RESTORING BALANCE TO ABUSE CASES: EXPANDING THE ONE-SIDED APPROACH TO TEACHING DOMESTIC VIOLENCE PRACTICE

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INTRODUCTION

"Balance" is an elusive concept in the domestic violence field.[1] Equilibrium can always be threatened by tension between attorney and client, between the parties and the legal system, and, of course, between the parties themselves. Abusive relationships are inherently unbalanced; the abusive partner maintains power and control by systematically overcoming the will of the other partner, often using violence and coercion.[2] When an

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1 Throughout this article, I use the terms domestic violence and abuse interchangeably to mean a pattern of abusive behavior by which one partner uses physical, sexual, emotional, economic, or psychological actions or threats of actions to gain or maintain power and control over an intimate partner; this includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone. *See* Department of Justice, Office of Violence Against Women, *Domestic Violence* (2013), http://www.ovw.usdoj.gov/domviolence.htm [http://perma.cc/8FPJ-TD4Y]. I refer to those who have been abused as such, or as "survivors." I also use gendered language to describe those who have been abused as "she" and the abuser as "he." On a practical level this is to comport with the case study offered within, which highlights how issues of gender bias may affect domestic violence cases in family court. *See infra* Part I.B (explaining use of a dominant narrative of domestic violence) and II.A.2.d (discussing issues of gender bias). Personal practice experience also suggests, and recent research confirms, that domestic violence is "overwhelmingly a crime of men against women." Mike Brigner, *Why Do Judges Do That?*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 13-1, 13-15 to 13-16 (Mo Therese Hannah & Barry Goldstein eds., 2010) [hereinafter DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY] (summarizing recent and reliable studies of domestic violence which show that most domestic violence cases involve female victims and male perpetrators).

2 Lois Schwaeber, *Recognizing Domestic Violence: How to Know It When You See It and How to Provide Appropriate Representation*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 1, at 2-1, 2-2 to

abuse case enters the legal system, therefore, the playing field is anything but level.

The legal system does little to right this imbalance. The pervasiveness of how abuse is popularly misunderstood impedes sufficient legal responses to domestic violence cases.[3] The common beliefs about domestic violence are that if someone is abused they will immediately report it, leave the relationship, and the abuser will be held accountable for his actions.[4] The reality, however, is that the risks of disclosing abuse, separating from the abuser, and taking legal action often outweigh the benefits.[5] Not only can separation make a survivor less safe, but she may find herself worse off from a legal standpoint: facing criminal charges herself, being subject to a retaliatory protective order, or fighting for custody of her children.[6] Even when legal interventions do not cause additional harms, they may offer little help to a survivor whose experience does not conform to what the legal system promises.[7] In either scenario it is the system, not the survivor, which dictates what the survivor's options are.[8]

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3 *See* Barry Goldstein, *Recognizing and Overcoming Abusers' Legal Tactics*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 1, at 18-1, 18-8. *See also* discussion *infra* Part II.A.2.

4 Schwaeber, *supra* note 2, at 2-11 to 2-12 (describing the popular social understandings that make the reality of domestic violence seem counterintuitive).

5 It is well-documented that women face new and escalating safety risks at separation. *See, e.g.*, LUNDY BANCROFT ET AL., THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 124–25 (2012) (citing a series of studies demonstrating the increased risk of violence to women who are attempting to leave their abusers and the higher rates of physical and sexual assaults and stalking among women who have separated from their abusers); *see generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (discussing issues of violence surrounding separation).

6 Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 23–28 (2007) [hereinafter Goodmark, *Law is the Answer?*] (describing the range of dangers the legal system poses to women who have been abused).

7 *Id.* at 33–35 (discussing the ways the legal system fails to deliver on its promises of safety and accountability regarding domestic violence); *see also* Leigh Goodmark, *Clinical Cognitive Dissonance: The Values and Goals of Domestic Violence Clinics, The Legal System, and The Students Caught in the Middle*, 20 J.L. & POL'Y 301, 316 (2012) [hereinafter Goodmark, *Clinical Cognitive Dissonance*] ("Rather than attempting to elicit the details of each woman's individual story of abuse, the legal system looks for a stock narrative, and in the absence of that stock narrative, withholds its benefits.").

8 Goodmark, *Clinical Cognitive Dissonance*, *supra* note 7, at 303, 319–20; *see also* Goodmark, *Law is the Answer?*, *supra* note 6, at 30–33 (explaining how the legal system deprives abused women of agency and dignity).

In custody cases involving domestic violence, the deck is even more stacked against abused women. Custody cases involving abuse have been confounding family court judges, practitioners, and litigants for decades.[9] While contested custody cases make up a very small percentage of the court's docket, most involve abuse allegations.[10] It is in these cases where the most is at stake.[11] By their very nature, domestic violence cases require careful,

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9 In *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, Joan S. Meier provides a historical overview of how the "national conversation about children in families experiencing domestic violence heat[ed] up" in the early 1990s. 11 AM. U. J. GENDER SOC. POL'Y. & L. 657, 659 (2003). Meier contrasts these policy developments with the stark reality that, two decades later (at the time the article was written), family courts were still failing to protect women and children and hold abusers accountable. *Id.* Now, yet another decade later, Jay G. Silverman states the condition of the current problem powerfully:

> Although great strides have been made in raising awareness of violence against women, and despite the significant changes made to institutional practices (e.g. within health care and criminal courts) to promote the safety of abused women and their children, the family courts remain a dark and terrifying gauntlet through which battered mothers must pass in their attempts to protect both themselves and their children from the violence of their ex-husbands.

Foreword, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 1, at xxv.

10 The vast majority (approximately ninety-five percent) of custody disputes are resolved by agreement between both parents. Goldstein, *supra* note 3, at 18-6 to 18-7 (citing studies relied upon in note 13, *infra*). In the small percentage of contested custody cases, it is estimated that anywhere between two thirds (Silverman, *supra* note 9) and ninety percent involve violence by fathers toward mothers. Goldstein, *supra* note 3 at 18-7.

11 When a family is dissolving, the risks to women and children cannot be understated. *See generally supra* note 5. In THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS, the authors examine the full scope of risk abusers pose as parents before, during, and after separation, including but not limited to physical violence. Of particular interest is the authors' comprehensive discussion of abusers' destructive parenting behaviors post-separation. *Id.* at 123–62. This is above and beyond the direct abuse that had been suffered while the family was intact. Justine A. Dunlap, *The Pitiless Double Abuse of Battered Mothers*, 11 AM. U. J. GENDER SOC. POL'Y. & L. 523, 524 (2003) (explaining that children can be the direct targets of abuse and suffer accidental injury when caught in the crossfire of abuse between parents); *see also* CHILD WELFARE INFORMATION GATEWAY, DOMESTIC VIOLENCE AND THE CHILD WELFARE SYSTEM 2–3 (2009), *available at* https://www.childwelfare.gov/pubs/factsheets/domestic_violence/domesticviolence.pdf [http://perma.cc/S9BP-MW3R] (discussing how children exposed to domestic violence are likely to experience difficulties which fall into three main categories: behavioral, social, and emotional problems; cognitive and attitudinal problems; and long-term problems including a greater chance of being abusive and being abused as adults).

individualized analysis of past and potential risk.[12] However, the family court system's limitations make it nearly impossible to meet this need.[13] Instead, courts direct "all efforts and resources . . . at having parents settle their differences and become parenting partners for life."[14] These attempts to level the playing field for both parents have a disproportionately negative impact on abused mothers.[15]

Domestic violence clinics have been working in observance of the tension caused by legal intervention in abuse cases for decades.[16] Domestic violence clinics encourage stu-

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12 *See* Peter G. Jaffe & Claire V. Crooks, *Assessing the Best Interests of the Child: Visitation and Custody in Cases of Domestic Violence*, *in* PARENTING BY MEN WHO BATTER: NEW DIRECTIONS FOR ASSESSMENT AND INTERVENTION 45, 50 (Jeffrey L. Edleson & Oliver J. Williams eds., 2007) [hereinafter PARENTING BY MEN WHO BATTER] ("[D]omestic violence is not a homogenous phenomenon but rather an umbrella term for a range of patterns and behaviors that differ in frequency, severity, intention, and impact.").

13 Courts, particularly those in urban areas, are stretched to their limits by high caseloads, increasing numbers of self-represented litigants, and waning resources. *See* Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 376 (2005) ("The number of unrepresented litigants . . . has surged nationwide, especially in family law cases. Some reports indicate that eighty to ninety percent or more of family law cases involve at least one pro se litigant."); *see also* Peter T. Grossi, Jr. et al., *Crisis in the Courts: Reconnaissance and Recommendations*, FUTURE TRENDS IN STATE COURTS 83–89 (2012), *available at* http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/1-2-Crisis-in-the-Courts.aspx [http://perma.cc/UF5D-SAEM] (summarizing the findings of the ABA Task Force on Preservation of the Justice System with respect to the issue of state court underfunding). Domestic violence cases compound these problems, often requiring supplemental investigations, coordination of multiple services, and additional safety precautions. Jaffe & Crooks, *supra* note 12, at 58. Domestic violence litigation is also more likely to be protracted. *See, e.g.*, T.K. Logan et al., *Divorce, Custody, and Spousal Violence: A Random Sample of Circuit Court Docket Records*, 18 J. FAM. VIOLENCE 269, 276 (2003) (finding that cases involving children and a history of domestic violence are more likely to involve post-decree activity); *cf.* Margaret B. Drew, *Collaboration and Coercion*, 24 HASTINGS WOMEN'S L.J. 79, 89 (2013) (explaining that "competent domestic violence lawyers approach alternative dispute processes with great caution" because they understand that an abusive, coercive spouse may co-opt or manipulate the settlement process).

14 Jaffe & Crooks, *supra* note 12, at 56. The preference for co-parenting is fueled by the myth that increased communication between parents leads to better outcomes for children. BANCROFT ET AL., *supra* note 5, at 177.

15 *See infra* Part II.A.2 (explaining the myths, biases, and double standards which create severe obstacles for abused mothers in family court).

16 Mithra Merryman, in her 1993 survey of curricular offerings about domestic violence, describes one of the pedagogical advantages of domestic violence clinics as confronting the limits of legal interventions for abused women. *A Survey of Domestic Violence Programs in Legal Education*, 28 NEW ENG. L. REV. 383, 400–04 (1993). A more current summary of law school offerings on domestic violence is much needed.

dents to adopt a critical perspective about the legal system,[17] and focus instead on the importance of the attorney-client partnership in generating options for abuse survivors.[18] In support of these efforts, domestic violence clinicians embrace a core set of principles in teaching students how to represent abuse survivors.[19] These principles include "working collaboratively with clients subjected to abuse, client-empowering advocacy, maximizing options for women subjected to abuse, and looking beyond the legal system to redress woman abuse."[20] These approaches attempt to restore some of the imbalance caused by abuse by equalizing power between attorney and client.[21]

However, the way domestic violence clinicians teach about domestic violence practice is anything but balanced. Traditionally, domestic violence clinics haven given almost exclusive attention to the experiences of abused women as they navigate the legal system; these courses are, after all, "uniquely feminist."[22] Yet a survivor's experience does not exist in a vacuum. To contextualize a client's experience, students must account for the competing interests of the other actors in a domestic violence case, namely, the abuser and the system itself. The dangers that accompany failing to acknowledge these complexities—simplifying or pathologizing clients' experiences,[23] substituting the advocate's judgment,

17 *Id.*; *see also, e.g.*, Susan Bryant & Maria Arias, *Case Study: A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering that Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207, 210 (1992).

18 "The best tool we have as attorneys for battered women is our relationship with them." Merryman, *supra* note 16, at 401 (quoting an interview with Professor Lois Kanter, Executive Director of the Domestic Violence Institute at Northeastern University School of Law (Ret.)).

19 Goodmark, *Clinical Cognitive Dissonance*, *supra* note 7, at 302.

20 *Id.*; *see also* V. Pualani Enos & Lois H. Kanter, *Who's Listening: Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLINICAL L. REV. 83 (2002) (describing the educational objectives and methods of Northeastern University School of Law's Boston Medical Center Domestic Violence Project); Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019 (1997) (describing clinical education of students working with women who have been abused).

21 Goodmark, *Clinical Cognitive Dissonance*, *supra* note 7, at 310.

22 Merryman, *supra* note 16, at 385 (explaining that domestic violence programs are "about the violence done primarily to women, taught by women, taken by mostly women students, and involve feminist methodology").

23 Efforts to respect and understand abuse victims' experiences can also give rise to harmful stereotypes. Shalleck, *supra* note 20, at 1043 ("[F]eminist critics, in an attempt to emphasize the agency of women who have been abused and to validate the perspectives of the women themselves, may romanticize the actions and perspectives of the women. . . . Women who are abused may go from being stereotypical victims to stereotypical heroes.").

and predicting outcomes[24]—can have dire consequences.

When a student views a domestic violence case through a narrow lens, the "right" outcome may seem clear.[25] Students bring anything but a balanced perspective about domestic violence to their clinic; indeed, many are righteous in their feminist ideals.[26] Yet these ideals can launch some students on a quest to "save" their client;[27] they may believe that "[j]ustice is whatever it takes for their client to prevail."[28] Other students may treat their client's case as symbolic of a larger plight, and they may see themselves as "soldiers in the battle against the ultimate expression of gender oppression."[29] Under either approach, students may ignore or demonize the abuser, "essentializing" him as the force against which

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24 Enos & Kanter, *supra* note 20, at 98–99 (describing some of the barriers to effective, empowering advocacy for abuse survivors, which include seeing clients as victims, failing to see the complexity of their experiences, and wanting to take control of the decision-making process).

25 Abbe Smith & Ilene Seidman, *Lawyers for the Abused and Lawyers for the Accused: An Interfaith Marriage*, 47 LOY. L. REV. 415, 445–46 (2001) (describing how, to students representing survivors of domestic violence, "the question of justice can appear crystal clear").

26 *Id.* at 446.

27 Law students can be disadvantaged by the combination of their desire to help survivors and their lack of realistic perspective on the law's ability to do just that. Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 CLINICAL L. REV. 167, 189 (1995) (describing how the author's lack of objectivity and inexperience as a student in a domestic violence clinic led her to believe it was her job to "save" her clients); *see also* Shalleck, *supra* note 20, at 1052 ("Some students want to save the woman from the danger they perceive to her or to her children and, therefore, often consciously or unconsciously find ways to impose on her their judgment about what action to take.").

28 Smith & Seidman, *supra* note 25, at 446.

29 *Id. But see* Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 52 (1993) [hereinafter Smith, *Rosie O'Neill Goes to Law School*] (describing the risks of new lawyers "hid[ing] behind externally defined roles"; as the author cautions, "Too often, who we are is what we do").

the survivor must fight.[30] At best, such an approach is simplistic; at worst, it is dangerous.[31]

It is incumbent upon domestic violence clinicians to help students confront the truth that the experiences of abused women in the legal system exist in constant tension with the abuser and the system itself. The questions for domestic violence clinicians then become: how can we paint a more accurate portrait of domestic violence practice, so that students are aware of the challenges they will inevitably face?[32] In light of that reality, what additional tools can we offer students to push back against the practices that continue to disserve those who have been abused? After all, "[w]e want to *mobilize*, not paralyze them."[33]

The answers may lie in looking for new strategies for restoring balance to abuse cases. Instead of simply focusing on advocacy for the abused, this article proposes giving students the simulated experience of consecutively representing both parties to a custody case involving domestic violence, so as to provide them with a more balanced perspective about this field of practice.[34] While it is standard clinical pedagogy to develop a theory of a case

30 Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER RACE & JUST. 531, 547 (2013) ("A victim requires a perpetrator, an identity that is constructed in opposition to the perfect victim."); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1080 (2006) ("The construction of the 'battered woman' identity needs an 'other,' which is an abusive man on the micro level . . . "). *But see* Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J. L. & POL'Y 39, 51 (2009) [hereinafter Goodmark, *Reframing Domestic Violence Law*] ("Essentializing men who batter is as problematic as essentializing women who are battered; both allow judges and legislators to rely on stereotypes in making policy, resulting in policies that are not responsive to the needs of the individuals who come within the system. In fact, essentializing men who batter reinforces problematic stereotypes about women who have been abused."); Smith & Seidman, *supra* note 25, at 452 ("In many cases demonizing—or ignoring—the opponent works to the client's disadvantage.").

