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## **“I PLEAD THE FIFTH”: NEW YORK’S INTEGRATED DOMESTIC VIOLENCE COURTS AND THE DEFENDANT’S FIFTH AMENDMENT DILEMMA**

*Rhona Mae Amorado\**

### **I. INTRODUCTION**

Domestic violence is a problem that continues to baffle society today. In June 1994, the nation came face-to-face with the horrifying truth about domestic violence when news of the brutal murder of Nicole Brown Simpson and subsequent arrest of football legend, Orenthal James (O.J.) Simpson, surfaced.<sup>1</sup> Incidents of domestic violence have recurrently appeared in national news headlines since then.<sup>2</sup> Two decades later, the media was filled with news of the arrest of then-National Football League player, Ray Rice, pertaining to a domestic assault caught on camera.<sup>3</sup> The effects of this unfortunate incident rippled wide and, once again, society was forced to face the uncomfortable topic of domestic violence.<sup>4</sup> On February 2, 2016, an

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<sup>1</sup> Eric Malnic & David Ferrell, *O.J. Simpson’s Ex-Wife Found Stabbed to Death*, LOS ANGELES TIMES (June 14, 1994), <http://www.latimes.com/local/la-me-oj-simpsons-exwife-found-stabbed-to-death-story.html>.

<sup>2</sup> See generally DAWN BRADLEY BERRY, *THE DOMESTIC VIOLENCE SOURCEBOOK* (3d ed. 2000) [hereinafter BERRY].

<sup>3</sup> Childs Walker, *One Year After Ray Rice Incident, Impacts Abound for Ravens, NFL, Domestic-violence Activists*, THE BALTIMORE SUN (Feb. 17, 2015), <http://www.baltimore.sun.com/sports/bs-sp-ray-rice-one-year-20150214-story.html>.

<sup>4</sup> *Id.*

estimated 5.11 million viewers tuned in to watch the first installment of television network FX's *American Crime Story, The People v. O.J. Simpson*.<sup>5</sup> Entertainment and news articles released a few days after the show's premiere suggest the continued significance and impact of the O.J. murder trial and subsequent civil trial on issues about race, gender, and more importantly, domestic violence.<sup>6</sup>

Domestic violence is not only a problem for celebrities or public figures. In fact, domestic violence is a serious public health concern.<sup>7</sup> Anyone can become a victim,<sup>8</sup> regardless of race, gender, religion, sexual orientation, socioeconomic status, or educational level.<sup>9</sup> Domestic violence can be perpetrated in the form of physical,<sup>10</sup> sexual,<sup>11</sup> emotional,<sup>12</sup> economic,<sup>13</sup> or psychological<sup>14</sup> abuse. The Centers for Disease Control and Prevention estimates that approximately 74.7 million people in the United States have experienced some form of domestic abuse in their lifetime.<sup>15</sup> It is also estimated

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<sup>5</sup> Rick Kissell, *3-Day Ratings: "People v. O.J. Simpson" is Tuesday's No.1 Show in Key Demos*, VARIETY (Feb. 16, 2016), <http://variety.com/2016/tv/news/3-day-ratings-people-vs-o-j-simpson-fx-1201707564/>.

<sup>6</sup> Sarah Marshall, *The People vs. O.J. Simpson Relives a Media Sensation*, NEW REPUBLIC (Jan. 31, 2016), <https://newrepublic.com/article/128762/people-vs-oj-simpson-relives-media-sensation>; Alyssa Rosenberg, *Why America is Still Haunted by the O.J. Simpson Trial*, THE WASHINGTON POST (Feb. 2, 2016), <https://www.washingtonpost.com/news/act-four/wp/2016/02/02/americas-unfinished-business-from-the-o-j-simpson-trial/>.

<sup>7</sup> Linda L. Dhalberg & James A. Mercy, *History of Violence as a Public Health Problem*, 11 AM. MED. ASS'N J. ETHICS 167 (2009).

<sup>8</sup> The author acknowledges that there are male victims of domestic violence. However, data show there are more female victims of domestic violence than male victims. For the purposes of consistency, in this comment, the author refers to "victims" as females, and "batterers" as males. NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *Domestic Violence Statistics* (2015), <http://ncadv.org/files/National%20Statistics%20Domestic%20Violence%20NCADV.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> *The 5 Forms of Domestic Violence*, WOODBRIDGE TOWNSHIP D.V.R.T., <http://www.woodbridgedvrt.org/pages/fiveforms.html> (last visited May 3, 2016) (describing physical abuse as inflicting or attempting to inflict physical injury and/or illness; withholding access to resources necessary to maintain health; and forcing alcohol and/or other drug use).

<sup>11</sup> *Id.* (describing sexual abuse as coercing or attempting to coerce any sexual contact without consent; and attempting to undermine a person's sexuality).

<sup>12</sup> *Id.* (describing emotional abuse as making or attempting to undermine a person's self-worth).

<sup>13</sup> *Id.* (describing economic abuse as making or attempting to make a person financially dependent).

<sup>14</sup> *Id.* (describing psychological abuse as instilling or attempting to instill fear; and isolating or attempting to isolate one from friends, family, school, and/or work).

<sup>15</sup> *National Intimate Partner & Sexual Violence Survey*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 2011), [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-)

that, in the United States, an average of twenty people per minute are physically abused by their intimate partners.<sup>16</sup> Scholars and lawmakers have been aware of these harrowing and growing statistics since the feminist movement in the 1970s.<sup>17</sup> Various studies, journals, and articles have been written about victims of domestic violence – their psychology, the short- and long-term effects of abuse, need for advocacy, and victims' rights.<sup>18</sup> However, little attention has been given to the effects of domestic violence on batterers.<sup>19</sup> Instead, most journals focus on the pathology of the abusers, the effectiveness, or lack thereof, of Batterers Intervention Programs, and abusers' efforts to manipulate the legal system.<sup>20</sup> The fundamental rights of domestic batterers seem to take a back seat in the fight against domestic violence.

This comment focuses on the recently established specialized courts in New York that attempt to address the complexities of domestic violence, the Integrated Domestic Violence (IDV) courts.<sup>21</sup> The main goals<sup>22</sup> of IDV courts are to hold batterers accountable and

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a.pdf (indicating that approximately 42.4 million women and 32.3 million men have experienced rape, physical violence, and/or stalking by an intimate partner at some point in their lifetime).

<sup>16</sup> NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *Domestic Violence Statistics* (2015), <http://ncadv.org/files/National%20Statistics%20Domestic%20Violence%20NCADV.pdf>.

<sup>17</sup> Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvement on an Effective Innovation*, 66 FORDHAM L. REV. 1285, 1290 (2000).

<sup>18</sup> See generally MARY ROTHWELL DAVIS, DORCHEN A. LIEHOLDT & CHARLOTTE A. WATSON (eds.), *LAWYER'S MANUAL ON DOMESTIC VIOLENCE REPRESENTING THE VICTIM* (6th ed. 2015) (stating that twenty-eight journals were dedicated to victims).

<sup>19</sup> *Id.* (Only two journals were dedicated to offenders).

<sup>20</sup> *Id.*

<sup>21</sup> *Integrated Domestic Violence Courts*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/project/integrated-domestic-violence-court> (last visited May. 3, 2016) (New York established the first Integrated Domestic Violence courts in the Bronx, Monroe, Onondaga, Rensselaer, Suffolk, and Westchester counties).

<sup>22</sup> Amanda B. Cissner, Sarah Picard-Fritsche, & Nora Puffett, *The Suffolk County Integrated Domestic Violence Court: Policies, Practices, and Implications*, CTR. FOR CT. INNOVATION 3 (Dec. 2011), [http://www.courtinnovation.org/sites/default/files/documents/Suffolk\\_IDV.pdf](http://www.courtinnovation.org/sites/default/files/documents/Suffolk_IDV.pdf) [hereinafter Cissner, *Suffolk IDV*].

The goals of the Integrated Domestic Violence Courts are to promote:

1. Informed judicial decision-making by obtaining comprehensive and up-to-date information on all issues involving the family;
2. Consistent handling of all matters relating to the same family by a single presiding judge;
3. Efficient use of court resources, with reduced numbers of appearances, and speedier disposition due to greater availability of complete information;

provide victims of domestic violence with justice and access to resources.<sup>23</sup> IDV courts take various cases, such as matrimonial, civil, and criminal cases in front of one judge.<sup>24</sup> This ensures that the judge is well informed about the entire situation and is able to provide consistent orders of protection.<sup>25</sup> While the consolidation of cases addresses the practical societal concerns of the victims, it fails to consider the potentially improper ramifications for the defendants involved in these cases.<sup>26</sup>

This comment argues that, while IDV courts purport to advance judicial efficiency, they neglect to consider possible infringements on the defendant's constitutional rights. Specifically, this comment will explore the constitutional dilemma created by the "one judge-one family"<sup>27</sup> system of IDV courts with regard to the defendant's Fifth Amendment privilege against self-incrimination.

This comment will be divided into four sections. Section II of this comment will focus on the history of domestic violence in the United States and New York. Section III will discuss the IDV courts in general, as well as their constitutionality. Section IV will address the possible violations of Fifth Amendment rights in IDV courts. Specifically, it will argue that the defendant's statements in his civil or matrimonial proceeding can be used against him in his criminal proceeding and vice-versa, potentially violating his privilege against

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4. Concentration of social services and other resources to address the family members' needs comprehensively;
  5. Victim safety, by eliminating conflicting orders and decisions that do not reflect domestic violence or child neglect histories;
  6. Increased confidence in the court system by reducing inefficiencies for litigants as well as opportunities for manipulation; and
  7. Coordinate response and collaboration among criminal justice and child welfare agencies, community-based social services and domestic violence and child victim advocacy groups.

*Id.* at 3-4.

