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Essay

*1 JUDICIAL RESPONSES TO DOMESTIC VIOLENCE: THE CASE FOR A PROBLEM SOLVING APPROACH

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I. Introduction

What is the responsibility of a court in dealing with a case of domestic violence? Is it to serve as a passive adjudicator of the issues presented by the parties, concerned only that the case is legally resolved? Or is there a larger role for a court to play in crafting a meaningful intervention that may change future behavior?

And what is the responsibility of a court system with respect to the subject of domestic violence? Should it view domestic violence as a serious social problem that courts can and should help solve? Or should it remain scrupulously detached, processing each case as it would any other and leaving it to the other branches of government to pass laws and execute strategies that will constitute society's response?

For centuries, questions like these never much troubled the waters of Anglo-American jurisprudence. In large part, this was because domestic violence was viewed as a private matter best not discussed even behind closed doors, let alone in public settings. [FN1] ***2** Prevailing social attitudes shaped the judicial response, which typically ranged from outright hostility to formal "neutrality" in a system marked by numerous stumbling blocks to the validation of women's claims of abuse. [FN2]

In recent years, however, public attitudes toward domestic violence have changed. No longer viewed as just a private family matter, domestic violence is now recognized as a public policy issue with major implications for the health and safety of women and children. [FN3] This new awareness, in turn, is leading many to question the adequacy of traditional approaches to cases involving violence between intimates.

Indeed, in New York State and other jurisdictions, a number of experiments are currently underway that seek to change "business as usual" by casting the judicial role as stopping the violence, not just deciding the case. Part of a broader movement that has been called "problem solving justice," [FN4] these new models differ from traditional responses in several significant ways.

In this essay, we sketch some of the thinking behind these new models, and outline issues they raise. Far from presuming to state the last word, we intend this as an invitation for further <PCITE, 27 W. St. U. L. Rev. 3>>discussion that hopefully will advance the delivery of justice in this complex area.

II. The Problem: Domestic Violence Cases Don't Fit The Mold

Domestic violence is the number one source of injury to women in the United States, "causing more injuries than rapes, auto accidents and muggings combined." [FN5] The most conservative estimates put the number of women annually assaulted by an intimate partner at one million. [FN6] Other surveys project that as many as four times this number are battered each year. [FN7]

Numbers like these suggest a crime wave of tsunamic proportions, but for years it went unnoticed by the criminal justice system. Beginning in the 1970s, the first challenge for battered women's advocates was to secure better access to the legal system for victims of family violence. After years of advocacy and education--and numerous statutory and law enforcement reforms [FN8]--we are beginning to see the fruits of

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these efforts, as ***4** increasing numbers of domestic violence cases now make their way to the courthouse door. [FN9] Building on these achievements, a second challenge looms: ensuring that the intervention the courts provide is meaningful.

This new challenge is far from trivial. The basic outlines of our criminal justice system--including what we expect courts to do and how we expect them to do it--were formed long before domestic violence was recognized as an act deserving criminal sanction. Not surprisingly, a system built on the model of offenses against strangers may falter when applied to crimes that occur in the context of intimate human relationships.

Without question, the relationship between the perpetrator and victim makes domestic violence different from prototypical "stranger" crimes. Unlike participants in a barroom brawl or street skirmish, perpetrators of domestic violence present a particularly high risk for continuing, even escalating violence against the complainant as they seek further control over her choices and actions. [FN10] Unlike victims of random attacks, battered women often have compelling reasons--like fear, [FN11] economic dependence [FN12] or affection--to feel ambivalent about cooperating with the legal process. In a system that generally assumes a victim's willingness to cooperate, this ambivalence is an anomaly that frequently results in the dismissal of the case. [FN13]

***5** Domestic violence cases are more volatile, more dangerous, harder to prosecute. These characteristics raise the risk that traditional case processing methods will fail to sanction or deter this type of violence. The fragmented nature of the criminal justice system exacerbates this risk. With little coordination or communication between police, prosecutors, the defense bar, victim advocates, probation, corrections and the courts, the chances are good that some of these problematic cases will slip between the cracks--and that battering will continue, sometimes with tragic results. [FN14]

This fragmentation also makes systemic reform difficult. Individual players in the system may see little point in improving their performance when others do not. And when tragedies do occur, fragmentation means that institutional responsibility is easily diffused, misdirected or just ignored.