31 It can be safer not to disclose abuse during litigation because doing so would antagonize the abuser. *Cf.* Schwaeber, *supra* note 2, at 2-10 ("Many women fail to self-identify as victims of [domestic violence] . . . because of . . . fear that they will not be believed, fear of more serious assaults, or fear of further abuse by their intimate partner."). *See also* Enos & Kanter, *supra* note 20, at 98 ("The advocate who ignores her client's complex reality risks advocating for simple solutions defined by the available services, not by the client's needs. Seeing easy answers and giving simple instructions is much easier than confronting a myriad of complex family dynamics and assessing the value of uncertain and often conflicting institutional interventions.").

32 *See* Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 342–43 (1982) (explaining that because students are "about to make one of the major social role changes of their lives—becoming a lawyer—they . . . will view whatever they learn as some form of preparation for solving problems that they will face in their professional careers").

33 Smith & Seidman, *supra* note 25, at 452.

34 Raja Raghunath, *The "Plus One" Clinic: Adding (Political) Value to the Clinical Experience by*

that considers the perspective of the "other side,"[35] the approach proposed in this article goes beyond *thinking* through both sides, by putting the students *in role* as counsel for both sides.[36] Immersion in a disorienting experience, combined with supervision and feedback,[37] can help students develop the tools to "do justice" in the future by how they lawyer, not just who they represent.[38]

Developing a more balanced perspective need not be an apolitical endeavor, however.[39] This article does not advocate for equalizing the rights of the abuser and the abused; rather

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Representing Landlords Alongside Tenants, 18 CLINICAL L. REV. 245, 250–51 (2011) (advocating for clinics to add at least one case from the "'other side'" to the clinic docket, so as to "lead students closer towards the balanced perspective that many longtime practitioners acquire only after years of exposure to their clients and opponents" (*quoting* W. William Hodes, *Accepting and Rejecting Clients—The Moral Autonomy of the Second-to-the-Last Lawyer in Town*, 48 U. KAN. L. REV. 977, 979 (2000))). Interestingly, Raghunath also suggests domestic violence as a practice area worthy of implementing the "plus one" approach because the two "sides" don't represent stark ideological divides so much as "difference in predictions about future harm." *Id.* at 273 (*quoting* Paul R. Tremblay, *Coherence and Incoherence in Values-Talk*, 5 CLINICAL L. REV. 325, 331 (1998)).

35 Smith & Seidman, *supra* note 25, at 452.

36 Smith and Seidman suggest a "double role-play" in which students from a domestic violence clinic act as counselor for an alleged perpetrator, and criminal defense clinical students counsel a domestic violence survivor. *Id.* at 453. Other clinicians have advocated for programs where students represent parties that are traditionally opposing. The perspective of the "other side" can be incorporated into a student's individual caseload (*e.g.*, Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J.L. REFORM 1 (1997) (describing a clinic where students represent children who have been abused or neglected, the parents accused of those acts, and the agency responsible for investigating the cases)) or collectively into the clinic seminar by comparison of different students' experiences representing opposing sides. *E.g.*, Linda F. Smith, *Benefits of an Integrated (Prosecution & Defense) Criminal Law Clinic*, 74 MISS. L.J. 1239 (2005) (describing an externship clinic where students are placed in both prosecutor and public defender offices, but meet in the same classroom to reflect upon their experiences); Raghunath, *supra* note 34. The pedagogical benefits of these approaches in other contexts are discussed more fully *infra* Part IV.

37 Smith & Seidman, *supra* note 25, at 450–52 (describing the importance of supervision in helping students consider the "big picture" of justice in domestic violence cases); Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing among Simulated and Real Clinical Experiences*, 7 CLINICAL L. REV. 123, 136 (2000) (explaining that supervision can help prevent reinforcement of preexisting prejudices or generalizations based on anecdotal information).

38 Smith & Seidman, *supra* note 25, at 452; *cf.* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 157 (2007) ("Faculty who teach . . . courses that are closely connected with practice have perhaps the greatest opportunities to show students what it means to practice law with integrity.").

39 Raghunath, *supra* note 34, at 254.

it advocates for righting the power imbalance that is inherent between the parties to an abuse case and the legal system. Specifically, this article provides guidance on how to teach students to safely and responsibly represent an abusive parent.[40] This type of representation relies on students' abilities to abandon the myopic definitions of zealous advocacy they may bring to a clinical course, instead helping their client make constructive decisions in pursuit of realistic and legitimate goals.[41] I suggest that the skills which are traditionally taught to law students working with those who have been abused—developing a client-centered narrative, engaging in safety-conscious problem-solving and pursuing risk reduction through legal action[42]—can be applied to representation of the abusive parent. The suggested strategies rely on understanding the dynamics of abuse, considering the risks an abuser can pose to a survivor and children post-separation, and taking steps to promote the family's recovery. The goal, therefore, is not to confuse students' loyalties, but rather to give them the "skills, opportunities, and resolve" to act on the ideals that most of them bring into a domestic violence clinical course: to promote safety and healing from abuse.[43]

Part I of this article describes a family law litigation course that introduces students to the dilemmas facing attorneys in a custody case involving domestic violence. Part II tells the story of the parties to the case explored in the course from the perspective of each parent, using the narratives as a vehicle for examining how the dynamics of abuse could play out for each party in family court. Part III introduces specific strategies for teaching students to represent an abusive father that reinforce the theoretical and practical underpinnings of domestic violence advocacy. Finally, Part IV discusses the potential implications of this exercise for bringing balance to individual families, to the field of domestic violence practice, and beyond.

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40 The exercise operates from the premise that all actors in a domestic violence case have a responsibility to identify and address risk of harm to those who have been abused. *See* discussion *infra* Part III.A; *see also* Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System,* 37 FAM. & CONCILIATION CTS. REV. 273, 289 (1999) ("Every actor in the family court system should look at every case assuming that it may involve an abusive relationship and the potential for violence. He or she must then ask: (1) How will I find out if violence is a possibility here? (2) How will I gauge the level of risk involved? and (3) What steps can I take to get my job done and contribute to an appropriate outcome while keeping everyone safe?").

41 *See* discussion *infra* Part III.A.

42 *See* sources cited *supra* note 20.

43 Christopher Eisgruber, *Can Law Schools Teach Values?*, 36 U.S.F. L. REV. 603, 610 (2001).

I. Capturing the Realities of Domestic Violence Practice in the Classroom

The Family Law Litigation Practicum exposes students to domestic violence practice in family court through simulated and real casework. The foundation of the course is a seminar, open to up to twelve upper-level students, which approximates domestic violence practice by simulating litigation of a divorce case involving abuse.[44] In recent years, I have co-taught the seminar with an experienced family law practitioner; this pairing optimizes the learning experience by combining advanced skills instruction with an expert perspective from the field.[45] Students also have the option of participating in part-time experiential placements with family law practitioners during the academic quarter in which the seminar is offered, to be followed by a full-time legal internship with that practitioner as part of Northeastern's Cooperative Legal Education Program.[46]

The seminar component of the course has been structured as an extended simulation during which students represent the parties to a divorce from initial client interview to trial of contested issues. The representation of both parties is consecutive. As one team, the student attorneys represent the wife in the early stages of the case. After the husband files for divorce, the students divide into two teams to represent both husband and wife going forward, switching teams halfway through the litigation.[47] Students are responsible

44 The seminar is a reiteration of Advanced Family Law Litigation, a course developed and taught for many years by Professor Clare Dalton, founder and former Executive Director of Northeastern's Domestic Violence Institute (Ret.). Clare's wise counsel and generosity with her materials in support of my efforts to teach the course cannot be understated. Nor can her brilliance in creating the story of Meg and Steve and this course as a vehicle for telling it. I continue to be amazed by the careful nuance of the underlying fact pattern, the pedagogical value of each aspect of the curriculum, and the cumulative effect of so closely replicating domestic violence practice for students. Of course, the fact that the court's treatment of domestic violence cases as captured by this course has not needed modification for over a decade is disheartening, but provides evidence of the need for further systemic change as this article suggests.

45 I have been fortunate enough to co-teach this course for the past several years with Janet Donovan, Manager of the Legal Advocacy Program at Casa Myrna Vazquez, a Boston-area domestic violence agency. Janet brings an unparalleled breadth and depth of expertise as a family law attorney for those who have been abused.

46 Following the first year of traditional academic study, Northeastern University School of Law operates on a quarter system wherein students alternate three months of academic coursework with three months of full-time work as a legal professional.

47 The litigation proceeds as follows, with minor variations each year: the wife contacts an attorney to explore her options for separating from her husband. The student attorneys all represent the wife in seeking a protective order. The husband appears at the extension hearing and serves the wife with a complaint for divorce. At this point, the students divide into two teams to represent both parties going forward, switching teams halfway through the case. Motions for temporary custody and visitation, child support, and the

for drafting most pleadings, maintaining a mock case file, and preparing and presenting oral argument to the court.[48] Tracking one case through the family court from start to finish gives the students a specific context in which to apply substantive and procedural family law and to anchor their skill development.[49] We also use "actors" to play the wife and husband, who are given a degree of artistic license in their depictions of the clients in order to add complexity and authenticity to the attorney-client relationship.[50] While nothing can compare to the experience of representing real clients, the actors' portrayals are critical in helping the students define, embody, and execute their attorney roles.[51]

The theoretical question underpinning this course is how domestic violence should factor into a custody determination. Exploring these difficult issues in a simulated context can be a highly effective learning experience because the consequences of students' decisions are seen more immediately, and the student can take risks without causing actual harm to a client.[52] This is a key advantage in domestic violence cases, where clients' lives are quite literally on the line.[53]

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appointment of a guardian ad litem are drafted and argued. Alimony and property division are settled through financial negotiations; what remains unsettled, however, are custody and parenting time. The case proceeds through a pretrial conference to a trial of these contested issues.

48 Family law practitioners with domestic violence experience participate as judges for every courtroom simulation. These roles are unscripted. We have found that their sensitivity to issues of abuse does not create a bias towards the abused mother; rather, the judges use their relevant experience to recreate the most common questions and challenges encountered in the family court.

49 "[B]ecause . . . students learn material best when it is presented in context, the holistic experience of simulations along with the exigencies of having to solve a particular problem for a particular client combine to construct an ideal environment for students to learn both the nuts and bolts and the finer points of legal analysis." Kris Franklin, *Sim City: Teaching "Thinking Like a Lawyer" in Simulation-Based Clinical Courses*, 53 N.Y. L. SCH. L. REV. 861, 873 (2009). Contextual learning also motivates students because it is active, relevant, and different from most other educational methods. Paul S. Ferber, *Adult Learning Theory and Simulations - Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417, 430–31 (2002).

50 In the history of the course, the parties have been played by everyone from professional actors to law students auditing the course. In recent years, we have found family law practitioners who work with survivors of domestic violence to be the most effective actors. Their daily work "in the trenches" allows them to bring depth and realism to their characters.

51 *See* Ferber, *supra* note 49, at 437 (suggesting that simulations can better approximate the "human dimension" of lawyering that is often neglected in traditional legal education).

52 *Id.* at 431.

53 Smith & Seidman, *supra* note 25, at 446.

The greatest drawback of a simulation, of course, is that it can only approximate one version of reality, to the exclusion of the experiences of many clients. This is an especially important consideration in domestic violence cases, where individual experiences of abuse must be understood in relation to the intersecting identities of those it affects.[54] The most important caveat about this course is that it tells the story of a dependent, heterosexual, middle-class female victim—the paradigm of whom domestic violence affects.[55] There has not been extreme physical or sexual violence between the parties, nor has there been action by the criminal justice or child protection systems against either parent. This is not the experience of many survivors of domestic violence, and in many respects not the type of case where an attorney may be most useful; the most marginalized clients may benefit the most from representation. Furthermore, the use of a dominant narrative can itself contribute to the systemic problems we are trying to highlight in the course by further marginalizing the experiences of survivors who do not conform.[56]

However, this story is instructive with respect to our stated course objectives. By de-

54 "Intersectionality is the primary framework used by feminist scholars to analyze the significance of co-occurring identities to the issue of domestic violence." MacDowell, *supra* note 30, at 542 (citing additional sources at 542 n.40). Sexual orientation, race, class, immigration status, disability status, religion, and geographic location are all part of a survivor's identity which intersect to shape her experience of abuse. Goodmark, *Clinical Cognitive Dissonance, supra* note 7, at 312. The intersectional framework has also been extended to analyze the identities of perpetrators. *See generally* MacDowell, *supra* note 30.

55 MacDowell, *supra* note 30, at 533 ("[T]he perfect victim . . . is generally identified as passive, dependent, white, middle-class, heterosexual, and female."); Morrison, *supra* note 30, at 1078–86 (describing in detail the abuse victim identity constructed by the legal system: "The battered woman, for whose benefit most anti-domestic violence laws and policies were enacted, is white, heterosexual, and middle-class."); Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 82–92 (2008) (describing the "paradigmatic victim" as passive, white, and straight). The reality, however, is that "women who experience domestic violence are . . . rich, poor, middle class, African-American, Latina, Asian, white, Native American, immigrant, disabled, able-bodied, gay, straight, transgendered, rural, urban, self-defensive, aggressive, frightened, and angry." Goodmark, *Reframing Domestic Violence Law*, supra note 30, at 41. While statistics on intimate partner violence are inherently difficult to obtain, a 2007 study revealed the following: women ages twenty to twenty-four are generally at the greatest risk of nonfatal intimate partner violence, and women of color experience intimate partner abuse at equal if not higher rates than white women, with American Indian and Alaska Native women experiencing the highest overall rates of intimate partner violence. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES (2007), *available at* http://www.bjs.gov/content/pub/pdf/ipvus.pdf [http://perma.cc/U9DQ-2VRC].

56 "The exclusion of victims who are perceived as not conforming to the perfect victim stereotype from needed services or legal protection—including victims of color, victims in same-sex relationships or who are transgender, and victims who fight back—is well-documented." MacDowell, *supra* note 30, at 533 (citing additional sources at 533 n.4).

sign, simulations allow students to contend with challenging issues in an environment that has been controlled for practical and pedagogical purposes.[57] Controlling for the presence of domestic violence brings several myths about abuse to the forefront. The first is the popular belief that abuse allegations must be evaluated in an innocence or guilt framework. By not having the husband deny the abuse outright, students must instead grapple with how to frame the "bad facts" before them.[58] Second, the nature of the abuse in the case illustrates where a family court's treatment of domestic violence issues can be most insidious.[59] This prompts students to wrestle with tough questions of how abuse manifests in a relationship, whether it is tied to parenting capacity, and whether it rises to the level that it should be a significant factor in determining a custody arrangement. Finally, the story attempts to highlight the competing interests of two parents and a legal system all with different ideas about what is best for the children. The students in turn face difficult decisions about what kind of legal strategy will help them best promote the children's well-being while fulfilling their responsibilities to their respective client. In this sense, the course aims to introduce students to the very real dilemmas facing attorneys in domestic violence cases.