<sup>23</sup> Anat Maytal, *Specialized Domestic Violence Courts: Are they Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197, 198 (Note) (2008).

<sup>24</sup> Sarah Picard-Fritsche, *Litigant Perspectives in an Integrated Domestic Violence Court: The Case of Yonkers, New York*, CTR. FOR CT. INNOVATION 1 (2011) [hereinafter Picard-Fritsche, *Litigant Perspective*].

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Integrated Domestic Violence Courts: Key Principles*, CTR. FOR CT. INNOVATION, [http://www.courtinnovation.org/sites/default/files/documents/IDV\\_FACT\\_SHEET.pdf](http://www.courtinnovation.org/sites/default/files/documents/IDV_FACT_SHEET.pdf) (last visited May. 3, 2016) (The "one family-one judge" model brings before a single judge the multiple criminal, family, and matrimonial disputes for families where domestic violence is an underlying issue).

self-incrimination. It will also argue that participation in a Batterers Intervention Program, where admission of abusive behavior is required, can potentially infringe on the defendant's privilege against self-incrimination. Section V will suggest two ways to resolve the Fifth Amendment dilemma in IDV courts. First, it proposes that IDV courts stay civil proceedings while criminal proceedings are ongoing. Second, it proposes the use of judicial immunity for therapeutic confessions.

## II. DOMESTIC VIOLENCE IN THE UNITED STATES

### A. Historical Overview

Intimate partner violence, usually against women, has been ingrained in society for centuries.<sup>28</sup> The 499 B.C. Ancient Roman law, *Paterfamilias*, for example, reads, "If you should discover your wife in adultery, you may with impunity put her to death without a trial, but if you should commit adultery or indecency, she must not presume to lay a finger on you, nor does the law allow it."<sup>29</sup> This notion remained commonplace in society, with similar laws enduring through the nineteenth century.<sup>30</sup> Common law in the United States provided that a husband could subject his wife to corporal punishment or "chastisement."<sup>31</sup> William Blackstone explained in his treatise on English common law that a husband could "give his wife moderate correction."<sup>32</sup> Blackstone stated,

[f]or, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with the power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer . . . .<sup>33</sup>

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<sup>28</sup> BERRY, *supra* note 2, at 19 (stating that domestic violence has been reported in virtually all societies, and in most countries, it has been both legally and socially acceptable).

<sup>29</sup> *Overview of Historical Laws that Supported Domestic Violence*, WOMEN SAFE, <http://www.womensafe.net/home/index.php/domesticviolence/29-overview-of-historical-laws-that-supported-domestic-violence> (last visited May 3, 2016).

<sup>30</sup> Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, FAC. SCHOLARSHIP SERIES, 2118 (1996).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2123 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 442).

<sup>33</sup> *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 430-33).

The criminalization of domestic violence did not come until the late 1800s.<sup>34</sup> In 1871, the Supreme Court of Alabama rescinded the legal right of husbands to beat their wives.<sup>35</sup> In *Fulgham v. State*,<sup>36</sup> the defendant's wife discovered him beating their children.<sup>37</sup> The wife intervened and voiced her distress over the excessive punishment.<sup>38</sup> The defendant turned the whip on his wife and struck her twice on the back.<sup>39</sup> The wife brought the case to court, asserting that her husband did not have the right to chastise her.<sup>40</sup> The case reached the Alabama Supreme Court, which held that the "rule of love superseded the rule of force," and the court denied the privilege of brutality against women.<sup>41</sup> Since then, the public perception of domestic violence slowly shifted from a private or personal matter to a public health and policy concern.<sup>42</sup>

The intense media attention of the 1994 O.J. Simpson case caused Americans to confront the issue of domestic violence on their televisions and in their newspapers and magazines almost daily.<sup>43</sup> Incidentally, domestic violence hotlines became flooded with numerous phone calls.<sup>44</sup> State legislators began taking the problem of domestic violence more seriously.<sup>45</sup> New York was quick to respond, enacting the New York State Family Protection and Domestic Violence Intervention Act of 1994, in January 1995.<sup>46</sup> While the case against O.J. Simpson led to an acquittal, it was pivotal in achieving acknowledg-

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<sup>34</sup> Maytal, *supra* note 23, at 200.

<sup>35</sup> *Fulgham v. State*, 46 Ala. 143, 146-47 (1871) (holding that "[A] rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as the husband's slave. And the privilege, ancient though it may be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law.").

<sup>36</sup> *Id.*

<sup>37</sup> Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, FAC. SCHOLARSHIP SERIES, 2118, 1234 (1996) (citing facts to *Fulgham v. State*, 46 Ala. 143 (1871)).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Fulgham*, 46 Ala. at 145.

<sup>41</sup> *Id.* at 147.

<sup>42</sup> Picard-Fritsche, *Litigant Perspective*, *supra* note 24, at 1.

<sup>43</sup> MARGI LARID MCCUE, DOMESTIC VIOLENCE: A REFERENCE HANDBOOK 53-54 (1995).

<sup>44</sup> *Id.* at 54.

<sup>45</sup> *Id.*

<sup>46</sup> *Domestic Violence*, NYCOURTS, <https://www.nycourts.gov/courts/family-violence/dv/index.shtml> (last visited May 3, 2016).

ment that domestic violence can happen anywhere and to anybody.<sup>47</sup> The case brought up issues such as the danger women face after separation, the effects of domestic violence on children, and the need to hold batterers accountable for their abuse.<sup>48</sup>

## B. New York

New York has been a frontrunner in the country's fight against domestic violence through its social reforms, legislation, and subsequent creation of specialized domestic violence courts.<sup>49</sup> In June 2012, the New York State Senate passed legislation that enhances victim protection and increases criminal penalties for abusers.<sup>50</sup> New York defines domestic violence as “[a] pattern of coercive tactics, which can include physical, psychological, sexual, economic and emotional abuse perpetrated by one person against an adult intimate partner with the goal of establishing and maintaining power and control over the victim.”<sup>51</sup>

Domestic violence is a complicated matter to confront, particularly because it involves various family dynamics that affect each involved individual differently.<sup>52</sup> While batterers find themselves involved in the legal system, victims of abuse suffer physical and mental problems as a result of domestic violence.<sup>53</sup> It is not uncommon for women to lose their jobs, if they even had any, because of absenteeism due to illness as a result of the violence.<sup>54</sup> Many women must move away from their homes, seek safety in a shelter, or find themselves homeless, all to avoid violence.<sup>55</sup> These women may lose family and friends as a result of battering.<sup>56</sup> Many women have to forgo

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<sup>47</sup> BERRY, *supra* note 2, at 55.

<sup>48</sup> BERRY, *supra* note 2, at 55.

<sup>49</sup> Suzane Cecala & Mary M. Walsh, *New York State's Response to Domestic Violence*, OFFICE OF THE PREVENTION OF DOMESTIC VIOLENCE 4 (2006), [http://opdv.ny.gov/whatisdv/about\\_dv/nyresponse/nysdv.pdf](http://opdv.ny.gov/whatisdv/about_dv/nyresponse/nysdv.pdf).

<sup>50</sup> *2012 New York State Domestic Violence and Related Laws*, OFFICE OF THE PREVENTION OF DOMESTIC VIOLENCE, [http://www.opdv.ny.gov/law/summ\\_year/sum12.html](http://www.opdv.ny.gov/law/summ_year/sum12.html) (last visited May 3, 2016).

<sup>51</sup> *The Law - Domestic Violence*, NYCOURTS, <https://www.nycourts.gov/topics/domesticViolence.shtml> (last visited May 3, 2016).

<sup>52</sup> BERRY, *supra* note 2, at 29.

<sup>53</sup> BERRY, *supra* note 2, at 29.

<sup>54</sup> BERRY, *supra* note 2, at 93.

<sup>55</sup> BERRY, *supra* note 2, at 96.

<sup>56</sup> BERRY, *supra* note 2, at 39.



financial security during a divorce to avoid further abuse.<sup>57</sup> For victims with children, the emotional and financial struggles are exacerbated.<sup>58</sup> In fact, children who witness domestic violence, or who may have been abused, demonstrate significant behavioral and emotional problems<sup>59</sup> and often require treatment and additional services on their own.<sup>60</sup> In order to address this complexity more efficiently, New York created a specialized criminal part dedicated to addressing domestic violence issues.<sup>61</sup> Currently, there are over thirty-nine domestic violence parts.<sup>62</sup> Each of these parts have specialized features, including a courtroom dedicated exclusively to the handling of domestic violence cases with a single presiding judge, a fixed prosecutorial team, court staff who receive special training in domestic violence issues, innovative computer technology to aid in monitoring defendants, a specialized domestic violence probation program, and extensive services for victims.<sup>63</sup>

Families who are affected by domestic violence also require a variety of legal services.<sup>64</sup> Orders of Protection<sup>65</sup> may either be obtained in family court, matrimonial court, or issued by a judge in criminal court.<sup>66</sup> Victims may have to go to family court in order to address custody and visitation arrangements if the parties have children.<sup>67</sup> Victims may also find themselves in matrimonial court

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<sup>57</sup> BERRY, *supra* note 2, at 94.

<sup>58</sup> BERRY, *supra* note 2, at 129.

<sup>59</sup> BERRY, *supra* note 2, at 129.

<sup>60</sup> BERRY, *supra* note 2, at 129.

<sup>61</sup> *Domestic Violence*, NYCOURTS, <https://www.nycourts.gov/courts/family-violence/dv/index.shtml> (last visited May 3, 2016).

<sup>62</sup> *Id.*

<sup>63</sup> Robert V. Wolf, Liberty Aldrich, & Samantha Moore, *Planning a Domestic Violence Court*, CTR. FOR CT. INNOVATION, 1 (2004) [hereinafter Wolf, *Planning DV Court*].

<sup>64</sup> See generally Melissa Labriola, et al., *A National Portrait of Domestic Violence Courts*, CTR. FOR CT. INNOVATION (2010).

