

ETHICAL AND EFFECTIVE REPRESENTATION OF UNACCOMPANIED IMMIGRANT MINORS IN DOMESTIC VIOLENCE-BASED ASYLUM CASES

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In the last two years more than 100,000 immigrant minors have flooded the southern border of the United States. Many of the children seeking refuge are domestic violence survivors whose governments cannot or will not protect them from familial assault, rape, and torture. Responding to the critical need for lawyers, the Family Protection Clinic at Chapman University Fowler School of Law represented four unaccompanied minors facing deportation. The children, siblings ranging in ages from thirteen to eighteen, fled Central America to escape extreme sexual and physical abuse at the hands of their father. This article focuses on specific opportunities and challenges encountered during the Clinic's representation of the minors to shed light on the pedagogical possibilities presented by the legal and humanitarian crisis of child migration. The article seeks to engage clinicians and law students in the representation of immigrant children and attempts to articulate best practices for enhancing student learning. The purposeful lawyering of unaccompanied minors in domestic violence-based asylum cases is a meaningful vehicle to teach practical lawyering skills, professional ethics, and critical analysis of the current legal paradigm. In selecting these cases, clinicians will be afforded the opportunity to teach the law of asylum, respond to a refugee disaster, and train the next generation of effective social justice advocates.

INTRODUCTION

During the unaccompanied minors surge of 2014, newspapers across the country decried the humanitarian crisis on the southern

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border of the United States.¹ More than 108,000 child migrants were apprehended by U.S. Customs and Border Protection at the U.S.-Mexico border between October 1, 2013, and September 30, 2015.² By the end of 2015, news headlines had turned into pleas not to ignore the children of the Central American immigration crisis.³

Immigrants' rights advocates have rightly condemned the lack of legal representation for these children.⁴ Though no right to counsel exists in immigration proceedings, studies have shown the likelihood of succeeding in claims for immigration relief are dramatically in-

¹ Julia Preston, *New U.S. Effort to Aid Unaccompanied Child Migrants*, N.Y. TIMES (June 2, 2014), <http://www.nytimes.com/2014/06/03/us/politics/new-us-effort-to-aid-unaccompanied-child-migrants.html> [perma.cc/W9SH-7YWG]; Haeyoun Park, *Q. and A., Children at the Border*, N.Y. TIMES (Oct. 21, 2014), http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0 [perma.cc/HNH3-JQNZ]; Diana Villiers NegroponTE, *The Surge in Unaccompanied Children from Central America: A Humanitarian Crisis at Our Border*, BROOKINGS: UP FRONT (July 2, 2014, 3:15 PM), <http://www.brookings.edu/blogs/up-front/posts/2014/07/02-unaccompanied-children-central-america-negroponTE> [perma.cc/W37H-XPAM].

² Dep't Homeland Sec., *Southwest Border Unaccompanied Alien Children Statistics FY 2015*, U.S. CUSTOMS & BORDER PROT., <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2015> [perma.cc/WDL7-LW8J] (last visited Dec. 7, 2015) (reporting that the vast majority of children entering the United States between October 1, 2013, and September 30, 2015—80,092 of the 108,511—came from El Salvador, Guatemala, and Honduras); see also U.S. BORDER PATROL, U.S. BORDER PATROL SOUTHWEST BORDER SECTORS FY 2014-FY 2015, <https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20FY14-FY15.pdf> [perma.cc/B6KA-2FL6] (reporting 68,541 unaccompanied alien children in FY 2015 and 39,970 in FY 2014, and reporting 28,387 unaccompanied alien children from El Salvador, Guatemala, and Honduras apprehended in FY 2015); U.S. BORDER PATROL, U.S. BORDER PATROL SOUTHWEST BORDER SECTORS FY 2013-FY 2014, https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf [perma.cc/W5HN-KF5M] (reporting 51,705 unaccompanied alien children from El Salvador, Guatemala, and Honduras apprehended in FY 2014); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-362, CENTRAL AMERICA: INFORMATION ON MIGRATION OF UNACCOMPANIED CHILDREN FROM EL SALVADOR, GUATEMALA, AND HONDURAS (2015), <http://www.gao.gov/assets/670/668749.pdf> [perma.cc/28M4-RNYK].

