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Featured Article

JURISPRUDENCE: DUE PROCESS CONCERNS FOR THE
UNDERREPRESENTED DOMESTIC VIOLENCE VICTIM

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Introduction

A variety of innovative court programs have been designed to improve the traditional criminal justice response to domestic violence.³ Specialized domestic violence courts have been created to single out domestic violence cases for special treatment and address the multiple legal, mental health, and social aspects of family violence by providing a more comprehensive and integrated approach that often combines criminal and civil cases.⁴ These specialized courts are commonly referred to as integrated domestic violence courts (“IDVC”). The ultimate goal of these specialized courts is to control the abuser and to increase victim safety and support services. Integrated domestic violence court programs have developed in Quincy, Massachusetts, Westchester County, New York,⁵ Dade County, Florida, and the District of Columbia *172 and exemplify these innovative court responses to domestic violence.⁶

To accommodate the comprehensive judicial mandates the integrated court's jurisdiction was expanded to include all cases in the civil and criminal spheres relating to the victim, the abuser and their families.⁷ The majority of integrated courts allow one judge to hear all the legal issues: criminal, family court and matrimonial that may arise when domestic violence occurs.⁸ In practice this means that most integrated courts not only hear the criminal case but also handle petitions for custody, visitation, paternity and family offenses. The goal of these changes is not only to consolidate the civil and criminal court cases so that proceedings are procedurally more efficient and responsive to victims' needs but also to enable the judge to craft practical orders that can truly increase victim safety and encourage all victims to access the court in times of need.⁹

The newly created IDVCs eschew the traditional adversarial models of jurisprudence in favor of a more clinical, “problem-solving” approach to jurisprudence.¹⁰ A wide range of social services for victims are integrated into the integrated courts, and comprehensive information from social science professionals *173 is provided to the judge, whose decisions can then take into account the larger picture of the victims' situation and needs.¹¹

The extra-legal support and the judicial problem-solving approach inherent in the IDVC is frequently referred to as “therapeutic jurisprudence.”¹² Therapeutic jurisprudence brings a practical, healing vision into the justice system, to address the totality of what a domestic violence victim needs to be safe.¹³ Therapeutic jurisprudence is a concept that originated in the field of mental health,¹⁴ and some proponents view both the perpetrator and the victim as engaging in dysfunctional behavior.¹⁵ It is the author's belief that the mental health model of therapeutic jurisprudence is not appropriate or even effective in domestic violence cases. Rather the therapeutic jurisprudence guiding the IDVC must focus on the abuser's dysfunction and offender's accountability with the ultimate goal of increasing victim safety and empowerment rather than “rehabilitation of the victim.” While the notion of therapeutic jurisprudence is embraced by many as a means of providing support services to victims of

domestic violence in the integrated courts, in practice, it may give rise to coercive forces that disempower the victim of domestic violence and pose significant constitutional procedural due process issues.

Any new judicial posture that addresses and impacts the critical issues of victim safety and family interests must be ***174** painstakingly examined for criteria of success as well as for unintended outcomes. As the framers acknowledge, integrated courts are works in progress, and as they evolve all participants will play a role in shaping their future.

It is undeniable that the role of every attorney and client and many witnesses in this court will be impacted by the new powers and mandates of the IDVC. The driving force behind the IDVC is to improve and expand extra-legal support for victims. However, the therapeutic jurisprudence dispensing these support services should be guided by the victims' expressed needs for support rather than dictating a therapeutic plan to be followed. Victims should play an active role in the process and not be silenced from voicing their concerns and having their day in court. Threats to the victim's constitutional procedural due process rights increase exponentially when involved in an IDVC proceeding, due to unconscious exposure to coercive forces of the government that are inherent in the dispensation of "therapeutic jurisprudence." Consequently, it is critical to examine the legal system's treatment of victims involved in IDVC proceedings. This article will examine the legal and extra-legal forces that victims of domestic violence encounter in integrated courts and argue that they must be guaranteed the right to counsel from the outset of any IDVC proceeding to ensure their constitutional procedural due process rights are adequately protected.

Domestic violence is commonly defined in terms of power and control. Given the dynamics of domestic violence and the power and control imbalance inherent in the victim's relationship with her abuser it is likely that the victim will be subjected to the abuser's manipulation and coercive influences during court proceedings. Confronting the abuser face to face in court presents an enormous obstacle in and of itself for many victims of domestic violence and decreases the likelihood that the victim will stay in the system long enough to pursue relief.¹⁶ The assistance of counsel minimizes these risks.¹⁷

***175** The abuser is not the only coercive force that the victim might encounter in the IDVC. There is also an inherent conflict between the victim and various representatives of the State who are present in the IDVC ostensibly to provide extra support and counsel to the victim.¹⁸ Prosecutors litigating the criminal case perform investigative, bureaucratic, administrative and political functions. Prosecutors do not have an identity of interest with the victim, do not advocate on behalf of the victim, and in fact, may decide to prosecute the criminal case without the cooperation of the victim. Prosecutors represent the State in the prosecution of the criminal case and are often unavailable to the victim. More importantly, prosecutors have no responsibility of confidentiality to the victim that exists in a lawyer-client relationship.¹⁹ Thus any communications that the victim has with the prosecutor or the prosecutor's representatives are not protected by the attorney-client privilege.

***176** The victim's confidentiality is also jeopardized when she communicates with the support staff and various other advocates and counselors who are present and make recommendations and reports to the IDVC. If a victim who is reluctant to leave the perpetrator speaks openly to an advocate or court representative, who may also be a mandated reporter, regarding the on-going and past abuse that has occurred in the presence of children she might find herself vulnerable to a court-ordered investigation by child abuse services or even to a neglect proceeding being filed against her.²⁰ IDVC proceedings also raise significant due process concerns because of the impact of a predominantly criminal court approach upon the victim's civil case.²¹ In a "one family/one judge" court, the same judge presides over the abuser's criminal case as well as later civil actions for custody and/or divorce. The IDVC judge may learn otherwise confidential information about the victim in the context of the criminal case or from service providers assigned to the criminal case investigation and who report to a resource coordinator. The judge may consider it relevant to seek important information regarding the victim's psycho-social capacities when rendering a sentence in the criminal case. These "insights" may negatively impact the victim in her civil case.²² The judge hearing the civil cases of victims who have refused to cooperate in their abuser's criminal prosecution may feel legally and morally obligated to apply this finding against the recalcitrant victim in later divorce and custody decisions.²³

Integrated domestic violence courts are charting new pathways in administering justice. Consequently, it is critical to examine the system's treatment of victims involved in these *177 specialized courts and to include in this examination victims' perspectives of what is important in charting these new pathways to justice. This article will examine:

- (1) core elements of the IDVC and coercive forces inherent in the dispensation of therapeutic jurisprudence that impact unrepresented victims of domestic violence in this context;
- (2) constitutional procedural due process bases supporting IDVC victims' right to counsel;
- (3) statutory and precedential authority supporting IDVC victims' right to counsel;
- (4) the implications of a criminal template for the IDVC, the IDVC victim's right to counsel and when this right should attach; and,
- (5) propose certain ethical directives and implications for best practice for attorneys representing victims in the IDVC.

This article argues in support of victims' right to independent legal representation to protect and safeguard their due process rights as they seek relief in integrated domestic violence courts. In essence, the authors hope to articulate a framework for examining and evaluating the work of the IDVC to ensure, that the improvements in terms of extra-legal support for victims do not come at the expense of disempowering the victim and jeopardizing the victim's constitutional legal rights to have her voice be heard and to preserve her personal autonomy and liberty interests.

I. Core Elements Of Integrated Courts And Coercive Forces Inherent In The Dispensation Of Therapeutic Jurisprudence In This Context

Celini²⁴ is a woman from Equador who was referred by her local police department to civil court for an order of protection. She is the mother of a six-week-old baby boy whom she holds in her arms. When the court Intake Advocate asks her to complete *178 the necessary court forms to begin her application for a civil protection order it becomes clear that she is illiterate in her native Spanish. However, there is determination in her voice as she describes why she has sought the services of civil court. She recounts the events of the prior night that prompted her neighbor to call the police and ended with her husband's arrest. "My husband was drunk," she says. "He swore at me and pushed me onto the bed while I was carrying the baby. The baby was lying on the bed and my husband began to slap and punch me on my arms and chest. The baby started to cry and when I reached for the baby he slapped me in the face. His ring hit my mouth and my tooth was chipped and my lip started to bleed and was sore and swollen. My breasts and chest were tender and sore and it hurt when I took a deep breath."

The police arrived and arrested Celini's husband. Celini refused to press criminal charges but was interested in obtaining an order of protection from civil court and was receptive to learning about various counseling and support services available. When the officers returned to the precinct they met with their Domestic Violence supervisor and decided to file criminal charges against Celini's husband.

The next morning Celini came to civil court and obtained a temporary order of protection and temporary custody of the baby. After speaking to the civil court judge at the ex parte proceeding, Celini's sense of burgeoning empowerment was palpable. Nothing like this exists in her native country, she said in wonder, or if it does, it is only for the very rich. In fact, after coming to the United States her husband had always told her if the police ever were called they would deport her and give him the baby since he had a work permit and she did not have any papers.

One week later Celini is sitting in the IDVC. The police had filed criminal charges against her husband and the civil and criminal cases have now been consolidated. Sullenly, almost angrily, she tells the Intake Advocate she needs to withdraw all of her temporary orders right away. She ran out of food and money, she says, and couldn't ask her husband for any because the criminal

court protection order forbade him to contact or communicate with her. On top of this, her sister-in-law and her husband's family is refusing to care for the baby while she is at *179 work and are blaming her for her husband's arrest. The written materials she had received for support services, emergency shelter and other help were useless to her and without childcare she is afraid she will lose her job. Celini felt totally isolated and trapped in criminal court proceedings that she had not requested and couldn't begin to understand and it was evident she trusted no one. She blamed the system for cutting off all ties to her only lifeline, her husband and his family. Further down the hall, a man sat with his family and attorney. The man kept looking at Celini with pleading eyes. Celini was approached by the district attorney, an advocate and the court resource coordinator. She met each with increasing hostility. Celini spoke in a voice loud enough for her husband to hear and said, "Just leave me alone, I didn't want him arrested. I love my husband. He is a good father. Nobody is listening to me. I want to drop all of these protection orders."

The court system in the above example is on the verge of failing to protect Celini. Worse, it may teach her that the legal system can make things more difficult for her and that it is the wrong place to go when she needs help. Can any court system truly protect Celini? What are realistic goals for any court system as court reformers strive to improve the judicial response to domestic violence to increase victim safety? Celini exemplifies the problem this article hopes to address. Celini had been empowered in civil court proceeding because she was in control of her litigation and could seek an order of protection with provisions crafted to suit her needs. Now, she finds herself in an environment where no one is listening to her expressed desires and she feels frustrated, out of control and disempowered.

Why is the integrated court failing Celini? The intended IDVC role is to "craft a meaningful intervention that may change future behavior."²⁵ As such the therapeutic jurisprudence dispenses in the IDVC is an interdisciplinary approach that imports psycho-sociological methods of inquiry as well as actual support services into the work of the court.²⁶ A new court staff member, the Resource Coordinator, "gathers information from all outside *180 agencies involved in a case . . . This ensures that the court has the best information available when making decisions that can turn out to be a matter of life or death."²⁷ Enhanced "information technology . . . facilitates the transfer of critical information between the court and a variety of other agencies that may be involved in a domestic violence case."²⁸ IDVC framers believe that a court thus fully informed of the many causes and effects of the domestic violence in the parties' lives—a judge informed of the "totality of [her] case in all its dimensions"²⁹ - will be able to fashion and implement comprehensive and hence, more effective remedies. Presumably, these remedies may include orders incorporating social and/or psychological prescriptions, consistent with the judge's expanded jurisdiction and his or her behavior-changing mandate.