<sup>65</sup> *Obtaining an Order of Protection*, NYCOURTS, <https://www.nycourts.gov/faq/orderOfProtection.shtml#q1> (last visited May 3, 2016). (“An order of protection is issued by the court to limit the behavior of someone who harms or threatens to harm another person. It is used to address various types of safety issues, including, but not limited to stipulations involving domestic violence. Family courts, criminal courts, and Supreme Courts can all issue orders of protection. An order of protection may direct the offending person not to injure, threaten or harass you, your family, or any other person(s) listed in the order. It may include, but is not limited to, directing him/her to stay away from you and your children, move out of your home, follow custody orders, pay child support, not have a gun.”).

<sup>66</sup> *Id.*

<sup>67</sup> See BERRY, *supra* note 2, at 155.

should they or their partners file for divorce.<sup>68</sup> It is common to find one family unit involved in at least two or more cases simultaneously.<sup>69</sup> Prior to 2000, parties in a domestic violence dispute in New York found themselves dealing with various judges in various courts.<sup>70</sup> Parties involved in cases of domestic violence were often simultaneously involved in related cases in family, criminal, and/or matrimonial matters<sup>71</sup> in the New York State Supreme Court.<sup>72</sup> This fragmentation made it difficult for victims to maneuver the court system.<sup>73</sup> In addition, it is possible for the family court and criminal court to issue conflicting orders of protection against the batterer.<sup>74</sup> In an effort to address these issues, New York established the IDV courts<sup>75</sup> in 2001.<sup>76</sup> IDV courts are Problem-Solving Courts,<sup>77</sup> which

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<sup>68</sup> See BERRY, *supra* note 2, at 155

<sup>69</sup> Picard-Fritsche, *Litigant Perspective*, *supra* note 24, at 1.

<sup>70</sup> Picard-Fritsche, *Litigant Perspective*, *supra* note 24, at 1.

<sup>71</sup> Picard-Fritsche, *Litigant Perspective*, *supra* note 24, at 1.

<sup>72</sup> This comment will refer to the New York State Supreme Court as “Supreme Court.” Where the supreme court of another state is concerned, this comment will specify.

<sup>73</sup> Wolf, *Planning DV Court*, *supra* note 63, at 1.

<sup>74</sup> Cissner, *Suffolk IDV*, *supra* note 22, at 2.

<sup>75</sup> 22 NYCRR § 41.1, entitled “Integrated Domestic Violence Parts of Supreme Court and Domestic Violence Parts of Superior Courts,” states:

(a) Integrated Domestic Violence Parts of the Supreme Court and Domestic Violence Parts of the Supreme or County Court may be established in one or more counties by order of the Chief Administrator of the Courts following consultation with and agreement of the Presiding Justice of the Judicial Department in which the affected county or counties are located. As provided by the rule of the Chief Administrator promulgated pursuant to subdivision (b) of this section:

(1) Integrated Domestic Violence Parts shall be devoted to hearing and determination, in a single forum, of cases that are simultaneously pending in the courts if one of them is a domestic violence case in a criminal court and the other is a case in Supreme or Family Court that involves a party or witness in the domestic violence case; or if one is a case in criminal court, Family Court or Supreme Court and the other is a case in any other courts having a common party or in which a disposition may affect the interests of a party to the first case. The Chief Administrator also may provide that, where cases are disposed of in an Integrated Domestic Violence Part, subsequent cases that would have been eligible for disposition in such Part were they to have been pending simultaneously with the cases already disposed of shall be eligible for disposition therein. Where no Domestic Violence Part has been established in the county pursuant to rules of the Chief Administrator promulgated pursuant to subdivision (b) of this section, the Chief Administrator may also provide that domestic violence cases pending in a criminal court in the county shall be eligible for disposition in the Integrated Domestic Violence Part if necessary to best utilize available court and community resources for

aim to improve the New York courts' effectiveness in meeting the needs of families involved in several cases.<sup>78</sup>

### III. INTEGRATED DOMESTIC VIOLENCE COURTS

New York State currently has forty-two IDV courts.<sup>79</sup> IDV courts handle all related cases of a single family where the underlying issue is domestic violence.<sup>80</sup> These related cases include, but are not limited to, criminal cases, child abuse and neglect cases, custody and visitation cases, and divorce cases.<sup>81</sup> This type of integrated court addresses the complicated trial court structure of New York.<sup>82</sup> In New York, divorce cases are handled in the matrimonial branch of the Supreme Court; allegations of criminal domestic violence and child abuse are prosecuted in any of the several criminal courts, including the Domestic Violence parts; and tort claims, custody, visitation, and other family matters are resolved in family court.<sup>83</sup> However, these different courts all have concurrent jurisdiction over

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domestic violence cases.

2) Domestic Violence Parts shall be devoted to the hearing and determination of domestic violence cases pending in criminal court in the county if necessary to best utilize available court and community resources for domestic violence cases.

(b) The Chief Administrator shall promulgate rules to regulate operation of Integrated Domestic Violence Parts in Supreme Court and Domestic Violence Parts in Supreme and County Courts. The rules of the Integrated Domestic Violence Parts shall permit a justice of the Supreme Court to transfer to such court, for disposition in an Integrated Domestic Violence Part thereof, any eligible case pending in another court in the same county. The rules of the Domestic Violence Parts shall permit a justice of the Supreme Court or a judge of the County Court to transfer to such court, for disposition in a Domestic Violence Part thereof, any eligible case pending another criminal court in the same county.

<sup>76</sup> *Integrated Domestic Violence Court*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/project/integrated-domestic-violence-court> (last visited May 3, 2016).

<sup>77</sup> See *infra* note 230 and accompanying text.

<sup>78</sup> Cissner, *Suffolk IDV*, *supra* note 22, at 1, 2.

<sup>79</sup> *Domestic Violence*, NYCOURTS, <https://www.nycourts.gov/courts/family-violence/dv/index.shtml> (last visited May 3, 2016).

<sup>80</sup> Cissner, *Suffolk IDV*, *supra* note 22, at 1, 2.

<sup>81</sup> *Domestic Violence*, NYCOURTS, <https://www.nycourts.gov/courts/family-violence/dv/index.shtml> (last visited May 3, 2016).

<sup>82</sup> *Id.*

<sup>83</sup> Cissner, *Suffolk IDV*, *supra* note 22, at 1.

issuance of Orders of Protection.<sup>84</sup> This means that victims of domestic violence may obtain an order of protection at any and all of these courts.<sup>85</sup> This fragmented system, combined with the complications inherent in domestic violence dispute, result in conflicting court orders, repeated interviews with parties, unnecessary delays, multiple court appearances, and other complications.<sup>86</sup>

### A. Transfer of Case to IDV Courts

Unlike other Problem-Solving courts, defendants cannot elect to opt-in or opt-out of IDV courts.<sup>87</sup> In IDV courts, a project director reviews cases from a database to find any cases that are open in both criminal court and family or matrimonial court.<sup>88</sup> These cases are then presented to the judge and reviewed to be determined whether they meet the criteria for transfer to IDV courts.<sup>89</sup> In New York, Part 141 of the Rules of the Chief Judge defines an IDV eligible case as “a domestic violence case commenced in a criminal court and a case commenced in Supreme or Family Court that involves a party or witness in the domestic violence case . . .” simultaneously pending in the county.<sup>90</sup> The criminal allegation of domestic violence forms the threshold requirement for entry into the IDV courts.<sup>91</sup>

Once it is determined that a case is appropriate, the IDV judge issues a formal transfer request of the various cases to the IDV courts.<sup>92</sup> The case is then placed on the IDV judge’s calendar, and the judge reviews the pretrial status of the defendant.<sup>93</sup> In reviewing

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<sup>84</sup> *Obtaining an Order of Protection*, NYCOURTS, <https://www.nycourts.gov/faq/orderOfProtection.shtml#q1> (last visited May 3, 2016).

<sup>85</sup> *Id.*

<sup>86</sup> *Integrated Domestic Violence Court*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/project/integrated-domestic-violence-court> (last visited May 3, 2016).

<sup>87</sup> Domestic Violence, NYCOURTS, <https://www.nycourts.gov/courts/family-violence/dv/index.shtml> (last visited Mar. 1, 2016).

<sup>88</sup> Daniel D. Angiolillo, *The Integrated Domestic Violence Court: New York’s Successful Experience*, in *LAWYER’S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM* 152 (Mary Rothwell Davis, et al., (eds.) 6th ed., 2015) [hereinafter Angiolillo, *IDV Court*].

<sup>89</sup> Angiolillo, *IDV Court*, *supra* note 88.

<sup>90</sup> 22 NYCRR § 141.1(b).

<sup>91</sup> NYCOURTS, *NEW YORK STATE PROBLEM SOLVING COURTS* (2015).

<sup>92</sup> *IDV Frequently Asked Questions*, NYCOURTS, <https://www.nycourts.gov/courts/10jd/suffolk/IDV/IDVQuestions.shtml#faqfunction> (last visited May 3, 2016) [hereinafter *Frequently Asked Questions*].

<sup>93</sup> *Frequently Asked Questions*, *supra* note 92.

the pre-trial status of the defendant, the judge makes sure that there is an order of protection in place, and the defendants who are not held pending trial are enrolled in, or referred to, a Batterers Intervention Program.<sup>94</sup> Cases that are transferred to IDV courts are not consolidated, but proceed according to the substantive and procedural law of the originating court.<sup>95</sup> Each case is assigned a new docket number, and heard separately during one court appearance.<sup>96</sup> Although integrating various cases under one court provides efficiency for all parties involved, questions have been raised as to the constitutionality of these court transfers.