II. Two Sides of A Domestic Violence Case

When domestic violence is alleged, there is usually little "hard evidence."[60] With limited resources to conduct their own investigations, judges are often left to make critical cus-

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57 Ferber, *supra* note 49, at 432.

58 There are certainly cases where the allegations of domestic violence are simply that: allegations. In those cases, the alleged abuser indeed deserves an advocate who will assert his innocence. Studies suggest, as does this author's experience, that true allegations of domestic violence are denied more often than false allegations are made. For further discussion of the myth of false abuse allegations in family court, *see infra* Part II.A.2 and study cited *infra* note 64.

59 As explained *supra*, the facts of our case do not involve extreme or frequent physical or sexual violence. In cases of arguably "lower-level" violence, "the risk to children from batterers is often underestimated." BANCROFT ET AL., *supra* note 5, at 162. In most custody cases where children are exposed to "disturbing or unsafe conditions, including substance abuse, allowing physical hazards to be present in the home, or engaging in criminal activity," courts don't have a difficult time deciding an appropriate custody arrangement; domestic violence cases continue to appear to be the exception. *Id.* at 42–43.

60 Evan Stark, *Reframing Child Custody Decisions in the Context of Coercive Control*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 1, at 11-1, 11-8 to 11-9 (discussing the reality that in most abuse cases, the majority of physical assaults are relatively minor (e.g., pushing, grabbing, and slapping), thus they don't require medical attention and do not trigger court involvement); *see also* Jaffe & Crooks, *supra* note 12, at 51 ("Even a good family lawyer may have considerable difficulty in establishing that abuse occurred if there is a lack of corroborative evidence of the victim's allegations.").

tody decisions with little information beyond the irreconcilable accounts of the parents.[61] Using the story told through our course as a case study, the following section illustrates some of the challenges that arise from the competing narratives of the parties to a family law case involving abuse. Each party's narrative highlights the complex dynamics of domestic violence, with a focus on the ongoing risks to the abused parent and the children during and post-separation. With these narratives as context, I then examine how abusive dynamics could play out in family court in light of pervasive myths, stereotypes, and biases regarding abuse.

A. The Abused Mother

1. Meg's Story

Imagine that you are meeting with a potential client, Meg Jones. Meg's husband Steve has just filed for divorce. Meg believes this was in retaliation against her for having obtained a restraining order; in fact, Steve served her with the papers in court on the day of the restraining order hearing. Steve is asking for custody of the couple's two children, five-year-old Chris and two-year-old Ariel.

Meg tells you that she sought the restraining order because she had become increasingly concerned about how her children, particularly Chris, were being affected by problems in the home. Chris was having nightmares and difficulty separating from Meg at pre-school. After Steve instigated a fight in front of the children about Meg having thrown a birthday party for Chris without Steve's knowledge, Meg decided that she "needed some space" and took the kids to stay with her parents for a long weekend. Steve confronted her there, grabbing her by the arms hard enough to leave bruises, and telling her to come home "or else." The next day, he repeated his threat over the phone, scaring her enough that she sought a protective order.

As you encourage Meg to talk more about her marriage to Steve, she describes a relationship characterized by Steve's criticism of her parenting, ability to run the household, and lack of emotional support for him. She admits that she avoids arguments with Steve because his unpredictable moods place her on edge. Meg discloses two earlier incidents of physical abuse, the first over two years ago while she was pregnant with Ariel. Steve had accused Meg of flirting with a waiter, and during the ensuing argument at home he grabbed Meg's ankle while she was walking upstairs, causing her to stumble and land on her stomach. Though Meg wasn't seriously injured, the incident took a toll: she began to

61 BANCROFT ET AL., *supra* note 5, at 124; Jaffe & Crooks, *supra* note 12, at 50–51.

have difficulty sleeping, and had to rely more heavily on Steve's mother, who lives in the apartment upstairs, to help her care for Chris.

After Ariel's birth, Meg's symptoms worsened. She was ultimately prescribed an anti-depressant and mild sleep aid by her doctor, and began seeing a therapist every other week. One evening about six months ago, Meg was late coming home from one such appointment. Steve demanded to know where she had been, and Meg asked if she could first put the kids, who were visibly upset by all the yelling, to bed. Furious, Steve followed Meg into their bedroom, pushed her down onto the bed, and slapped her across the face when she tried to turn away from him.

Meg had never intended anything more than a temporary separation when she left Steve a few weeks ago, but the events of those weeks have raised new concerns. Meg is worried about her ability to get by without Steve's support. She hasn't worked since she first became pregnant, and Steve is self-employed as a contractor, having inherited the family business after his father's death. Steve has kept such a tight hold on the family finances that Meg does not even know what might be available to her.

More importantly, Meg is concerned that Steve is pushing boundaries with respect to the children. Pursuant to the restraining order, Steve was allowed limited parenting time on the weekends, facilitated by Meg's father. At the most recent exchange, Steve asked permission to take Chris to a professional sporting event on a school night; he did this in front of Chris, having already gotten the child excited about the opportunity. When Meg later declined, thinking it was not an appropriate outing for a five-year-old, Steve left an angry voicemail at her parents' house. Meg noticed that Chris was particularly glum after the next visit with his father. He told her that he was upset about not getting to go the game, and that Steve had said it was okay for him to "show mommy how angry he was."

When you ask Meg what kind of relationship she envisions the children having with Steve, she explains that her dilemma is twofold. Meg does want to nurture the children's relationship with Steve. The kids ask about him often, and Chris in particular gets excited about every visit and phone call with Steve. On the other hand, Meg thinks that Steve is using parenting time as an opportunity to advance his own agenda of "punishing" her for breaking up the family. She does not feel comfortable communicating directly with Steve about the children yet. Meg is scared to be alone, but even more scared about Steve's reaction to any steps she takes to protect and provide for herself and the kids.

2. Taking Meg's Story to Court

Meg's situation exemplifies the dilemmas facing a survivor of domestic violence in a custody case. The following section will explore how pervasive myths and biases create severe obstacles for abused mothers in family court. This is well-traveled territory for domestic violence scholars and practitioners, and serves to illustrate the context in which abuse cases are litigated in family court.

a. The Myth of False Allegations

The first decision Meg faces is whether to disclose the abuse to the court.[62] Given that Steve filed for divorce first, Meg has found herself in a defensive position; if she now raises allegations of domestic violence in court, her motives will likely be questioned.[63] The belief persists that litigants "cry" domestic violence to gain an advantage in family court, despite the fact that "[f]alse denials of true allegations are actually much more common than false allegations are."[64] Family court professionals may presume allegations are false because they are suspicious of how often domestic violence appears in cases they see, even though rates of abuse have been shown to increase with family court involvement.[65] Disclosures of abuse in family court proceedings continue to be met with skepticism about why it was never reported before, despite the range of valid reasons.[66]

Demonstrating abuse is an uphill battle. Custody statutes which take domestic violence into consideration generally require a preliminary showing that there has been abuse in order to trigger a presumption against shared custody, or to implement other protections.[67]

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62 *See* Goodmark, *Clinical Cognitive Dissonance, supra* note 7, at 316–17 (describing the "internal checklists" that judges, among others, are looking to satisfy when deciding whether to act on stories about abuse).

63 Brigner, *supra* note 1, at 13-13 ("The incredulity with which courts greet reports of abuse from battered women is well known.").

64 BANCROFT ET AL., *supra* note 5, at 143 (citing Peter Jaffe et al., CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY (2003)). Bancroft et al. note that professionals rarely report or punish false denials of true allegations of abuse, which may contribute to the general preoccupation with the rare cases of false allegations. *Id.*

65 BANCROFT ET AL., *supra* note 5, at 153.

66 "It is widely recognized that battered women sometimes tell no one about the abuse prior to separation because of shame, fear, and many other factors." *Id.* at 160 (quoting Dalton, *supra* note 40, at 281–82).

67 As of 2012, twenty-three states and the District of Columbia have statutes that provide for a rebuttable

In many cases like Meg's, there is no "paper trail" of the domestic violence because it was never disclosed to police or medical professionals prior to separation from the abuser.[68] Even those survivors who have obtained restraining orders or other relief from lower courts may find that family court judges find that information neither helpful nor persuasive.[69] In the absence of "hard evidence," the court may trivialize survivors' experiences of abuse,[70] especially when criticism, isolation, and financial control are not included in the court's definition of domestic violence.[71]

presumption that sole or joint physical or legal custody is not in the best interests of the child and should not be awarded to the perpetrator of domestic violence; the standard of proof required to trigger the presumption varies. NAT'L COUNCIL OF JUVENILE AND FAM. COURT JUDGES, REBUTTABLE PRESUMPTION STATES (2012), *available at* http://www.ncjfcj.org/sites/default/files/chart-rebuttble-presumption.pdf [http://perma.cc/A9UY-HBD9]. Twenty-nine states have statutes requiring that domestic violence be considered in custody determinations, either giving its presence extra weight in the best interests of the child analysis, or making an exception to considering certain best interests factors when there has been domestic violence. NAT'L COUNCIL OF JUVENILE AND FAM. COURT JUDGES, DOMESTIC VIOLENCE AS A FACTOR TO BE CONSIDERED IN CUSTODY/VISITATION DETERMINATIONS (2013), *available at* http://www.ncjfcj.org/sites/default/files/chart-custody-dv-as-a-factor.pdf [http://perma.cc/U9KG-YZD4]. Our course uses Massachusetts law, which provides for a rebuttable presumption and considers domestic violence to be a factor contrary to the best interests of the child. MASS. GEN. LAWS ANN. ch. 208, § 31A (West 2014).

68 Even when abuse is documented, poor record-keeping and information-sharing systems may prevent that information from making its way to the family court. Jaffe & Crooks, *supra* note 12, at 51 (citing Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 1013 (2005)) (demonstrating that many documented histories of abuse do not get raised in divorce cases).

69 Despite the fact that many custody statutes consider the presence of a restraining order as a factor relevant to an abuse finding, its existence alone may not trigger the protections contemplated by the statute. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 208, § 31A (West 2014) (stating that the issuance of a protective order "shall not in and of itself" trigger the presumption against an award of custody to the abusive parent, and is not admissible to show that a "pattern or serious incident of abuse has occurred"). The facts underlying the issuance of the order may be considered, but the weight those facts will be given becomes a matter of judicial discretion. *Id. See also* Dana H. Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 198–202 (2009) (suggesting that statutes which provide for a presumption against an award of custody to an abuser place nearly insurmountable requirements on abused mothers).

70 *See* Stark, *supra* note 60, at 11-8 to 11-9 (explaining that professionals expect physical violence to be frequent and extreme, which is often not the case).

71 *See* BANCROFT ET AL., *supra* note 5, at 203–04 (suggesting that psychological and emotional abuse are under-recognized by family courts). Many domestic violence and custody statutes define abuse as actual or threatened physical or sexual violence. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 208, § 31A (West 2014). For a broader discussion of how civil domestic violence law ignores the full scope of harms affecting abused women, *see* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107 (2009).

b. The Myth that Abuse Ends at Separation

If Meg can meet the burden of establishing that there has been domestic violence, there is no guarantee that the court will find it relevant to a custody determination.[72] Although family courts have made significant progress in recognizing the impacts on children of witnessing abuse in the home,[73] they continue to fail to see why children are still at risk once the parents are no longer together.[74] When courts focus superficially on the violence between the parents rather than on the harmful attitudes that underlie the abusive parent's behaviors,[75] it is presumed that the violence—and the risk of children's exposure to it—ends at separation.[76] Abusive behaviors themselves are not viewed as a parenting decision.[77] The burden then falls on the protective parent to give independent reasons as to why the abusive parent's access to the children should be limited post-separation.[78]

Ongoing abusive dynamics can also be obscured by the belief that both parents are to blame for protracted custody litigation.[79] Mutuality of blame is evident in the language

72 Numerous studies confirm that family courts remain reluctant to consider abusive behavior as a reflection on parenting or as a factor in determining custody. *See* Sharon K. Araji & Rebecca L. Bosek, *Domestic Violence, Contested Child Custody, and the Courts: Findings from Five Studies*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 1, at 6-1, 6-6 to 6-7; BANCROFT ET AL., *supra* note 5, at 142–43 (citing studies with similar findings in numerous jurisdictions).

73 Two prominent judicial guides published by the National Council of Juvenile and Family Court Judges explain that children are impacted by exposure to domestic violence, but both focus on exposure to physical violence between parents. CLARE DALTON ET AL., NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE'S GUIDE 9–10 (2006), *available at* http://www.ncjfcj.org/sites/default/files/navigating_cust.pdf [http://perma.cc/HV86-QM58]; JERRY J. BOWLES ET AL., A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES 6 (2008) *available at* http://www.ncjfcj.org/sites/default/files/judicial%20guide_0_0.pdf [http://perma.cc/6R4K-L9HK].

74 BANCROFT ET AL., *supra* note 5, at 143.

75 *Id.* at 178 (explaining how the dominant typologies judges use to assess risk define that risk as exposure to continued violence against the abused parent).

76 Brigner, *supra* note 1, at 13-10. *But see supra* notes 5 and 11 (discussing range of post-separation risks to women and children in abuse cases).

77 Abuse of one parent by another shows serious irresponsibility about the children's well-being and should be reflective of their ability to make positive decisions in the future. Meier, *supra* note 9, at 705 ("By definition, a father who abuses the mother has indicated that he cannot put the children's interests first, since their mother's abuse, by undermining her well-being, [is] inherently harmful to the children.").

78 BANCROFT ET AL., *supra* note 5, at 214.

79 *Id.* at 165–66. The mutuality of blame can also be miscast as circumstantial to the divorce or custody

used in court to "soften" domestic violence and avoid the reality that one parent is usually responsible for the abusive dynamics in the family.[80] Particularly problematic is the term "high-conflict divorce[;]" at the core of this theory is a presumption of mutuality of inappropriate behaviors between parents.[81] In short, courts want to call domestic violence anything but what it is. This predisposition can plays directly into the abuser's favor by allowing him to frame the abuse as mutual, trivial, or simply a symptom of marital discord.[82]

c. The Bias Towards Co-parenting

Meg's safety concerns may be overridden by the court's bias towards co-parenting. Indeed, the tension is palpable in Meg's own desire for the children to have an ongoing relationship with Steve, just only if it is under circumstances that promote safety, accountability, and structure.[83] The "best interests" standard itself presumes that parents should have equal rights to their children; even when there has been abusive misconduct, a presumption against an award of custody to the abusive parent can be rebutted by showing that such an order would be in the children's best interests.[84] Judges and custody evaluators

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case, as is demonstrated by the belief that people "behave badly" due to the stresses of litigation. Goodmark, *Law is the Answer?*, *supra* note 6, at 11–13 (explaining that family court judges misinterpret parties' "bad behavior" during litigation, ignoring the connections to underlying abusive dynamics in the family).

80 Jaffe & Crooks, *supra* note 12, at 47 ("In the average courtroom, the terms *domestic violence, conflict,* and *abuse* may be used interchangeably, without any clear definition or understanding of these terms."). Even in cases identified as involving "violence and abuse," the cause of the difficulties is attributed to "dysfunctional families" and parents' "limited capacity to cooperate," not the abuser's behavior. BANCROFT ET AL., *supra* note 5, at 165 (quoting Janet R. Johnston & Linda E. Campbell, IMPASSES OF DIVORCE xv (1988)).