III. Don't Blame The Cases--Change The Mold

One possible judicial response to the current situation is to continue to process domestic violence cases as any other kind of case, and to continue to observe systemic failures. Another response, however--the problem solving response--is to try to ***6** design court programs that explicitly take into account the special characteristics that domestic violence cases present. If domestic violence defendants present a particular risk of future violence, then why not enhance monitoring efforts to deter such actions? If victims remain in abusive situations due to fear for their own and their children's well-being, then why not provide links to services and safety planning that may expand the choices available to them? If cases are slipping between the cracks of a fragmented criminal justice system, then why not work together to improve coordination and consistency? If domestic violence cases don't fit the mold, then why not change the mold?

A. The Brooklyn Felony Domestic Violence Court

In New York, we have developed several model programs that seek to apply these basic insights in different contexts. To date, our most advanced experiment is the Brooklyn Felony Domestic Violence Court ("the DV Court").

Launched in June 1996 through the collaborative efforts of the New York State courts, the Kings County District Attorney, Victim Services, [FN15] New York's Center for Court Innovation [FN16] and others, the Brooklyn Domestic Violence Court was the State's first specialized court dedicated to hearing domestic violence felonies. In addition to fairly judging the merits of each case, the court has three key goals: promote victim safety, increase defendant accountability and encourage better coordination among all the ***7** institutions in the criminal justice system that deal with domestic violence.

To promote victim safety, every complainant in the DV Court is provided with a victim advocate who can explain the process, assist in safety planning and provide social service referrals. [FN17] This reduces some of the greatest risks to victim safety, and

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minimizes some of the greatest obstacles to victim cooperation. The advocate also provides a vital communication link, keeping the complainant informed of the status of the case and keeping the court informed of any reports of potentially dangerous situations at home. [FN18]

To increase defendant accountability, the DV Court strictly monitors defendants' compliance with court orders. The court requires those defendants out on bail to appear regularly so that the judge may check their status. This simple calendaring function sends a message to defendants that the court takes these cases--and their conduct--seriously. As one of the DV Court's presiding judges, John Leventhal, puts it, "'I see defendants every two to three weeks just to let them know the court is watching them." ' [FN19]

Defendants sentenced to probation are strictly monitored after the legal case is over. They receive intensive supervision by specially trained probation officers, and are required to appear in court so that the judge can personally confirm their compliance.

***8** The DV Court plays an active role in trying to improve communication and collaboration within the system as a whole. Within the court itself, a core set of dedicated personnel--including the judges, prosecutors, victim advocates and probation officers--handles each case from start to finish. This process reduces the number of "hand-offs" within the system, and thereby reduces the opportunities for cases to fall between the cracks.

In addition, a new court staff person--called the Resource Coordinator-- gathers information from all outside agencies involved in a case (such as treatment programs or Victim Services) before every court appearance. This ensures that the court has the best information available when making decisions that can turn out to be a matter of life or death. Work is currently underway to develop computerized linkages between the court and these agencies to allow real-time on-line reporting of significant developments related to the parties or the case.

And beyond the courtroom, the presiding judge holds a monthly meeting with all the participants in the process--police, prosecutors, defense attorneys, Family Court judges, victim advocates, treatment providers, representatives from the Departments of Health, Probation, Parole, Corrections, Social Services and others--to discuss how to improve systemic performance.

The synergies created by this collaborative process have been extraordinary. The Department of Parole, for example, recently invited Victim Services to provide training on domestic violence issues for its line officers. The Administration for Children Services has requested training for its case workers, and begun discussion of a domestic violence protocol for child neglect investigators. Finding a need in some cases for victim advocates to continue their involvement even after the sentencing of the defendant, Probation also has strengthened its links with Victim Services. The DV Court has even improved communications with its nearby judicial neighbor, the Family Court, and established new procedures for sharing information regarding families involved in both forums.