³ Stephen J. Brogan, Opinion, *Don't Ignore the Children of the Central American Immigration Crisis: The News Coverage Has Quieted Down, but Tens of Thousands Still Need Legal Help*, NAT'L L.J., Oct. 19, 2015, at 27; Clara Long, *The Other Refugee Crisis, from Central America to the U.S.*, PROGRESSIVE (Sept. 18, 2015), <http://www.progressive.org/news/2015/09/188320/other-refugee-crisis-central-america-us> [perma.cc/844F-9M3N]; Sonia Nazario, Opinion, *The Refugees at Our Door*, N.Y. TIMES (Oct. 15, 2015), <http://www.nytimes.com/2015/10/11/opinion/sunday/the-refugees-at-our-door.html> [perma.cc/2Y54-E747].

⁴ See Complaint, *J.E.F.M. v. Holder*, No. 14-cv-01026 (W.D. Wash. July 9, 2014) (initiating a nationwide class-action lawsuit challenging the constitutionality of the federal government's failure to provide legal representation to such children); *Representation for Unaccompanied Children in Immigration Court*, TRACIMMIGRATION (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/> [perma.cc/B844-ZN7F] (finding that only thirty-two percent of UACs were represented by counsel).

creased if a child is given adequate legal representation.⁵ Statistically, children that are represented have an almost one in two probability of being allowed to remain in the United States, where those lacking representation have only a one in ten probability of being granted immigration relief.⁶

In 2014 and 2015, the federal government and some states and localities responded to the crisis by creating limited funding for counsel, particularly focusing on unaccompanied minors who are victims of domestic violence.⁷ Yet, in the first year of cases following the 2014 surge, only half of unaccompanied minors were represented by an attorney in immigration removal proceedings.⁸ As public funding is insufficient to find attorneys for the tens of thousands of unaccompanied minors currently in the immigration system,⁹ law

⁵ *New Data on Unaccompanied Children in Immigration Court*, TRAC IMMIGRATION (July 15, 2014), <http://trac.syr.edu/immigration/reports/359/> [perma.cc/943A-PKPE] (finding that only forty-eight percent of children were represented by counsel in their immigration proceedings between January 2013 and June 2014 and concluding that children who are represented by counsel had an almost one in two probability of being allowed to remain in the United States; when lacking representation, they had only a one in ten probability of being allowed to remain in the country); STEERING COMMITTEE OF THE N.Y. IMMIGRANT REPRESENTATION STUDY REPORT, *ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS*, NEW YORK REPRESENTATION STUDY 3 (2011), <https://www.ils.ny.gov/files/Accessing%20Justice.pdf> [perma.cc/9XJL-CZG2] (finding that unrepresented immigrants, not in detention, have only a thirteen percent chance of obtaining immigration relief or having their court cases terminated).

⁶ *New Data on Unaccompanied Children in Immigration Court*, *supra* note 5.

⁷ Annie Chen & Jennifer Gill, *Unaccompanied Children and the U.S. Immigration System: Challenges and Reforms*, J. INT'L AFF., Spring/Summer 2015, at 115, 119 (discussing available legal services for UACs); *Justice Department and CNCS Announce New Partnership to Enhance Immigration Courts and Provide Critical Legal Assistance to Unaccompanied Minors*, CORP. FOR NAT'L & CMTY. SERV. (June 6, 2014), <http://www.nationalservice.gov/newsroom/press-releases/2014/justice-department-and-cnsc-announce-new-partnership-enhance> [perma.cc/857X-GBUD] (discussing the federal funding of AmeriCorps positions for attorneys to represent unaccompanied minors); *Unaccompanied Refugee Minors Program*, CAL. DEP'T OF SOC. SERVS., <http://www.cdss.ca.gov/refugeeprogram/PG3011.htm> [perma.cc/Z26K-FZ55] (last visited July 7, 2015) (discussing the State of California's funding for the representation of unaccompanied minors); *NYC Council Speaker Melissa Mark-Viverito, the Robin Hood Foundation and New York Community Trust Announce New \$1.9 Million Unaccompanied Minor Initiative*, N.Y. CITY COUNCIL (Sept. 23, 2014), <http://www.council.nyc.gov/html/pr/092314um.shtml> [perma.cc/2SR4-Q267] (discussing New York City's funding for the legal representation of unaccompanied minors).

⁸ David Rogers, *Obama Plan Leaves Child Migrants Adrift*, POLITICO (Aug. 11, 2015, 1:52 PM), <http://www.politico.com/story/2015/08/obama-plan-leaves-child-migrants-adrift-121254> [perma.cc/2Y2U-TXJV] (“[A]mong the 13,451 cases completed since July 18, 2014, barely half the children had legal representation.”).