81 Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11 (2003); BANCROFT ET AL., *supra* note 5, at 164–65.

82 For example, Steve characterizes the violent incidents as "spats" stemming from marital discord and a failure to communicate. *See infra* Part II.B.1.

83 In a 2003 study of shared parenting among African American couples with histories of domestic violence, the two assumptions framing mothers' perspectives on co-parenting were the need for fathers' access to their children, and the need for their own safety. Carolyn Y. Tubbs & Oliver J. Williams, *Shared Parenting After Abuse: Battered Mothers' Perspectives on Parenting After Dissolution of a Relationship, in* PARENTING BY MEN WHO BATTER, *supra* note 12, at 19, 26–28. The authors found that the former belief was based largely on "popularized or outdated notions of child-development theory, or cultural mores," and contradicted more recent research showing that children benefit less, rather than more, from contact with abusive parents. *Id.* at 41.

84 These standards come from Massachusetts law, which is used in our course. *See* MASS. GEN. LAWS ANN. ch. 208, § 31 (West 2014). ("In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal."); MASS. GEN. LAWS ANN. ch. 208, § 31A (West 2014) ("A . . . finding, by a preponderance of the evidence, that a pattern or serious incident of abuse

operate from the premise that children's interests are best served by extensive contact with both parents, and that parental equality should be the overriding concern.[85] However, the ideas of fairness and equality have become conflated in family courts: a "fair" outcome is seen as shared legal custody and equal parenting time between the two parents, though this rarely approximates the division of caretaking and decision-making responsibility that existed pre-separation.[86] Shared parenting is even less likely to be possible going forward in a relationship characterized by domination of one partner by the other.[87]

In prioritizing co-parenting over safety, a judge may see Meg's request for sole custody or supervised visitation as chilling Steve's participation in the children's lives.[88] Meg may appear malicious rather than protective, as courts give significant weight to whether a parent is willing to promote a relationship between the children and the other parent.[89] Despite

has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child."). *See supra* note 67 for summaries of other states' custody and domestic violence laws.

85 *See* BANCROFT ET AL., *supra* note 5, at 150–53 (citing studies which show that evaluators are strongly biased towards recommending ample visitation with the noncustodial parent, against the wishes of children and their mother, and despite a dearth of research showing that children do better when they spend more time with the noncustodial parent; in fact, research suggests that outcomes are actually worse for children under those circumstances).

86 *Id.* at 149. Abusers are characteristically under-involved in children's daily caretaking and as such are often unreliable in being able to provide information like names of teachers, details of medical conditions, names of doctors, or a description of children's interests, strengths, and ambitions—exactly the type of information critical to a "best interests" evaluation. *Id.* at 36.

87 Jaffe & Crooks, *supra* note 12, at 56–57 ("[S]hared parenting plans require good communication between parents, which is unlikely in the context of fear and disrespect in a historically abusive relationship."); *see also* BANCROFT ET AL., *supra* note 5, at 7 (stating that abusers may coerce decisions about how children are treated, fed, and educated).

88 *See* BANCROFT ET AL., *supra* note 5, at 133 (explaining that courts are reluctant to limit participation of an interested father).

89 Jaffe & Crooks, *supra* note 12, at 50. This idea has been fueled by the pseudoscience theory of Parental Alienation Syndrome (PAS), which posits that mothers fabricate abuse allegations and "program" their children to resist visitation with their father, all in an effort to "punish" the ex-spouse and secure custody for themselves. *See generally* Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232 (2009). Despite the fact that PAS has been debunked, the notion persists in family courts that mothers are prone to alienate children from their fathers. Thirty-two states have codified this idea in "Friendly Parent Statutes," which promote an award of custody to the parent who is more likely to encourage children's contact with the other parent. Joan Zorza, *Child Custody Practices of the Family*

evidence of the additional dangers created by visitation in cases where there is history of domestic violence,[90] courts grant abusive parents liberal, unsupervised visits with their children in the majority of cases.[91] If supervised visitation is granted, it may be conditioned solely on the passage of time or on conduct observed during supervised visits; neither of these approaches accurately assesses whether the abusive parent is making progress to change his or her abusive behaviors.[92]

Believing that improved communication between parents can solve many of a family's problems,[93] the court may also resist any of Meg's efforts to limit her own interaction with Steve. In practice, however, encouraging communication can have the opposite of its intended effect; it can become the only available means for the abusive parent to continue to intimidate or threaten his or her former partner.[94] The cumulative effect of court involvement may be the creation of legal relationships and rights that give abusers an unsafe level of access to their partners and children—perhaps the exact opposite of what those who have been abused envision that the family court can do for them.

d. The Bias Against Protective Mothers

In stepping into the family court, Meg is entering hostile territory. Many of the negative experiences of abused mothers in family court can be traced to gender bias: a perfect storm of stereotypes, myths, and misconceptions about gender that lead to unfavorable

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Courts in Cases Involving Domestic Violence, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 1, at 1-1, 1-24.

90 BANCROFT ET AL., *supra* note 5, at 136–37.

91 *Id.* at 136.

92 Conduct observed during supervised visitation is not reliable for several reasons. *Id.* at 41–42. First, the short duration of a supervised visit does not test many of the caretaking skills required on a daily basis. *Id.* at 41. Second, both abusers and their children may perform well under observation; children raised in abusive homes develop this ability in response to conscious or subconscious fear. *Id.* at 41–42.

93 *Id.* at 177 (describing theories which suggest that improved communication between separating parents benefits children, yet explaining how these theories are inappropriate when applied to domestic violence cases).

94 This is illustrated by Steve's harassing voicemails for Meg. Courts increasingly rely on electronic communication to coordinate parenting time, but this can quickly devolve into harassment, belittlement, or threats. One of my clients received regular emails from her former partner calling her resistance to more liberal parenting time "being a bad mother." In one email, the father recommended that my client do more research on child development—as he had been doing—and embedded an article on "parental alienation."

outcomes for women.[95] Gender bias leads judges to systematically trivialize domestic violence.[96] In custody cases, this manifests as mitigating the true impact of abuse by deeming it mutual or justifiable, or by disregarding it completely.[97]

Yet "[j]udicial gender bias extends well beyond mere distraction [from abuse], acting as the driving force for legal determinations made in a particular case."[98] The onus of protecting children from abuse is almost exclusively on mothers.[99] Fathers are often immunized from responsibility due to the stereotype of their lack of engagement in their children's lives.[100] Family court judges who generally expect fathers to be uninvolved tend to be more impressed with fathers who actively engage with the legal process.[101] Sympathy for fathers in turn feeds skepticism of protective mothers' requests.[102]

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95 Conner, *supra* note 69, at 190–91 (quoting Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 35, 55 (1996)); *see also* Meier, *supra* note 9, at 687 (stating that a discussion of courts' "rejection of the implications of domestic violence in custody cases . . . would be incomplete without some reference to what we know about gender bias in this area").

96 Lynn H. Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1065 (1995).

97 Conner, *supra* note 69, at 190–91. One explanation is that gender bias leads judges to afford women litigants much less credibility than men. Meier, *supra* note 9, at 687, (citing Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 253 (1993)).

98 Conner, *supra* note 69, at 191.

99 Margo Lindauer, *Damned if You Do, Damned if You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 AM. U. J. GENDER SOC. POL'Y & L. 797, 805–06 (2012) (explaining that abused mothers are held to a double standard: if the mother doesn't take legal action prior to separating from an abuser, she is accused of "failing to protect" her children; post-separation, courts become suspicious of her efforts at protective action); *see also* BANCROFT ET AL., *supra* note 5, at 149. In *Nicholson v. Williams*, 203 F. Supp. 2d 153, 209 (E.D.N.Y. 2002), New York City's child protection agency was found to have violated the constitutional rights of abused mothers and children by removing children on the basis of neglect when the mothers themselves had done nothing wrong. It was revealed that the agency held an abused mother accountable in child protection proceedings ninety percent of the time, while only proceeding against the abusive parent fifty percent of the time. *Id.* at 211; *see also* Dunlap, *supra* note 11, at 527.

100 Lindauer, *supra* note 99, at 805–06.

101 *Id.* at 809; *see also* BANCROFT ET AL., *supra* note 5, at 148 (explaining how the demonstrated bias towards fathers has not overridden the popular belief that mothers always have the advantage in custody disputes, making the father who seeks custody look unusually caring).

102 BANCROFT ET AL., *supra* note 5, at 149.

The double standard in favor of abusive fathers also manifests in how judges evaluate parenting capacity.[103] A family court will inevitably put each parent under the microscope. However, mothers, who generally perform the majority of caretaking, are judged by how well they fulfilled their parenting responsibilities in the past; fathers, who tend to have less experience with childcare, are judged by their expressions of emotion and intention for the future.[104] As in Steve and Meg's case, abuse can indirectly interfere with a survivor's ability to parent, undermining her emotional health and creating a dynamic that affects her ability to care for the children.[105] Unfortunately, it is the effects of abuse—impaired parenting, homelessness, and financial instability, among others—rather than the cause—the abusive behavior—that are usually most visible to the court.[106] This does not even address the traumatizing effects of the survivor having to face the abuser in court, relive her experience through her testimony, and potentially be subject to cross examination by her abuser or his attorney—with no guarantee that the outcome will be affected.

B. The Abusive Father

1. Steve's Story

Now imagine that Steve is your potential client. He filed for divorce from his wife, Meg, after she left him and took the kids with her. Meg's behavior became increasingly erratic after the birth of their younger child, Ariel. At that time Steve was still coping with the unexpected death of his father. Almost overnight, Steve inherited the family business and assumed responsibility of caring for his ailing and grieving mother. He needed Meg's support and companionship, but she was too consumed with her own emotional problems to be there for him.

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103 Molly Dragiewicz, *Gender Bias in the Courts: Implications for Battered Mothers and Their Children*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 1, at 5-1, 5-13 (summarizing findings of gender bias task forces with respect to double standards affecting abused mothers in the courts). Racial bias and bias against immigrant abused women can further compound the disadvantage. BANCROFT ET AL., *supra* note 5, at 150.

104 Dragiewicz, *supra* note 103, at 5-13 to 5-14.

105 *See* BANCROFT ET AL., *supra* note 5, at 84–85 (describing how an abuser indirectly interferes with his partner's parenting).

106 Conner, *supra* note 69, at 191–92 (describing how abused women are subject to class bias in courts, even though their poverty is often a product of an abuser's coercive control); *but see* Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19 (1999) (describing myriad reasons women do not leave their abusive partners, including financial despair, mental illness, homelessness, substance abuse, and immigration status).

Steve is genuinely concerned that Meg's depression is having a negative effect on the children. Chris has been clinging to her, and she tolerates and even encourages it, barely letting Steve spend quality time with his son. Granted, Steve rarely makes it home in time to read to Chris before bed, but he makes an effort to spend every Saturday coaching Chris in sports. Steve admits that he has high standards for his son and can be a harsh disciplinarian, but he feels he needs to compensate for Meg's leniency with the kids. Ariel is still a baby of course, and Steve confesses that he has minimal patience for her after a long day's work.

Steve had hoped that medication would put Meg back on track, but he thinks it has had the opposite effect. He tells you about an incident several months ago when Meg began to take sleeping pills and did not wake up when Chris got up and tried to make himself breakfast. He dropped a bowl and cut himself on the broken glass. Thankfully, Steve's mother had heard Chris's cries from upstairs and was able to intervene. When Meg finally awoke, her daze quickly turned into panic over Chris's injury. It took a while for her to calm down.

When you ask Steve what precipitated his filing the divorce, he explains that he was blindsided by Meg suddenly leaving him, moving in with her parents, and getting a restraining order that prevented him from contacting her and the children. He admits that he was distraught and reacted inappropriately in that moment, saying some things to Meg that he didn't mean. When you ask him about the other incidents Meg described in her restraining order application, he tells you any "abuse" is an exaggeration of his attempts to get Meg to engage in legitimate dialogue with him. He explains that those incidents need to be understood in the context of Meg's pattern of avoiding confrontation. He thought they had always been in agreement that theirs would be a traditional marriage, where Steve focused on the family business while Meg kept things running at home. While they had normal marital spats, he had no idea there were any deeper issues between them as a couple. Now, because of the restraining order, he can't even discuss whether and when things broke down.

Steve tells you that he is sympathetic to the fact that Meg needs some space to get well and he's willing to support her while she stays with her parents for a while. But he draws the line at her taking the children with her. Removing them from the only home they've ever known is unfair to both them and Steve. He sees no reason why Meg needed to get a protective order that prevents him from being able to have a normal relationship with them. He's never done anything to hurt them. The visitation schedule he currently has to obey feels like a cruel joke: He has to pick up and drop off the kids at a set time at a public place, and there's been no flexibility. Just a few weeks ago he got free tickets to a profes-

sional sporting event and Meg refused to let Chris go. He tried to explain to Chris that it was Meg's decision, not his, but Chris's disappointment broke his heart. Steve tells you that the worst part is that he feels like he's the one being babysat under this visitation plan. His mother has to be there during the visits themselves, and he can only coordinate them with Meg's father, who monitors pick up and drop off to the minute, causing a stir if Steve is even fifteen minutes late. Steve does not understand when everyone stopped trusting him with his own children.

Steve is distraught about the dissolution of his family, but he is anxious to minimize the impact on his relationship with his children. He thinks it is more appropriate that Meg's time with the kids be limited while her health is questionable, so that he can give them the stability and support they need. History shows that he's been the only reliable provider for them. Steve believes that the children need to come first, but Meg's actions show that she is putting her own needs before theirs. She has managed to turn everyone else against him in the process; the last thing he wants to see is for the same to happen to his kids.

2. Taking Steve's Story to Court

There has been little analysis of custody litigation from the perspective of abusive parents. Instead, abusers' strategies in family court have mostly been examined by domestic violence advocates, who are primarily concerned with how those tactics compound the negative experiences of abuse survivors.[107] In the absence of information about how to safely and responsibly represent abusive fathers in family court, those charged with that task are left with a clear picture of the problems, but with little guidance on how to solve it.

This is precisely the predicament students faced in our course before we implemented a guided exercise in representing the abusive father. The following section will discuss observations of students' tactics in role as Steve's attorney in an early iteration of the course. As the actions of these students suggest, in the absence of alternative strategies for representing the abusive father, students were left to appeal to the stereotypes of what an abuser and his attorney would do. Their strategies illustrated how lawyers can be susceptible to acting as an abuser's agent in the ongoing pursuit of power and control in the family courts,

107 *See, e.g.*, BANCROFT ET AL., *supra* note 5, at 154–60 (describing common tactics used by batterers in family court, including making defensive accusations, manipulating mediations, and using litigation as a form of abuse); Joan Zorza, *Batterer Manipulation and Retaliation Compounded by Denial and Complicity in the Family Courts, in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 1, at 14-7 to 14-8, 14-18 to 14-25 (describing ways abusers manipulate the legal system, including claiming to be the victim, contacting child protection agencies, threatening court personnel, and using litigation tactics that financially and emotionally deplete the victim's resources).

a job made easier when the courts are complicit.

a. Entrenching Misconceptions About Abuse

The main strategy students employed was to distract the court from the underlying issues of abuse. This was accomplished on two fronts: creating confusion about the credibility of the allegations, and projecting a non-abusive image of Steve. Steve's counsel called Meg's credibility about the abuse into question by pointing out the lack of "objective" evidence.[108] This simple strategy can be very powerful in family courts. The popular assumptions about domestic violence are that it is physical, it is reported as soon as it happens, and when it is reported, there are consequences for the perpetrator—all of which have been proven to be the exception, not the rule, in most domestic violence cases.[109] Encouraging the court to operate from these premises, then framing the current case as one that does not fit that mold, multiplies the impact by discrediting the allegations at hand while entrenching misconceptions about domestic violence.[110] At the very least, the question of abuse becomes a "he-said/she-said" situation that the court has neither the time nor resources to investigate.[111] Ultimately, this strategy encourages the judge not to engage with allegations of abuse at all because of the additional complexities it would cause.[112]

b. Exploiting the Court's Bias towards Abusive Fathers

Similarly, the students attempted to minimize the significance of the abuse allegations

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108 One student defended this strategy, stating, "I maintain that there is no benefit to either side for anyone to accept 'facts' that have no basis in documented evidence as if we were a 'fly on the wall' when the alleged incidents occurred. I don't think it is realistic or fair to force the father's attorneys to characterize the client as a perpetrator of domestic violence when the objective facts do not show such a clear picture." Final reflection from Student A (Nov. 8, 2012) (on file with author).