After entering the court system, the victim is linked with comprehensive services, including counseling services for the victim and her children, housing assistance, employment training and immigration status assistance, that will encourage her participation in the legal process to help her escape the perpetrator's abuse.³⁰ One service provided almost universally is "victim advocacy," i.e., consultation with specially trained personnel who establish a relationship with the victim and assist her in myriad ways, including explaining the legal process, linking her to necessary services, helping with safety planning and providing ongoing moral and emotional support.³¹ In many courts, a victim advocate is present at all times in the courtroom as a court employee, and reaches out to all victims after their initial court appearance to help the victim with her legal and extra-legal needs.³² But what happens when the victim's desires conflict with *181 the stated goals and objectives of the advocacy support services. For example, what will happen if a victim insists on a limited order of protection that does not order the abuser to vacate the residence when the advocate favors a vacate? Will the court ignore the victim's voice and substitute their judgment for hers or will the court fashion a remedy in conjunction with the victim that will send a message to the abuser so as to hold him accountable for his actions as well as empower the victim by giving her control of her case?

In addition to an inter-disciplinary problem solving approach the IDVC also provides a more prominent judicial focus on victim welfare.³³ Although offender accountability remains an important component of the court's mandate,³⁴ this new victim focus serves the "problem-solving" goal of eliminating domestic violence by increasing victim safety. Under this model the judge's jurisdiction in the IDVC is expanded to encompass a holistic approach with a focus on victim safety. In many of the new IDVCs,

the judge presides over all legal actions involving the *182 parties, including divorce, custody, child abuse and neglect, civil orders of protection, support and criminal matters.³⁵

By expanding judicial jurisdiction [intervention] and integrating social services, IDVC reformers hope to give the victim what she needs to be safe.³⁶ However, what the victim needs to be safe however, may be defined differently by the IDVC and the victim.

Empowering the victim by sending the message that domestic violence is a serious crime and that community services can be mobilized to respond to her safety needs may be just as important as sending a message to the abuser that domestic violence will not be tolerated and that he will be held accountable. Consequently, providing a mouthpiece for the victim to express her needs will be a critical element to empower and validate victims in any IDVC that is truly victim focused. What remains to be seen is who will determine what the victim needs to be safe. Will the IDVC seek victim input into defining “safety” needs for her particular situation? Will the IDVC problem-solving team accept the victim's self-declared needs if they conflict with the remedies recommended to the IDVC by the cadre of professionals providing input and evaluation of a particular case? Will the IDVC victim feel free to articulate her desires in the presence of her abuser?

*183 Mandatory reporting laws also present a significant threat to victims in integrated courts. The majority of professionals that a victim is likely to encounter in integrated courts are mandated reporters. An indigent victim proceeding pro se may unknowingly divulge compromising information or make admissions on the record that may later prove prejudicial or serve as a basis for a neglect charge. Had this same victim been afforded counsel this situation might have been avoided. An attorney representing a client is notably exempted from the list of mandated reporters. This exemption from reporting is an acknowledgment of the great social value inherent in the relationship between an attorney and client, in which the attorney holds an inviolable duty not to disclose a client's confidences.³⁷

Will the unprecedented focus on extra-legal problem-solving in integrated courts add new dimensions to the victim's attorney's ethical responsibilities? Or will her attorney's duties be vitiated by a panoply of advocates, counselors, coordinators and the all-knowing judge, all devoted to promoting the victim's best interests? Or will it be that, as this article contends, the right to counsel will be even more critical than in the past and will be crucial at the victim's first appearance in the IDVC in order to protect her procedural due process right to let her voice be heard?

II. Constitutional Procedural Due Process Bases Supporting Victims' Right To Counsel In Integrated Domestic Violence Courts

There are two Due Process clauses in the United States Constitution. The Fifth Amendment Due Process Clause limits the power of the national government and the Fourteenth Amendment limits the power of state governments. Both clauses guarantee that no person shall be deprived by the government “of life, liberty, or property, without due process of law.”³⁸ Due Process guarantees a fair and reasonable law (i.e., substantive due process) as well as a fair proceedings in the application and enforcement of the law with notice and opportunity to be heard (i.e. procedural due process).

*184 A substantive due process claim asserts a law as written is not fair because it unduly burdens or interferes with a liberty or property interest, while a procedural due process claim asserts an individual is being deprived of a liberty or property interest without a fair hearing (i.e., lack or notice or opportunity to be heard).

Due process has never been precisely defined and there is no bright line rule for its application.³⁹ Moreover, “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”⁴⁰ “Applying the Due Process Clause is therefore an uncertain enterprise where a court must determine what “fundamental fairness” consists

of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.”⁴¹

Failure to provide victims of domestic violence with counsel in the IDVC may deprive them of their procedural due process rights since, without representation, victims may be forced to litigate or proceed in judicial proceedings in which they encounter coercive forces and bargain away their right to personal autonomy and safety. Victims proceeding without counsel in the IDVC may not have an adequate and meaningful opportunity to be heard on matters of utmost importance to their personal autonomy or liberty interests.⁴² The right to be present at a court proceeding is not synonymous with the right to meaningful access and the right to be heard. How can it be “fundamentally fair” to give victims access and the right to be present in the IDVC if they are not guaranteed that their voices will be heard?

There is no constitutional right to counsel in civil litigation unless it is clearly established that a fundamental right or liberty ***185** interest is at issue.⁴³ Counsel has been constitutionally required even where a person's own physical liberty is not implicated but where “liberty interests” are at issue. These “liberty interests” have included rights to bodily integrity⁴⁴ as well as rights concerning parenthood and the family.⁴⁵

All IDVC proceedings concern issues and choices surrounding marriage, family life, and the upbringing of children. To protect these fundamental interests, victims must be guaranteed the assistance of counsel in order to neutralize coercive forces in the course of the court proceedings that may deprive them of these interests.

Procedural Due Process Analysis

Procedural due process means that there must be procedural protections in place to protect individuals engaged in the process of preserving fundamental and/or important interests.

A procedural due process analysis involves determining the following:

- 1) if a “fundamental” or protected interest in life, liberty, or property is threatened by governmental action
- 2) if the protected right is impaired to such a degree as to trigger due process (i.e. impairment must rise above de minimus threshold level)
- 3) what procedure is fair in the particular case (i.e., what type of notice and/or opportunity to be heard that must be afforded in the particular case).

***186 Personal Liberties: Penumbras and Emanations**

The first step in any procedural due process inquiry is determining whether the government interferes with a fundamental or protected liberty interest.⁴⁶ Protected liberty interests that trigger due process rights that are classified as “fundamental” and falling within the protection of the Due Process clause may be specifically mentioned or enumerated in the Bill of Rights such as freedom of speech and right of privacy, or may be found to lie “within the zone of privacy created by several fundamental constitutional guarantees.”⁴⁷ Other protected liberty interests triggering procedural due process protection are defined by statute, regulation, case precedent and official custom and practice.

Choices about marriage, family life, and the upbringing of children are among rights that the Supreme Court has ranked of “basic importance in our societyrights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard,

or disrespect”⁴⁸ Justice Douglas in *Griswold* recognized the right of marital privacy and linked this right to a *187 “zone of privacy created by several constitutional guarantees”⁴⁹ that have penumbras emanating from those guarantees in the Bill of Rights.⁵⁰ Other justices in *Griswold* rejected this approach and found the right of marital privacy “implicit in the concept of ordered liberty.”⁵¹ And as such fell within the “liberty” of the 14th Amendment Due Process Clause.⁵² Other justices agreed that the right of marital privacy is an aspect of due process “liberty” but based their conclusion on the Ninth Amendment⁵³ that states “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people” (emphasis added).⁵⁴

While the seven members of the *Griswold* majority offered different bases for finding a fundamental right of marital privacy they uniformly agreed that certain liberty interests fell within the “liberty” protected by the Due Process Clause even though they are not specifically enumerated in the Bill of Rights. Since *Griswold*, the Supreme Court has recognized other non-enumerated personal liberty interests that fall within the Due Process Clause. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) Chief Justice Burger stated that “the Court has acknowledged that certain unarticulated rights are implicit in enumerated guaranties.”

What initially began as a right of privacy has subsequently evolved into a right of personal autonomy. In *Whalen v. Roe*, 429 U.S.589, 599-600 (1977) the Court further defined the right of personal autonomy as “the interest in independence in making certain kinds of important decisions.” Personal decisions the Court has found to be protected by the right to personal autonomy *188 include decisions regarding marriage,⁵⁵ family integrity⁵⁶, and intimate associations⁵⁷.

Additionally, courts have recognized a fundamental right to bodily integrity and personal autonomy. These cases have generally involved women contemplating certain medical procedures⁵⁸ but a similar argument can be made for the domestic violence victim who is attempting to retain her physical and emotional freedom i.e., personal autonomy. In *Planned Parenthood v. Casey* the Court expanded the notion of personal liberty to encompass the liberty interest of personal autonomy. The *Casey* Court held that “at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁵⁹ The Court went on to state that “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter,”⁶⁰ and “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment.”⁶¹

The *Casey* Court recognized a zone of privacy centered about private and personal decisions. However, a court has never recognized the “right” of a domestic violence victim to be free from her abuser as a fundamental right or liberty interest.

Yet domestic violence victims seeking redress in integrated courts must make numerous decisions central to their personal autonomy and family integrity. Should they stay or should they end the relationship? What is in their children's best interests? *189 What is the safest course of action? Following the *Casey* logic it can be argued that a domestic violence victim should have the same fundamental right to control her own person and be free from governmental interference when making personal decisions regarding marriage, family integrity and intimate relationships.⁶² Consequently, a victim of domestic violence has a right to counsel because the domestic violence victim may be deprived of her fundamental liberty interest and personal autonomy and, in many cases, her life if she is not afforded representation in the IDVC to guarantee her an opportunity to be heard.

The liberty interests in personal autonomy and intimate personal decision-making discussed above that are guaranteed by the Due Process Clause are negative liberties in the sense that individuals are not absolutely guaranteed that the government will make these rights available to them but only have a right to be free from governmental interference if exercising these rights. Thus, the Due Process Clause does NOT require the government to assume an affirmative duty to protect or guarantee individuals the means to exercise these liberties if they cannot do so on their own UNLESS the government assumes or enters into

a “special relationship” with an individual by “restraining the individual's freedom to act on his own behalf.”⁶³ Consequently, where the government has placed the individual in a position where he is “more vulnerable” and has less “freedom to act on his own behalf” than he or she would have had without the government action,⁶⁴ the government may develop a “special relationship” with that individual and therefore, an affirmative duty to protect that individual's liberty interests.⁶⁵

In *Youngberg v. Romeo*, 457 U.S. 307 (1982) the court found that a state mental hospital had a “special relationship” with inmates involuntarily confined and consequently had an affirmative duty to protect and care for the inmates and to preserve their liberty interests in physical safety and bodily freedom.

In contrast, in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 the Court distinguished *Youngberg* and held that a state had no affirmative constitutional duty to protect a child from being beaten by its father because there was no “special relationship” between the child and the state since the child was living at home and was not in the custody of the state.

Whether a “special relationship” existed in *Youngberg* and *DeShaney* turned on the control the government had over the individual.