### B. Constitutionality

The constitutionality of the IDV courts was questioned for the first time in *People v. Fernandez*.<sup>97</sup> In this case, Fernandez was accused of threatening and harassing his former paramour on several occasions over the phone.<sup>98</sup> Fernandez was subsequently charged with aggravated harassment in the second degree based on his actions.<sup>99</sup> Thereafter, a court ordered Fernandez's case to be transferred to the IDV Part of the Supreme Court of Kings County, where he was convicted of the charges against him.<sup>100</sup> The main issue on appeal was whether, under the New York State Constitution, the IDV part of the Supreme Court had subject matter jurisdiction to hear misdemeanor charges without a grand jury indictment or a superior court information.<sup>101</sup>

In its analysis, the court looked to the language of the New York Constitution, which states that the Supreme Court has the pow-

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<sup>94</sup> EDWARD W. GONDOLF, BATTERER INTERVENTION SYSTEMS, 9-13 (2001). Batterers intervention programs are an innovative effort of the American social service system to address the growing problem of domestic violence in the country. These programs generally consist of weekly group counseling sessions for men and women arrested for assaulting their partners. These programs employ various theoretical frameworks, such as psycho-educational, psychodynamic, and the Duluth model. *Id.*

<sup>95</sup> *Frequently Asked Questions*, *supra* note 92.

<sup>96</sup> *Frequently Asked Questions*, *supra* note 92.

<sup>97</sup> 897 N.Y.S.2d 158 (App. Div. 2d Dep't 2010) (stating that the principal issue presented on this appeal was a first impression for this court).

<sup>98</sup> *Id.* at 160.

<sup>99</sup> *Id.* at 161.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

er to adjudicate all causes of action, including misdemeanors.<sup>102</sup> The court then discussed the constitutionality of IDV parts, and stated that the constitution authorized removal of misdemeanor cases to the IDV parts of the Supreme Court.<sup>103</sup> Nevertheless, Fernandez argued that the Supreme Court did not have jurisdiction over his case because he had not been indicted by a grand jury, nor had the district attorney filed a written accusation against him in a superior court, as required under CPL § 210.05.<sup>104</sup> The court rejected this argument holding that “CPL 210.05 merely prescribes the method and manner required for a prosecutor to prosecute an offense . . . it was not intended to prohibit the Supreme Court from exercising its jurisdiction under the New York State Constitution, nor can it.”<sup>105</sup> The court, therefore, affirmed the trial court’s judgment against Fernandez.<sup>106</sup>

This case established that an IDV court, as a Supreme Court, is not constitutionally limited in the cases that it may hear. Further, it established that IDV courts may order the removal and transfer of criminal and civil cases to their jurisdiction. However, the transfer of these cases, which has varying procedural and substantive laws, under one court creates a constitutional problem for the defendants in these proceedings. Specifically, this integration raises a potential for a violation of a defendant’s Fifth Amendment privilege against self-incrimination.

#### IV. THE FIFTH AMENDMENT AND IDV COURTS

The origin of the Fifth Amendment of the United States Constitution is the English common law.<sup>107</sup> The English courts initially relied on the Latin maxim, *nemo tenetur seipsum prodere* – “no man is bound to accuse himself” – to protect the accused from unjust methods of interrogation.<sup>108</sup> In the eighteenth century, the English courts established the privilege against self-incrimination as a funda-

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<sup>102</sup> *People v. Fernandez*, 897 N.Y.S.2d at 162 (citing N.Y. CONST., art. VI § 7(a)).

<sup>103</sup> *Id.* at 163, 164.

<sup>104</sup> *Id.* at 165 (citing CPL § 210.05, which provides, “The only methods of prosecuting an offense in a superior court are by an indictment filed therewith by a grand jury or by a superior court information filed therewith by a district attorney”).

<sup>105</sup> *Id.* at 166.

<sup>106</sup> *Id.* at 167.

<sup>107</sup> LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 368 (1968).

<sup>108</sup> *Id.* at 3.

mental right of criminal defendants.<sup>109</sup> This was adopted by the American courts, and in 1789, was added to the Bill of Rights.<sup>110</sup>

The Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>111</sup> The privilege against self-incrimination applies to the states under the Fourteenth Amendment.<sup>112</sup> New York State has adopted the language of the Fifth Amendment, providing, for the most part, similar protections under this clause.<sup>113</sup> The privilege against self-incrimination is not limited to criminal cases.<sup>114</sup> The United States Supreme Court has held that this fundamental right applies to both criminal and civil proceedings.<sup>115</sup> In the United States Supreme Court case, *Leftkowitz v. Turley*,<sup>116</sup> the court held that:

The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.<sup>117</sup>

The privilege against self-incrimination, therefore, guarantees every person the right to remain silent when there is real and substantial risk of incrimination.<sup>118</sup> This constitutional privilege also protects against any communication that links “a chain of evidence” that

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<sup>109</sup> STEVEN SALKY & PAUL B. HYNES, *THE PRIVILEGE OF SILENCE* 2 (2d ed.) (2009).

<sup>110</sup> *Id.* at 2, 3.

<sup>111</sup> U.S. CONST. amend. V.

<sup>112</sup> *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that “the Fifth Amendment’s exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States).

<sup>113</sup> N.Y. CONST. art. I, § 6 (stating in relevant part that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself or herself . . .”).

<sup>114</sup> *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (stating “The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, whenever the answer might tend to subject criminal responsibility him who gives it”).

<sup>115</sup> *Id.*

<sup>116</sup> 414 U.S. 70 (1973).

<sup>117</sup> *Id.* at 77.

<sup>118</sup> Jessica Wilen Berg, *Give me Liberty or Give me Silence: Taking a Stand on Fifth Amendment Implications for Court-Ordered Therapy Programs*, 79 CORNELL L. REV. 700, 796 (1994) [hereinafter Berg, *Liberty or Silence*] (citing *Minor v. United States*, 396 U.S. 87, 98 (1969)).

could be used for further prosecution.<sup>119</sup> In *Murphy v. Waterfront Commission of New York Harbor*,<sup>120</sup> Justice Goldberg discussed the values and purposes of the privilege against self-incrimination.<sup>121</sup> He stated:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; . . .<sup>122</sup>

The courts realized that, while the privilege functions as a “shelter to the guilty,” it often provides “protection to the innocent.”<sup>123</sup> The values and purpose of the Fifth Amendment have expanded over the years. More recently, this privilege against self-incrimination has been viewed as providing individuals with their “most treasured protections – preservation of our autonomy, privacy, and dignity against the threat of state coercion.”<sup>124</sup>

The Fifth Amendment right against self-incrimination applies when a communication is “testimonial, incriminating, and compelled.”<sup>125</sup> First, the United States Supreme Court defines testimonial communications as spoken words or actions, whether explicit or implicit, that reveal one’s thoughts, beliefs, or knowledge.<sup>126</sup> Second, a communication is compelled when, by an action of the government or a body of authority, one makes a statement under undue influence, force or coercion.<sup>127</sup> Lastly, a communication is incriminating when a person’s testimony creates a real and ascertainable risk of exposing

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<sup>119</sup> *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Ohio v. Reiner*, 532 U.S. 17, 21-22 (2001) (per curiam).

<sup>120</sup> 378 U.S. 52 (1964).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 55.

<sup>123</sup> *Quinn v. United States*, 349 U.S. 155, 161-62 (1995).

<sup>124</sup> *State v. Reyes*, 2 P.3d 725, 733 (Haw. Ct. App. 2000).

<sup>125</sup> *Hübel v. Sixth Judicial*, 542 U.S. 177, 189 (2004).

<sup>126</sup> *United States v. Hubbell*, 530 U.S. 27, 35, 42-43 (2000); *Doe v. United States*, 487 U.S. 201, 209-11 (1988).

<sup>127</sup> *United States v. Washington*, 431 U.S. 181, 187-88, 190 (1977) (stating that the test for compulsion “is whether, considering the totality of the circumstances, the free will of the witness was overborne” *Rogers v. Richmond*, 365 U.S. 534, 544 (1961)).



himself to future criminal charges.<sup>128</sup> This constitutional privilege, however, is not automatic.<sup>129</sup> Therefore, a defendant must expressly assert his Fifth Amendment right; otherwise, it is waived.<sup>130</sup>

There are, however, two situations where the privilege against self-incrimination is self-executing.<sup>131</sup> The first situation involves custodial interrogations.<sup>132</sup> This situation usually arises when an individual is being interrogated while in police custody.<sup>133</sup> The second situation where the privilege against self-incrimination is self-executing involves penalty cases.<sup>134</sup> The United States Supreme Court has held that an individual's Fifth Amendment privilege is violated when the "State not only compel[s] an individual to appear and testify but also [seeks] to induce him to forgo [his] Fifth Amendment privilege by threats to impose economic or other sanctions 'capable of forcing self-incrimination.'"<sup>135</sup> This is particularly evident in cases where defendants are punished for invoking their Fifth Amendment right and choosing to remain silent.<sup>136</sup>

Defendants in IDV courts find themselves in concurrent proceedings where a judge has access to all their information from their criminal, family and matrimonial cases.<sup>137</sup> This situation creates a risk that the defendant's Fifth Amendment privilege against self-incrimination will be violated because each case is usually heard in

<sup>128</sup> *Id.* at 765-69.

<sup>129</sup> *Minnesota v. Murphy*, 465 U.S. 420, 427-28 (1984).

<sup>130</sup> *Id.*

<sup>131</sup> *Berg, Liberty or Silence*, *supra* note 118, at 712-13.

<sup>132</sup> *Berg, Liberty or Silence*, *supra* note 118, at 712.

<sup>133</sup> *Murphy*, 465 U.S. at 429-30 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

<sup>134</sup> *Berg, Liberty or Silence*, *supra* note 118, at 713.

<sup>135</sup> *Murphy*, 465 U.S. at 434 (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977)).