⁹ See generally AM. BAR ASS'N COMM'N ON IMMIGRATION, *A HUMANITARIAN CALL TO ACTION: UNACCOMPANIED ALIEN CHILDREN AT THE SOUTHWEST BORDER* (2014), <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACStatement072014.authcheckdam.pdf> [perma.cc/8L4Z-EW7F] (describing legal representation support efforts and programs); *Immigrant Children's Legal Program: Become a Pro Bono*

school clinics have heeded the call for assistance and taken up the cause of representing these children. As the unaccompanied minors' cases filter their way through the courts, law school clinics can play a critical role in responding to and reshaping this refugee crisis.¹⁰

The representation of unaccompanied minors in domestic violence-based asylum cases presents tremendous pedagogical opportunities for law school clinicians seeking to teach core lawyering skills to the next generation of attorneys.¹¹ These cases enable law students to study a complex and evolving area of law and reflect on the asylum law's applicability to child applicants.

In representing unaccompanied minors, student attorneys are called upon to devise multifaceted case theories and prepare child clients to testify to sophisticated legal concepts. In engaging in such representation, law students will often struggle with challenging ethical dilemmas. Current rules of professional ethics do not provide clear guidance as to best practices for situations that commonly arise in the representation of these children. Indeed, the children's multiple layers of victimization make them susceptible to harm by well-intended attorneys, therapists, and immigration officials alike.

In representing unaccompanied minors in domestic violence-based asylum cases, law students will be exposed to the dynamics of working with trauma victims and tasked with developing litigation strategies in the larger context of the child's overall welfare. Student attorneys must take into account the unique mental state of these children, accommodating for their age and particular vulnerability due to past trauma. Through the adoption of various client centered litigation techniques, law students can learn to mitigate, though not eliminate, the traumatizing process unaccompanied minors must traverse to gain asylum based upon domestic violence.

By engaging in the representation of unaccompanied minors in

Attorney for Immigrant Children, U.S. COMM. FOR REFUGEES & IMMIGRATION, <http://www.refugees.org/our-work/child-migrants/become-a-pro-bono-attorney.html> [perma.cc/ZZ3H-7EPK] (last visited Dec. 7, 2015) (describing the need for volunteer attorneys for the Immigrant Children's Legal Program).

¹⁰ See generally Sarah Pierce, Migration Policy Institute, *Unaccompanied Child Migrants in U.S. Communities, Immigration Court, and Schools 14* (2015), <http://www.migrationpolicy.org/research/unaccompanied-child-migrants-us-communities-immigration-court-and-schools> [perma.cc/GD3G-2UV9] (noting the various legal representation service organizations that are attempting to fill the justice gap for UACs); *Immigration Court Backlog Keeps Rising*, TRACIMMIGRATION (May 15, 2015), <http://trac.syr.edu/immigration/reports/385/> [perma.cc/9PNR-H9S7] (reporting a backlog of 70,035 UAC cases through the end of April 2015).

¹¹ See *Immigrant Children's Legal Program: Become a Pro Bono Attorney for Immigrant Children*, *supra* note 9 (describing its pro bono attorney program as a way to "make a difference at a critical juncture in a child's life while also developing client advocacy, litigation, research, and writing skills[.]").

domestic violence-based asylum cases, clinicians can guide law students through a critical examination of the relevant power structures that shape the individual autonomy and legal rights of clients. The direct representation of these children naturally lends itself to a critique of race and gender biases inherent in clients' countries of origin and the United States immigration system.

The author views the pedagogical possibilities presented by the representation of unaccompanied minors through a case study, a law school clinic's representation of four unaccompanied teenage siblings. The deep and difficult questions presented in the paper's case study are likely to arise in many domestic violence-based asylum cases currently being litigated on behalf of unaccompanied minors. The case study is utilized to highlight systemic problems in the current legal paradigm with the intent of inscribing critical analysis into the teaching of these cases.

In Part I, the children's cases are discussed in some detail. The case study illustrates the gravity of the "typical" unaccompanied minor case, particularly for those children who have suffered familial violence in their countries of origin. In Part II, the author uses the case study to provide an overview of the law of asylum as it relates to victims of domestic violence. The section highlights the intricate legal theories student attorneys will devise to successfully litigate domestic violence-based asylum cases and the skills students will develop in preparing the children to testify to such legal theories. In teaching law students how to litigate asylum claims, clinicians are well positioned to invite student evaluation and critique of the legal remedy's suitability for childhood victims of crime.