***9** Preliminary statistics suggest that these systemic changes are making a difference. In the first two years of the Brooklyn Domestic Violence Court's operation, dismissal rates declined almost sixty percent--with the rate now the lowest for any felony bureau in the Brooklyn District Attorney's office. Probation violation rates of DV Court defendants are nearly half the typical rate. And while unfortunately there have been recent domestic violence fatalities in Brooklyn, none of these fatalities has involved victims with cases in the DV Court.

B. Translating the Lessons

The New York State Unified Court System is now working on translating the lessons from the Brooklyn Domestic Violence Court to other court settings, [FN20] including high volume misdemeanor courts [FN21] as well as courts that hear a mix of felony and misdemeanor matters. [FN22]

The lessons are also being applied in civil Family Court settings. Recently, the Westchester County Family Court entered into a collaborative effort with the Westchester County Executive, Pace University Law School, Westchester Putnam Legal Services ***10** and others to improve legal representation of family offense

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petitioners. This collaborative approach is improving the quality of applications for protective orders, reducing the number denied for lack of formal sufficiency and enhancing the court's ability to craft comprehensive orders tailored to the parties' situation. The program is also training a new generation of advocates on domestic violence issues. [FN23]

With each experiment, we learn new lessons and expand our understanding of how courts can deal more effectively with this significant segment of our docket.

IV. Is "Problem Solving" an Appropriate Role for the Courts?

Not everyone, of course, agrees that courts should take a problem solving approach to their caseloads. Some object that it interferes with courts' core value of neutrality or turns judges into social workers. Others assert that problem solving is inappropriate "policymaking" by the judiciary. All these objections flag concerns that must be dealt with by problem solving judges. But none necessarily preclude tempered and balanced efforts to improve the handling of domestic violence cases.

With respect to the concerns for judicial neutrality, working to devise a system that will better serve the needs of the public need not affect a court's ability to judge the merits of an individual case fairly. [FN24] Defendants in domestic violence courts are unquestionably ***11** entitled to the full panoply of due process protections; appellate review still exists to check any erroneous applications of law. Indeed, problem solving courts seek to improve victim safety not through more partial justice but through more complete justice--decisions that are based on more, not less, information; orders that achieve more, not less, compliance. In the final analysis, the key to these courts' effectiveness is their ability to get more out of the system, not less out of the Bill of Rights. [FN25]

By keeping clear that the goal is to improve outcomes within the framework of the rule of law, problem solving jurists should be able to avoid any role confusion. [FN26] A judge can be interested in the details of the parties' situation without crossing the professional divide between jurist and therapist. Hands-on justice doesn't have to mean hand-holding by the judge.

And finally, with respect to the charge of judicial "policymaking," much of the discretion that problem solving judges exercise occurs within a sphere that is unquestionably within the purview of the courts: how to put the resources that have been allocated to us to their best and most effective use. In other words, much of this so-called "policymaking" is nothing more than sound court administration.

***12** To the extent that problem solving judges reach out to other agencies to seek joint solutions to common problems, this enhances--not usurps--the authority of the other branches of government. The concreteness of the cases courts face on a daily basis gives us the motivation to find approaches that work. It also gives us the hard facts and immediate feedback by which new approaches can be tested. Unlike other branches of government, courts don't need to hold lengthy investigative hearings or rely on anecdotal reports to get a sense of what the problems are. We simply need to look down the day's docket for all the data we need. When we share our experiences with the policymaking branches, everyone potentially gains.

But perhaps the ultimate answer to these objections is: what's the alternative? Domestic violence cases--hundreds of thousands of them--are in our nation's courthouses, and we have to deal with them one way or another. If we handle them inadequately, tragedies occur. Lives are lost. And public confidence in our justice system moves down yet another notch. If we refuse to take action, refuse to change, we may preserve our traditions and decorum. But at what cost?