<sup>136</sup> *Marchetti v. United States*, 390 U.S. 39, 52-53 (1968) ("Substantial hazards of incrimination as to past or present acts plainly may stem from the requirements to register and to pay the occupational tax. In the first place, satisfaction of those requirements increases the likelihood that any past or present gambling offenses will be discovered and successfully prosecuted. It both centers attention upon the registrant as a gambler, and compels "injurious disclosure[s]" which may provide or assist in the collection of evidence admissible in a prosecution of past or present offenses. These offenses need not include actual gambling; they might involve only the custody or transportation of gambling paraphernalia, or other preparations for future gambling. Further, the acquisition of a federal gambling tax stamp, requiring as it does the declaration of a present intent to commence gambling activities, obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes").

<sup>137</sup> *Angiolillo, IDV Court*, *supra* note 88, at 151-52.

one day, one after the other.<sup>138</sup> Furthermore, defendants in IDV courts usually find themselves mandated to Batterers Intervention Programs as part of their plea agreements or conditions of bail.<sup>139</sup> Section A will discuss the concurrent proceedings in IDV courts and their implications for the IDV defendant. It will demonstrate that statements made by defendants during these concurrent proceedings would most likely satisfy the three elements required to establish that a Fifth Amendment right exists.<sup>140</sup> Section B will discuss the treatment mandates imposed in IDV courts and how treatment confessions likely fall under Fifth Amendment penalty cases.<sup>141</sup>

### A. Concurrent Civil-Criminal Proceedings

Courts that combine civil and criminal cases, such as IDV courts, increase the possibility that a defendant's Fifth Amendment right would be violated because the statements that he makes in these proceedings are likely testimonial, coerced, and incriminating.<sup>142</sup> The Supreme Court in *United States v. Ward*<sup>143</sup> stated, "[T]he distinction between civil penalty and criminal penalty is of some constitutional import."<sup>144</sup> Criminal and civil courts have different practices, procedures, and burdens of proof.<sup>145</sup> However, the essential difference between these courts is their purpose.<sup>146</sup> The goal of civil court is to correct a legal wrong by awarding monetary or equitable relief to the plaintiff.<sup>147</sup> The purpose of criminal courts, on the other hand, is to

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<sup>138</sup> *Frequently Asked Questions*, *supra* note 92.

<sup>139</sup> Angiolillo, *IDV Court*, *supra* note 88, at 153.

<sup>140</sup> *See supra* note 125 and accompanying text.

<sup>141</sup> *See supra* note 134 and accompanying text.

<sup>142</sup> *See Ex parte Rawls*, 953 So.2d 374, 387 (2006) (stating "The civil divorce proceeding and the criminal proceeding based on the stalking charge are parallel proceedings, and Bryan's Fifth Amendment protection against self-incrimination in the criminal proceeding is threatened if the divorce proceeding is not stayed"); *Hoover v. Knight*, 678 F.2d 578, 581 (5th Cir. 1982) (recognizing that "[F]ifth [A]mendment issues frequently arise when parallel criminal, civil or administrative proceedings are pending").

<sup>143</sup> 448 U.S. 242 (1980).

<sup>144</sup> *Id.* at 248.

<sup>145</sup> Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1352 (1991) (civil courts have a preponderance of the evidence burden of proof, while criminal cases have a clear and convincing standard, a much higher burden of proof).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

protect society by punishing the defendant.<sup>148</sup> While there is an arsenal of civil remedies, there are more fundamental rights afforded to a criminal defendant because of the severity of punishment he would face should he be found guilty.<sup>149</sup>

Although the privilege against self-incrimination provides broad protections, it is not absolute particularly in civil cases.<sup>150</sup> This becomes a problem for defendants who find themselves in IDV courts where one judge hears these simultaneous proceedings. The factual overlap between these cases creates a particular risk for the defendants in that their statements in one proceeding may be used against them in another.<sup>151</sup> A survey conducted by the Battered Women's Justice Project on specialized criminal domestic violence courts suggested that combined civil and criminal jurisdiction may inappropriately encourage judges and prosecutors to focus on facts that should not influence their decisions in criminal cases.<sup>152</sup>

A study conducted by the Center for Court Innovation regarding the litigant's perspective of IDV courts revealed that only 44% of defendants felt that their cases were treated fairly.<sup>153</sup> In addition, over 75% of defendants reported being unhappy with the judge's decision in their family court case.<sup>154</sup> Their satisfaction with their case outcomes was significantly related to whether they viewed the IDV courts process as fair or not.<sup>155</sup> What is most concerning is that 80%

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<sup>148</sup> *Id.*

<sup>149</sup> See generally Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991).

<sup>150</sup> See *Mertsching v. United States*, 704 F.2d 505, 507 (10th Cir. 1983) (noting that privilege against self-incrimination does not shield tax preparer from giving testimony because penalties are civil in nature); *Attor v. Attor*, 894 A.2d 83, 92-93 (N.J. Super. Ct. App. Div. 2006) (holding that trial court erred when it allowed the wife to assert her Fifth Amendment privilege because statutes of limitations had run and her fear of deportation was only a civil hardship).

<sup>151</sup> Picard-Fritsche, *Litigant Perspective*, *supra* note 24, at 18.

<sup>152</sup> Julie A. Helling, *Specialized Criminal Domestic Violence Courts*, BATTERED WOMEN'S JUSTICE PROJECT 6 (1999), [http://www.bwjp.org/assets/documents/pdfs/specialized\\_criminal\\_domestic\\_violence\\_courts.pdf](http://www.bwjp.org/assets/documents/pdfs/specialized_criminal_domestic_violence_courts.pdf) (stating that victims sometimes ask the prosecutor to dismiss or reduce the charges of the defendant because the victim feared that the defendant would not pay child or spousal support. Judges have also asked prosecutors to dismiss a criminal charge after having granted an Order of Protection against the defendant).

<sup>153</sup> Picard-Fritsche, *Litigant Perspective*, *supra* note 24, at 13.

<sup>154</sup> Picard-Fritsche, *Litigant Perspective*, *supra* note 24, at 18 (noting that 69% "of both victims and defendants reported that they got very little or none of what they wanted" from their family case outcome).

<sup>155</sup> Picard-Fritsche, *Litigant Perspective*, *supra* note 24, at 18.

of both victims and defendants felt the judge used information from their criminal case in making decisions about their family court case, or vice-versa.<sup>156</sup> These results show that having the criminal, family and matrimonial cases under one court to be heard in front of one judge potentially violates the defendant's Fifth Amendment privilege against self-incrimination.

### 1. *Dilemma in Concurrent Proceedings*

The one family-one judge structure of IDV courts can blur the procedural differences between criminal and civil courts thereby increasing the chance that a defendant's Fifth Amendment right would be violated.<sup>157</sup> Although each case in the IDV courts retains its own docket, the fact that one judge hears each case in one day, beginning with the criminal case, places the defendant in a problematic position of whether to remain silent and suffer the consequences, or waive his Fifth Amendment right and suffer possible consequences of this confession.<sup>158</sup>

*Havell v. Islam*<sup>159</sup> highlights the differences among civil, matrimonial and criminal cases, and it also illustrates the dangers had these cases been integrated under one court.<sup>160</sup> In *Havell*, the parties were involved in concurrent matrimonial and criminal cases.<sup>161</sup> The parties were married for twenty-one years with six children.<sup>162</sup> On April 15, 1999, the plaintiff allegedly informed the defendant that she wanted a divorce.<sup>163</sup> On the morning of April 22, 1999, the defendant repeatedly struck the plaintiff's face and head with a barbell, severely injuring her.<sup>164</sup> The defendant was subsequently arrested and charged for second degree attempted murder and first degree assault.<sup>165</sup> Sub-

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<sup>156</sup> Picard-Fritsche, *Litigant Perspective*, *supra* note 24, at 19.

<sup>157</sup> Angiolillo, *IDV Court*, *supra* note 88, at 151-52 (stating that the judge in IDV courts must maintain objectivity because he presides over both family and criminal cases of one family, and "is in possession of the pertinent information on the related cases").

<sup>158</sup> *Cf.* Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549 (1990) (where defendant had to choose between producing her child and possibly being incarcerated or asserting her Fifth Amendment right to remain silent and be in contempt of court).

<sup>159</sup> 718 N.Y.S.2d 807 (N.Y. Sup. Ct. 2000).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 808.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Havell*, 718 N.Y.S.2d at 808.

<sup>165</sup> *Id.*

sequently, the plaintiff filed a divorce action against the defendant.<sup>166</sup> A month later, the defendant was alleged to have violated the terms of his temporary order of protection when he went into the marital residence with his attorney to remove personal property.<sup>167</sup>

The defendant requested a stay for his contempt case.<sup>168</sup> He argued that the concurrent criminal cases, one arising from his attempted murder charge and the other from a violation of an order of protection, would open him to a risk of self-incrimination.<sup>169</sup> Specifically, the defendant argued that testifying about his violation could lead to inferences about his state of mind, which could be used against him in his pending attempted murder case.<sup>170</sup> In deciding whether to grant such stay, the court looked to the factors used by federal courts.<sup>171</sup> Finding that several factors applied in this case, the trial court stayed the criminal contempt proceeding for six months.<sup>172</sup>

In the divorce action, the defendant filed a motion to preclude the plaintiff's offering any evidence concerning his conduct during marriage.<sup>173</sup> The trial court, however, denied the defendant's motion, which the Appellate Division affirmed.<sup>174</sup> The court reasoned that while conduct is generally not considered in determining equitable distribution, there are exceptions to this rule.<sup>175</sup> Specific to this case was the catchall provision, which includes "misconduct that 'shocks the conscience' of the court."<sup>176</sup> Having found that the defendant's conduct falls under this exception, which had been substantiated by several witnesses, the court held that the trial court did not err in considering the defendant's abusive behaviors toward his wife in determining equitable distribution.<sup>177</sup>

This case demonstrates the complexity of domestic violence cases, and how these cases are usually ongoing. This also shows the

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<sup>166</sup> *Havell v. Islam*, 751 N.Y.S.2d 449, 449 (1st Dep't 2002).