In Part III, this article discusses the compounded issues of confidentiality and loyalty that commonly arise in unaccompanied minor cases. The involvement of multiple family members and mental health professionals often strain the existing rules that govern attorney ethics. In this section, the author explores the tension between the principles elucidated in the Model Rules of Professional Conduct, and specific immigration related rules of professional responsibility, and the real life demands of representing children. These ethical dilemmas create rich areas for discussion and exploration as clinicians and law students reflect upon professional rules as they apply to the representation of powerless children. The author concludes that despite the pedagogical norm of inscribing confidentiality into all cases, there are areas where maintaining strict confidentiality may in fact not be possible or be in conflict with the overall well-being of an unaccompanied minor.

Part IV explores the grave potential for re-victimization of unac-

accompanied minors due to the demands of the asylum process. The mental health of the children is often so precarious that attention to their trauma permeates all litigation decisions. The section articulates best practices for teaching law students techniques to reduce the re-victimization of child clients within the current legal framework. The author explores the tensions that decisions to mitigate client trauma may create for legal strategy. The section concludes that even with clinician and student efforts to mitigate trauma, the asylum process is itself inherently victimizing to childhood domestic violence survivors. This section then articulates the pedagogical potential of these individual cases in teaching critical race and feminist legal theory. It reviews current calls for a systemic change and concludes that student representation of individual children will invite a larger evaluation of the current legal framework under which unaccompanied minors seek immigration relief.

In conclusion, this article advises that law school clinics can constructively contribute to a current humanitarian crisis by providing legal representation to unaccompanied children. Student attorneys can, with appropriate training, positively impact the lives of children. Law students litigating such cases will be positioned to develop essential skills in case theory analysis, exposed to complications in attorney ethics, and trained in the dynamics of working with traumatized clients. In addition to gaining practical litigation tools, law students will be well positioned to assess the efficacy and humanity of the current legal regime under which child survivors of domestic violence seek immigration relief.

PART I. THE CASE STUDY

The Bette and Wylie Aitken Family Protection Clinic (the Clinic) at Chapman University Fowler School of Law represents survivors of domestic violence, sexual assault, and human trafficking. Each semester, second and third year law students, acting under the supervision of faculty, serve as counsel to undocumented immigrants who are eligible for victim-based immigration relief. In 2014, clinical students represented four unaccompanied minors facing deportation.¹²

¹² Nina Tarr has argued that faculty who teach in clinics should not use student or client stories in scholarship due to the potential for exploitation and abuse of confidentiality. She also has suggested that use of such stories could violate human-subject research laws. Nina W. Tarr, *Ethics, Internal Law School Clinics, and Training the Next Generation of Poverty Lawyers*, 35 WM. MITCHELL L. REV. 1011, 1038 (2009); Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity*, 5 CLINICAL L. REV. 271 (1998). Such critiques are valid and should be acknowledged. It is possible that the power dynamic between a law professor and a marginalized client is such that an attorney request to release confidentiality cannot be

In the summer of 2014, the four siblings in the case study fled their small town, secretly escaping their father, Fernando, the man who had beaten, sexually assaulted, and threatened to kill them.¹³ Olga (eighteen) and her younger siblings Sofia (seventeen), Teresa (fifteen), and Jose (thirteen) traveled from Central America, across Guatemala and up through Mexico.¹⁴ The children rode atop a dan-

freely and knowingly given by the client. The author believes that the clients in this case study were significantly empowered after being granted asylum. The clients waived confidentiality after they expressed a desire to save the lives of other children similar situated. The children understood the focus of this article and believed that others could benefit from their experience. The author received written consent from all four clients to use their story. In addition, the author verified with all appropriate institutions that this article complies with relevant human-subject research laws. Clinicians utilizing live-client cases for scholarship must also protect student educational privacy rights under the Family Educational Rights and Privacy Act of 1974 (FERPA) § 513(a), 20 U.S.C. § 1232g (2012). The three student attorneys who worked on the case study authorized the telling of this story. The students reviewed an earlier draft of this article to ensure that the depiction of their role was accurate and acceptable to them. The students were eager to see this article published and also expressed a desire that their own learning experience be used to build capacity in other law school clinics.