In *Youngberg* the inmates were found to have a “special relationship” with the government because they were under the control of the government since they were confined within a state mental hospital and subject to the rules and regulations promulgated within the state facility. In contrast, in *DeShaney*, there was no “special relationship” between a child and the state because the child was living at home and was not subject to control and regulation by the state. In their analysis the *DeShaney* court suggested that the result would have been different had the child been in the custody and control of the state instead of in the custody and control of the parents.

IDVC victims who are not guaranteed counsel are similar to the inmates in *Youngberg* and have a “special relationship” with the state since they are essentially subject to the arms of the court as they navigate the court proceedings. They may become subject to court mandates and be forced to participate in proceedings that they did not initiate such as criminal cases, court ordered investigations and the like.

The IDVC has been created by legislation and creates an environment where multiple disciplines converge to create a plan for victims of domestic violence. Victims who proceed without counsel in the IDVC may find their liberty interests in personal autonomy at odds with the therapeutic jurisprudence of integrated courts. The fact that court intervention might be at odds with victims' goals and objectives was recognized by the court in *Nicholson v. Williams*, 203 F. Supp. 2d 153, when it stated that to “satisfy due process the court must conduct sufficient investigation to establish objectively reasonable case planning.”⁶⁶ It is unlikely that this objective case planning in which the victim is an active participant can be achieved in the IDVC unless victims are represented by counsel.

Due Process Rights in the Absence of “Fundamental” or Enumerated Liberty Interests:

The indigent civil litigant has no constitutional right to appointed counsel unless fundamental rights or protected liberty interests are at issue.⁶⁷ Courts have been reluctant to create new “fundamental liberty interests” requiring appointment of counsel.⁶⁸ Yet courts have recognized there are circumstances where individuals face such grievous consequences should they be denied counsel that courts in their discretion should assign counsel to preserve due process rights and ensure that judicial proceedings are “fundamentally fair”.⁶⁹

The requirement that counsel be appointed for an indigent where no potential for deprivation of fundamental and or physical liberty exists but where important “liberty interests” are at issue is discussed in the Supreme Court's opinion in *Lassiter v.*

Department of Social Services.⁷⁰ In *Lassiter* the court wrote: it is the defendant's interest and personal freedom and not simply the special sixth and fourteenth amendments right to counsel in criminal cases, which triggers the right to appointed counsel⁷¹

The *Lassiter* court described the analysis required in cases where “liberty interests” rather than physical freedom is at stake. The *Lassiter* court spoke of balancing the three elements articulated in *Mathews*⁷² “against each other, and then setting their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful may lose his personal freedom.”⁷³ Thus in civil cases in which direct personal freedom is not at stake, the court must look to and balance the private interests at stake, the government's interests and the risk that the procedures used will lead to erroneous decisions and then balance the net weight of these factors against the presumption that there is a right to appointed counsel only where the indigent, if unsuccessful, may lose their “liberty interests.” While the *Lassiter* court held there was no constitutional right to assigned counsel for parental termination proceedings it found that in appropriate cases a balancing of the *Mathews* factors and the parental interests in a individual case could overcome the presumption against the right to appointed *193 counsel. In dicta, the *Lassiter* court underscored the importance of ensuring that any judicial process is “fundamentally fair” and stated “[a] wise public policy, . . . , may require that higher standards be adopted than those minimally tolerable under the Constitution.”⁷⁴

Applying this analysis to a victim involved in a custody case in the IDVC it is clear that the victim has tremendous “liberty interests” at stake, her family, her children and her home environment are impacted by any judicial directive, the government's interest are those of punishing the defendant if there is a criminal case pending, as well as deterrence, rehabilitation and victim safety. In the event of a custody proceeding the government's main interest is to preserve the family and/or act as *parens patriae* if the children are at risk. Even if a visitation or custody petition is not directly before the court it may become a collateral matter in a family offense proceeding if the victim is seeking an order of protection on behalf of her children. If the victim is unrepresented and does not have a voice in the decision-making which is arrived at via a myriad of service provider reports that may not account for the victim's perspective, the risk is high that an erroneous decision will be made that may even impact the safety of the victim.⁷⁵ Balancing the weight of these factors against the presumption that there is a right to counsel only if the victim, if unsuccessful, will lose her “liberty interests,” it is clear that a victim of domestic violence should have a right to counsel in the IDVC. Without counsel the victim has no real voice in the process and is vulnerable to settling the case according to the consensus and recommendations of the service providers and as a result may agree to terms that in fact jeopardize her safety or the safety of her children.

***194 Due Process and Right to Assigned Counsel in Domestic Violence Civil Litigation:**

A civil litigant has a constitutional right to retain hired counsel.⁷⁶ This right is rooted in the Fifth and Fourteenth Amendment notions of due process but does not require courts to provide lawyers for litigants in civil matters.⁷⁷ Historically the right to counsel for civil actions was virtually non-existent.⁷⁸ However, as previously discussed, some courts have found that the Due Process Clause requires the appointment of counsel in cases when a fundamental liberty interest is in jeopardy,⁷⁹ when an individual's proceeding is quasi-criminal or involves the potential for loss of physical liberty,⁸⁰ or in instances when an extreme imbalance of power between litigants exists.⁸¹

The United States District Court in *Nicholson v. Williams*⁸² found that due process rights of victims of domestic violence were violated when their children were removed from their custody by *195 ACS solely on the grounds that the mothers had been abused. The court not only found that an important liberty interest existed but also held that due process required that counsel be assigned. The court stated that “domestic violence cases involve special problems that make the lack of effective representation particularly dangerous.” The court emphasized that physical safety of victims is often at risk, and decisions that mothers make in legal matters may have life or death consequences for herself and her children.⁸³ The court stated, “[w]hen

counsel is not assigned to represent indigent petitioners in family offenses, victims of domestic violence must make critical decisions on their own that may affect their future physical safety.”⁸⁴ Moreover, the court stressed that the right to appointed counsel when necessary for due process is the right to effective counsel.⁸⁵ In *Nicholson*, the court found that assigned counsel had not been effective because the appointment came too late, counsel did not have the time or resources to adequately prepare to effectively represent the victims' liberty interests.⁸⁶

The *Nicholson* court emphasized that “domestic violence cases present complex issues of accountability and services that few battered women will be able to resolve without an effective advocate. These issues can arise in case conferences, where much of the safety planning actually occurs, as well as in court.”⁸⁷ In addressing post dispositional conferences, the court stated, “the presence of an attorney or other advocate . . . can mean the difference between an inadequate and effective case plan, and one that engages the parent and adequately addresses her needs.”⁸⁸

State Action Impeding Liberty Interest

If one accepts that a domestic violence victim has a liberty interest in preserving personal autonomy that may be jeopardized within the context of an integrated court proceeding then the next step in a procedural due process analysis is to find a state action *196 that impedes her exercise of this right to such a degree that it triggers due process scrutiny.⁸⁹ Yet, the IDVC is a court that is specifically designed to provide domestic violence victims easier access to a multitude of support services. How could any state action in this setting and undertaken for this purpose be perceived to impede a victim's liberty interest? The procedural due process argument is twofold: 1) that coercive forces inherent within the problem-solving/therapeutic context create a power imbalance between the victim and the “system” to such an extent that the victim will not have an opportunity to be heard; and 2) that it is the state's failure to act in this particular context that interferes with the victim's fundamental right to exercise their personal autonomy. The state's failure to act to provide counsel to IDVC victims unduly burdens, impedes and possibly prevents their opportunity to be heard. It seems contradictory to establish an IDVC and to encourage victims to access the court system, but once granting access, through passivity deny the victims meaningful presence and participation in the court proceedings by not providing victims the right to counsel.⁹⁰

Determining the Nature of the Hearing Required

The final step in the procedural due process analysis is to determine what type of hearing, i.e., notice and opportunity to be heard is fair in the particular case. Typically the three-part test from *Mathews v. Eldridge*⁹¹ is applied in a procedural due process analysis. When applying the *Mathews* test, the court must balance three factors: (1) the private interest affected by the official action; (2) the risk that the deprivation will occur erroneously based on the *197 procedures used and the value of additional or substitute procedural safeguards; and (3) the government interest in maintaining the current procedures (i.e. the cost-benefit analysis).⁹²

The private interests at stake for the victim of domestic violence is the victim's physical liberty interest in escaping being held hostage by her abuser, the victim's right to personal autonomy and to make personal and family decisions, and the right to be free from emotional and physical abuse. The risk that she might be erroneously deprived of this interest is high in the IDVC given the power and control dynamics inherent in the relationship of the victim and abuser combined with the power imbalance the victim faces when facing the cadre of IDVC experts and support staff should their recommendations conflict with her wishes and she is seen as a recalcitrant or uncooperative victim. The government also has an interest in engendering faith in the system and having judicial proceedings for IDVC victims perceived as “fundamentally fair” with the process viewed by victims as a safety net responsive to their articulated safety needs. Both of these interests-the victim's interest in personal autonomy and the government's interest in not erroneously depriving an IDVC victim of meaningful access to the court more than outweigh the government's competing concern to prevent increased costs and administrative burdens.

In the case of a domestic violence victim the state could argue that the victim does not require the assistance of counsel in the IDVC because it is a court that has been designed specifically to respond to the victim's needs and that providing for assigned counsel would only increase the tax burden and add more expenses to this process.

The argument that assigning counsel to IDVC victims poses too much of a tax burden must fail because silencing the domestic violence victim only perpetuates the intergenerational cycle of violence and ultimately results in tremendous costs to society. Whatever short-term tax burden that would result from providing counsel to IDVC victims would be more than offset in later savings. It is extremely difficult to accurately ascertain the *198 economic costs of domestic violence.⁹³ Incidents of violence often remain hidden and the statistics that are available frequently examine only costs to the individual, without considering effects on the community.⁹⁴ It is clear, however, that physical abuse of women has an overwhelmingly damaging impact on the economy.⁹⁵ Estimates of total costs of violence against women in the United States range from \$3 billion to \$10 billion in health care, criminal justice, and other social costs.⁹⁶

Domestic violence results in exorbitant health care costs. A recent study by the Center for Disease Control found that domestic violence now costs an estimated \$4.1 billion each year in health care expenses alone, including medical and mental health care services.⁹⁷ Other studies have figured that number to be as high as \$10 billion⁹⁸ and a 1996 study found that women make 1.85 million emergency department visits annually as a result of domestic violence.⁹⁹ Women are treated for injuries caused by domestic violence incidents than by any other cause of injury.¹⁰⁰ Additionally, abused women have higher levels of health care use than did women who do not have a history of abuse.¹⁰¹ Not included in the above figures is the cost of mental health assistance *199 and therapy for the anywhere from 3.3 to 10 million children who annually witness domestic violence within their homes.¹⁰²

The workplace is affected by domestic violence at a price tag of approximately \$3-5 billion per year through absenteeism and lost productivity.¹⁰³ One study found that of employed victims of domestic violence, 60 percent were late to work, 50 percent missed days of work, and 70 percent had difficulty performing their job because of the abusive situation.¹⁰⁴ Domestic violence perpetrators commit more than 13,000 acts of violence against women at their workplace every year¹⁰⁵ and a study found that nearly 75 percent were harassed by their abusive partners either on the phone or in person while at work.¹⁰⁶ In a 1994 survey, almost 50 percent of senior executives reported that domestic violence had a harmful effect on their company's productivity.¹⁰⁷ Losing a worker, either because her abuser forces her to leave work¹⁰⁸ or because of death due to domestic violence¹⁰⁹ is a significant business cost.¹¹⁰ The loss of a trained worker results in initial lost time, cost of replacing the lost worker and training the new worker, and the continuous loss of productivity until the new worker begins to function at the same skill level as the lost employee.¹¹¹