109 Stark, *supra* note 60, at 11-8.

110 *See* Brigner, *supra* note 1, at 13-12 to 13-13 (describing why judges think women are lying: they do not report the violence until after separation, they reconcile with abusers, they do not see the litigation through, and abusers feed the myth of false allegations of abuse).

111 Jaffe and Crooks explain that "without a domestic violence analysis . . . allegations may be misunderstood as more of the 'he said/she said' perspectives on a relationship that are often found in high-conflict divorce." *Supra* note 12, at 54; *see also* sources cited *supra* note 81 (describing the problems with confusing domestic violence cases with high-conflict cases).

112 Brigner, *supra* note 1, at 13-10 (finding that judges dismiss allegations of domestic violence as "irrelevant to the divorce case" because "dealing with it will only slow down the proceedings and delay the 'solution' of a permanent judicial dissolution of the relationship").

by making Steve's situation appear neither uncommon nor unsympathetic. The image projected of Steve was of a concerned father and blameless victim of his wife's retreat from the marriage with the children. In an attempt to promote his credibility, the students also presented an alternative argument regarding the abuse: even if Steve had "put his hands on" Meg, it was a singular occurrence he regrets. Appearing contrite about physical violence, yet without admitting to abusive attitudes, made it seem that Steve did not pose any ongoing risk of violence.[113] This served to obscure any connections between Steve's behavior and the potential risk he posed as a parent.

The students also advanced Steve's agenda for sole custody without regard to whether it was a realistic or legitimate goal. An abuser's sudden desire for custody can send a very powerful message to a family court judge who is reluctant to impede the participation of an interested father.[114] Here, the students anticipated that the court would apply a double standard to evaluating the "best interests of the children," in that Steve's expressed interest and potential as a father would be given more weight than Meg's history of caretaking in determining custody.[115] However, this approach ignored whether any improper motives were driving Steve's goals.[116] For example, Steve attempted to win Chris's loyalty with tickets to the sporting event, but then used Meg's denial of the request to incite Chris's disrespect for her.[117] These actions suggest an attempt to confuse Chris about who was to blame for the

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113 *See* BANCROFT ET AL., *supra* note 5, at 21.

114 The "fatherhood movement" has contributed to the social attitudes that children's lives are strengthened by a father's involvement. Jeffrey L. Edleson & Oliver J. Williams, *Introduction: Involving Men Who Batter in Their Children's Lives*, *in* PARENTING BY MEN WHO BATTER, *supra* note 12, at 3, 6. However, the different groups that comprise this "movement" vary in their views of domestic violence. *Id.* at 10. While some groups denounce acts of violence in an effort to encourage father involvement and responsibility, they tend not to address the root causes of coercion, control, and entitlement, nor do they actively promote gender equality. *Id.* Some members of the most visible group, Fathers' Rights advocates, claim that abuse allegations are exaggerated and falsified in a systemic effort to strip men of their parenting rights. *Id.* For more about the Fathers' Rights movement, *see* Jan Kurth, *Historical Origins of the Fathers' Rights Movement*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 1, at 4-1 to 4-29.

115 *See* discussion *supra* Part II.A.2.d.

116 *See* discussion *infra* Part III.C.

117 *See* BANCROFT ET AL., *supra* note 5, at 7 ("Harsh and frequent criticism of the mother's parenting . . . can undermine her authority and incite children's disrespect of her.").

disappointment,[118] or worse, an effort to disrupt Chris's relationship with Meg.[119]

c. Drawing on Negative Stereotypes of Abused Mothers

Finally, the students chose to strengthen Steve's parenting position by weakening Meg's. Rather than grappling with the more challenging task of demonstrating Steve's capacity to be primary caretaker of the children, they focused instead on why Meg did not deserve to be the primary custodian. They drew attention to her struggle with depression and suggested that her parenting capacity was compromised.[120] By exploiting Meg's vulnerabilities, the students tried to show that Steve was healthier, more caring, and more competent as a parent.[121] In turn, Meg looked like a composite of destructive stereotypes about domestic violence survivors: a crazy, untruthful, bad mother.[122]

Of course, the students were not to blame in concluding that this approach would be an effective way to meet Steve's objectives. Representing Steve was a very challenging task, and our job as teachers was to provide the students with the skills to undertake it. Our focus on the challenges that would arise in the context of representing Meg had left the students unprepared to represent Steve. Similarly, the theoretical frame of reference we used throughout the course had also made representing Steve more difficult; by highlighting the way abusers contribute to the problems facing abused mothers in family court, we had made the students more susceptible to doing what they thought was expected of an abuser's attorney. Lastly, our criticisms of the family court system were not followed with suggestions for how to challenge the problematic practices. As one student reflected at the end of her experience representing Steve, "If there is a way to adequately protect a client's interests when s/he has been accused of domestic violence, without denying the domestic violence, minimizing the domestic violence or addressing concerns about the victim's

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118 *See id.* at 41 (explaining abusers' ability to shift blame).

119 *See id.* at 129–30 (noting that a strong bond with the nurturing parent is necessary for helping children heal from the impacts of trauma and divorce).

120 Abused women have higher rates of symptoms associated with mental health problems and often receive incorrect diagnoses, which are then exploited by abusers in court. *Id.* at 146–47. Instead of recognizing the impacts of abuse on their partners, abusers attribute the symptoms to the abused mother's inherent weaknesses and reasons why she should not have custody. *Id.* at 141 (citing Dalton, *supra* note 40, at 284–85).

121 *See* BANCROFT ET AL., *supra* note 5, at 78.

122 *See* Dunlap, *supra* note 11, at 528 ("The label of 'battered woman' has stuck with societal force. With the second label of 'battered mother' superimposed over the first, [a woman] stands virtually no chance of being viewed as a competent, loving mother.").

credibility, I still do not know what it is."[123] In short, we had shown the students a problem and expected them to address it without giving them the tools to do so.

III. Teaching Students to Represent the Abusive Father

Following this experience, we realized that in order to counteract the problematic lawyering practices that compound abused mothers' negative experiences in family court, we had to provide students with alternative strategies for representing the abusive parent. Domestic violence advocates have devoted significant attention to what it means to represent those who have been abused, and how to teach law students to embrace those principles.[124] But what has not been explored is how those lessons might translate in the seemingly incompatible context of representing the abuser.

Guiding students through the exercise of representing an abusive father became an unexpected opportunity to reinforce the skills and values that define domestic violence advocacy.[125] Our intent was not to be dogmatic about our values as domestic violence advocates, but rather to help students gain insight into how values can shape one's role as attorney in an abuse case. We wanted to encourage students not to be consumed by their role, but to step back from and consider the larger goals of all actors in a family law case involving domestic violence. The students could then decide how they could carry out the representation in pursuit of these goals. In order for the lessons of this exercise to be transferable, the students had to take ownership of the decisions they were making about how to represent their client, as well as the justifications for those choices.[126]

The strategies described below follow the traditional lawyering process of assessment, decision-making, and action[127] as seen through the eyes of the domestic violence practitioner. At each stage, we articulated where "bright line rules," such as ethical and statutory constraints applied; what existed between the bright lines, however, was the murky area

123 Final reflection from Student A (Nov. 8, 2012) (on file with author).

124 *See supra* notes 16–21 and accompanying text (summarizing the key literature on teaching the principles of domestic violence advocacy).

125 This section elaborates on the actual exercise conducted in this course, which was carried out on a smaller scale and in a less linear fashion. However, this article serves as a tool for restructuring and building upon the exercise in future deliveries of the course.

126 Shalleck, *supra* note 20, at 1058.

127 Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 163 (2002).

where students had a choice about how to define and execute their role.[128] With a backdrop of the dynamics of abuse and the corresponding challenges of domestic violence practice, we aimed to provide the students with options that would promote rather than compromise the safety and well-being of the children and abused mother.

A. Redefining Zealous Advocacy

In asking a student with feminist, altruistic ideals to represent an abusive father, the usual response is that it is impossible to reconcile this task with the concept of zealous advocacy.[129] Many students assume that zealously advocating for Steve means they should use the legal system to further his agenda at all costs.[130] That students would come into the course with this understanding is no surprise. Given the power differential in domestic violence cases and the extremely high stakes, lawyers fight hard to protect their clients' rights and interests.[131] The byproduct of this image of zealous advocacy is that abusers are demonized or portrayed as simply the force to fight against.[132] The popular concepts of zealous advocacy may also prioritize "winning" over broader issues of professionalism and fairness.[133] These concepts often draw on criminal defense imagery, which is at best

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128 Donald A. Schön refers to this murky area as "indeterminate zones of practice" or a "swamp" where technical rules may not provide sufficient guidance to solve a problem; rather, the practitioner must learn to develop professional judgment by a constant process of action and reflection. *See generally* Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231 (1995).

129 *See supra* note 26 and accompanying text (explaining the values many students bring to domestic violence courses). For many students who take this course, representing an abuser can be an unappealing prospect. The shift to representing Steve is especially difficult because all students have been representing Meg until the divorce is filed.

130 Smith and Seidman explain how students representing those accused of domestic violence quickly subscribe to the ideal that "the best result, the right result, the *just* result is getting the client out of the clutches of the system even if it means bringing the complainant down." *Supra* note 25, at 448.

131 *Id.* at 434–35.

132 *See supra* note 30 and accompanying text.

133 *See* Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 501 (1995) (explaining that traditionalists presume that their client wants to win at all costs). This ideal can eclipse the professional concerns of lawyers as counselors and respected officers of the court. SULLIVAN ET AL., *supra* note 38, at 127. Some states have chosen to temper the language of their ethical rules to eliminate references to zealous advocacy, in hopes of curbing its use as an excuse for unprofessional behavior. *See, e.g.*, OHIO RULES OF PROF. COND. R. 1.3 cmt. (Baldwin, Westlaw through 2012) (comparison to former Ohio Code of Professional Responsibility) (discussing deletion of reference to acting "with zeal in advocacy" in comparison to former code of conduct).

misplaced in the family court context. Furthermore, it may also unnecessarily put the goals of lawyers on each side of a domestic violence case at odds.[134]

An attorney in a family law case is more than just a "hired gun."[135] The first step in representing Steve is therefore redefining zealous advocacy as helping him make constructive decisions in pursuit of legitimate interests. The same definition is compatible with advocacy for an abuse survivor, in that the principles of client-centeredness, empowerment, and risk reduction still apply.[136] Yet in representing either party, the student may have to break from non-directive, nonjudgmental advocacy in order to raise a safety concern or manage his or her client's expectations about what is possible in family court.[137] The degree to which such a "reality check" is required may be more apparent on one side than on the other, however.[138]

A related premise we ask the students to work from is that the judge will prioritize the children's well-being. While this would seem to be a given in custody litigation, what is often overlooked is the interdependence of a child's well-being with his or her protective parent's safety and the abusive parent's accountability for both.[139] The challenge in incorporating these principles into representing Steve is that the dominant view of abusive fathers—that they are presumptively deficient parents—offers little guidance on how to understand and address the root causes of their abusive attitudes and behaviors.[140] Yet if the focus is solely on the relationship between Meg and the children, Steve may be able to

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134 *But see* Smith & Seidman, *supra* note 25, at 420–21 (discussing how lawyers for the abused and accused can have shared visions of justice and shared sensibilities about lawyering).

135 Lisa Angel & Lee Rosen, *Zealous and Ethical Representation of Batterers*, *in* THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK 83, 83 (Margaret B. Drew et al. eds., 2d ed. 2004) ("Zealous representation of a batterer means more than the use of the court to continue the battle and inflict greater injury on the victim.").

136 *See infra* Parts III.B-D (applying principles of domestic violence advocacy to representation of the abuser).

137 Transparency and honest communication are key principles underlying work with both abusive fathers (*see, e.g.*, Katreena L. Scott et al., *Guidelines for Intervention with Abusive Fathers*, *in* PARENTING BY MEN WHO BATTER, *supra* note 12, at 102, 111) and those who have been abused (*see, e.g.*, Enos & Kanter, *supra* note 20, at 94).

138 *See* discussion *infra* Part III.B.

139 Scott et al., *supra* note 137, at 108–10.

140 Einat Peled & Guy Perel, *A Conceptual Framework for Fathering Intervention with Men Who Batter*, *in* PARENTING BY MEN WHO BATTER, *supra* note 12, at 85, 88.

avoid dealing with the consequences of his abusive behavior, possibly increasing the risk to the family going forward.[141] In order to provide the children with a stable, nurturing environment, Steve's attorney's approaches should therefore be tailored to recognizing rather than minimizing Steve's abusive behaviors.[142]

The obvious counterargument to this "redefinition" of zealous advocacy is that Steve's attorney has a duty to put her client's interests first. Indeed, this duty is mandated by ethical and professional rules.[143] However, "zealous advocate" is only one of an attorney's roles. She is an officer of the court charged with upholding the dignity of the profession; as such, she should use the law's procedures only for legitimate purposes and not to harass or intimidate others.[144] She is also a public citizen "having special responsibility for the quality of justice."[145]

These roles should, ideally, be reconcilable.[146] Yet in any given case, the attorney's responsibilities to simultaneously promote justice on the individual and collective levels may be in tension.[147] This conflict has been captured as a central question of the legal profession: "Does the responsibility to pursue substantive justice in individual cases and to consider the broader impact of one's actions conflict with advocacy on behalf of one's client?"[148] In domestic violence cases, the dilemma is crystallized by the severity of potential harm to the targets of abuse, risks that rise with legal involvement.[149] The domestic violence practitioner arguably faces a heightened sense of responsibility to consider the collateral impacts of her actions in both counseling and advocating for her client. The approach suggested in this article is not inconsistent with ethical obligations; while the rules of professional con-

141 Scott et al., *supra* note 137, at 102.

142 Peled & Perel, *supra* note 140, at 92.

143 MODEL RULES OF PROF'L CONDUCT Preamble § 2 (2013) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

144 *Id.* § 5.

145 *Id.* §§ 1, 6.

146 *Id.* § 8 ("A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious.").

147 *Id.* § 9 ("Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person.").

148 SULLIVAN ET AL., *supra* note 38, at 131.

149 *See supra* notes 5, 11, 107 (describing the serious risks to women and children when separating from an abuser).

duct protect the "lawyer's obligation zealously to protect and pursue a client's legitimate interests," they also suggest that the attorney must be "guided by personal conscience" in resolving conflicts between his or her responsibilities.[150] This moral and professional obligation will be discussed in the context of representing the abusive father in the sections that follow.