A problem solving approach to domestic violence cases posits several new roles for judges: active case manager, creative administrator and community leader. These are, admittedly, different from traditional conceptions of the judge's role as a remote and passive adjudicator. Different, but not inappropriate. By taking a more active approach, by working to foster communication among all the players, judges can help to build a justice system that better responds to the needs of all citizens in the 21st century.

V. Remaining Challenges

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Courts are, of course, only one institution among many in society that have an obligation to respond to domestic violence. Social service providers, law enforcement, schools, religious organizations, the medical profession--all have a role to play in stemming the epidemic. Since courts don't become involved until after an act of violence has occurred, we are effectively the ***13** institution of last resort in this area. That makes it all the more critical that we perform our role well.

We still have much to learn about domestic violence. What are the strong predictors for violence against intimates? How can we interrupt intergenerational patterns of behavior? What kind of sanctions and services work best? A problem solving approach requires that we recognize that our understanding of this issue is still evolving. [FN27] As our understanding deepens, that may well affect both how we define the problem and how we construct the solutions.

For too long, our legal system either ignored the issue of domestic violence or uncritically applied traditional case processing methods without regard to what outcomes these procedures were achieving. Our justice system can and should do better. With a problem solving attitude, the judicial branch can begin to play a more active role in ensuring that our courts deliver justice that is both fair and effective--justice that respects rights and saves lives.

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[FN1]. As the North Carolina Supreme Court stated in 1874: "[i]f no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze and leave the parties to forget and forgive." State v. Oliver, 70 N.C. 60, 61-62 (1874) (affirming a fine of $10 imposed upon husband for whipping wife and inflicting bruises that remained for two weeks).

[FN2]. These stumbling blocks have historically included police inaction in response to complaints of domestic violence and prosecution policies based on stereotypical views of victims of domestic violence. See Leonore M.J. Simon, A Therapeutic Approach to the Legal Processing of Domestic Violence Cases, reprinted as adapted in Law in A Therapeutic Key 243, 266-76 (David B. Wexler & Bruce J. Winick eds., 1996).

[FN3]. See infra text accompanying note 5. Children who witness violence against their mothers may suffer a number of psychological impairments. American Bar Association, The Impact of Domestic Violence on Children 1 (1994). Children who live with a batterer face an increased risk that they themselves will be abused, or become victims or perpetrators of violence later in life. Anne H. Meltzer, Child Witnesses to Domestic Violence, in Lawyer's Manual on Domestic Violence: Representing the Victim 205 (Anne D. Lopatto & James C. Neely eds., 1995).

[FN4]. "Problem solving justice" is a term that describes judicial efforts to use the authority of courts not just to resolve the legal questions presented in a case, but also to address the deeper social issues that may underlie a significant portion of the caseload. Other examples of problem solving courts include Criminal Drug Treatment Courts, Family Treatment Courts and Community Courts. See Judith S. Kaye, Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run, 48 Hastings L.J. 851, 855-62 (1997) (describing New York's Midtown Community Court and Family Treatment Courts); David Rottman & Pamela Casey, Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts, Nat'l Inst. Just. J., July 1999, at 13.

[FN5]. Tonya McCormick, Note and Comment, Convicting Domestic Violence Abusers When the Victim Remains Silent, 13 B.Y.U. J. Pub. L. 427, 428 (1999) (citing NOW Legal Defense and Education Fund, Domestic Violence Fact Sheet (1995)). While men may also be victims of domestic violence, women are much more likely to be victimized and are much more likely to suffer severe injury at the hands of an intimate partner. See Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 Harv. L. Rev. 1849, 1854

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n.20 (1996) (reporting Department of Justice figures indicating 90-95% of all domestic violence victims are women); Andrea D. Lyon, Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan, 5 Mich. J. Gender & Law 253, 261-62 (1999) (reporting a study showing that when men are injured by female partners, their injuries tend to be far less severe than the partner's injuries).

[FN6]. Ronet Bachman & Linda E. Saltzman, Bureau of Justice Statistics, NCJ-154348, Special Report: Violence Against Women: Estimates from the Redesigned Survey 3 (1995).

[FN7]. See American Bar Ass'n, supra note 3, at 1.