Domestic violence prevents women from achieving full participation in the national economy¹¹² and has an adverse effect on interstate commerce, by deterring from traveling interstate and engaging in employment in interstate business, decreasing the *200 demand for interstate products, increasing the medical and other costs, and decreasing national productivity.¹¹³ Victims suffer from decreased productivity because they are harassed by their batterers while at work, prevented from arriving at work on time, and must often skip work entirely because of injuries¹¹⁴ or because they were threatened by their abusers to the point that they were afraid to go to work.¹¹⁵ The CDC report found that women in the U.S. may be losing a combined 8 million days of paid work each year because of domestic violence, resulting in an estimated loss of \$727.8 million.¹¹⁶ The CDC also reported that the expected value of lost earnings that domestic violence homicide victims would have contributed to society had they lived to their full life expectancy is \$892.7 million.¹¹⁷ At least 30 percent of domestic violence victims

report having lost a job because of domestic violence.¹¹⁸ A 1997 study found that 46 percent of participants' abusers forbade the participants to hold jobs.¹¹⁹

The limitations that domestic violence places on women's economic opportunities results in an increased dependency on public assistance,¹²⁰ thereby raising the economic costs to society. Between 50 to 80 percent of women across the nation receiving AFDC are past or current victims of domestic violence and as many as 65 percent of welfare recipients reported that they had been victims of physical domestic abuse at some point.¹²¹ *201 Domestic violence victims are more likely than non-victims to receive welfare for five years or longer.¹²² In New York City alone, an estimated 21 percent of homeless families and 25 percent of single homeless women are without shelter due to domestic violence; using 1991 shelter cost estimates of \$90 per day for a family and \$40 for singles, the annual total cost is \$34 million.¹²³ Furthermore, 40 percent of children in New York City's foster care system come from domestically violent families, and in 1991 the cost of keeping a child in the foster care system was \$13,600 per child annually, adding up to a total cost of 71.5 million.¹²⁴ Regardless of these or similar economic interests raised by the State to argue why assigned counsel is not a cost-effective method of guaranteeing procedural due process to victims of domestic violence in integrated courts the tax burden argument must fail because there is overwhelming evidence of the substantial costs to society imposed by domestic violence.

III. Statutory And Precedential Authority For Right To Counsel In Civil Litigation

In order to ensure “fundamental fairness” in civil litigation Congress has granted district courts statutory authority to “request” appointed *202 counsel for indigent civil litigants.¹²⁵ 28 USCA 1915(e) Proceedings in forma pauperis, provides: (e)(1) The court may request an attorney to represent any person unable to afford counsel (*italics for emphasis*). This statute is understood to guarantee indigents “meaningful access” to the courts as required by the Constitution,¹²⁶ but to date has never been interpreted as guaranteeing every indigent civil litigant the right to appointed counsel. Generally under 1915 the court has discretion whether or not to appoint counsel.¹²⁷ However, the circuits are split as to how the courts should exercise their discretion. In *Hodge v. Police Officers*, the Second Circuit laid down a test for the district court to apply when determining whether to assign counsel to an indigent civil litigant.¹²⁸ The test adopted by the *Hodge* court was of the same breath of the seventh's circuits ruling in *Maclin v. Freake*.¹²⁹

[T]he district judge should first determine whether the indigent's position seems likely to be of substance. If the claim meets this threshold requirement, the court should then consider the indigent's ability to investigate the crucial facts, whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder, the indigent's ability to present the case, the complexity of the legal issues and any special reason in th[e] case why appointment of counsel would be more likely to lead to a just determination.¹³⁰

In *Hodge*, the plaintiff brought a claim against two police officers for beating him without cause in connection with his apprehension (and later conviction) for robbery, assault, and criminal possession of a weapon. The district court denied *Hodge's* request for counsel stating that the issues to be presented at trial were straightforward and the outcome of the case would turn on the credibility of *Hodge* and the officers.¹³¹ The Second Circuit vacated and remanded the case back to the district court, finding that the trial judge failed to determine whether *Hodge's* claim was of substance, and the fact that if the case was to run on the credibility of the participants then there was a strong case for the appointment of counsel in the civil litigation.¹³²

More recently, the Third Circuit in *Montgomery v. Pinchak*¹³³ provided that the district courts have broad discretion in appointing counsel for an indigent party but went on to lay out a *203 test for the district courts to apply in exercising their discretion to appoint counsel: first, the party seeking counsel must meet a minimum threshold that his or her cause has some merit in law and fact and as such establishing a prima facie case. Then the court will examine the six “post-threshold” factors

established in *Tabron v. Grace*¹³⁴ to determine whether counsel is appropriate. These factors are not exhaustive and are meant only to serve as guideposts and include:¹³⁵

- (1) plaintiff's ability to present his own case;
- (2) difficulty of the particular legal issues;
- (3) degree to which factual investigation will be necessary and ability of plaintiff to pursue such investigation;
- (4) plaintiff's capacity to retain counsel on his own behalf;
- (5) extent to which the case is likely to turn on credibility determinations; and
- (6) whether the case will require testimony from expert witnesses¹³⁶

The Eighth Circuit applies a less stringent test. Under *Hahn v. McClellan*,¹³⁷ only the minimum threshold test of the Second, Third and Seventh Circuits that a prima facie case exists before the court, upon an indigent's request, should order the appointment of counsel.¹³⁸ The Fifth,¹³⁹ Sixth, Ninth, and Eleventh¹⁴⁰ Circuits *204 require a more stringent finding of "exceptional circumstances" to appoint counsel under 1915.¹⁴¹ These courts state that appointment of counsel in civil cases is a privilege, and not a constitutional right and is justified only in exceptional circumstances where a court finds the case presents complex factual and legal issues and the litigant cannot adequately represent himself.¹⁴² The common threads running throughout all of the standards discussed above that are used to determine whether counsel should be assigned to preserve "fundamental fairness" is the complexity of the case and the ability of the litigant to get the relevant facts before the court.¹⁴³ Victims of domestic violence proceeding in the IDVC should fall well within any of these tests. It is well documented that the dynamics of domestic violence adds complexity to even an otherwise simple case.¹⁴⁴ Additionally, given the power imbalance inherent in the context of domestic violence it is highly unlikely that victims will get the relevant facts before the court and likewise, will not have the resources to obtain expert witnesses on their behalf.

***205 IV. Implications Of A Predominantly Criminal Model For The Idvc: When The Idvc Victim's Right To Counsel Should Attach**

The batterer is not the only adversary the victim of domestic violence might encounter in the IDVC. At the outset of any IDVC proceeding, a domestic violence victim may find herself in an adversarial position to the state and may be subject to various types of questioning where the State exerts "overwhelming" or "coercive influences".

The challenge of victim autonomy has played an enormous role in recent developments of criminal law and enforcement protocols regarding domestic violence. The unwillingness of many victims to participate in the prosecution of their abusers' criminal cases has long been considered a critical obstruction to offender accountability. Reformers have theorized that in these cases the abuser has so restricted his victim's autonomy that respecting her decision about the prosecution of a case only presents opportunities for the abuser to dictate his wishes through the victim.¹⁴⁵ This view has provided moral authority for new criminal law enforcement protocols mandating state action that bypasses altogether the articulated will of the domestic violence victim, e.g., mandatory arrest and "no-drop" prosecution laws. Under such assumptions, the "benefits of mandatory arrest [in reducing the social costs of domestic violence] outweigh victim autonomy."¹⁴⁶

While such statistics indicate that these initiatives have increased conviction rates,¹⁴⁷ legal theorists disagree as to the benefit, if any, to victims of domestic violence. Many have welcomed mandatory state interventions because they represent a salutary

shift from social norms that held the victim responsible for provoking and/or enduring the domestic violence to an aggressive focus on offender accountability. Others contend that these state actions “re-victimize” the victim by replicating the batterer’s modus operandi of subjugating the victim’s autonomy to a stronger *206 power.¹⁴⁸ A victim unwilling to cooperate with a therapeutic process and goal backed by a court whose jurisdiction over virtually every part of her life comes with a problem-solving mandate may find herself in a singularly difficult position.¹⁴⁹ As the focus of this court shifts to helping this victim, she may find herself the object of its blame. Furthermore, bypassing a victim’s assessment of her own needs, safety and otherwise, can be lethal.¹⁵⁰

A victim who is unwilling to testify or to cooperate with the prosecutor may face neglect charges if it is perceived that she is not taking the necessary measures to protect her children from the exposure to domestic violence. Once a neglect proceeding is filed the victim may be subjected to “moral and psychological pressures to confess emanating from sources of official coercion, of which the right to counsel was meant to protect.¹⁵¹ Alternatively, the victim of domestic violence may herself be a respondent in a cross-petition filed by her batterer. Social service providers with the ear of the judge may deem her incapacitated under a clinical discipline that views the victim as a patient in need of treatment rather than as a litigant whose right to be heard must be guaranteed. Legal advocates under the employ of the court may similarly censure her, or at least feel obligated to pressure her into compliance “for her own good.” Shielding unrepresented individuals from imbalances of power and coercive governmental pressure is the fundamental underlying purpose of the Sixth Amendment.

In 1963, the United States Supreme Court handed down its landmark decision in *Gideon v. Wainwright*,¹⁵² holding that the Sixth and Fourteenth Amendments require the states to provide counsel to criminal defendants charged with felony offenses. The Court extended this right to all criminal cases in *Argersinger v. *207 Hamlin*.¹⁵³ The Court further held that the right “does not attach until formal judiciary proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing,”¹⁵⁴ because it is at this point that the government has committed itself to prosecute and the adversarial of the government and defendant have solidified.¹⁵⁵ It is at this point that the power imbalance between the government and the defendant are perceived to be unconstitutional and a deprivation of the defendant’s right to a fair trial unless counsel is available to represent the defendant and negate any overwhelming or coercive influences that might proceed from the government’s prosecution.

It is widely recognized that the driving force in domestic violence is the power and control of the batterer over his victim. This power and control may be physical or perceived by the victim. Given this power imbalance the victim of domestic violence is similarly positioned as a criminal defendant facing coercive forces inherent in the government prosecution of the criminal case. She must face her perpetrator in any negotiation or adversarial proceeding and is at a distinct disadvantage and subject to overwhelming and coercive influences if not represented by counsel. This power imbalance only increases if the perpetrator has assigned counsel in the criminal case that is proceeding in the IDVC and the victim is present and is unrepresented for collateral proceedings. Following *Gideon* and its progeny, this right to counsel should attach at the first court appearance in the integrated court because it is at this point that the power imbalance between the perpetrator, the government and the victim of domestic violence solidifies and the victim becomes vulnerable to potentially coercive forces that may have a chilling effect on her constitutional due process rights to preserve her personal autonomy and to have her voice be heard in the proceedings.

Often, victims will obtain *ex parte* relief only to drop the case or drop important safety provisions once they face their abuser in court. Unrepresented victims may also drop their orders of protection as part of negotiating a consent agreement for custody and visitation. It is critical for victims to have counsel as *208 early as preliminary proceedings because individual safety concerns may be negotiated away in the initial court appearances. It is interesting-if not telling-that there is little or no mention of the role of a victim’s attorney in much of the current writings about the IDVCs.¹⁵⁶ This may be in large part attributable to the lack of trained domestic violence attorneys in many areas of the country where pilot IDVCs are located. There is, however, significant discussion of “legal advocates” and other lay personnel who help “navigate” the victim through the alien complexities of the legal system. This type of quasi-legal assistance can include legal advice, help completing legal documents and “court

accompaniment.” These advocates seem to be either employees of the court itself or employees of domestic violence services agencies contracted by the IDVC to advise victims appearing before it.¹⁵⁷ The impression is inescapable that in the ranking of services to increase victim cooperation with the legal process, attorney representation for victims is not a priority.