¹³ All names have been altered to protect client privacy. The author acknowledges that a simple name change can in certain circumstances be insufficient to protect client confidentiality. The clients in the case study knowingly waived confidentiality. The author believes that the particular facts of the case study are useful in articulating larger themes. A recent UNHCR report documented the rise of gender based violence in Central America through interviews with 160 women who suffered persecution similar to the clients in the case study. U.N. HIGH COMM'R FOR REFUGEES, *WOMEN ON THE RUN: FIRST HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO* (2015), <http://www.unhcr.org/5630f24c6.html> [perma.cc/D24X-XMCR]. The women in this report speak of pervasive physical and sexual abuse of women and children in their homes and the inability or unwillingness of law enforcement to protect them. *Id.* at 4. The report discusses how mothers are often forced to leave children behind, and that such children then make the journey north alone. *Id.* at 2, 43. In sum, the story of the children in the case study mirrors the stories of the 160 women interviewed by UNHCR. The case study gives a powerful and personal voice to the current Central American immigration crisis. The particular facts of the case study enable the author to effectively articulate the legal mandates placed on these children, the precarious mental health of unaccompanied minors, and the immigration procedural structures that are ill-suited for children and victims of trauma. Binny Miller has articulated the virtue of using real client stories in scholarship. Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 *GEO. J. LEGAL ETHICS* 1, 26–27 (2000). Miller emphasizes the many ethical concerns in appropriating a client's story. However, she acknowledges that the teachable moments that arise from actual client narratives in scholarship cannot always be sufficiently replicated by pure fiction; in the same manner that simulation cannot always serve law students as beneficially as live-client representation. *Id.* The author believes that the specific ethical and policy dilemmas presented in the case study of this article bring a sense of urgency to this scholarship that could not be replicated by a fictionalized case.

¹⁴ See generally Muzaffar Chishti & Faye Hipsman, *The Child and Family Migration Surge of Summer 2014: A Short-Lived Crisis with a Lasting Impact*, *J. INT'L AFF.*, Spring/Summer 2015, at 95, 96 (noting that in 2014, seventy-five percent of all unaccompanied minors arriving in the United States came from Guatemala, El Salvador, and Honduras, not Mexico).

gerous train and hiked across hot and barren deserts.¹⁵ Three weeks into their journey, the children were apprehended by United States immigration authorities in southern Texas.¹⁶

The children in the case study were part of the surge of unaccompanied minors fleeing Central America in the summer of 2014.¹⁷ Ill prepared for the surge, the federal government scrambled to formulate a response to the humanitarian crisis, creating makeshift detention centers that often re-traumatized these vulnerable victims.¹⁸ Olga and her siblings were housed in such a detention center, spending three days in “the freezer” (a federal holding cell nicknamed by the child migrants due to its frigid temperatures).¹⁹ After receiving little food or water for days, the children were transferred to an Office of Refugee and Resettlement (ORR) facility in the Midwest.²⁰ By September 2014, the four siblings were reunited with their mother under the Court settlement in *Flores v. Reno* and procedures developed as part of the Homeland Security Act of 2002.²¹ According to

¹⁵ See generally Jennifer Podkul (Rebecca Katz & Joanne Kelsey eds.), *Detention and Treatment of Unaccompanied Migrant Children at the U.S.-Mexico Border*, in U.C. HASTINGS CTR. FOR GEN. & REFUGEE STUDIES, CHILDHOOD AND MIGRATION IN CENTRAL AND NORTH AMERICA: CAUSES, POLICIES, PRACTICES AND CHALLENGES ch. 9 (Karen Musalo, Lisa Frydman & Pablo Ceriani Cernadas eds., 2015), http://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_English.pdf [perma.cc/28YN-XCT2] (describing the dangerous journey taken by children coming from Central America and crossing into southern Texas); CATHOLIC RELIEF SERVICES, CHILD MIGRATION: THE DETENTION AND REPATRIATION OF UNACCOMPANIED CENTRAL AMERICAN CHILDREN FROM MEXICO 32 (2010), <http://www.crs.org/sites/default/files/tools-research/child-migration.pdf> [perma.cc/7CEJ-JSDD] (describing the dangerous and often deadly Mexican freight train, “La Bestia,” that children are forced to ride on top of en route to the United States).

¹⁶ See generally Podkul, *supra* note 15, at ch. 9 (describing the typical procedures CBP officials use for apprehending unaccompanied minors at the border, placing them in temporary detention, and screening them for placement at an Office of Refugee Resettlement Facility under the Trafficking Victims Protection Act).

¹⁷ See Chishti & Hipsman, *supra* note 14.