[FN8]. In New York, for example, the Family Protection and Domestic Violence Intervention Act of 1994 repealed the three-day choice of forum rule that formerly precluded victims of domestic violence from pursuing remedies in both Family and Criminal Court, established mandatory arrest provisions, and increased the penalties for various family offenses, including violations of orders of protection. Family Protection and Domestic Violence Intervention Act of 1994, ch. 222, §§ 31-32, 46-47, 1994 N.Y. Laws 786.

[FN9]. A study of domestic violence filings in 21 states found a 239% increase between 1985 and 1997. Examining the Work of State Courts, 1997: A National Perspective from the Court Statistics Project 39 (Brian J. Ostrom & Neal B. Kauder eds., 1998).

[FN10]. The recidivism rate for crimes of violence between intimates is two and one-half times that for violence between strangers. Elena Salzman, The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention, 74 B.U. L. Rev. 329, 344 n.83 (1994).

[FN11]. Their fear is well founded: the risk of injury increases substantially when women separate from their partners. Lyon, supra note 5, at 262.

[FN12]. When a battered woman separates from her partner, one study found a 50% chance that she will slip below the poverty line. Margi Laird McCue, Domestic Violence: A Reference Handbook 113 (1995). It has been estimated that half of homeless women lack housing due to domestic violence. Peter Margulies, Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection and Voice, 63 Geo. Wash. L. Rev. 1071, 1075 (1995).

[FN13]. In a study of felony arrests in New York City in the early 1970s, researchers from the Vera Institute of Justice reported that "the most striking finding of all" in its review of crimes of personal violence was the "high incidence of prior relationships and the frequency with which those relationships result in dismissal of charges." Vera Institute of Justice, Felony Arrests: Their Prosecution and Disposition in New York City's Courts 61 (1977). The researchers further found that the reluctance of the complainants to pursue prosecution (often because they were reconciled with the defendants or in some cases because they feared the defendants) accounted for a larger proportion of the high rate of dismissal than any other factor. Id. at 135.

[FN14]. An uncoordinated response can raise risks at every juncture:

> If police arrest offenders and judges release them without punishment... the result is offenders who feel licensed by the court to carry on, and to scoff at the police as well. If social workers... encourage women to take the dangerous step of running from batterers and no shelter is available, the result is homeless women who are doubly endangered. If judges issue restraining orders but police do not enforce them, the result is often another headline femicide: "Murdered Wife Had Protection Order."

Ann Jones, Next Time She'll Be Dead: Battering and How to Stop It 212 (1994).

[FN15]. Victim Services is a nonprofit organization based in New York City that has for the past 21 years provided practical services, counseling and courtroom assistance for crime victims.

[FN16]. The Center for Court Innovation is a public-private partnership that functions as the New York State court system's research and development arm. By investigating chronic problems seen daily in New York's trial courts--like domestic violence, drug abuse, quality of life crimes and child neglect--the

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Center develops groundbreaking model approaches to address these deep-rooted problems. In 1998, the Center was one of 10 programs selected from 1,500 nominees to receive the prestigious Innovations in American Government Award from the Ford Foundation and Harvard University's John F. Kennedy School of Government.

[FN17]. Victim advocates are assigned from either the District Attorney's Office or Victim Services. Service referrals may address both emergency and long-term issues, such as food, shelter, welfare benefits, job training and immigration status. One complainant recently described how victim advocates helped her avoid eviction and obtain a job. She summed up her experience by saying "[t]hey make you feel like you have backup. They know the most important thing is that your kids eat. They have made the courts human." Nanci L. Katz, Targeting Spousal Abuse: Get-Tough Effort Links Numerous Agencies, N.Y. Daily News, July 4, 1999, at Suburban 1.

[FN18]. In one case, for example, the advocate learned that the defendant was making threatening telephone calls. She immediately notified the District Attorney and the Court's Resource Coordinator so that the court could address this potentially dangerous situation before it escalated.

[FN19]. Susan R. Paisner, A Court Grows in Brooklyn: Dedicated Domestic Violence Court Serves as National Model, Domestic Violence Prevention, Sept. 1999, at 5, 6 (quoting Judge Leventhal).