<sup>167</sup> *Id.* at 451.

<sup>168</sup> MELISSA L. BERGER ET AL., *NEW YORK LAW OF DOMESTIC VIOLENCE* (2014) (citing *Havell*, 718 N.Y.S.2d 807).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Havell*, 751 N.Y.S.2d at 451.

<sup>174</sup> *Id.* at 451, 455.

<sup>175</sup> *Id.* at 452.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 452-55.

possible dilemma that defendants face when there are concurrent proceedings similar to those in IDV courts. Often, a defendant would have to choose between testifying and risking that his statements would be used against him at a later proceeding or asserting his privilege against self-incrimination and risking other consequences of his silence.

## 2. *Implications for the IDV Defendants*

The construction of IDV courts, where one judge hears all the cases of one family, creates unique issues for the defendants, including having to choose between asserting their Fifth Amendment right and risking the consequences of their silence.<sup>178</sup> Defendants are held to a great degree of accountability in IDV courts because of their frequent interaction with the judge.<sup>179</sup> The judge probes the defendant about his life and compliance with court mandates, such as orders of protection and participation in Batterers Intervention treatment.<sup>180</sup> Judges, prosecutors, caseworkers, probation officers, treatment providers, and sometimes, defense attorneys also meet beforehand to discuss the defendant's progress, or lack thereof, in treatment.<sup>181</sup>

In Suffolk County, New York, all of these participants streamline the court process by sharing information with each other.<sup>182</sup> Prosecutors, although not involved in the defendant's family or matrimonial cases, often observe these hearings.<sup>183</sup> The rationale behind this is that it enables the court to make better, more informed decisions regarding the complexities of domestic violence cases.<sup>184</sup> This streamlining of access to information is a key characteristic of IDV courts.<sup>185</sup> This structure provides several benefits to both the court and victims, which includes efficiency in handling the various

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<sup>178</sup> Julie A. Helling, *Specialized Criminal Domestic Violence Courts*, BATTERED WOMEN'S JUSTICE PROJECT 6 (1999), [http://www.bwjp.org/assets/documents/pdfs/specialized\\_criminal\\_domestic\\_violence\\_courts.pdf](http://www.bwjp.org/assets/documents/pdfs/specialized_criminal_domestic_violence_courts.pdf).

<sup>179</sup> Amanda B. Cissner, Melissa Labriola & Michael Rempel, *Testing the Effects of New York's Domestic Violence Courts*, CTR. FOR CT. INNOVATION 29 (2013) [hereinafter Cissner, *Testing Effects*].

<sup>180</sup> Cissner, *Testing Effects*, *supra* note 179.

<sup>181</sup> Cissner, *Testing Effects*, *supra* note 179, at 28-29.

<sup>182</sup> Keri M. Herzog, Suffolk County District Attorney, Speaker at Touro Law Center Assigned Counsel Defender Plan of Suffolk County Seminar (Feb. 16, 2016).

<sup>183</sup> *Id.*

<sup>184</sup> Angiolillo, *IDV Court*, *supra* note 88, at 151.

<sup>185</sup> Angiolillo, *IDV Court*, *supra* note 88, at 151.

cases of the parties.<sup>186</sup> Nevertheless, the integration of these cases and the process of hearing each case in one day in front of one judge create a potential for a Fifth Amendment violation.

The defendant's statements during these hearings can be considered testimonial because they reveal the contents of his mind.<sup>187</sup> His statements in his criminal case, if used in his civil or matrimonial case, and vice-versa could be considered incriminating.<sup>188</sup> Furthermore, if the defendant is forced to report about his program mandates or adherence to his orders of protection, these statements would be considered compelled, thereby violating his privilege against self-incrimination.<sup>189</sup> Unfortunately, IDV courts seem to minimize and overlook this concern despite its seriousness.<sup>190</sup> Another area where a defendant's Fifth Amendment right might be violated is through mandated participation in a treatment program.

### B. Treatment Mandate as used in IDV Courts

Requiring a defendant to admit to alleged abusive behaviors as part of his plea agreement is a potential violation of his Fifth Amendment right against self-incrimination.<sup>191</sup> Domestic violence courts emphasize the need to keep the victims safe and the offenders accountable for their actions.<sup>192</sup> Accountability not only involves acknowledging one's abusive behavior, but also admitting that one has indeed been abusive toward his partner.<sup>193</sup> This admission could lead to further consequences for a defendant. However, denials could also lead to further consequences as the court might see these as noncompliance.<sup>194</sup> A mandate to participate in a treatment program, therefore, could be considered falling under penalty cases, thereby raising a Fifth Amendment violation.<sup>195</sup>

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<sup>186</sup> Julie A. Helling, Specialized Criminal Domestic Violence Courts, BATTERED WOMEN'S JUSTICE PROJECT 10-12 (1999), [http://www.bwjp.org/assets/documents/pdfs/specialized\\_criminal\\_domestic\\_violence\\_courts.pdf](http://www.bwjp.org/assets/documents/pdfs/specialized_criminal_domestic_violence_courts.pdf).

<sup>187</sup> See *supra* note 126 and accompanying text.

<sup>188</sup> See *supra* note 128 and accompanying text.

<sup>189</sup> See *supra* note 127 and accompanying text.

<sup>190</sup> Angiolillo, *IDV Court*, *supra* note 88, at 152.

<sup>191</sup> Berg, *Liberty or Silence*, *supra* note 118, at 702.

<sup>192</sup> Angiolillo, *IDV Court*, *supra* note 88, at 151.

<sup>193</sup> VIBS Fam. Violence & Rape Crisis Ctr., Program Manual (2006) (unpublished program curriculum) (no file with the VIBS HALT Program).

<sup>194</sup> Angiolillo, *IDV Court*, *supra* note 88, at 153.

<sup>195</sup> See *supra* notes 134-35 and accompanying text.

### 1. *Batterers Intervention Program*

Mandating a defendant to a Batterers Intervention Program<sup>196</sup> before a conviction has been rendered unfairly subjects him to the stigma of being a batterer without a finding of guilt or innocence, which violates his due process rights, and likely violates his Fifth Amendment right against self-incrimination.<sup>197</sup> Treatment mandate is usually part of the defendant's bail condition or plea agreement for a lower sentence.<sup>198</sup> The United States Supreme Court upheld the constitutionality of this type of plea-bargaining, stating:

[W]e cannot hold that it is unconstitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the government who demonstrates by his plea that he is willing to admit his crime and enter the correctional system in a frame of mind that affords hope for successful rehabilitation in a shorted period that might otherwise be necessary.<sup>199</sup>

Most states believe that the interests in facilitating rehabilitation and avoiding the expense of a full trial are sufficient to justify encouraging a guilty plea, despite the potential for unfair pressure on the defendant.<sup>200</sup>

Several appellate courts throughout the United States have permitted court mandates to treatment programs as well as therapeutic confessions.<sup>201</sup> Most courts do not see these as coerced confessions falling under a violation of the Fifth Amendment right against self-incrimination.<sup>202</sup> Instead, judges, in their discretion, view the therapeutic confession as a way to hold respondents accountable in family offense matters.<sup>203</sup> Regardless of whether the therapeutic confession would be appropriate in certain domestic violence matters, a question remains as to whether a defendant's confession or therapeutic accountability "incriminate[s] him in a pending or later criminal

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<sup>196</sup> Wolf, *Planning DV Court*, *supra* note 63, at 9 (noting that New York does not have a unified model or guideline for Batterers Intervention Programs).

<sup>197</sup> Wolf, *Planning DV Court*, *supra* note 63, at 10-11.

<sup>198</sup> Angiolillo, *IDV Court*, *supra* note 88, at 153.

<sup>199</sup> *Brady v. United States*, 397 U.S. 743, 753 (1970).

<sup>200</sup> *Id.*

<sup>201</sup> Berg, *Liberty or Silence*, *supra* note 118, at 954.

<sup>202</sup> Berg, *Liberty or Silence*, *supra* note 118, at 954.

<sup>203</sup> Berg, *Liberty or Silence*, *supra* note 118, at 954.



prosecution.”<sup>204</sup> This then creates another conflict wherein the defendant might construe these programs as punitive instead of rehabilitative.

Interventions for domestic violence offenders begin with a basic philosophy of eliminating the offender’s abusive behavior towards women.<sup>205</sup> The priority of the program at all times is the safety of women and children.<sup>206</sup> In a Batterers Intervention Program, a psycho-educational group modality is utilized to hold the abuser accountable for past abusive behavior while promoting a responsibility for change.<sup>207</sup> A cornerstone of a Batterers Intervention Program is a belief that these defendants abuse their victims in order to gain and maintain power and control over them.<sup>208</sup> While participants in the program may claim that they have benefitted from group participation, this goal is typically secondary to the objective of promoting safety for women.<sup>209</sup>

In order to be accepted into a Batterers Intervention Program, these defendants must agree to three main requirements.<sup>210</sup> First, defendants must make a commitment to change.<sup>211</sup> Second, to show this commitment, defendants are expected to demonstrate strict attendance.<sup>212</sup> Lastly, defendants must make the commitment to act in a nonviolent, non-threatening manner prior to beginning the program.<sup>213</sup> These defendants are, therefore, expected to admit their abusive behaviors toward their victims in order to make these com-

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<sup>204</sup> *Murphy*, 465 U.S. at 435.

