "slap on the wrist" that was not always well enforced, lack of supports for women to leave their partners (such as housing and financial support), and concerns about the ability of the Court to serve the needs of marginalized populations. On the latter point, language and cultural barriers for immigrant populations were identified,¹³⁵ as well as lack of treatment options for Aboriginal people, persons with disabilities, and members of the GLBT community.¹³⁶ Recommendations suggested by the stakeholders included ongoing education for justice personnel on domestic

¹³³ *Ibid.* at 11-13.

¹³⁴ *Ibid.* at 2, 3.

¹³⁵ *Ibid.* at 3. See also Nancy K.D. Lemon, "Can Domestic Violence Courts Better Address the Needs of Non-English Speaking Victims of DV?" (2006) 21 *Berk. J. Gender, Law & Justice* 38 and Sack, *Creating a Domestic Violence Court*, *supra* at 36.

¹³⁶ *Ibid.*

violence, including its impact on marginalized populations, and a communication mechanism between civil and criminal courts.¹³⁷

Similar concerns were raised in interviews conducted for an earlier evaluation of Alberta's civil protection order legislation with justice and community stakeholders.¹³⁸ The legislation was widely seen to be underutilized due to a lack of knowledge, training and education, and also because of police attitudes favouring a criminal approach to domestic violence.¹³⁹ However, some police officers failed to utilize protection orders even where there was insufficient evidence to lay criminal charges.¹⁴⁰ This problematic interplay between criminal and civil systems was seen as reinforced by judges who refused to grant protection orders if the respondent was in custody.¹⁴¹ Another concern was that breaches of protection orders were not taken seriously by the police or courts.¹⁴² The lack of accessibility of the legislation for groups such as immigrant/refugee populations, Aboriginal persons, and people with disabilities was also noted as being problematic.¹⁴³ Ongoing training for police and judges and public education / information campaigns were recommended in response to these concerns.¹⁴⁴

Some of the challenges raised in these evaluations that might be addressed in an IDV court model include the disconnect between criminal and civil justice systems and the need for a more responsive, wholistic, accessible approach to domestic violence, problems with the enforcement of sanctions (tied to victim safety and offender accountability/monitoring), the lack of appropriate services for victims and offenders (particularly those from marginalized groups), the lack of information available to the parties about the justice system and its approach to domestic violence, concerns about buy-in and neutrality,¹⁴⁵ and the need for specialized training and education of justice personnel.

¹³⁷ *Ibid.* at 4.

¹³⁸ Tutty et al, *PAFVA Evaluation Report, supra*. This evaluation also included court file reviews.

¹³⁹ *Ibid.* at 5, 56, 83. Under the *PAFVA*, applications for emergency protection orders (EPOs) can be made by police, child welfare workers and victims of family violence, by telecommunication in some circumstances.

¹⁴⁰ *Ibid.* at 56.

¹⁴¹ *Ibid.* at 56, 66. The problem here is that if the accused is released, the victim will not be protected unless a no-contact condition is attached to bail.

¹⁴² *Ibid.* at 8, 11.

¹⁴³ *Ibid.* at 84-85. The overrepresentation of Aboriginal persons in the protection order system (approximately 23% of claimants and 19% of respondents) was another finding of the report (*ibid.* at 44).

¹⁴⁴ *Ibid.* at 95-96.

¹⁴⁵ Concerns about judicial neutrality have been raised in the literature, as noted above, but others raise concerns related to inappropriate judicial attitudes to domestic violence in spite of training. See Levey, Steketee and Keilitz, *supra* at 8-11. The authors also note that training on domestic violence issues for judges is "woefully lacking" (at 18). See also Rosemary Hunter, "Narratives of Domestic Violence" (2006) 28 *Sydney L. Rev.* 733, whose research

In addition to responding to the concerns identified with Calgary's DV Court and civil protection order system, an IDV Court should not result in the sort of unintended consequences that flowed from the first wave of domestic violence justice system reforms. In other words, IDV Courts should not pose new risks and problems for victims and / or offenders, and should not have an adverse impact on members of marginalized groups. Several concerns have been identified in the literature that are worthy of consideration in this respect. First, Epstein notes that the increased information sharing in IDV courts amongst various justice sectors and service providers may make victims more susceptible to losing their children through child protection proceedings.¹⁴⁶ Information sharing may also pose safety concerns unless strict confidentiality is maintained.¹⁴⁷ Another concern is that as they become institutionalized, IDV courts may become less victim oriented and make it more difficult for women to decline services they do not wish to participate in.¹⁴⁸ Further, when criminal and family matters are consolidated, victims may lose control over whether to participate in the proceedings if a zero tolerance model is used, which runs contrary to the civil model where the parties are generally in control.¹⁴⁹ It may be fair to assume that most cases in the IDV courts will involve relationships that have broken down, but this does not necessarily translate into an assumption that the victim will wish to pursue criminal charges. A concern related to due process is that evidence from civil matters, taken on a lower standard of proof, may taint the criminal aspect of the case, even if rules of procedure and evidence try to maintain the relevant standards.¹⁵⁰ Another potential problem is that IDV courts may result in new litigation challenging jurisdictional and other aspects of the new model, potentially working against the access to justice goal of these courts.¹⁵¹ The need for legal representation by those with sufficient expertise in family, civil and criminal matters has also

found that traditional attitudes towards domestic violence were fairly entrenched even in specialized forums in Australia.