B. Developing a Client-Centered Narrative

One of the most striking observations from the course before this exercise was implemented was how much students were disadvantaged by not having an opportunity to develop their own understanding of Steve as their client. By introducing his character as Meg's abuser, we had defined the students' image of Steve for them. Within this narrow frame of reference, students were inclined to supplement the image of Steve with their own ideas of who a perpetrator of domestic violence was, a task which lends itself to relying on negative stereotypes.[151] In turn, they developed the theory that in order to counter the abusive image of their client they had to tell the story they thought the court wanted to hear, one that absolved Steve of any responsibility for the abuse.

This led us to see how important it was for students to have an opportunity to hear Steve's story firsthand.[152] Domestic violence clinicians stress the importance of honoring a survivor's individual experience of abuse,[153] and identify listening as a discrete skill neces-

150 MODEL RULES OF PROF'L CONDUCT Preamble §§ 9, 7 (2013).

151 *See* MacDowell, *supra* note 30, at 547–48 (describing the "perceptible perpetrator" of domestic violence, who is constructed from stereotypes of criminality and immorality).

152 The tendency of lawyers and law students to use dominant frameworks to tell a client's story—often to the exclusion of the client's reality—is a concern in poverty law practice generally. *See, e.g.*, *Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (describing an instance in which a welfare lawyer's framing of the client's story to fit legal categories was not as effective as the client's own narrative); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) (arguing for stronger integration of client narrative in public storytelling and legal advocacy); *cf.* Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 336, 343–358 (1989) (criticizing traditional legal education for abstracting and generalizing clients' experiences and excluding the experiences of subordinate and marginalized populations). *See also* DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 76 (2002) (cautioning law students against the habit of "gap-filling," the tendency of lawyers to construct clients' narratives themselves "rather than by seeking additional information from [their] clients").

153 The importance of giving voice to survivors of domestic violence has been noted by many advocates. *See, e.g.*, 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, 1098–1100 (1995). *See also*

sary for eliciting that experience.[154] While we taught about this in the context of representing Meg, we hadn't encouraged students to elicit Steve's narrative with the same empathic, nonjudgmental ear.[155] To remedy this, we reserved class time for the students to conduct a preliminary client interview with Steve before representing him in an in-court simulation.[156] The goal was to encourage students to see that an abuser's view of his abusive behavior does not exist solely within an innocence/guilt paradigm; it may exist anywhere on a continuum from total denial to acceptance, with myriad explanations (or excuses) along the way.[157] Importantly, these views must be elicited in connection to the abusive father's attitudes about parenting, which may be similarly complex.[158] The hope was that, by developing an understanding of their client that was grounded in his lived experience, students would be better equipped to advocate responsibly on his behalf.[159]

At the same time, students can be encouraged not to adopt Steve's narrative without analysis. Ethical demands require getting enough of Steve's story so that students can competently represent him without knowingly advancing a falsehood.[160] Yet where abusers

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Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 527 (1992) (coining the term "particularity" to reflect the importance of recognizing the complexity of abused women's experiences).

154 Shalleck, *supra* note 20, at 1046–47; Enos & Kanter, *supra* note 20, at 90–91.

155 In their study, Peled and Perel conducted in-depth interviews with abusive men about their attitudes towards fathering. *Supra* note 140, at 88. The authors explain that intervention with abusive fathers is "effective only if it is based on respect and empathy for their experiences and views." *Id.* at 90.

156 Previously, the students' first exercise in the role of Steve's counsel was in simulated court proceedings, which forced them to prepare their case based on what they knew about Steve on paper.

157 For every perpetrator who asserts his innocence, there may be another who, based on his own experience as a survivor or witness of abuse, normalizes physical violence in a relationship as an acceptable response to conflict; advocating for this client may mean adapting the narrative to one of explaining the behavior, without excusing its harmful effects. For an in-depth exploration of the attitudes and beliefs driving abusive behavior, *see* LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN (2002).

158 Peled & Perel, *supra* note 140, at 89 (discussing the authors' findings that abusive fathers "could be located on a continuum extending from feelings of failure and missed opportunities to a sense of growth and improvement as part of a wider change process bound up with cessation of violence.").

159 *See id.* at 88–89 (describing the importance of firsthand accounts in understanding and contextualizing abusive men's attitudes towards parenting).

160 *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2013) ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem . . . "); *see also* R. 3.3 (discussing the concept "candor to the tribunal").

have a history of minimizing violence and distorting reality, comparing that narrative to other sources of information is critical.[161] A domestic violence analysis of all available information, including Steve's own story, is necessary.[162] A domestic violence screening tool can be particularly helpful in allowing students to see for themselves whether and how their client has exhibited abusive behaviors.[163] The screener gathers information about abuse in the relationship by asking *what* happened, not *why;* those responses are then analyzed for context, intent, and effect with respect to patterns of power and control.[164] Instead of simply interrogating Steve about specific incidents of physical violence, the student can consider whether he exhibits attitudinal characteristics of an abuser and how those manifest in his behavior. This becomes particularly important in assessing past and potential risk to Meg and the children.[165]

The facts of this case are illustrative. The incident that prompted Meg to leave Steve was his outburst at Meg's having thrown a birthday party for Chris without Steve's knowledge. After she left, Steve confronted her at her parents' house and grabbed her arms hard enough to leave bruises. Steve tells his lawyer that this was only an attempt to engage Meg

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161 Jaffe & Crooks, *supra* note 12, at 54 (noting the importance of assessing relationship dynamics and conducting a domestic violence analysis of the facts when abuse has been alleged in a custody case).

162 *See id.*

163 GAY, LESBIAN, BISEXUAL AND TRANSGENDER DOMESTIC VIOLENCE COALITION, INTIMATE PARTNER ABUSE SCREENING TOOL FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER (GLBT) RELATIONSHIPS (2003) [hereinafter INTIMATE PARTNER ABUSE SCREENING TOOL]. Normally, screening would take place at the stage where the attorney is deciding whether or not to accept a case. Our simulation bypasses this important stage of the representational decision-making process. The students are assigned to either side of the case randomly once the divorce action is filed. However, learning about screening is useful given the likelihood that students may find themselves advocating for a perpetrator of domestic violence at some point in their career. For more information on how to screen for domestic violence, *see* Am. Bar Ass'n, *Tool for Attorneys to Screen for Domestic Violence* (2005), http://www.americanbar.org/content/dam/aba/migrated/domviol/screeningtoolcdv.authcheckdam.pdf [http://perma.cc/C7WT-AGHR]. For a discussion of an attorney's continuing obligation to screen for abuse during the course of representation, *see* Sarah Buel & Margaret Drew, *Do Ask and Do Tell: Rethinking the Lawyer's Duty To Warn In Domestic Violence Cases*, 75 U. CIN. L. REV. 447, 479–83 (2007).

164 *See* INTIMATE PARTNER ABUSE SCREENING TOOL, *supra* note 163, at 5–7. The criteria used to analyze abusive situations are as follows: (1) Context, intent, and effect of abusive behaviors; (2) Agency: Who makes the decisions in the relationship? How do disagreements get resolved? Whose life is getting smaller?; (3) Empathy: Who is blaming? Minimizing? Suppressing detail?; (4) Assertion of Will: Are there repeated instances in which one partner has overcome/disapproved of the other's desire to do something?; (5) Entitlement: Who is taking responsibility for the abuse?; (6) Fear: Who is scared? Is fear based on abusive behavior?

165 *See* BANCROFT ET AL., *supra* note 5, at 6–22 (detailing the characteristics of abusers and how such traits may manifest in harmful behaviors to the abuser's partner and children).

in a dialogue about their marital problems and prevent her from avoiding confrontation. Yet when a student analyzes Steve's narrative within his or her understanding of how abusive dynamics are present in the relationship, the facts may take on a new meaning. Even if causing injury was not Steve's desired result, his actions demonstrate an attitude of entitlement: anger at not having had control over the birthday party decision, a need to resolve the disagreement on his terms, and a belief that violence was a defensible means to that end. These dynamics also suggest cause for concern about Steve's judgment as a parent, given his unwillingness to respect Meg's authority to make parenting decisions on her own and his disregard for the children witnessing his outburst.[166]

One of the biggest challenges students in this course have expressed in forming a relationship with Steve is their limited ability to relate to his position.[167] Journals can offer students an outlet for reflecting on these feelings and how they impact their ability to advocate for Steve.[168] Classroom discussions also create an opportunity to surface any biases that impede the attorney-client relationship.[169] Most importantly, students can be encouraged to recognize that expressing empathy for Steve's situation is not the same as condoning his violent behavior.[170] Rather, trust and mutual respect set a precedent for transparent communication that facilitates future efforts to move beyond the violence.[171]

C. Engaging in Safety-Conscious Problem-Solving

Client-centered, empowering advocacy is a central tenet of domestic violence prac-

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166 *See id.* at 75–78 (explaining how an abusive father may question the mother's decisions in the presence of children in order to deliberately undermine her authority and create a dynamic where children believe she is "second in command").

167 As one student commented after being assigned to represent Steve, "I was unenthusiastic." Final reflection from Student B (Nov. 16, 2012) (on file with author).

168 *Cf.* Shalleck, *supra* note 20, at 1053–54 (noting the importance of students having an outlet for expressing their frustrations and anger about domestic violence clients).

169 *Id.*; *see also* Scott et al., *supra* note 137, at 113 (discussing how those who work with abusive fathers must be flexible and aware of their own biases).

170 Peled & Perel, *supra* note 140, at 90 (coining the phrase "duality in practice" to mean that an intervention with abusive fathers, it is necessary to be empathetic and respectful, while repudiating the violence).

171 Scott et al., *supra* note 137, at 111 ("Respect for [abusive] fathers . . . requires that there be open and honest communication."); *see also* Angel & Rosen, *supra* note 135, at 83 (explaining that building a relationship with an abusive client is the foundation for effective counseling).

tice.[172] Traditionally, client-centered counseling means letting the client define the scope of his or her problem, the desired ends, and the means he or she wishes to employ to achieve them.[173] Domestic violence clinicians, however, often frame client counseling as a collaborative "problem-solving" process.[174] In order to reflect the complex reality of the client experience and to account for safety concerns, remedies must be tailored to the client's needs, resources, and limitations.[175] A student's role in problem-solving is to help the client analyze her options and reframe her articulated goals, so as not to restrict her possible legal outcomes.[176] To truly maximize the client's options, students must think "beyond the legal system about what their clients really need."[177] At the same time, they are encouraged to examine legal remedies critically to see that there are inadequacies and even adverse consequences of legal intervention.[178]

In the early iteration of the course, students strayed from these principles by blindly pursuing Steve's quest for sole custody. While this was Steve's articulated goal, the students did not appear to have counseled him about whether it was legitimate or realistic.[179] Abusers are more likely to seek custody than non-abusers, and they are often successful.[180] However, they do so with varying motivations;[181] the student's objective is to try to assess

172 Goodmark, *Clinical Cognitive Dissonance, supra* note 7, at 304–08.

173 *E.g.*, DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (2d ed. 2004).

174 *See, e.g.*, Enos & Kanter, *supra* note 20, at 94 (describing multidisciplinary problem-solving in a hospital-based domestic violence clinical program); Bryant & Arias, *supra* note 17 (describing community-based problem-solving approaches in the Battered Women's Rights Clinic of the City University of New York School of Law). In discussing "collaboration" and "problem-solving," I am speaking specifically about the context of the attorney/client relationship. I am not advocating for the use of alternative dispute resolution or collaborative law in domestic violence cases, as I believe these processes are inherently dangerous when there has been coercive control in a relationship. *See generally* Drew, *supra* note 13.

175 Enos & Kanter, *supra* note 20, at 95.

176 *Id.* at 94 ("Once the problem is defined from the client's perspective, the advocate's role can best be viewed as partnering with a client to exchange information, assisting the client in prioritizing her needs and desires, and strategizing with her to devise alternatives that best address the client's priorities.").

177 Goodmark, *Clinical Cognitive Dissonance*, *supra* note 7, at 314.

178 *Id.* at 313; Bryant & Arias, *supra* note 17, at 210.

179 *See supra* Part II.B.2.b (describing an incident of students blindly pursuing Steve's requests for sole custody).

180 BANCROFT ET AL., *supra* note 5, at 96 (citing numerous studies supporting this proposition).

181 *Id.* at 140–42.

which of those motivations are characteristic of further abuse, in light of what they know about the underlying relationship dynamics.[182] To facilitate this, the student can return to the questions of context, intent, and effect that were used to analyze Steve's abusive attitudes and behaviors.[183] Did Steve articulate this goal because he is seeking validation by the family court?[184] Does he want custody because he truly believes he is the better parent?[185] Does he have an honest desire to be with his children?[186] Or was the desired effect to punish Meg by depriving her of access to the children?[187] When these answers are placed in the context of abuse, the student may uncover a difficult truth that Steve's request for custody could stem from a prioritization of his own needs over those of the children.[188] Under this view, Steve's goal of getting custody may collide with the interests of both Meg and the family court judge.

The premise of a problem-solving approach is that when a greater goal is defined, the parties' objectives need not be irreconcilable.[189] Here, both parents and the court may

182 This piece of the exercise implicates the idea of "parallel universe thinking," wherein students explore alternative explanations for a client's behavior when they feel judgmental about it. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 70–72 (2001).

183 *See supra* note 164.

184 *See* BANCROFT ET AL., *supra* note 5, at 78, 141 (explaining how some abusers see winning custody as social validation of their perspectives, or absolution of responsibility for the abuse—needs which intensify post-separation).

185 *See id.* at 140–41 (discussing abusers' distorted perceptions of self and contempt for their partners).

186 *See* Tubbs & William, *supra* note 83, at 33 (presenting results of a study of fathers' comments on parenting and violence which showed that they believe they have a right to contact their children, a desire to be with them, and something to offer them; however, these fathers did not recognize that their children may be traumatized or fearful of them because of the abuse).

187 *See* BANCROFT ET AL., *supra* note 5, at 140–41 (stating that some abusers see their partner's decision to leave the relationship as evidence of immaturity, weak commitment, or lack of concern for the children; getting custody becomes a way to frighten, control, and retaliate against the partner).

188 *See id.* at 9 ("[B]atterers expect family life to center on the meeting of their needs.").

189 Carrie J. Menkel-Meadow, *The Lawyer as Problem Solver and Third Party Neutral: Creativity and Nonpartisanship in Lawyering*, 72 TEMP. L. REV. 785, 797 (1999) ("[The] adversary conception of lawyering assumes that the other sides' needs and wants will necessarily be competitive with ours, instead of complementary, and seeks to 'defeat' the other side, rather than look for ways to accomplish solutions which are enduring because they satisfy the needs of both (or all) parties."). I do not share Menkel-Meadow's broader critique of the adversarial system, however; I agree with Smith and Seidman that the adversarial system is necessary to protect the rights of those who have been abused. *See supra* note 131 and accompanying text. I am simply encouraging students not to let their role in a domestic violence case be

be able to agree that the well-being of the children should be paramount; however, they currently disagree about what the best means are for ensuring this. Family court judges often reach the conclusion that shared parenting is best for children.[190] Yet this presumes that parents are able to put the children's needs ahead of their own,[191] and ignores the fact that when there has been abuse, the children's needs are inherently dependent on the safety of the protective parent.[192] Endorsing Steve's request for sole or shared custody does not address either of these considerations. Students may therefore come to realize that a more appropriate solution incorporates interventions that support, rather than undermine, Meg's relationship with the children.[193]

Counseling Steve becomes a task of both advising against abusive behavior and providing guidance on realistic means by which to accomplish his objectives.[194] In an attempt to maximize Steve's options, the student can help him distinguish between short-term prospects and long-term objectives.[195] For example, if Steve is intent on wanting custody, the student can attempt to clarify what his ultimate objective is. If it is to have a healthy and positive relationship with the children,[196] the immediate prospect of getting custody may not be the best way to accomplish it. Instead, taking action to get beyond the violence and to allow Meg and the children to heal may be more appropriate in the short term.[197]

Steve's concern for the well-being of the children may be leveraged to counsel him to-

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defined by opposition alone.