<sup>205</sup> VIBS Fam. Violence & Rape Crisis Ctr., Program Manual (2006) (unpublished program curriculum) (on file with the VIBS HALT Program).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* The basic tenets of the program are:

1. Batterers are abusive in order to maintain POWER and CONTROL over their partners
2. Battering is a CHOICE
3. Battering is a LEARNED BEHAVIOR
4. Battering is a CRIME
5. Battering is solely the RESPONSIBILITY of the abuser

*Id.*

<sup>209</sup> VIBS Fam. Violence & Rape Crisis Ctr., Program Manual (2006) (unpublished program curriculum) (on file with the VIBS HALT Program).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

mitments and successfully complete the program.<sup>214</sup>

Treatment providers are required to submit monthly progress reports to the various mandating agencies, including IDV courts.<sup>215</sup> Unfortunately, offenders often deny the commission of an offense and the inappropriateness of their actions.<sup>216</sup> IDV courts and treatment providers believe that before rehabilitation can take place, an individual must first admit and acknowledge that he has a problem.<sup>217</sup> However, to a defendant, admitting and acknowledging the problem is an admission of guilt.<sup>218</sup> Offenders who fail to acknowledge their abusive behavior face the risk of restarting the program or being terminated from the program.<sup>219</sup> This then blurs the lines between the punitive and therapeutic purpose of Batterers Intervention Programs.

In *People v. Bongiovanni*,<sup>220</sup> the defendant was charged with assaulting his wife.<sup>221</sup> He was then mandated to attend a domestic violence program as a condition of his bail.<sup>222</sup> The defendant filed a motion to vacate his bail condition, stating that this was unreasonable.<sup>223</sup> The court, in its analysis, stated that it is authorized, by statute, to set a condition of bail when necessary.<sup>224</sup> It further reasoned that domestic violence requires intense judicial attention because of its complexity and damage to families.<sup>225</sup> The court then related program mandates to orders of protection: that they serve the same purpose of imposing punitive restrictions on the defendant.<sup>226</sup> Moreover, they serve as a reminder to the defendant that his freedom can be rescinded should he fail to comply with the mandate.<sup>227</sup> As such, the

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<sup>214</sup> VIBS Fam. Violence & Rape Crisis Ctr., Program Manual (2006) (unpublished program curriculum) (on file with the VIBS HALT Program).

<sup>215</sup> *Id.*

<sup>216</sup> Jeffrey A. Klotz, et al., *Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and Plea Process*, 15 U. PUGET SOUND L. REV. 579, 581-82 (1992).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> VIBS Fam. Violence & Rape Crisis Ctr., Program Manual (2006) (unpublished program curriculum) (on file with the VIBS HALT Program).

<sup>220</sup> 701 N.Y.S.2d 613 (N.Y. Sup. Ct. 1999).

<sup>221</sup> *Id.* at 613.

<sup>222</sup> *Id.* at 613-14.

<sup>223</sup> *Id.* at 613.

<sup>224</sup> *Id.* at 614.

<sup>225</sup> *Bongiovanni*, 701 N.Y.S.2d at 614.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

court denied the defendant's motion to vacate his bail condition.<sup>228</sup> This case illustrates, what seems to be the general view of IDV courts, that treatment programs are merely tools to punish or further punish a defendant.<sup>229</sup> This emphasizes the concern regarding therapeutic confessions and how they likely violate a defendant's Fifth Amendment right against self-incrimination.

## 2. *Therapeutic Confessions*

IDV courts are part of a much larger system of problem-solving courts.<sup>230</sup> Problem-solving courts are courts aimed at reducing crime and increasing public safety.<sup>231</sup> With increased judicial oversight through weekly or bi-weekly monitoring, intensive pre- and post-sentencing case management or supervision, and a general philosophy of therapeutic and restorative justice, the goal of the problem-solving court is to address the core issues underlying criminal conduct in order to prevent future harm.<sup>232</sup>

However, unlike other problem-solving courts where rehabilitation is the focus, the purpose of IDV courts is not rehabilitation or treatment of offenders.<sup>233</sup> Judges and prosecutors use program mandates in IDV courts as pre-disposition condition of bail and a way to closely monitor defendants.<sup>234</sup> However, if these mandates are purely punitive, then the required confession that the defendant makes in order to be admitted into a program can be said to be coerced and in-

<sup>228</sup> *Id.*

<sup>229</sup> Angiolillo, *IDV Court*, *supra* note 88, at 153. A defendant is warned:

Noncompliance with any of these mandated programs will result in your bail being increased possibly to an amount that you may not be able to make. If this were to occur, you will be housed at the Westchester County Jail awaiting disposition of this case. Noncompliance will result in your case being advanced on the court calendar. We will not wait until the scheduled court date to address noncompliance. In other words, noncompliance will be addressed immediately. If you fail to appear, a warrant will be issued....

Angiolillo, *IDV Court*, *supra* note 88, at 153

<sup>230</sup> Angiolillo, *IDV Court*, *supra* note 88, at 151.

<sup>231</sup> See generally AMERICAN COUNCIL OF CHIEF DEFENDERS, *Ten Tenets of Fair and Effective Problem-Solving Courts*, [http://www.nlada.org/Defender/Defender\\_ACCD/ACCD\\_TenTenets](http://www.nlada.org/Defender/Defender_ACCD/ACCD_TenTenets) (last visited May 3, 2016). (enumerating the Ten Tenets of Problem-solving courts).

<sup>232</sup> *Id.*

<sup>233</sup> Angiolillo, *IDV Court*, *supra* note 88, at 151.

<sup>234</sup> Angiolillo, *IDV Court*, *supra* note 88, at 151, 153.

criminating.<sup>235</sup> Alternatively, a therapeutic confession could fall under the category of penalty cases since defendants who refuse to comply or choose to remain silent are likely to face consequences for their noncompliance.<sup>236</sup>

In *State v. Rickert*,<sup>237</sup> the defendant was arrested and charged with assaulting and harassing his partner, as well as for violating his order of protection.<sup>238</sup> The defendant pled *nolo contendere* to all charges.<sup>239</sup> Part of his plea condition was an order of probation and a mandate to participate and complete a Domestic Abuse Education Program (DAEP).<sup>240</sup>

At the defendant's intake evaluation at DAEP, he denied any abuse behaviors and all the allegations against him.<sup>241</sup> The defendant also denied particular facts relating to his charges,<sup>242</sup> including making verbal threats to kill his victim and intimidating her with a gun.<sup>243</sup> He did, however, admit to other abusive behaviors, such as breaking his own belongings, yelling and screaming at his victim, calling her names, and displaying inconsistent emotions as a form of power.<sup>244</sup> Because of the defendant's denial and lack of insight, the intake worker denied the defendant placement in the domestic violence program, stating, "[H]e made himself unavailable to treatment."<sup>245</sup> Upon receipt of the intake worker's report, the probation officer filed a complaint for violation and revocation proceedings.<sup>246</sup> The complaint alleged that the defendant did not take responsibility for his behaviors associated with these convictions.<sup>247</sup> The trial court revoked the defendant's probation condition as a result.<sup>248</sup>

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<sup>235</sup> See *supra* notes 127, 128 and accompanying text.

<sup>236</sup> See *supra* notes 134, 135 and accompanying text.

<sup>237</sup> 665 A.2d 887 (Vt. 1995).

<sup>238</sup> *Id.* at 888.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> William A. Nelson, *The New Inquisition: State Compulsion of Therapeutic Confessions*, 20 VT. L. REV. 951, 958 (1996) (citing Transcript of Violation of Probation Merits Hearing at 27 (Feb. 7, 1994), *Rickert* (No. 94-187)).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 958 (citing Transcript of Violation of Probation Merits Hearing at 29-30 (Feb. 7, 1994), *Rickert* (No. 94-187)).

<sup>245</sup> *Rickert*, 665 A.2d at 888.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

On appeal, the defendant argued that the revocation of his probation was a violation of his Fifth Amendment privilege against self-incrimination.<sup>249</sup> The defendant felt that he was being penalized for denying facts and behaviors related to his charges to which he never admitted.<sup>250</sup> The court found that the defendant failed to show how refusal to answer questions created a risk of incrimination.<sup>251</sup> Further, the court noted that the defendant was protected “against double jeopardy, [and] faces no threat of subsequent prosecution.”<sup>252</sup> The court, therefore, affirmed the trial court’s decision.<sup>253</sup>

This case illustrates the conundrum faced by defendants regarding mandated programs and treatment confession. Should the defendant choose to stay silent, he would be deemed noncompliant and would have to face consequences from the court.<sup>254</sup> However, if a defendant agrees with the plea agreement or condition of bail and “confesses,” he risks incriminating himself in future proceedings, particularly if he has not been found guilty at the time of his participation in the program.<sup>255</sup>

## V. SOLUTIONS

### A. Stays in Concurrent Proceedings

The structure of the IDV courts is innovative and efficient.<sup>256</sup> It provides a solution to the problem of fragmentation in domestic violence cases.<sup>257</sup> However, it also creates a Fifth Amendment violation risk for the defendants.<sup>258</sup> This comment proposes that IDV courts allow for the civil case to be stayed while the criminal case is pending.

Stays have been used in cases where there were simultaneous

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<sup>249</sup> *Id.* at 887, 888.

<sup>250</sup> *Rickert*, 665 A.2d at 888.

<sup>251</sup> *Id.* at 888-89.

<sup>252</sup> *Id.* at 889.

<sup>253</sup> *Id.*

<sup>254</sup> Angiolillo, *IDV Court*, *supra* note 88, at 153.

<sup>255</sup> Thomas L. Hafemeister, *If All You Have is a Hammer: Society’s Ineffective Response to Intimate Partner Violence*, 60 CATH. U.L. REV 919, 995-96 (2011).

<sup>256</sup> Angiolillo, *IDV Court*, *supra* note 88, at 151.