¹⁴⁶ Epstein, *supra* at 34-37; Levey, Steketee and Keilitz, *supra* at 14-15. See also Dunford-Jackson et al, *supra* at 141, noting that records relating to children are often kept in the name of the mother, and may come up where a search is done under the victim's name, potentially suggesting she is of bad character.

¹⁴⁷ Dunford-Jackson et al, *ibid.*

¹⁴⁸ Epstein, *supra* at 38. On the other hand, a focus on batterer treatment may take away from resources for victims. See Dunford-Jackson et al, *supra* at 145; Turgeon, *supra* at 355; Tsai, *supra* at 1314.

¹⁴⁹ See Dunford-Jackson et al, *ibid.* at 138-139. Provision of independent victim advocates may help offset this concern.

¹⁵⁰ See Dunford-Jackson et al, *ibid.* at 139, 141-2. See also *New York Law of Domestic Violence*, *supra*, §1:13, citing cases where judges were not required to recuse themselves in such circumstances. The Westchester, NY IDV Court addresses this issue by hearing criminal and family matters on separate days. See Sack, *Creating a Domestic Violence Court*, *supra* at 44.

¹⁵¹ See *New York Law of Domestic Violence*, *supra*, §§1.6, 1:13, discussing a number of challenges raised in the context of IDV courts.

been identified.¹⁵² Finally, do IDV courts make efforts to achieve buy-in and positive change at the systemic level, or can they only provide an individualized response to domestic violence?¹⁵³ While actual change at the systemic level would be difficult to measure,¹⁵⁴ the involvement of judges and other IDV court players in public education about domestic violence, its structural, gendered and rights-based elements, and the proper role of the state in combatting it may respond to some of the concerns raised about the first wave of domestic violence responses.¹⁵⁵

V. Exploring New York’s IDV Courts as a Possible Model for Calgary, Alberta

In the research that will form the basis for this section, I will endeavor to determine the extent to which New York’s IDV Courts further the criteria and avoid the unintended consequences identified in the previous section. This will be determined by conducting courtroom observations, and interviewing justice system and community representatives involved in the implementation and operation of the Courts. It must be emphasized that this is not an evaluation of the Courts in the nature of those examined in this paper; because of resource and time constraints, I will not review court files to obtain quantitative data, nor will I interview victims and offenders. Nevertheless, it is hoped that the qualitative interviews and courtroom observations that I undertake will shed useful light on the operations of the Courts, and whether they can respond to the challenges experienced in Calgary without creating further problems. A list of the interview questions I submitted to the NYU University Committee on Activities Involving Human Subjects is attached as Appendix 1.

¹⁵² Dunford-Jackson et al, *supra* at 143. See also Levey, Steketee and Keilitz, *supra* at 11, 21.

¹⁵³ I am interested in exploring the individualization of domestic violence that is arguably perpetuated by “therapeutic”, problem-solving courts, and the situation of this approach in a neo-liberal governance model, but that is probably another paper.

¹⁵⁴ Buzawa and Buzawa, *supra* at 259-261, note that the trend in funded research is on particular reforms in particular communities, rather than comprehensive evaluations of domestic violence laws and policies.

¹⁵⁵ See Turgeon, *supra* at 357, 361, 367; Salvaggio, *supra* at para. 34; Tsai, *supra* at 1325-1326; Dunford-Jackson et al, *supra* at 137.

Appendix 1



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Legal Approaches to Domestic Violence in Canada and the United States: Comparing Justice System Responses in Alberta and New York

Justice/Community Stakeholder Interview Schedule Fall, 2011

I am an Associate Professor in the Faculty of Law at the University of Calgary, Canada, as well as a Global Research Fellow at NYU University's School of Law. I am undertaking a research project comparing the justice system responses to domestic violence in Calgary, Alberta and New York, N.Y. As part of my research, I am asking a number of key justice and community stakeholders in New York to share their perspectives on and experiences with New York's Integrated Domestic Violence Court.

- 1.) Describe your agency and/or organization and what services you provide for those affected by domestic abuse.
- 2.) How is your agency connected/affiliated with the Integrated DV Court?
- 3.) In your view, why initially did the Integrated DV Court develop?

Prompts:

- *What problems was it developed to address?*
- *What challenges (if any) did it face in getting up and running?*
- *Have there been any ongoing challenges or problems?*
- *What has been working well?*

- 4.) In general, how would you compare the performance of the justice system before and after the creation of the Integrated DV Court? How has it made a difference?

Prompts: Did it make a difference in:

- *identifying domestic violence as a societal problem*
- *police response to domestic violence*
- *faster processing of domestic violence cases*
- *access to justice advantages*
- *breadth of remedies*
- *avoidance of inconsistent orders / filling gaps*

- *case outcomes*
- *impact for victims*
- *impact for offenders*
- *use of specialized personnel*
- *response to needs of diverse populations*
- *sector collaborations*
- *increased reporting of domestic violence*
- *recidivism*

5.) Do you have suggestions about how the Integrated DV Court could improve its response to domestic abuse?

6.) Do you have other comments or concerns about the Integrated DV Court?

7.) Do you have any additional comments or concerns about the broader justice system response to domestic violence?

Thank you for your time.