¹⁸ Julia Preston, *Hope and Despair as Families Languish in Texas Immigration Centers*, N.Y. TIMES (June 14, 2015), <http://www.nytimes.com/2015/06/15/us/texas-detention-center-takes-toll-on-immigrants-languishing-there.html> [perma.cc/TTQ3-956Z]; Julia Preston, *U.S. Setting Up Emergency Shelter in Texas as Youths Cross Border Alone*, N.Y. TIMES (May 16, 2014), <http://www.nytimes.com/2014/05/17/us/us-sets-up-crisis-shelter-as-children-flow-across-border-alone.html> [perma.cc/D589-XNVP].

¹⁹ See generally Complaint, Doe v. Johnson, No. 15-cv-00250 (D. Ariz. June 8, 2015) (challenging the constitutionality of DHS procedures in holding immigrants in freezing detention cells).

²⁰ See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235(b)(3), 8 U.S.C. § 1232(b)(3) (2012) (requiring that unaccompanied children from countries other than Mexico and Canada must be transferred to the custody of the Secretary of Health and Human Services within 72 hours of apprehension).

²¹ Homeland Security Act of 2002 § 462(g), 6 U.S.C. § 279(g) (2012); Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. 1997); Chishti & Hipsman, *supra* note 14, at 101.

ORR, the subdivision of the Department of Health and Human Services charged with the care and custody of unaccompanied minors, ninety-six percent of children who enter ORR custody are ultimately released to a parent or other relative in the United States.²² In the case study, the children's mother, Patricia, had settled in the United States in 2001 to flee their father's persecution. Patricia told her children that if she stayed in El Salvador she would be killed or resort to killing herself.

When the children in the case study were screened for potential immigration relief, it was clear that all four children were psychologically traumatized. Indeed, the youngest child refused to speak at all. It was also clear the children in the case study, like most unaccompanied minors, had no money to pay for an attorney. In the context of civil immigration proceedings, there is no right to counsel, as that is a right reserved for criminal defendants, not administrative respondents.²³ The Immigration and Nationality Act specifies that a person in removal proceedings, "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."²⁴ Since immigration proceedings are not criminal in nature, the government is not required to provide free immigration lawyers.²⁵ This stands in stark contrast to juvenile delinquency cases in which the United States Supreme Court has held that a "child requires the guiding hand of counsel at every step in the proceedings against him."²⁶

In 2014, the Department of Homeland Security created an expedited court docket intended to deport unaccompanied minors, like Olga and her siblings, as quickly as possible.²⁷ The children in the

²² *Securing the Border: Understanding and Addressing the Root Causes of Central American Migration to the United States: Hearing Before the S. Comm. Homeland Sec. & Gov't Aff.*, 114th Cong. CRS-6 (2015) (statement of William Kandel, Analyst in Immigration Policy, Cong. Research Serv.).

²³ Ashley Ham Pong, *Humanitarian Protections and the Need for Appointed Counsel for Unaccompanied Immigrant Children Facing Deportation*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 69 (2014) (arguing that it is a violation of due process to fail to provide unaccompanied immigrant minors with counsel).

²⁴ Immigration and Nationality Act (INA) § 292, 8 U.S.C. § 1362 (2012).

²⁵ Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. LEGIS. 331, 332 (2013).

²⁶ *In re Gault*, 387 U.S. 1, 36 (1967) (quoting *Powell v. Alabama*, 287 U.S. 45, 61 [sic] (1932)).

²⁷ Karen Musalo, Lisa Frydman & Misha Seay, *Immigration Remedies and Procedural Rights of Migrant Children and Adolescents*, in U.C. HASTINGS CTR. FOR GEND. & REFUGEE STUDIES, *CHILDHOOD AND MIGRATION IN CENTRAL AND NORTH AMERICA: CAUSES, POLICIES, PRACTICES AND CHALLENGES* ch. 10 (Karen Musalo, Lisa Frydman & Pablo Ceriani Cernadas eds., 2015), http://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_English.pdf [perma.cc/28YN-XCT2].

case study were placed in this “rocket docket” at the Executive Office of Immigration Review (EOIR), meaning the children and their counsel would have only a few months to prepare and present all four cases.²⁸

The children in the case study remember their father beating them from the time they were babies. They do not recall a moment in their lives free from violence. The abuse substantially increased when their mother fled El Salvador. Without their mother to act as buffer and protector, the children’s father, Fernando, acted with impunity. He beat the children daily. He believed that as the man of the house, he was entitled to do what he wanted with his children. Fernando forced the children to bathe in front of him. He sexually assaulted his daughters and encouraged his friends to sexually molest them.