The striking absence of enhanced legal representation for victims in the IDVC suggests that in integrating the victim's civil legal actions into a template of criminal jurisprudence, the victim may be viewed as a witness only and the criminal case may take precedence over the collateral civil matters. It is therefore crucial that all IDVCs be studied for the impact of a predominantly criminal court approach upon the victim's civil cases and, by extension, the victim's constitutional rights.

Because the batterer is facing criminal proceedings in the IDVC he is automatically afforded the right to assigned counsel. The victim may find herself at odds with the prosecutor as well as her batterer once proceedings are initiated in the IDVC. A victim could well give up important rights (restitution) and or forgo safety concerns (drop vacate or stay away provisions in OOP) unless afforded the right to consult with counsel at the commencement of the IDVC proceeding.

***209 V. Ethics And Implications For Practice: The Challenge Of Victim Autonomy And Preserving Due Process Rights**

The American Bar Association's Model Rules of Professional Responsibility relating to a lawyer's duty to promote her client's cause states in Rule 1.3 that, “A lawyer shall act with reasonable diligence and promptness in representing a client.” This imperative is elucidated in the accompanying Comment: “[. . . A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.” This expansive language has spawned an entire spectrum of models for advocacy. These range from the “lawyer as hired gun” proponents who advocate a laser-like crusade for the client's ends, to those who hold that the attorney's duties are first and foremost to the cause of justice.¹⁵⁸ This spectrum can also be understood in the following terms: how far may an attorney ethically stray from promoting the articulated wishes of her client?

The predominant approach¹⁵⁹ views the attorney as the voice of the client's informed decision. In this model, the attorney informs the client of the available options and the client then articulates a decision concerning the goal she wishes to pursue in the legal action. As long as the goal does not promote criminal activity [sic] the attorney is obligated to advocate for and promote the client's chosen course with all possible zeal. Under our adversary system, a neutral adjudicator arrives at a true and just decision when judging between two zealous advocates presenting their clients' cases in the most favorable light possible.

In essence the predominant approach articulates the duty of the attorney to “preserve and foster the client's autonomy within the law.”¹⁶⁰ This implies that strictly and squarely within the bounds of the law at all times, an attorney must promote the stated *210 goals of their client. Such representation is not only the best means to protect the client's due process rights but also serves as “best practice” so as to comply with ethical mandates. Concomitantly, representation that preserves and fosters the client's autonomy strengthens the public's acceptance of the legal system's authority, since “client control of the case is a significant element in a litigant's perception that justice has been done, regardless of the outcome.”¹⁶¹ Most importantly, however, in the context of the IDVC this approach will ensure that the victim's due process rights are protected by having counsel to voice the stated goals and wishes of the victim, thus ensuring that the victim is not merely present in the proceedings but also has meaningful access to the proceedings and an opportunity to be heard.

Even using this victim-focused approach as the correct ethical guide, the attorney for the victim of domestic violence in the IDVC may confront difficult ethical quandaries beyond those involved in other kinds of legal representation, even under the traditional adversarial judicial system. Unique pressures may operate in integrated courts that frustrate the attorney in promoting the client's expressed goals. These pressures fall into two general categories: (1) How does the attorney determine when the victim of domestic violence is articulating her free and informed will? and, (2) Does the victim's attorney represent the “cause” or the client? And what should the attorney do when the client has clearly chosen a dangerous path?

The Challenge of Victim Autonomy

Kristen has a custody case in the IDVC in addition to the criminal case against her husband. Kristen was physically and psychologically abused for many years by her husband and has recently started therapy, which seems to have empowered her to separate from her abuser and seek custody of their child. In between court appearances Kristen makes an appointment to see her attorney and asks to withdraw her case. She states that her abuser has promised her a large sum of money from an unknown source if she withdraws her criminal court case. He has also told her that if she doesn't withdraw her case, as soon as the case is *211 resolved he would disappear without a trace and forever from her life and her children's lives. The attorney knows from Kristen's history that her abuser usually makes good on his threats.

How should the attorney try to "foster and preserve" Kristen's autonomy within the law, how should the attorney direct Kristen's case?

Scholars have noted many privations that can compromise a client's ability to arrive at a free and informed decision about the course of their legal action. Poverty, racism and a lack of education can impact a client's free will.¹⁶² The crime of domestic violence inflicts perhaps the ultimate impairment on the victim's autonomy. The perpetrator of domestic violence tries to exert control over all aspects of the victim's existence, mental, emotional and physical.¹⁶³ In the context of the court proceedings, perpetrators of domestic violence may use their control over their victims' decision-making and autonomy to manipulate negotiations so as to escape accountability for their abuse.¹⁶⁴ By depriving the victim of power over her own destiny, the abuser "obliterate[s] the victim's ability to make reasonable choices,"¹⁶⁵ i.e., choices representing the victim's best interests. A successful perpetrator thereby "produces" a victim unwilling and/or unable to support the legal system's efforts to hold the abuser accountable for his crimes.

This seemingly inescapable dialectic about the nature of victim autonomy presents difficult ethical quandaries for the victim's attorney. When the victim chooses a course of legal action that appears overwhelmingly to promote the perpetrator's abusive ends over her own welfare, her attorney may have justifiable concerns about the outcome of successfully advocating for this course in court. The lawyer's understanding of the dynamics of domestic violence may lead her to question exactly whose interests their client is promoting. In such situations how *212 does the attorney "know" what the victim truly wants? In such situations, how does the victim's attorney discern, let alone "preserve and foster," their client's autonomy?

All clients, even those seemingly uncompromised and independent can simultaneously embrace contradictory objectives. Wrongfully discharged, "bullied" and discriminated against employees often want their jobs restored rather than substantial compensation. Victims of toxic torts with potentially huge and provable claims often accept significantly smaller settlements rather than endure protracted litigation. Domestic violence victims, often and understandably frequently want both to be safe, free, and unafraid, and to live with the partner they love or the partner they feel is needed to provide financial security for themselves and their children.

Attorneys representing clients in the IDVC should recognize the potential for and avoid the impulse of "misplaced paternalism" and have on-going consultations with the victim of domestic violence to define client goals and objectives. These discussions should also include safety planning¹⁶⁶ and referrals to the support services available through the IDVC.

Agenda vs Client Focused Representation

Isabel and her boyfriend, who is her child's father, are present in the IDVC with their attorneys as petitioner and respondent respectively in a case for an order of protection. After her boyfriend's last attack on her, Isabel fled to a shelter where she was connected with her attorney, who works in the shelter's legal division. Unbeknownst to her attorney, Isabel has been

reconsidering her request for a full, i.e., stay away order of protection, and has decided to move back in with her boyfriend. She still wants a limited order of protection that will prohibit her boyfriend from intimidating, threatening or committing any criminal offense against her. Isabel has refrained from telling her attorney about her change of heart because she is afraid of her attorney's disapproval. In her experience at the shelter she noticed that everyone who works there strongly promotes the shelter's *213 mission statement: to "provide a safe haven for victims and their children away from their abusers, and empower victims to break the cycle of violence by leading independent lives."

A conference is held with the judge's law clerk before the trial, during which the clerk urges the parties to reach an agreement about the contents of an order of protection to which the respondent can consent, and thereby avoid a trial. Isabel states that she wants a limited order of protection. Surprised and taken aback, her attorney states that given the facts of this case, she cannot and will not represent Isabel if she is seeking anything less than a full order of protection.

The interests of the cause of eradicating domestic violence can militate against the victim's attorney promoting and fostering her client's expressed goals. When the victim's articulated goals appear to be in conflict with the cause of eradicating domestic violence, her attorney can feel beleaguered by the sense that by promoting her client's wishes she would be promoting domestic violence. Attorneys working in the legal division of a not-for-profit organization whose mission statement includes language about promoting the victim's safety by enabling her to separate from her abuser may find that the "cause" motivates them personally and professionally more than the client. Attorneys whose work is funded under grants advocating specific "solutions" or "desired outcomes" for domestic violence, such as arresting and obtaining stay away orders of protection against abusers, may feel as ethically bound to advocate for the directives of the funding entity as for their client's stated goals.¹⁶⁷ Similarly attorneys working for shelters may feel compelled or pressured to follow the shelter's agenda rather than the client's directives.

Considerations in Establishing Ethical Guidelines for the Victim's Attorney in the IDVC

An attorney who diligently and zealously promotes her client's decisions within the law will reassure the victim of the integrity and impartiality, and hence the legitimacy, of the legal *214 system."¹⁶⁸ This kind of representation is most critical for domestic violence victims because it is central to victim safety. With statistics reflecting that only 20% of domestic violence incidents are ever reported at all,¹⁶⁹ the potential of all court reforms to alienate victims must be considered carefully.¹⁷⁰ Representation by an attorney with clear ethical obligations to preserve and foster the victim's autonomy not only is critical to protect the victim's procedural due process rights but also is critical to the victim's sense of empowerment and control over her legal actions. Victims who are not afforded this sense of control may be dissuaded from accessing the legal system to remedy future abuse. It is therefore important to establish clear ethical guidelines for attorneys representing victims of domestic violence in the IDVC. Ethical rules should establish a duty for victims' attorneys to foster and preserve the victim's autonomy by respecting her client's particular assessment of her situation and the risks or benefits inherent in any single legal course.¹⁷¹ Comments to these rules should squarely address the challenges inherent in discerning victim autonomy, and in agenda vs. client driven representation that were presented above. This will help attorneys recognize situations in which they are tempted to impose their own goals on their client out of a sense of "misplaced paternalism,"¹⁷² with potentially lethal results. Concomitantly, comments to ethical rules should also give attorneys guidance when faced with a situation where a client insists on following a clearly dangerous path. Clearly safety planning and referrals to support services may not suffice in these instances but rather a more pro-active approach by the attorney may be indicated. But where is the line drawn that *215 separates misplaced paternalism from pro-active advice and legal counseling?

Ann Shalleck has delineated certain special considerations in the representation of domestic violence victims¹⁷³ that should be used as important guideposts in developing these ethical rules. For example, the attorney should accept a priori the process in which her client is engaged, and support her client's decisions as they evolve through the course of the representation. The legal representation should respond to the possible shifts in course that often result from a victim's developing response to the complexities of the abuse as well as her different legal and personal options. "[T]he lawyer needs to see his or her role not as

furthering a stable goal of the client, but as creating an opportunity for a client to explore multiple possibilities, as well as her own changing desires to further any of them.”¹⁷⁴ This will enable the victim to “figure out, within the contours of that relationship, what she thinks is best for her to do.”¹⁷⁵ However, representing the client in this manner may jeopardize the attorney's integrity as viewed by the court who may perceive the attorney as “waffling” rather than as advocating for the client at every step of the evolving process. The attorney may have to educate the court as to the on-going processes the victim encounters in order to clarify and substantiate the victim's changing needs. For example, a victim contemplating divorce may need to delete a no contact provision from an existing order of protection so as to be able to discuss certain property issues. Other victims may initially pursue a vacate or stay away provision only to return at the next court date fearing that they will not be able to pay the upcoming rent demanding that their order be modified so that the abuser be permitted to return to the home. Still others besieged by guilt when their children express that they miss their father return to court wanting to withdraw the entire matter.