<sup>257</sup> *Id.*

<sup>258</sup> Julie A. Helling, *Specialized Criminal Domestic Violence Courts*, BATTERED WOMEN’S JUSTICE PROJECT 6 (1999), [http://www.bwjp.org/assets/documents/pdfs/specialized\\_criminal\\_domestic\\_violence\\_courts.pdf](http://www.bwjp.org/assets/documents/pdfs/specialized_criminal_domestic_violence_courts.pdf).

proceedings to protect the defendant from having to make a difficult choice between asserting his Fifth Amendment right or testifying.<sup>259</sup> Federal courts have used the following six factors in deciding whether to grant a stay:

- (1) The extent to which the issues in the criminal case overlap with those presented in the civil case;
- (2) the status of the [criminal] case, including whether the defendants have been indicted;
- (3) the private interests of the plaintiffs in proceeding expeditiously weighted against the prejudice to the plaintiffs caused by the delay;
- (4) the private interests of and burden on the defendants;
- (5) the interests of the courts; and
- (6) the public interest.<sup>260</sup>

Although the decision to grant a stay is dependent on the court and its evaluation of these factors, having this option would decrease the risk of putting a defendant in a difficult position of choosing between remaining silent and waiving his constitutional privilege.<sup>261</sup> As seen in *Havell*, this was beneficial in protecting a defendant's Fifth Amendment right against self-incrimination.<sup>262</sup> Despite this, it has been argued that staying the civil case in a parallel proceeding will cause significant delays.<sup>263</sup> Nevertheless, the unique structure of IDV courts negates this argument.

IDV courts handle all the cases of one family, including criminal, matrimonial, and family.<sup>264</sup> A study has found that it takes longer to reach a disposition in IDV courts than in traditional courts.<sup>265</sup> In fact, family cases take the longest time to process compared to the matrimonial or criminal cases.<sup>266</sup> Since criminal cases in IDV courts generally reach a disposition quickly, staying the matrimonial and family cases would not result to significant delays in court. Furthermore, families in IDV courts generally continue to be

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<sup>259</sup> Michael R. Holt, *Parallel Proceedings in Florida's State and Federal Courts – Fifth Amendment Considerations*, 82 FLA. BAR J. 10 (2008) [hereinafter Holt, *Parallel Proceedings*].

<sup>260</sup> *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 99 (2d Cir. 2012).

<sup>261</sup> Holt, *Parallel Proceedings*, *supra* note 259, at 10.

<sup>262</sup> See discussion *supra* Section IV.A.1.

<sup>263</sup> David A. Hyman, *When Courts Collide: Procedural Intersection and the Rule of Law*, 71 TUL. L. REV. 1389, 1449 (1997).

<sup>264</sup> Picard-Fritsche, *Litigant Perspective*, *supra* note 24, at 1.

<sup>265</sup> Cissner, *Suffolk IDV*, *supra* note 22, at 36.

<sup>266</sup> Cissner, *Suffolk IDV*, *supra* note 22, at 36.

involved with the court even after the conclusion of the criminal case because the defendant is monitored for a period of time post-disposition.<sup>267</sup> Therefore, the structure of IDV courts makes it a viable setting in using civil stays.

### B. Therapeutic Immunity

The premise behind problem-solving courts is to attempt to resolve societal problems by looking at the underlying issues that cause them.<sup>268</sup> Domestic violence is a serious and complicated problem that must be addressed holistically, with the aim of rehabilitating the defendant.<sup>269</sup> Domestic violence is not a victim or a women's problem; it is a batterer's issue.<sup>270</sup> This means that in order to resolve the problem of domestic violence, the focus must be on the batterers.<sup>271</sup> IDV courts then must shift their focus and fully embrace being a problem-solving court, and focus on rehabilitating these defendants.<sup>272</sup> However, many, if not most, of these defendants would be adamant in not complying with treatment mandates or even taking the therapeutic process seriously if they believe that their statements might be used against them in a later proceeding.<sup>273</sup> Thus, this comment proposes that IDV courts use limited immunity with regard to therapeutic confessions.

Therapeutic immunity is a way to encourage defendants to take Batterers Intervention Programs seriously.<sup>274</sup> Instead of being preoccupied with whether their statements would be used against them, which leads to concealment of important therapeutic information, defendants would be able to focus on working on their abu-

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<sup>267</sup> Cissner, *Suffolk IDV*, *supra* note 22, at 44.

<sup>268</sup> Bruce J. Winick, *Therapeutic Justice and Problem Solving Courts*, 30 *FORDHAM URBAN L. J.* 1055, 1060 (2002).

<sup>269</sup> *Id.* at 1057.

<sup>270</sup> Jason Katz, *Violence Against Women – It's a Men's Issue*, TED (May 2013), [https://www.ted.com/talks/jackson\\_katz\\_violence\\_against\\_women\\_it\\_s\\_a\\_men\\_s\\_issue/transcript?language=en](https://www.ted.com/talks/jackson_katz_violence_against_women_it_s_a_men_s_issue/transcript?language=en).

<sup>271</sup> *Id.*

<sup>272</sup> Angiolillo, *IDV Court*, *supra* note 88, at 151.

<sup>273</sup> Bruce J. Winick, *Therapeutic Justice and Problem Solving Courts*, 30 *FORDHAM URBAN L. J.* 1055, 1067 (2002).

<sup>274</sup> Scott Michael Solkoff, *Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs*, 17 *NOVA. L. REV.* 1441, 1485 (1993) [hereinafter Solkoff, *Use Immunity*].

sive behaviors.<sup>275</sup> Moreover, it would advance the goals of IDV courts in maintaining openness among and between the various parties and agencies involved.<sup>276</sup> Despite the benefits of therapeutic immunity, some courts have opposed its use.<sup>277</sup>

It is argued that granting defendants therapeutic immunity would interfere with the prosecution of a criminal case.<sup>278</sup> However, immunity does not mean that a defendant can never be prosecuted.<sup>279</sup> Giving defendants limited therapeutic immunity only means that prosecutors would not be able to use the defendant's statements against him in a later proceeding.<sup>280</sup> The prosecution could still use independently obtained information against the defendant. Therefore, therapeutic immunity not only protects the defendant's Fifth Amendment privilege against self-incrimination, but it also functions as an effective therapeutic tool in the rehabilitation of these defendants.

## VI. CONCLUSION

Society's understanding of domestic violence has come a long way from being a private matter to becoming a public health matter. The goals of specialized courts, particularly IDV courts, which attempt to tackle the complexity of domestic violence in a holistic manner, have served victims and society well.<sup>281</sup> However, IDV courts seem to have overlooked the needs of one party in these cases, the defendants.

Our constitution dictates that the Fifth Amendment protection against self-incrimination is a fundamental right.<sup>282</sup> Nonetheless, the one family-one judge structure of IDV courts creates a situation

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<sup>275</sup> Keith Guzik, *The Agencies of Abuse: Intimate Abusers' Experience of Presumptive Arrest and Prosecution*, 42 L. & SOC. REV. 111, 129 (2008) [hereinafter Guzik, *Agencies of Abuse*].

<sup>276</sup> Angiolillo, *IDV Court*, *supra* note 88, at 151.

<sup>277</sup> Solkoff, *Use Immunity*, *supra* note 274, at 1487-89.

<sup>278</sup> Solkoff, *Use Immunity*, *supra* note 274, at 1487-89.

<sup>279</sup> Solkoff, *Use Immunity*, *supra* note 274, at 1490.

<sup>280</sup> See *Kastigar v. United States*, 406 U.S. 411, 453 (1972) (stating "Transactional immunity, which affords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege").

<sup>281</sup> Picard-Fritsche, *Litigant Perspective*, *supra* note 24, at 20-22.

<sup>282</sup> U.S. CONST. amend. V.



where this fundamental right will likely be violated.<sup>283</sup> Specifically, integrating the criminal, family and matrimonial cases in one court and hearing these cases in one day creates a risk that the defendant's privilege against self-incrimination will be violated.<sup>284</sup> A defendant's statements in these proceedings are testimonial.<sup>285</sup> Moreover, because of the heightened judicial oversight, his statements are likely to be coerced and incriminating.<sup>286</sup> To reduce the risk that a defendant's statements in his family or matrimonial case will be used against him in his criminal case, it is suggested that the civil case be stayed until the resolution of the criminal case.<sup>287</sup>

Furthermore, therapeutic confessions upon admission and participation in Batterers Intervention Programs likely violate the defendant's constitutional privilege against self-incrimination.<sup>288</sup> Construing batterers programs as a mere form of another punishment does not promote the goal of IDV court or problem-solving courts as a whole.<sup>289</sup> It is important that rehabilitation of these defendants becomes a priority in the fight against domestic violence. To achieve defendant accountability, which is one of the primary goals of IDV courts,<sup>290</sup> it is suggested that IDV courts use limited immunity for these defendants. In this way, limited immunity lessens the defendants' concern that their statements during therapy can and may be used against them in a later proceeding.<sup>291</sup> It then allows the defendants to take the program seriously, thereby increasing the chance of rehabilitation.<sup>292</sup> It is important to remember that the constitution affords protection to each and every individual, including domestic batterers, and not just to those deemed deserving by the courts or society.

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<sup>283</sup> *Frequently Asked Questions*, *supra* note 92.

<sup>284</sup> *Frequently Asked Questions*, *supra* note 92.

<sup>285</sup> See discussion *supra* Section IV.A.2

<sup>286</sup> *Id.*

<sup>287</sup> See discussion *supra* Section V.A.

<sup>288</sup> Berg, *Liberty or Silence*, *supra* note 118, at 702.

<sup>289</sup> See *Bongiovanni*, 701 N.Y.S.2d at 614 (stating that treatment programs serves as a reminder to the defendant that the court "can rescind his liberty on his failure to abide by [program mandate] dictates").

<sup>290</sup> Cissner, *Testing Effects*, *supra* note 179.

<sup>291</sup> See discussion *supra* Section V.B.

<sup>292</sup> Guzik, *Agencies of Abuse*, *supra* note 275.