190 *See* discussion *supra* Part II.A.2.c.

191 Tubbs & William, *supra* note 83, at 28.

192 Scott et al., *supra* note 137, at 108; BANCROFT ET AL., *supra* note 5, at 237.

193 Scott et al., *supra* note 137, at 110 ("Rather than focusing on co-parenting, intervention [with abusive fathers] should emphasize the need for men to be respectful and nonabusive of children's mothers and of the mother-child relationship.").

194 *See* Angel & Rosen, *supra* note 135, at 83; *cf. supra* note 170 (discussing the concept of "duality in practice").

195 *See* Angel & Rosen, *supra* note 135, at 83.

196 *See id.* (stating that a zealous advocate for an abuser should evaluate the client's prospects for having a positive relationship with their children, family, and community after the relationship with the victim is over).

197 *See* BANCROFT ET AL., *supra* note 5, at 128–29 (noting the importance of children having a strong bond to the protective parent in order to heal from the dual traumatization of abuse and divorce); *see also supra* note 193.

wards requesting reasonable access to his children.[198] While Steve cites this concern often, he misplaces the blame for any negative impacts the children have suffered on criticisms of Meg's parenting.[199] By raising awareness around how the children have been impacted by abuse in the home, Steve may be encouraged to pursue a safe visitation arrangement; third-party supervision of visits could be beneficial to the children's healing in the short term, and supervised exchange mechanisms may prevent unnecessary contact with Meg, reducing the risk of restraining order violations.[200] The student may be able to explain to Steve that supportive parenting programs, batterer intervention services, or other treatment may actually benefit him more in the long run.[201]

Students may face many challenges in implementing these principles in their representation of Steve. They are disadvantaged by their lack of professional experience, which impedes their ability to recognize the legal system's limitations and exercise independent judgment in prioritizing the safety and well-being of Meg and the children.[202] They may struggle to take on an active role in the attorney/client partnership. Often, students come

198 *See* Goodmark, *Law is the Answer?*, *supra* note 6, at 180 ("Recent research suggests that batterers can be reached through their children; understanding how their violence affects their children can motivate batterers to change their behavior."). For recommendations on how to structure custody and visitation in domestic violence cases, *see* A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES, *supra* note 73, at 32–34; *see also* BANCROFT ET AL., *supra* note 5, at 214–21.

199 For example, Steve refers to Meg's inability to discipline the children as an inherent weakness, when in fact it may be an impact of his attempts to undermine her authority as a parent directly—by overruling her decisions—or indirectly—by impairing her parenting ability. *See* BANCROFT ET AL., *supra* note 5, at 79–80. Furthermore, he notes that the children get excited about and enjoy their time with him, without recognizing that these feelings may be symptoms of unhealthy attachment caused by his inconsistent presence in the home. *See id.* at 66 (describing the phenomenon of "traumatic bonding" between children and abusive fathers).

200 *See* Angel & Rosen, *supra* note 135, at 84. Of course, many lawyers may feel that this type of counseling is outside the scope of their role. I would argue that in a custody case involving domestic violence, abuse is inseparable from the best interests of the children, which it is the lawyer's responsibility to pursue.

201 *See* Buel & Drew, *supra* note 163, at 485 (explaining that counsel who are knowledgeable about abuse may be able to persuade their clients about the benefits of batterer intervention programs); *cf.* Scott et al., *supra* note 137, at 104, 106 (recommending strong encouragement or mandate when referring abusive fathers to intervention programs, as voluntary participation is unlikely to be effective).

202 *See generally* Kimberly E. O'Leary, *When Context Matters: How to Choose an Appropriate Client Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103, 134–35 (2001) (explaining that experienced attorneys often have "[the] knowledge leading to an opinion that is helpful to the client," and "the willingness and skill to provide strong, independent views in a manner that will not impede upon the client's autonomy," allowing for more directive counseling in certain settings).

into clinics with "directive, hierarchical and individualistic" images of lawyering, causing them to focus on absorbing legal knowledge in the belief that legal mechanisms alone can solve their clients' problems; this can make adopting a client-centered approach more difficult.[203] We observed that in representing Steve, however, students have tended to hold back in honest and forthcoming counseling because they do not think they can effectively shape his goals or they believe outcomes have been predetermined by the legal system. As a result, they may default to the position that it is their duty to put Steve's interests first, and to pursue his objectives above all else.[204]

It is helpful to reinforce with students that problem-solving is a collaborative approach. While Steve's experience forms the foundation from which to generate options, students can help him recognize his resources and limitations.[205] In fact, as his lawyers, they may be in the best position to help him make constructive choices.[206] They must recognize that expressing reservation and giving advice about his chosen course of action is a necessary part of counseling.[207] Ethical obligations to Meg and the children may also require that they advise against future abusive behavior.[208]

Effective counseling does not mean avoiding getting Steve the relief that he is entitled to, however; prioritizing the safety and well-being of Meg and the children must be weighed against Steve's rights as a father.[209] To accurately define those rights, the student must understand the applicable custody law and advise Steve honestly about the feasibility

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203 Enos & Kanter, *supra* note 20, at 85–86.

204 *See supra* Part III.A (discussing the challenges of reconciling ethical responsibilities towards the abuser with broader considerations of safety of third parties).

205 *See* Enos & Kanter, *supra* note 20, at 94.

206 *See* Buel & Drew, *supra* note 163, at 485.

207 *See supra* Part III.A (discussing that a lawyer is not merely "a 'hired gun,'" but rather, he or she bears a responsibility to provide guidance and "'reality check[s]'").

208 MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (discussing that an attorney may warn third parties of harms reasonably certain to occur). *See generally* Buel & Drew, *supra* note 163 (arguing that ethical obligations impose upon lawyers in domestic violence cases "an affirmative duty to (1) screen battering clients who have indicated a likelihood of harming others, (2) attempt to dissuade them from carrying out planned violent crimes, and (3) warn identifiable abuse victims whom their clients have threatened.").

209 *See* SULLIVAN ET AL., *supra* note 38, at 131 (discussing how the lawyer's obligations as counselor, "to raise for the client the ramifications and implications of particular courses of legal action," must exist alongside the duty of loyalty to the client).

of his request.[210] Even if there had not been abuse, Steve's record of caretaking is limited, and he may not have the capacity or (non-financial) resources to care for the children going forward.[211] Favorable facts can be used to support reasonable requests for access to the children, but the student must also possess the ability—and a certain confidence—to manage Steve's expectations.

D. Pursuing Risk Reduction Through Legal Action

Once the ends have been defined, the student can develop responsible, safe means by which to achieve them. It is when the pressure is on—when the judge is on the bench—that students are most at risk of "going along to get along" in the family court.[212] It becomes even more important at this stage, therefore, to reinforce the overall goal of not escalating the risk of harm to Meg and the children. The lessons here build on the work the student has done throughout the process of defining his or her role as Steve's attorney.

As discussed *supra,* our experience in the early iteration of this course found that in an effort to advance Steve's agenda, the students adopted strategies of both minimizing and distracting from allegations of domestic violence in court.[213] To enhance Steve's appeal as a parent, the portrait they painted of Steve was a frustrated, overworked husband trying to keep it together to provide for his family. Had the judge relied only on this selective image

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210 *See* MODEL RULES OF PROF'L CONDUCT Preamble § 2 (2013) ("As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.").

211 For example, Steve plans to continue working but have his mother care for the children during the day. *See* BANCROFT ET AL., *supra* note 5, at 39 (explaining how an abusers' self-centeredness can lead him to seek custody, only to shift caretaking responsibility to relatives).

212 *See* Goodmark, *Clinical Cognitive Dissonance*, *supra* note 7, at 322 ("Perhaps the easiest, and most troubling, route for new lawyers to take once they leave the clinical setting and enter practice is to reject what they have been taught and to accept that the stereotypes of women subjected to abuse in the legal system are accurate and that the legal system knows best when it comes to addressing domestic violence."). Of course, the simulated proceedings in our course are not "real practice." As has been explained *supra* in Part I, however, we make an effort to approximate reality in the course, and our experience suggests that students still feel pressure to conform to the demands of "time and place" in simulated proceedings. *Cf. id.* at 322–23 (citing Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 397 (2001)).

213 *See supra* Part II.B.2.

of Steve, an unsafe amount of access to the children could have been granted.[214] Of course, it is up to the judge, not Steve's attorneys, to determine a safe visitation arrangement. However, deflecting attention from Steve's abusive behaviors may encourage the judge to draw conclusions from incomplete information.[215]

Students displayed a related instinct to damage Meg's image in order to bolster Steve's. One specific approach was undermining the credibility of the domestic violence allegations by treating Meg as the complaining witness in a criminal case.[216] At the same time, the students criticized her parenting by highlighting her vulnerabilities and extrapolating these to being an unfit mother.[217] These offensive attacks reinforced negative stereotypes about survivors, and perpetuated the idea that the courtroom is not a safe space in which to discuss domestic violence.[218]

Instead, students can be encouraged to consider the principles of accountability and empowerment, which are at the core of intervention with abusive fathers.[219] These princi-

214 *See* BANCROFT ET AL., *supra* note 5, at 136–37 (discussing risks that abusers pose to children during unsupervised visits).

215 *See supra* note 61 and accompanying text (describing the risks that arise when judges make custody determinations based on incomplete information).

216 *Cf.* Ellen Yaroshefsky, *Balancing Victim's Rights and Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 137 (explaining that a criminal defense lawyer's job is to test and discredit the version of reality offered by the victim, even if the lawyer believes she's being truthful). While the domestic violence and custody statute used in this course does charge the judge with making a factual finding about the existence of a "pattern or serious incident of abuse," the burden of proof is not the same as in a criminal matter. MASS. GEN. LAWS ANN. ch. 208 § 31A (West 2014). Regardless of whether the presumption is triggered, securing an award of sole custody for Steve requires a showing that it is in the best interests of the children; therefore, focusing so much on the credibility of the allegations is an incomplete strategy. *Id.* (explaining that the presumption can be rebutted by the best interests of the child); *see also* MASS. GEN. LAWS ANN. ch. 208 § 31 (West 2014) (describing the best interests standard which applies when there is no presumption).

217 *See generally* discussion *supra* Part II.A.2.d. (discussing gender bias and the tendency of courts to judge mothers on how well they fulfill their parenting duties). We often have to caution students about the fact that "parental unfitness" is a term of art in family court, because students are so inclined to use this phrase in describing the opposing party.

218 *See, e.g.*, Kim Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 VIOLENCE AGAINST WOMEN 1367, 1384 (2005) (exposing Massachusetts courts' systematic discrimination against abused mothers, where the majority of women interviewed "said that judges, guardians ad litem, and probate probation officers had treated them with condescension, scorn, and disrespect").

219 Peled & Perel, *supra* note 140, at 92, 94; Scott et al., *supra* note 137, at 104–13 (describing the

ples support a move away from a deficit paradigm about parenting by abusers to focus on the complexity of their experience and need for support to change.[220] Client empowerment is also a central tenet of domestic violence practice, and it encourages the advocate to consider, from the client's perspective, the strengths and resources they have to work towards positive outcomes.[221] An understanding of Steve's experience allows for the development of a more nuanced narrative than the stock narrative of the victimized father that the court expects.[222] These considerations may also help a student focus on the facts that favor the abuser having an ongoing relationship with his children, and to use these to develop a strategy that safely promotes his rights rather than just depriving the abused mother of hers.

At the same time, accountability remains an important principle. With recognition of the reality of abuse in the family, a student cannot simply ignore its existence in the courtroom.[223] Rather than inciting the court to discard Meg's experience, the student representing Steve can be encouraged to treat her with empathy and respect.[224] Hopefully, the student representing Steve can see the litigation as more than just another battle within a larger war.

E. Lawyers Can Not Solve Abuse Cases Alone

It would be both foolish and dangerous to think that a lawyer alone can solve a domestic violence case. While this exercise suggests specific strategies for safely and responsibly representing an abusive spouse, students should be cautioned that there are barriers to implementing these strategies in practice. In the course, Steve is played by an actor so he can decide how much to resist the students' approaches without going to the point that the exercise becomes pedagogically useless. As teachers, we can give him the benefit of the doubt that he will facilitate students' learning during this process. In real life, a client like Steve may never hire an attorney who does not intend to act as a proxy for his abuse in family court, and with proper screening, the kind of future lawyers taking this course

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"accountability guidelines" underlying the authors' parenting intervention program).

220 Peled & Perel, *supra* note 140, at 88–89.

221 Enos & Kanter, *supra* note 20, at 94.

222 *See* discussion *supra* Part III.B.

223 In fact, doing so may constitute a failure to disclose material facts, which carries ethical implications. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 (2013).

224 Scott et al., *supra* note 137, at 110 (noting the importance of emphasizing respect for former partners in work with abusive fathers).

would be unlikely to take on a client like that.[225] In a more likely scenario, the attorney may not discover the extent of her client's abusive behavior and potential risks to her former partner and children until later in the representation. At that point, the lawyer's options are much more limited; she may not be able to persuade the client to follow her advice against further abuse, and she may need to withdraw.[226] Recognizing the lawyer's resistance to his goals, a client like Steve might fire her before it even gets to that point. In either of these scenarios, there are real safety risks to both the attorney and the targets of the abusive spouse's behaviors.[227]

This exercise also imagines a scenario where the parties have access to meaningful, skilled representation in a domestic violence case, a reality that is far from realized. Students, therefore, need to recognize that lawyers are only a piece of the puzzle in encouraging an improved community response to domestic violence cases.[228] However, the hope is that students will walk away from this course feeling like lawyers can make a difference in a domestic violence case.[229]

IV. Implications

A. Restoring Balance in Families Impacted by Abuse

Our experience in this course suggests that, with guidance and structure, the exercise of representing Steve can encourage safer, more responsible representation of abusers in family court. At the core of such representation is a move away from approaches that minimize or distract from a court's consideration of abuse allegations. Our experience suggests that this exercise expanded students' views of how domestic violence allegations can be handled. In earlier iterations of the course, students reflected upon representing Steve

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225 *See* note 163 (providing resources on screening for domestic violence).

226 *See* Buel & Drew, *supra* note 163, at 468–71 (discussing a lawyer's options when their obligation to warn a third party of intended abuse is triggered, including disclosure of the threat and cessation of the attorney-client relationship).

227 *See id.* at 469–70.

228 Bancroft et al. provide guiding principles for professionals in multiple sectors, including courts, custody evaluators, visitation centers, and child protective personnel. *Supra* note 5, at 235–76.