Adequate legal representation for domestic violence victims may also require more time than is usual with clients to accommodate the particular complexities of the victim's situation. This is a particularly challenging aspect of diligent representation *216 for domestic violence victims, but ethically necessary, nonetheless.¹⁷⁶ The ABA model rules for legal representation of domestic violence victims refer to the need for attorneys to possess the “skills required” for such representation.¹⁷⁷ This may well include representation that is available at 2 a.m., for example.¹⁷⁸ Furthermore, if the IDVC intends to devote itself to victim safety, might it not be ethically obligated to provide legal resources on a 24 hour basis? With statistics reflecting an almost 75% increase in victims accessing final protection orders after receiving 24/7 legal assistance,¹⁷⁹ should there be IDVC attorneys available on call and available on an around the clock basis to offer legal information and services to victims at the time when victims are asking for assistance and are most likely to be receptive to such assistance? [reality of court intervention coming weeks after incident-neighborhood courts like in Time Square that are 24/7 and Ds are processed immediately and referred to services within hours after arrest]

Proponents of the IDVC have accurately understood that for the court to achieve its goals, “victims should have more input into the proceedings.”¹⁸⁰ Increased social services to victims can indeed serve as a means of “amplifying victims' voices [to] help the government better respond to individual concerns.”¹⁸¹ But care *217 should be taken that the victim's voice as “victim” is not amplified without an equal amplification of the victim's voice as an empowered party before the court. The victim's attorney, operating under appropriate ethical guidelines, plays a key role in maintaining this balance.

To empower the victim (and thereby hold realistic promise for diminishing domestic violence) court reformers must proceed cautiously with a course that protects the freedom of the victim's choice in a manner that will be clearly understood as such by the victim from her initial contact with the judicial system. The victim's civil attorney is the only appropriate guardian of these rights, and her role and ethical obligations should be both expanded and articulated accordingly. In addition to critical social and community services support, the victim must view the legal system as just, and that can only be if she is given an opportunity to be heard as she decides-freely and without coercion. It has wisely been noted that, “[t]he interaction between lawyer and client is a part of construction what it means for a woman who has been abused to deal with the legal system.”¹⁸²

Conclusion

Due process demands representation for domestic violence victims in integrated courts. The more the IDVC court takes on the role of social engineer and neutral dispenser of justice, the more crucial it is that the victims of domestic violence have expert, professional legal representation to protect their right to refuse to be “socially engineered.” Only an attorney fully versed in the dynamics of domestic violence, and dedicated to, protecting the victim's due process rights and personal autonomy can protect the victim from the kind of state action in which every aspect of her most personal existence is considered within the court's holistic jurisdiction.¹⁸³ Only an attorney fully aware and dedicated to the IDVC's victim's due process rights can protect the victim from the kind of state action that my ultimately interfere with the victim's *218 liberty interests. Under these circumstances, the victim's right to counsel should logically attach at the outset of any IDVC proceeding, even if initially only

a criminal case against the abuser is contemplated since case management that flows out of the criminal case may ultimately impact the victim as well as the abuser.¹⁸⁴

Threats to a domestic violence victim's constitutional rights increase exponentially when she is involved in an IDVC proceeding due to her exposure to coercive forces of the government as well as her batterer. Even well-meaning therapeutic jurisprudence and the cadre of professionals may not always have an identity of interest with the victim and the IDVC advocates have no responsibility of confidentiality that exist in a attorney-client relationship..

IDVCs have been created for the noble purpose of improving the judicial response to domestic violence. Victim safety and empowerment will only be realized if the IDVCs provide a protected space, a sanctuary, where victims can speak their truth. To provide victims with meaningful access to the IDVC and to ensure that their voices will be heard and to prevent due process tragedies, the legislatures when creating the IDVCs should guarantee the right to counsel to victims at the outset of their IDVC proceedings, even if initially, only a criminal case against the abuser is contemplated.

Footnotes

- 1 Cornell University B.S.N; J.D. Pace University of Law; the authors give thanks to Julia Bonner for her assistance with the project.
- 2 A.B. Harvard College; J.D. Harvard Law School
- 3 Julia Weber, *Domestic Violence Courts: Components and Considerations*, 2 J. Ctr. fams., child & Cts., 23 (2000).
- 4 See Robyn Mazur & Liberty Aldrich, *What Makes a Domestic Violence Court Work: Lessons from New York*, 42(2) A.B.A. Judges J. 10 (2003):

“Many domestic violence advocates are hesitant to embrace the idea that domestic violence courts are ‘problem-solving courts.’ There are substantial differences between domestic violence courts and other problem-solving courts. Many of these differences stem from how success is measured and to whom services are offered. Drug courts can easily look to see whether defendants are successfully completing their court-mandated drug-treatment programs. But domestic violence courts are not targeted at ‘rehabilitating’ defendants. Indeed, services are offered primarily to help victims achieve independence. The primary ‘service’ offered to defendants is batterers programs.”
- 5 “In New York, under the leadership of Chief Judge Judith S. Kaye, the state court system has developed or is planning sixteen domestic violence courts, including six recently-launched ‘integrated domestic violence courts,’ [IDVC] in which the presiding judges handle all issues-both criminal and civil-affecting a single family.” *Id.* at 6. The IDVC developed as part of Chief Judge Kaye's initiative to make the judiciary more responsive to victims of domestic violence who confront complex legal issues and seek protection from the judicial system. See also Daniel J. Becker & Maura D. Corrigan, *Moving Problem-Solving Courts into the Mainstream: A Report Card from the CCJ-COSCA Problem-Solving Committee*, 39 Ct. Rev. 4, 6 (2002).
- 6 Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 *Fordham L. Rev.* 1285, 1297 (2000); see also Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 Ct. Rev. 28 (2000).
- 7 Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *Yale J.L. & Feminism*, 3, 29-30.
- 8 See *id.*
- 9 *Id.* at 33.
- 10 Tsai, *supra* note 5, at 1296-97.
- 11 *Id.*

- 12 Therapeutic jurisprudence is a concept originating in the field of mental health that has been embraced by IDVC reformers who are committed to using the IDVC for “problem-solving” by reaching out to new disciplines for “extra-legal” insights and methods to reduce domestic violence. Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 U. Mo. Kan. L. Rev. 33, 33-34 (2000).
- 13 *Id.* at 39-41.
- 14 See generally David Finkelman & Thomas Grisso, [Therapeutic Jurisprudence: From Idea to Application](#), 20 *New Eng. J. on Crim. & Civ. Confinement* 243, 252 (1994).
- 15 Winick, *supra* note 11, at 78 (“Victims may develop various dysfunctional thoughts and cognitive distortions These cognitive distortions may prevent her from taking steps to change her situation or distort her judgment in ways that make her ignore signs of danger or fail to take appropriate action to protect herself.”); Fritzier & Simon, *supra* note 5, at 31 (“One of the most important roles of a domestic violence court is to confront the perpetrator's cognitive distortions.”).
- 16 A domestic violence victim, despite educational background or resourcefulness often experiences utter powerlessness in the presence of the batterer-an attorney equalizes this imbalance of power. In pilot studies with Project DETER, the PWJC found that prior to a program providing 24/7 legal services and vertical representation to victims of domestic violence seeking relief in Family Court only 20% of those who sought temporary orders of protection stayed in the system long enough to convert their temporary orders into permanent orders as opposed to 95% after the implementation of the program. Anecdotal reports of victims indicated that many had sought multiple ex parte temporary orders that ultimately were dismissed or withdrawn due to the victims' reluctance to navigate the court proceedings at least initially, pro se. Statistics on file with the Pace Women's Justice Center, from a Grants To Encourage Arrests, done in partnership with the White Plains Police Department.
- 17 *Id.*
- 18 The “applicants” or “claimants” of a myriad of governmental social welfare programs (i.e., Department of Social Services, the Human Resources Administration, and the Social Security Administration,) rarely access these services or benefits without advice and/or advocacy from someone who is not trying to “help,” but rather to represent them. It is easy to understand why “applicants” seeking redress/assistance from these agencies rarely proceed pro se since the “helpers” or “therapists” the applicant encounters once entering the system may exercise a vast amount of discretion that at times may seem lawless and irrational and any appellate process equally defies pro se negotiations. See *Goldberg v. Kelly*, 397 U.S. 254, 268-269 (1970) (finding welfare recipients who were denied benefits had right to counsel, albeit not appointed counsel, because “helping” caseworkers' presentations of recipients' cases were not sufficient to protect due process rights of having their position presented and heard).
- 19 Model Rules of Prof'l Conduct Rs. 1.6, 4.1 (2002).
- 20 See Epstein, *supra* note 6, at 34
- 21 The necessity for clear separation of the criminal and civil Family Court issues has been considered and implemented in the Westchester County IDVC. “The separation is intended in part, to assure that the resolution of issues is not mixed; so that there is no effort for quid pro quo.” Protocol: IDVC-NINTH JUDICIAL DISTRICT (on file in offices of Pace Women's Justice Center).
- 22 In order to control for this overlap and possible prejudice some IDVCs have purposefully separated the civil and criminal cases and have calendared them for different days of the week. Other IDVCs address this by resolving the criminal cases prior to the civil cases. See *Id.*
- 23 Cheryl Hanna, [No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecution](#), 109 *Harv. L. Rev.* 1849, 1898 (June, 1996).
- 24 This example is derived from an actual case handled by the Pace Women's Justice Center (PWJC). However, all names have been changed and fact patterns altered to protect confidentiality.
- 25 Judith S. Kaye & Susan K. Knipps, [Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach](#), 27 *W. St. U. L. Rev.* 1 (1999/2000).
- 26 Tsai, *supra* note 5, at 1295-96.