[FN20]. A second felony domestic violence court has recently opened in Bronk County.

[FN21]. The New York City Criminal Court, for example, last year arraigned close to 20,000 misdemeanor domestic violence matters. That court is currently developing specialized Domestic Violence Parts to handle this enormous volume fairly and effectively. Since June 1998, the Bronx County Criminal Court has operated a Domestic Violence All-Purpose Part, to which all domestic violence cases are adjourned after arraignment; a Domestic Violence Trial Part to try cases not otherwise resolved; and a brand-new type of part--a Domestic Violence Compliance Part--to monitor defendants' compliance with court-ordered conditions of a sentence, such as completion of a batterers' intervention program or compliance with an order of protection. In March 1999, a Domestic Violence Court was also opened in the Buffalo City Court. See Gene Warner, Courting Trouble: Judge Plays Hardball on Domestic Violence, Buffalo News, July 9, 1999, at A1.

[FN22]. In June 1999, the state's first combined felony-misdemeanor domestic violence court was opened in Westchester County. See Donna Greene, New Court to Handle Domestic Abuse Cases, N.Y. Times, June 20, 1999, at WC7. For a description and evaluation of several model programs, see Betsy Tsai, Note, The Trend Toward Specialized Domestic Violence Courts: Improvements on An Effective Innovation, 68 Fordham L. Rev. 1285 (2000).

[FN23]. See Oliver W. Prichard, Network To Help Battered Women, Westchester J. News, Oct. 27, 1999, at B1.

[FN24]. So long as the activity does not cast doubt on the judge's capacity to act impartially, New York's Rules of Judicial Conduct permit judges to participate in groups devoted to the "improvement of the law, the legal system or the administration of justice." N.Y. Comp. Codes R. & Regs. tit. 22, § 100.4(C)(3) (1998). Citing this rule, New York's Advisory Committee on Judicial Ethics has opined that a judge may serve on a "Domestic Violence Task Force" that seeks to improve the handling of domestic violence matters and that includes representatives from the offices of both the District Attorney and the Public Defender. See Opinion 95-34 (Mar. 9, 1995), reprinted in New York Unified Court System, XIII Selected Opinions of the Advisory Committee on Judicial Ethics (Jan. 1, 1995-Dec. 31, 1995). Of course, participation in groups that do cast doubt on a judge's impartiality must be avoided. See New York Advisory Committee on Judicial Ethics Opinion 99-46 (Mar. 11, 1999) (advising that a judge should not serve on a Domestic Violence Coordinating Council that engages in vigorous advocacy on behalf of domestic violence victims); Massachusetts Supreme Judicial Court Committee on Judicial Ethics Opinion 98-16 (Sept. 15, 1998) (stating that a judge may occasionally attend a domestic violence roundtable but should avoid "repeated attendance at meetings where substantive issues are to be discussed in a one-sided

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fashion”).

[FN25]. Judge John Leventhal is very clear about his role as a judge in the DV Court: “‘I see my role as a dual obligation: to preserve and protect defendant's constitutional and procedural rights, but also to see that the complainant is safe both during the proceedings and after as well.”’ Paisner, supra note 19, at 7 (quoting Judge Leventhal).

[FN26]. Judge JoAnn Ferdinand, the presiding judge of another problem solving court, the Brooklyn Drug Treatment Court, put it this way:

The challenge of working in the Treatment Court is to figure out a role for the judge in the treatment process. It is very important that I be viewed as a judge--not a counselor, not a probation officer, not a friend. Defendants have to understand that if they fail to fulfill the treatment mandate, it will be a judge that responds.

Perspectives from the Bench, Treatment, News from the Brooklyn Treatment Court (Fund for the City of New York), Winter 1998, at 2, 2.

[FN27]. In New York, we have institutionalized our commitment to keeping abreast of the latest learning in this area through the establishment of a Family Violence Task Force. Comprising judges and practitioners from around the state, the Task Force conducts year-round training programs for both judicial and nonjudicial staff on the legal, medical and psychosocial aspects of family violence.

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