229 *See* Smith & Seidman, *supra* note 25, at 439 ("[L]awyers are essential to battered women obtaining meaningful access to the legal remedies available to them. For many victims of domestic violence, the right to be *heard* requires a lawyer."); *see also* Shalleck, *supra* note 20, at 1038 ("Lawyers have the potential to be . . . important resources for these women as they confront the legal system.").

more as defending an alleged perpetrator than helping a parent make constructive decisions about access to his children, stating, for example, "I wanted Steve to get out ahead of the accusations."[230] Other reflections displayed a prioritization of the client's cause while remaining detached from the client as a person;[231] as another student expressed, "I didn't feel an emotional bond besides wanting to do well in court."[232]

When encouraged to view the case through the more complex lens of Steve's experience, the students expressed newfound empathy; one stated, "There really is a chance to relate to any client on at least a basi[c] level."[233] Being able to empathize with both parties can also better "inform ... students' views on how these disputes should be resolved."[234] Here, students moved beyond simply denying the abuse allegations to find a middle ground by employing problem-solving approaches to their representation of Steve. As one student explained, "[W]hen I prepared my materials for trial, I found myself figuring out how to ask questions and present my argument to best represent my client without simply shooting down Meg's accusations."[235]

After this guided exercise, the tone of other students' reflections also shifted from defending Steve against the domestic violence allegations to focusing on his strengths as a parent, stating, "[A]s [Steve's] attorney, I wanted to convey his want to be a good father[.]"[236] By giving more thoughtful attention to their representation of Steve, students appeared to more fully consider the scope of harm caused by domestic violence in the family, and how those harms could be aggravated by the legal system. One student captured this in

230 Final reflection from Student C (Nov. 9, 2012) (on file with author).

231 As Smith and Seidman explain,

> [T]he students' embrace of client may make it difficult for them to contemplate broader issues of justice. The stronger the attachment, the greater the righteousness, the harder it is to notice anything else. It sometimes seems that students simply cannot do both; they cannot take on a client's cause body and soul, while keeping an eye on justice, fairness, and equality.

Supra note 25, at 448.

232 Final reflection from Student D (Nov. 16, 2012) (on file with author).

233 Final reflection from Student E (Aug. 15, 2013) (on file with author).

234 Raghunath, *supra* note 34, at 250.

235 Final reflection from Student B (Nov. 16, 2012) (on file with author).

236 Final reflection from Student E (Aug. 15, 2013) (on file with author).

her final reflection: "I . . . saw the challenges that domestic violence thrust upon a divorce case. It requires heightened awareness of safety issues, consideration of the intricacies of the marital relationship and the effects of the abuse on the children."[237]

B. Raising the Quality of Domestic Violence Practice

Representing both parties allows the students to gain a breadth of perspective and depth of insight about domestic violence practice in family court "beyond what it otherwise would have been."[238] As such, the exercise has potential to move students closer towards the "balanced perspective that many longtime practitioners acquire only after years of exposure to their clients and opponents."[239] Being able to see the case "through the prism of clients on both sides" exposes students to the broader issues unique to domestic violence practice in a way that the traditional clinical model cannot.[240] One student who plans to pursue a career in the domestic violence field noted the practical benefit that representing Steve allowed her to "understand how counsel for perpetrators might approach a case such as this one."[241]

Having a more balanced perspective about a practice area is helpful not just for one's individual practice; rather it "is an essential ingredient in the professionalism of the bar as a whole."[242] Achieving such balance need not mean sacrificing the ideologies or political agenda characteristic of a particular practice area.[243] Attorneys on either side of a domestic

237 Final reflection from Student F (Aug. 14, 2013) (on file with author). Another student stated, focusing on her advocacy for Meg, "The process seems to open the door to revictimization of the survivor client by both the perpetrator and the court system, which—fresh to a perpetrator's devices—may find him the more credible party." Final reflection from Student G (Aug. 16, 2013) (on file with author).

238 Raghunath, *supra* note 34, at 250, 255–56.

239 *Id.* at 250–51; *see also* Schön, *supra* note 128 (explaining that professional expertise comes from continued exposure to, and reflection upon, the challenges of real legal practice).

240 Raghunath, *supra* note 34, at 250. Raghunath notes that the "individual case-centered model of clinical legal education" is predominant, but is skeptical of its soundness as a teaching method because it does not incorporate alternative perspectives. *Id.* at 255–56 (quoting Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV., 355, 368 (2008)); *cf.* Smith & Seidman, *supra* note 25, at 448–49 (suggesting that students who represent the abused or those accused of domestic violence will be better advocates if their clinical experience helps them develop a "broad, critical perspective of our legal system").

241 Final reflection from Student G (Aug. 16, 2013) (on file with author).

242 Raghunath, *supra* note 34, at 250–51.

243 *Id.* at 254.

violence case may be able to find common ground in the shared goal of helping a family move beyond the harm caused by abuse while using similar advocacy skills.[244] Furthermore, by experiencing firsthand the difficulty of providing safe, empowering representation to either the abused mother or the abusive father, albeit in a simulated context, students may be poised to empathize with their opponents rather than conforming to the stereotypes of hostile adversarialism that exist in the legal system.[245]

C. Beyond the Domestic Violence Field

Recognition of how values can shape client representation may promote socially responsible lawyering in other contexts. Experiential courses that put students in traditionally opposing roles exist in integrated prosecution and criminal defense clinics,[246] and in child advocacy clinics in which students represent children who have been abused or neglected, the parents accused of those acts, and the agency responsible for investigating the cases.[247] Others have been suggested in landlord-tenant and employment law.[248] In each of these settings, students' dialogue about different lawyering roles is meant to engender critical reflection about how values inform those roles, and how those roles provide different perspectives on the legal system.[249]

On a most basic level, litigating both sides of a case helps a student gain perspective on his or her future practice choices.[250] As many have suggested, client selection is a value-driven process that can define a lawyer's career.[251] In this course, students quite naturally reflect on whether they could ever represent someone accused of domestic violence. By considering which clients or issues are important to them, students engage in a moral and

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244 *Cf.* Smith & Seidman, *supra* note 25, at 453–54 (explaining how putting students representing those who have been abused and those accused of abuse in the same class could encourage them to consider whether they share common goals).

245 *See generally id.* (suggesting that lawyers can move beyond the traditionally hostile dynamic between those on either side of a domestic violence case).

246 *E.g.*, Smith, *supra* note 36.

247 *E.g.*, Duquette, *supra* note 36.

248 *E.g.*, Raghunath, *supra* note 34, at 245, 247.

249 Smith, *supra* note 36, at 1255; Duquette, *supra* note 36, at 15.

250 Raghunath, *supra* note 34, at 251.

251 *See id.* (citing sources on how values influence client selection).

professional decision-making process that will better prepare them for the challenges they will experience in the practice of law.[252]

Moreover, students get the opportunity to see that, rather than subscribing to externally defined roles in the legal system, they "have the right to define for themselves the role they will play, and the moral justifications they will develop" in that role.[253] The tough decision-making necessary throughout the process of representing Steve constitutes an exercise in professional identity development.[254] Letting personal values infuse professional choices can bring more meaning to one's career, in turn improving the quality of representation for individual clients.[255]

D. Challenges

Despite its potential benefits, the exercise of representing the abusive father is not without its challenges. First, even though we make clear in advertising the course what we hope to accomplish, the goals and interests each student brings to the course impact how effective the exercise will be in pursuing our overall course objectives.[256] Students largely self-select for the course based on their interest or experience with issues of abuse, and we recommend as much in our course registration materials.[257] However, students who are simply interested in learning the basics of family court practice often enroll, and their attitudes about domestic violence can range from apathy to antipathy.[258] Still other students

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252 Adrienne Jennings Lockie, *Encouraging Reflection on and Involving Students in the Decision to Begin Representation*, 16 CLINICAL L. REV. 357, 358 (2010); *see also* SULLIVAN ET AL., *supra* note 38, at 135 ("Because law school represents a critical phase in the transition into the profession, it is inevitable that it will influence students' image of what kind of lawyers they want to be.").

253 *See* Smith, *supra* note 36, at 1256 (describing this benefit in the context of a combined criminal defense/prosecution clinic).

254 SULLIVAN ET AL., *supra* note 38, at 135 ("Professional identity is, in essence, the individual's answer to questions such as, Who am I as a member of this profession? What am I like, and what do I want to be like in my professional role? and What place do ethical-social values have in my core sense of professional identity?").

255 Raghunath, *supra* note 34, at 252.

256 For example, we make clear that it is a course about domestic violence practice in family court and that we bring a domestic violence advocate's perspective to our teaching of it.

257 The instructors' collective experience throughout the history of the course is that it is very challenging to provide students with enough of a foundation in the dynamics of abuse to support their work in the course without extensive additional reading or individualized instruction.

258 *Compare* Anonymous course evaluation (Nov. 2012) ("I think the DV aspect of [the course] should be

have experience with domestic violence in a criminal law context. For these students, it can be especially difficult to orient themselves both philosophically and strategically in the course, given that they may be conditioned to an innocence/guilt paradigm. As such, students in the course exhibit varying levels of resistance to the strategies and philosophies presented in the course. Given that the goal of the exercise is ultimately to suggest a new way of thinking about domestic violence practice, provocative yet productive dialogue about these challenges is invited—but in order to keep the litigation "on the rails," certain variables must be controlled.[259]

The exercise of representing the abusive father is also premised on the idea that students will be capable of viewing the domestic violence situation as a whole, rather than just the impacts on one party or the blameworthiness of another.[260] The ability of a law student to see a family violence situation holistically may be inherently limited by his or her lack of experience.[261] Combining this challenge with learning substantive and procedural family law and developing litigation skills is an ambitious endeavor for both instructors and students. Keeping the class small enables the instructors to direct students to the guides and resources that will fill in gaps in their knowledge and provide the "scaffold" for their learning.[262] While it remains a challenging course, we are firm in our conviction that the students' progress towards expertise is served by immersion, in role, in a context that exists "outside the rules."[263]

CONCLUSION

Domestic violence practice is hard. To embrace the skills and values of domestic vio-

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eliminated [as] it plays no learning role in a trial course."), *with* Final reflection from Student A (Nov. 8, 2012) ("I truly felt for [Steve's] situation and wanted to help him gain equal rights for and time with his children and protect the assets that his parents worked to build and he worked to maintain.") (both on file with author).

259 For example, if students were successful in counseling Steve away from a request for sole custody, the case may not go to trial, which is the culminating experience of the course. *See* discussion *supra* Part I (discussing additional limitations of a simulation course).

260 *See* discussion *supra* Part III.A (describing premises of the exercise that we encourage students to adopt).

261 *But cf.* SULLIVAN ET AL., *supra* note 38, at 117 ("The novice should not be asked to exercise judgment or interpret a situation as a whole.").

262 *See id.* at 116 ("[R]ules and procedures are essential scaffolds that enable beginners to gain a basic grasp on how to function in a variety of practice situations.").

263 *See id.* at 117.

lence advocacy, students must first unlearn what they believe to be true about lawyering.[264] Once they begin working with clients who have been abused, students will face constant challenges adhering to these values. The principles underlying the work can be at odds in any given case. Safety often clashes with empowerment: How is a student to respect a client's decision when the student feels that choice is dangerous?[265] Even absent immediate safety concerns, students will struggle to establish true partnership with their clients, to find the balance between collaborating with and advocating for them.[266] Because the stakes of each case are so high, students can feel a "heightened sense of urgency" about their clients' struggles.[267] As a result of these challenges students can become detached, frustrated, or even hostile towards their clients.[268] They may burn out. They may begin to embrace the institutional attitudes which discount and distrust the experiences of domestic violence survivors, leading them see their clients purely as "victims."[269] These are the very practices clinics try to stem.

Achieving better outcomes for abuse survivors and their children requires changing the culture around how domestic violence allegations are handled in family court. As this article argues, this shift can begin with how future lawyers and judges are trained. By

264 Enos & Kanter, *supra* note 20, at 85–87 (describing the "directive, hierarchical and individualistic methods of advocacy" that accompany the "images of the ideal lawyer" students bring to domestic violence clinics); Goodmark, *Clinical Cognitive Dissonance*, *supra* note 7, at 321–22 ("Domestic violence clinical professors often find themselves attempting to persuade students that everything they believe they know about lawyering and the legal system is wrong, and that they must re-learn how to lawyer to be effective advocates for women subjected to abuse—not an easy paradigm shift for students to accept.").

265 Enos & Kanter, *supra* note 20, at 99 ("The hardest cases, however, are those where abusive acts have caused or threaten to cause serious injury and suffering and the advocate does not simply disagree with her client's decision-making, but perceives her client as acting or failing to act in ways that may further endanger the client or her children.").

266 *Id.* ("Even advocates who respect the client's right to make her own decisions can experience disappointment and frustration when a client chooses not to take a course of action that the advocate perceives to be beneficial. They may question whether they can or should be more proactive in their partnership with their client.").

267 Smith & Seidman, *supra* note 25, at 446.

268 *Id.* at 96–97 (describing how students may stifle their emotional responses to cases, which in turn reduces their effectiveness as an advocate and leads them to deny or minimize what clients have told them); Shalleck, *supra* note 20, at 1052 (describing the frustration, anger, hurt, and distress some students may experience because of the unstable, disruptive, and high stakes nature of domestic violence advocacy); Howard, *supra* note 27, at 188 (explaining the author's own anger and frustration with her client as a student in a domestic violence clinic).

269 Shalleck, *supra* note 20, at 1041–42.

describing strategies for representing an abusive parent that address rather than minimize abuse, this article attempts to stem the practices that continue to endanger and disadvantage survivors in family court.

The resistance students will encounter in implementing these strategies in practice is great. Much of what students learn about domestic violence advocacy is at odds with how they will experience it in practice.[270] Students who enter the domestic violence field will be faced with the choice of taking the path of least resistance—accepting the legal system's limitations and working within them—or challenging those institutional structures by "working . . . to bring the system in line with the principles, values and goals that many of us have for practice with women subjected to abuse—the same principles, values and goals that are taught in domestic violence clinics every day."[271] It is critical, therefore, that students encounter these challenges before they enter the profession.

As teachers, is it our responsibility to send students out into the world not only with legal training, but "a sense of responsibility for others."[272] As this article suggests, encouraging students to "see beyond their side when it comes to justice" can help.[273] The implications of an exercise in representing the traditionally opposing party can reach beyond the classroom and beyond a particular practice area. By struggling to define the quality of justice in a given case, students begin to develop a "broad, critical perspective" about the

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270 Goodmark, *Clinical Cognitive Dissonance*, *supra* note 7, at 302.

271 *Id.* at 323.

272 Jane H. Aiken, *Striving to Teach "Justice, Fairness, and Morality"*, 4 CLINICAL L. REV. 1, 6 n.10 (1997); *see also* Raghunath, *supra* note 34, at 250 ("[T]here is great civic value to allowing individuals to 'occasionally see elsewhere' on controversial issues, in instances when they otherwise might not.") (quoting CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 157 (2009)).

273 Smith & Seidman, *supra* note 25, at 445. Our experience in this course confirms this proposition. In the most recent delivery, most students expressed how appreciative they were for having had the opportunity to represent both Meg and Steve. One stated, "I very much appreciated the opportunity to have the experience of representing a client with whom I had difficulty seeing eye-to-eye—I am sure this experience is not unique to perpetrators" (Final reflection from Student G (Aug. 16, 2013) (on file with author)), and another stated, "I . . . appreciated the opportunity this course gave me to represent 'the other side.'" (Final reflection from Student I (Aug. 16, 2013) (on file with author)).

practice of law and their role within it.[274] We hope that students, armed with this insight when they enter the profession, will see that the responsibility to pursue justice lies within them.

274 *See* Smith & Seidman, *supra* note 25, at 449 ("We believe that even those students who pursue careers representing the abused or accused will be better lawyers and better people if they develop a broad, critical perspective of our legal system and are concerned about justice."); *see also* Smith, *Rosie O'Neill Goes to Law School*, *supra* note 29, at 59 (explaining that for students who feel a conflict between feminist ideals and representing someone accused of crime, a broader focus on the "'quality of justice' . . . is enormous common ground." (quoting RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 171 (1989))).