- 27 Kaye & Knipps, *supra* note 24, at 8.
- 28 Tsai, *supra* note 5, at 1301-02.
- 29 Karan, Keilitz, & Denaro, p. 83
- 30 Tsai, *supra* note 5, at 1298.
- 31 *Id.* at 1297-1308; Jennifer R. Hagan, [Can We Lose the Battle and Still Win the War? The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act](#), 50 *DePaul L. Rev.* 919, 981-82 (2001).
- 32 Louise G. Trubek & Jennifer J. Farnham, [Social Justice Collaboratives: Multidisciplinary Practice for People](#), 7 *Clinical L. Rev.* 227, 243 (2000). Some victims may erroneously believe that communications with an advocate are confidential. Margaret F. Brown, [Domestic Violence Advocates' Exposure to Liability for Engaging in the Unauthorized Practice of Law](#), 34 *Colum. J.L. & Soc. Probs.* 279, 290 (2001). Since the IDVC advocate is acting as an arm of the court and is not operating under the supervision of the victim's counsel, there is no privilege that attaches to communications between advocates and domestic violence victims. "Mandatory reporting of child abuse is an important concern for domestic violence collaboratives because of the duty to report on the part of some of the advocates." Trubek & Farnham, *supra* at 228. Rachel Callahan suggests that the advocate-client relationship bears a strong resemblance to the attorney-client relationship in that both the attorney and advocate must know all the details of a victim's story in order to advocate effectively. Callahan maintains that, since attorneys are exempted from mandatory reporting because of the need for full disclosure from the client, advocates should be extended this privilege as well. Rachel Callahan, [My Lips are Sealed: The Nened for a Testimonial Privilege and Confidentiality for Victim-Advocates](#), 18 *Hamline J. Pub. L. & Pol'y* 226, 245 (1996).
- 33 Fritzier & Simon, *supra* note 5, at 31.
- 34 Lincoln (Neb.) Family Violence Council advocates documented a four-year trend of declining number of domestic assaults despite increasing population was reversed when courts moved from reliance on fines rather than jail or probationary sentences for abusers. The council concluded that "while it doesn't advocate sending all offenders to jail, statistics clearly show the heavy use of fines is ineffective and dangerous. Andrew Klein, [Statistics, Nebraska Advocates Link Decline in Sentencing Abusers to Increase in Reabuse, Domestic Violence Prevention 8 May 2003](#) (Can't find this source)
- 35 Winick, *supra* note 11 at 39-40.
- 36 The impact of various police and community responses to domestic violence victims' safety has often been evaluated by recidivism, mandatory arrest and conviction rates. Joan Zorza has pointed out in her in-depth analysis of the Minneapolis Police Experiment and replication studies that experiments studying mandatory arrest of batterers showed very low rates of prosecution and conviction which very likely prevented arrest from reaching the maximum potential for deterrence. For example, in Milwaukee only 5% of the offenders were charged with a crime and only 1% were convicted. Zorza opines that had prosecution, conviction, and punishment of the offender occurred, the deterrence effect of arrest may have been more significant. Joan Zorza, [Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies](#), 28 *New Eng. L. Rev.* 929, 930, 985 (1994). However, Lisa Lerman suggests that even prosecution and conviction may not be enough to deter post-conviction recidivism. She believes that in order to decrease recidivism rates, law enforcement must coordinate with social services and mental health systems to monitor and treat abusers and maintain communication with the courts. Lisa G. Lerman, [The Decontextualization of Domestic Violence](#), 83 *J. Crim. L. & Criminology* 217, 220-221 (1992).
- 37 Model Rules of Prof'l Conduct, R. 1.6 (2001).
- 38 U.S. Const. amends. V, XIV, § 1.
- 39 [Lassister v. Dep't Soc. Serv.](#) 452 U.S. 18, 24 (1981).
- 40 [Cafeteria & Rest. Workers v. McElroy](#), 367 U.S. 886,895 (1961).
- 41 [Lassister](#), 452 U.S. at 24-25; see also [Cafeteria & Rest. Workers](#) 452 U.S. at 895 ("[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.").

- 42 “The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. [Goldberg v. Kelly](#), 397 U.S. 254, 268-69.
- 43 28 U.S.C.A. § 1915 (2003); [Christy v. Robinson](#), 216 F.Supp.2d 398 (2002).
- 44 [Cruzan v. Dir. Mo. Dep't of Health](#), 497 U.S. 261, 286-87 (1990) (holding that the right to make one's own health care decisions has been recognized as a substantial right deserving governmental protection); [Rivers v. Katz](#), 67 N.Y.2d 485, 492 (1986).
- 45 [In re B.](#), 30 N.Y.2d 352, 357 (1972).
- 46 Since the 1960's the Supreme Court has found that certain unenumerated rights are “fundamental” and merit constitutional protection because they are implicit in the enumerated guarantees of personal liberty. Chief Justice Berger wrote, “[n]otwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees.” [Richmond Newspapers, Inc. v. Virginia](#), 448 U.S. 555, 579 (1980). The Court recognized that the nature of liberty interests is not static and may evolve over time to conform to societal needs and directives. [Rochin v. California](#), 342 U.S. 165, 171-72 (“To believe that this judicial exercise of judgment could be avoided by freezing ‘due process of law’ at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges”). It should also be noted that states may afford their citizens more protection under their state constitutions and/or statutes than is afforded under the U.S. Constitution and/or federal statutes. [Vitek v. Jones](#), 445 U.S. 480, 488 (1980).
- 47 [Griswold v. Connecticut](#), 381 U.S. 479, 485 (1965).
- 48 [M.L.B. v. S.L.J.](#), 519 U.S. 102 (1966); The Second Circuit has held it to be “beyond peradventure” that the “existence of a private realm of family life which the state cannot enter has its source not in state law, but in intrinsic human rights”; [Duchesne v. Sugarman](#), 566 F.2d 817, 825 (1977).
- 49 [Griswold](#), 381 U.S. at 485.
- 50 [Griswold](#), 381 U.S. at 484-86.
- 51 [Griswold](#), 381 U.S. at 500.
- 52 [Id.](#) at 499.
- 53 Following this analysis Justice Goldberg in [Griswold](#) concluded that the unenumerated “right of privacy in marital relations is . . . a personal right ‘retained by the people’ within the meaning of the Ninth Amendment” and consequently is a “fundamental” personal liberty protected by the 14th Amendment Due Process Clause. [Id.](#) at 486. Anne, this is where I stopped.
- 54 [Griswold](#), 381 U.S. at 484, 486-86,492-93.
- 55 [Zablocki v. Redhail](#), 433 U.S. at 386 (marriage established “the relationship that is the foundation of the family in our society”)
- 56 [Moore v. City of E. Cleveland](#), 431 U.S. 494 (1977) (invalidated ordinance that interfered with family living arrangement by barring a grandmother, her son, and 2 grandsons from living together in the same home).
- 57 [Roberts v. United States Jaycees](#), 468 U.S. 609,618 (1984) (“certain kinds of highly personal relationships [must be afforded] a substantial measure of sanctuary from unjustified interference by the state”)
- 58 [Wash. v. Glucksberg](#), 521 U.S. 702 (1997); [Planned Parenthood v. Casey](#), 505 U.S. 833 (1992).
- 59 [Casey](#), 505 U.S. 833 at 851.
- 60 [Id.](#) at 847.
- 61 [Casey](#), 505 U.S. 833 at 851.
- 62 In [Nicolson v. Williams](#), 203F.Supp. 2d 153 (2002) the court, quoting [M.L.B. v. S.L.J.](#), 519 U.S. 102 (1996) stated, “choices about marriage, family, life, and the upbringing of children are among associational rights the court has ranked of ‘basic importance in our

society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation disregard, or disrespect." *Id.* at 233. The Nicholson court then went on to state this liberty interest in the private realm of family life is also protected by international law instruments of which the United States is a signatory. *Id.* at 234. See Universal Declaration of Human Rights, Art. 12 ("no one shall be subjected to arbitrary interference with his privacy, family, home or correspondance."); International Convention on Civil and Political Rights, Art. 17 ("No one shall be subjected to arbitrary or unlawful interference with his . . . family").

63 [DeShaney v. Winnebago County Dept. of Social Servs.](#), 489 U.S. 189, 197-200 (1989).

64 *Id.* at 200-201.

65 It is generally accepted that before a municipality can be liable for tort damages for failure to protect against the acts of a third party a "special relationship" must exist between the municipality and the individual. While an order of protection standing alone does not establish this "special relationship" a duly issued order of protection constitutes an assumption by the municipality of an affirmative duty of protection coupled with an awareness that inaction could lead to harm and should additional contact between the municipality and the injured party lead to the party's justifiable reliance on the municipality for protection then liability for failure to protect might attach. [Mastroianni v. County of Suffolk](#), 668 N.Y.S.2d 542 (1977).

66 [Nicholson v. Williams](#), 203 F.Supp.2d 153,237 (2002).

67 Robert S. Catz & Nancy Lee Firak, [The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard](#), 19 Harv. C.R.-C.L. L. Rev. 397,408-09 (Summer 1984); Lisa E. Martin, Comment, [Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel](#), 34 Gonz. L.Rev. 329,348 (1998-99).

68 "[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements," since "[t]he facts and circumstances . . . are susceptible of almost infinite variances. . ." [Gagnon v. Scarpelli](#), 411 U.S. at 790.

69 [Tabron v. Grace](#), 6 F.3d 147 (3d Cir. 1993); States have recognized the vulnerability of litigants in various contexts and have passed legislation providing assigned counsel to indigent litigants in proceedings where important, albeit not "fundamental" or even enumerated, liberty interests may be impacted.

70 [Lassiter](#), 452 U.S. at 18.

71 *Id.* at 25; See also [In re Gault](#), 387 U.S. 1 (1967); [Vitek v. Jones](#), 445 U.S. 480 (1980).

72 [Mathews](#), 42 U.S. at 319 (e.g., the private interests at stake, the government's interests, and the risk that the procedures used will lead to an erroneous decision).

73 [Lassiter](#), 452 U.S. at 27

74 *Id.* at 33.

75 See Peter Finn & Sarah Colson, National Inst. of Justice, U.S. Dep't of Justice, [Civil Protection Orders: Legislation, Current Court Practice, and Enforcement](#) 19 (1990) cited in Margaret F. Brown, 34 *Colum. J.L. & Soc. Probs.* 279, n. 23 (2001) ("those victims who are not represented by counsel are less likely to get protection orders-and, if an order is issued, it is less likely to contain all appropriate provisions regarding exclusion from the residence, temporary custody of children, child support, and protective limitations on visitation rights").

76 [U.S.C.A. Const. amend. V](#); While never directly addressing the right to retain hired counsel in civil litigation the Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit under the Fifth Amendment's concept of due process and the principle that notice and hearing are preliminary steps essential to the passing of an enforceable judgment. See, e.g., [Powell v. Alabama](#), 287 U.S. 45, 69 (1932); [Cooke v. United States](#), 267 U.S. 517, 537 (1925).

77 [R.B. Potashnick v. Port City Constr. Co., et al.](#), 609 F.2d 1101 (5th Cir. 1980).

78 Robert S. Catz & Nancy Lee Firak, [The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard](#), 19 Harv. C.R.-C.L. L. Rev. 397, 406 (1984), cited in Lisa Martin, [Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel](#), 34 Gonz. L. Rev. 329 (1998-1999).

- 79 “A parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer.” [In re B.](#), 30 N.Y.2d at 356-57.
- 80 “We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.” [In re Gault](#), 387 U.S. at 41.
- 81 Catz & Firak cited in Martin, *supra* note 76.
- 82 [Nicholson v. Williams](#), 203 F. Supp. 2d 153 (2d Cir. 2002).
- 83 *Id.* at 228.
- 84 *Id.* at 153.
- 85 *Id.* at 239.
- 86 *Id.* at 255.
- 87 [Nicholson](#), 203 F. Supp. at 228.
- 88 *Id.*
- 89 Examples of “state action” interfering with a fundamental right include preventing non-property owners from voting in elections for approving the issuance of general obligations bonds, [City of Phoenix v. Kolodziejcki](#), 399 U.S. 204 (1970); preventing residents of a school district from voting in a school district election unless they own taxable real property, [Kramer v. Union Free Sch. Dist. No. 15](#), 395 U.S. 621 (1969); requiring voters to pay local poll taxes required by state law before being permitted to vote in federal elections, [Harman v. Forssenius](#), 380 U.S. 528 (1965).
- 90 See discussion *supra* note 62 where government is deemed to have a special relationship with an individual and therefore assumes an affirmative duty to act to protect that individual's liberty interests.
- 91 [Mathews v. Eldridge](#), 424 U.S. 319 (1976).
- 92 *Id.* at 335.
- 93 James T.R. Jones, [Battered Spouses' Damage Actions Against Non-Reporting Physicians](#), 45 DePaul L. Rev. 191, n.6 (Winter 1996).
- 94 Kelsey S. Barnes, [The Economics of Violence: Why Freedom from Domestic Violence must be Treated as a Developmental Right in International Law](#), 6 Y.B. of Int'l L. 97, 118 (1997/1998).
- 95 [S. Rep. No. 101-545](#), at 37 (1990).
- 96 [S. Rep. No. 101-138](#), at 41 (1993); see also National Center for Injury Prevention and Control, Atlanta, GA: Centers for Disease Control and Preventions, [Costs of Intimate Partner Violence Against Women in the United States 32](#) (Mar. 2003) available at http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf (last visited on July 24, 2003).
- 97 National Center for Injury Prevention and Control, Atlanta, GA: Centers for Disease Control and Preventions, [Costs of Intimate Partner Violence Against Women in the United States 30](#) (Mar. 2003) available at http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf (last visited on July 24, 2003).
- 98 Barnes, *supra* note 91 at 119.
- 99 Mary-Christine Sungaila, [Brief Amici Curiae in Support of Petitioners](#), 9 S. Cal. Rev. L. & Women's Stud. 369, 391 (Spring 2000).
- 100 *Id.*