Fernando is an official at the local courthouse. He was formerly assigned to the unit that confiscated guns from local gangs. When he would harm his children, he would often place a gun close by to remind them that he could kill them, if he wanted to. Fernando was known throughout the town due to his position of power. While living in El Salvador, Patricia, the children’s mother, sought protection from the police and court system to no avail. After the children’s mother fled to the United States, the children themselves obtained a Restraining Order to attempt to free themselves from their father. However, the police refused to enforce the order. The oldest sibling, Victoria, “disappeared” and was found dead in a shallow grave behind the children’s home. When Fernando threatened Olga, Sofia, Teresa, and Jose that they would face the same fate as their older sister, the children decided they must flee El Salvador to escape a near certain death.

PART II. ASYLUM LAW AS APPLIED TO CHILDHOOD VICTIMS OF DOMESTIC VIOLENCE

A. *Inadequate Immigration Remedies For UACs*

U.S. law defines an unaccompanied alien child, or UAC, as “a

²⁸ *Id.* (describing the expedited removal proceedings for unaccompanied children that requires children to appear in immigration court within weeks of arriving in the United States and instruct immigration judges to grant only short continuances of no more than six weeks to two months for children to seek counsel, explore legal options, and present their cases). See also David Rogers, *Under 16 and Ordered Deported — with No Lawyer*, POLITICO (Nov. 18, 2015 5:23 AM), <http://www.politico.com/story/2015/11/under-16-and-ordered-deported-with-no-lawyer-215944#ixzz3s1vuiBsR> [perma.cc/JC4X-DUK6] (according to statistics gathered by POLITICO under the Freedom of Information Act, since the summer 2014 unaccompanied minor surge, EOIR issued 2,800 removal orders “for children who were afforded no defense lawyer and only a single hearing. In at least forty percent of these cases, the defendant was 16 or younger”).

child who has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody.”²⁹ Children who are unified with one parent after arriving in the United States, such as the children in the case study, can maintain the UAC distinction for purposes of applying for immigration relief.³⁰ This policy allows the children to present their asylum cases in a non-adversarial proceeding before United States Citizenship and Immigration Services, the administrative agency of the Department of Homeland Security, instead of having to litigate the entire case before an Immigration Judge at the Executive Office of Immigration Review.

Current immigration law provides inadequate avenues for UAC children to gain lawful status.³¹ The limited numbers of family visas and long wait times, restrictions on including derivative children in certain forms of immigration relief, and the reality of mixed status families have left just a handful of options for children fleeing Central America to seek lawful status.³²

Child victims of domestic violence, at first blush, seem to have more potential forms of immigration relief available to them than other unaccompanied minors. However, despite horrific years of abuse, children like Sofia, Olga, Teresa, and Jose often will not qualify for any of these more straightforward and relatively simple forms of immigration protection. The Violence Against Women Act (VAWA) allows for spouses and children of Legal Permanent Residents and Citizens to “self-petition” for lawful status.³³ However, when an abuser is not a U.S. Citizen or Legal Permanent Resident, children are not able to self-petition under VAWA. Children who are victims of domestic violence and child abuse within the United States and assist U.S. law enforcement can at times apply for U nonimmigrant status.³⁴ But, when crimes do not occur within the interior of the United States, children do not have an opportunity to cooperate with U.S. law enforcement, and thus, cannot apply for a U nonimmigrant visa.³⁵

²⁹ 6 U.S.C. § 279(g)(2) (2012).

³⁰ Memorandum from Ted Kim, Acting Chief, Asylum Div., USCIS, to All Asylum Office Staff, on Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (May 28, 2013), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf> [perma.cc/JP9S-75CJ].

³¹ Musalo, Frydman & Seay, *supra* note 27, at ch. 10.

³² *Id.*

³³ Violence Against Women Act of 1994 (VAWA) § 40701, 8 U.S.C. § 1154(a) (2012).

³⁴ 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2012).

³⁵ 8 C.F.R. § 214.14(b)(4) (2015); U.S. CITIZENSHIP & IMMIGRATION SERV., OMB No.