- 101 Id.
- 102 Howard A. Davidson, [Child Abuse and Domestic Violence: Legal Connections](#), 29 Fam. L. Q. 357, 370 (Summer 1995).
- 103 Id. at 381, 385.
- 104 Barnes, supra note 91, at 121-22.
- 105 Sungaila, supra note 96, at 387.
- 106 Barnes, supra note 91, at 122.
- 107 Id.
- 108 Sungaila, supra note 96, at 384.
- 109 An estimated 1,252 women are killed by an intimate partner each year. National Center for Injury Prevention and Control, Atlanta, GA: Centers for Disease Control and Preventions, [Costs of Intimate Partner Violence Against Women in the United States 19 \(Mar. 2003\)](#) available at [http:// www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf](http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf) (last visited on July 24, 2003).
- 110 Barnes, supra note 91, at 122-23.
- 111 Id. at 123.
- 112 S. Rep. No. 103-138, at 54 (1993).
- 113 Peter M. Shane, [Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism](#), 45 V.L.L.R. 201, xxx (200).
- 114 Sungaila, supra note 96, at 381.
- 115 Id. at 384.
- 116 National Center for Injury Prevention and Control, Atlanta, GA: Centers for Disease Control and Preventions, [Costs of Intimate Partner Violence Against Women in the United States 19 \(Mar. 2003\)](#) available at [http:// www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf](http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf) (last visited on July 24, 2003).
- 117 National Center for Injury Prevention and Control, Atlanta, GA: Centers for Disease Control and Preventions, [Costs of Intimate Partner Violence Against Women in the United States 19 \(Mar. 2003\)](#) available at [http:// www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf](http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf) (last visited on July 24, 2003).
- 118 Sungaila, supra note 96 at 386.
- 119 Id. at 383.
- 120 Id. at 393.
- 121 Id. at 394.
- 122 Id. at 395.
- 123 Barnes, supra note 92 at 126.
- 124 Id.
- 125 28 U.S.C.A. §1915(e) (West 2003). States have also provided similar guarantees. See [NY CPLR 1102](#). A person who is granted poor person status is potentially eligible for the assignment of free counsel. Whether counsel is assigned is at the discretion of the court and indigency by itself does not entitle a party to the appointment of free counsel. The constitutional right to counsel in civil proceedings is restricted to situations in which physical liberty is at stake or where "liberty interests" are at issue. [McKinney's CPLR 1102 Practice Commentaries](#) (1997)

- 126 [Bounds v. Smith](#), 430 U.S. 817, 823 (1977).
- 127 See, e.g., [Hodge v. Police Officers](#), 802 F.2d 58 (2d Cir. 1986); [Montgomery v. Pinchak](#), 294 F.3d 492 (3d Cir. 2002); [Christy v. Robinson](#), 216 F. Supp. 2d 398 (2002).
- 128 [Hodge](#), 802 F.2d at 61.
- 129 [Maclin v. Freake](#), 650 F.2d 885 (7th Cir. 1981).
- 130 [Hodge](#), 802 F.2d at 61.
- 131 *Id.* at 62.
- 132 *Id.* at 62.
- 133 [Montgomery v. Pinchak](#), 294 F.3d 492, 492 (3d Cir. 2002).
- 134 [Tabron v. Grace](#), 6 F.3d 147, 155 (3d Cir. 1993).
- 135 *Id.* at 155-157.
- 136 *Id.* cited in [Montgomery](#), 294 F.3d at 499.
- 137 [Hahn v. McCley](#), 737 F.2d 771 (8th Cir. 1984) court held that counsel should be assigned counsel where inmate's Eighth Amendment claim that was deprived of prescribed medication was found to be too complex and therefore posed due process concerns).
- 138 *Id.*
- 139 [Branch v. Cole](#), 686 F.2d 264 (5th Cir. 1982) (holding that no right to appointment of counsel exists in a civil case unless the case presents exceptional circumstances). Although “no comprehensive definition of exceptional circumstances is practical,” *Id.*, there are factors that should be considered in ruling on requests for appointment of counsel, including (1) the type and complexity of the case; (2) whether the indigent is capable of adequately presenting his case; (3) whether the indigent is in a position to adequately investigate his case; (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross examination. [Ulmer v. Chancellor](#), 691 F.2d 209, 213 (5th Cir. 1982).
- 140 [Poole v. Lambert](#), 819 F.2d 1025, 1028 (11th Cir. 1987) (holding that appointment of counsel in a civil case is required to preserve due process only in exceptional cases, such as where the facts and legal issue are so novel or complex as to require the assistance of a trained practitioner) (11th Cir. 1987)
- 141 See, e.g., [Aldabe v. Aldabe](#), 616 F.2d 1089 (9th Cir. 1980); [Weller v. Dickinson](#), 314 F.2d 598 (9th Cir. 1963); [Lavado v. Keohane](#), 992 F.2d 601, 605-606 (6th Cir. 1993).
- 142 [Lavadon v. Keohane](#), 992 F.2d 60, 605-6 (6th Cir. 1993)
- 143 The fact that many litigants are compromised in their ability to get relevant facts before the court was recognized in [In re Gault](#), 387 U.S. 1 (1961) where the Supreme Court found the constitutional guarantee of due process required that juveniles charged as delinquents have the right to counsel. “Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.” *Id.* at 5.
- 144 Besty Tai, Note, [The Trend Towards Specialized Domestic Violence Courts: Improvements on an Effective Innovation](#), 68 *Fordham L.Rev.* 1285, 1293-94 (March 2000).
- 145 Machaela M. Hctor, [Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California](#), 85 *Cal. L. Rev.* 643, 687 (May 1997).
- 146 *Id.* at 686; [Hanna](#), *supra* note 21 at 1888.

- 147 “[W]omen who have been sanctioned for failure to cooperate [with mandatory protocols] may be treated poorly on other legal proceedings such as divorce and custody.” Hanna, *supra* note 14 at 1898.
- 148 Mills, *infra* note 170
- 149 Epstein, *supra* note 5 at 38; regarding the risk involved in a “service-defined (as opposed to woman centered) advocacy, where advocates focus on providing available services regardless of whether they fit into a particular women’s risk analysis or safety plan.”
- 150 *Id.* at 18.
- 151 [Colorado v. Connelly](#), 479 U.S. 157, 169 (1986).
- 152 [Gideon v. Wainwright](#), 372 U.S. 335 (1961).
- 153 [Argersinger v. Hamlin](#), 407 U.S. 25 (1972).
- 154 [United States v. Gouveia](#), 467 U.S. 180, 185 (1984).
- 155 [McNeil v. Washington](#), 501 U.S. 171, 175 (1991).
- 156 Jennifer Thompson, [Who’s Afraid of Judicial Activism? Reconceptualizing a Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs](#), 56 *Me. L. Rev.* 407 (2004); See generally, Betsy Tsai, *supra* note 6 for an overview of many of the pilot programs around the country.
- 157 *Id.*
- 158 Robin West, Symposium, [The Zealous Advocacy of Justice in a Less than Ideal World](#), 51 *Stan. L. Rev.* 973 (April 1999).
- 159 Those who oppose this approach hold that an attorney’s ethical duties are first and foremost to the integrity of the legal system and the duty to the client’s wishes is secondary. According to this view, an attorney should examine their client’s goals in the broader context of the outcome of the dispute that the attorney decides is the most “just.” Attorneys can then refuse to advocate for certain goals that deviate unacceptably from this outcome. *Id.*
- 160 Monroe H. Freedman “Understanding Lawyers’ Ethics” (1990).
- 161 *Id.* at 55.
- 162 Epstein, *supra* note 5.
- 163 Lenore Walker; Kaye & Knipps, *supra* note 23 at 4.
- 164 Rita Smith & Paul Coukos, [Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations](#), 36 *No. 4 Judges’ J.* 38, 39-40 (Fall 1997).
- 165 Ann Shalleck, [Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused](#), 64 *Tenn. L. Rev.* 1019, 1024 (Summer 1997).
- 166 Jill Laurie Goodman, [Thinking About Danger and Safety](#), *Lawyers Manual on Domestic Violence*, 27-35 (Supreme Court of New York, Appellate Division, 1st Dept., 4th ed. 2005).
- 167 See generally Shalleck, *supra* note 165 (for discussion of inherent tensions raised for “client-centered” lawyering due to attorney’s personal values, past experience and attitudes).
- 168 Since, as stated above, “client control of the case is a significant element in a litigant’s perception that justice has been done, regardless of the outcome,” Freedman, *supra* note 158 at 55.
- 169 Anne O’Dell

- 170 The personal experience of the authors in representing hundreds of domestic violence victims in Family Court confirms how easily a victim can be driven underground by the fear that the legal system will be unresponsive to her wishes, particularly when she advocates more lenient measures regarding her abuser than that recommended by the court advocates and support staff.
- 171 Mills, Linda G., "[Killing Her Softly: Intimate Abuse and the Violence of State Intervention](#)," 113 Harv. L. Rev. 550, 569 (Dec. 1999).
- 172 Freedman, *supra* note 158 at 57.
- 173 Shalleck, *supra* note 1653 at 1027-39.
- 174 *Id.* at 1034.
- 175 *Id.*.
- 176 Shalleck, *supra* note 1653 at 1033.
- 177 See Model Rules of Prof'l Conduct R. 1.1 (2002); John M. Burman, [Lawyers and Domestic Violence: Raising the Standard of Practice](#), 9 Mich J. Gender & L. 207, 224 (2003).
- 178 The author's experience as 24/7 on-call attorney for Project DETER, in speaking with victims in the moments after an incident of abuse and representing her from that moment onward has proven repeatedly the enormous impact of such representation on the victim's ability to maintain their actions in civil court. Statistics compiled during the implementation of DETER indicate that while prior to DETER only 27% of victims seeking temporary orders of protection in civil court actually returned to court to obtain a final order of protection, 95% of those assisted by a Project DETER attorney did so. Furthermore, an attorney speaking with a victim virtually at the time of the incident has an appreciation for the nature of the abuse and its effects that is impossible to receive at any other time, and that attorney's ability to advocate for her client is immeasurably enhanced by this understanding.
- 179 Project DETER, described in "A Handbook of Intervention Strategies with Domestic Violence," by Albert R. Roberts, Oxford University Press (2002).
- 180 Frizler & Simon, *supra* note 4 at 35.
- 181 Epstein, *supra* note 5 at 20.
- 182 Shalleck, *supra* note 165 at 1047. Shalleck, Ann, [Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused](#), 64 Tenn. L. Rev. 1019 at 1047 (Summer 1997).
- 183 In the context of criminal defense, but also directly applicable to this thesis, "A central element of human dignity is personal autonomy, particularly in matters that affect our own lives as substantially as those in which lawyers are needed for assistance." Freedman, *supra* note 158 at 54.
- 184 Martin, *supra* note 63 at 331-33.