Children who are without parents “due to abuse, neglect, [or] abandonment” and under the jurisdiction of a juvenile court can petition for Special Immigrant Juvenile Status.³⁶ However, children like Olga and her siblings are often reunified with one parent, making it logistically difficult to obtain a state court order for Special Immigrant Juvenile status.³⁷

Despite the outward appearance of more generous immigration remedies for childhood domestic violence survivors, often children like those in the case study are left with one viable option: asylum.³⁸

Under section 101(a)(42)(A) of the Immigration and Nationality Act (INA), an individual who has suffered past persecution or has a well-founded fear of future persecution in his or her country of origin, can apply for asylum if he/she has been persecuted on account of race, religion, nationality, political opinion, or membership in a particular social group.³⁹

As is often the case, given the narrow interpretation of asylum law, fitting clients, like these four children, into one of the five protected categories of asylum law is legally challenging and logistically daunting.⁴⁰ In 2012, the United Nations High Commissioner for Refugees reported that eighty-five percent of asylum applications to the United States were from individuals in El Salvador, Honduras, and Guatemala.⁴¹ However, lack of counsel and the complexities of presenting an asylum claim, especially for child migrants, results in a very low asylum approval rate for children from Central America.⁴²

1615-0104, FORM I-918 SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION (2013), <http://www.uscis.gov/sites/default/files/files/form/i-918supa.pdf> [perma.cc/RH37-4WBZ].

³⁶ 8 U.S.C. § 1101(a)(27)(J)(i) (2012); 8 C.F.R. § 204.11 (2015).

³⁷ Special Immigrant Status, 58 Fed. Reg. 42,843, 42,847 (Aug. 12, 1993); Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978, 54,980 (Sept. 6, 2011) (making the state courts the finders of fact to determine whether a child has been abused, neglected, or abandoned for purposes of applying for Special Immigrant Juvenile status).

³⁸ See U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 54 (2014), http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf [perma.cc/6GFE-KXSJ] (reporting the results of a study involving 404 unaccompanied or separated children from El Salvador, Guatemala, Honduras, and Mexico and recommending more uniform responses and approaches to displaced children including the assessment of a claim for refugee status, asylum, or any other form of international protection).

³⁹ 8 U.S.C. § 1158(a)-(b) (2012) (codifying in U.S. immigration law the international definition of refugee).

⁴⁰ See Musalo, Frydman & Seay, *supra* note 27, at ch. 10.

⁴¹ U.N. HIGH COMM’R FOR REFUGEES, *supra* note 38, at 15.

⁴² SARA CAMPOS & JOAN FRIEDLAND, AMERICAN IMMIGRATION COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT (2014), http://www.immigrationpolicy.org/default/files/docs/_and_fear_claims_final.pdf [perma.cc/N7RY-XATP] (discussing asylum obstacles); U.S. DEP’T OF HOMELAND SEC., 2013 YEARBOOK OF IMMIGRATION STATISTICS 39 (2014), <http://www.dhs.gov/>

This section of the article highlights the complex requirements of domestic violence-based asylum claims. It uses the case study to explore how law school clinics can successfully devise and implement case theories for unaccompanied minors. The section highlights the demands the asylum process places on childhood victims of crime by requiring them not only to describe past persecution, but to advance complicated legal theories about the basis of that persecution, theories children cannot reasonably be expected to understand. The section notes the pedagogical opportunity these cases present not only for developing advanced case theories, but for law student discussion and critique of the asylum remedy's suitability for unaccompanied minors.

B. Teaching Law Students To Successfully Formulate And Document A Domestic Violence-Based Asylum Case Theory

Asylum law requires unaccompanied minors to articulate a theory of their persecution. Children must testify to either an administrative agency officer or an Immigration Judge articulating not only the specific details of previous persecution, and the likelihood of future persecution, but a theory explaining the basis for that persecution. As there is no derivative status for asylum among siblings,⁴³ even children, such as those in the case study, who are seeking relief with a brother or sister, must individually articulate facts to support a legally sufficient theory of persecution.⁴⁴ This section will evaluate the two theories of asylum established in the case study as a model for clinicians endeavoring to represent unaccompanied immigrant minors in domestic violence-based asylum cases.

1. Unaccompanied Minors Must Demonstrate Past Persecution

An alien seeking asylum must fall within the definition of a refugee as set forth in INA § 101(a)(42)(A). As defined in the federal regulations, a refugee is an individual who “has suffered past persecution or . . . has a well-founded fear of future persecution . . . in the applicant’s country of nationality or . . . last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or

sites/default/files/publications/ois_yb_2013_0.pdf [perma.cc/J4CD-YXKM] (reporting data on refugees and asylees in Tables 13–19); Scot Rempell, *Stalemate on Immigration Reform: Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge*, 18 CHAP. L. REV. 337, 370–71 (2015) (discussing asylum grant rates).

⁴³ See generally 8 U.S.C. § 1158(b)(3) (2012) (providing derivative status only for an asylee’s spouse and children).

⁴⁴ 8 C.F.R. § 1208.13 (2015).

avail himself or herself of the protection of, that country owing to such persecution.”⁴⁵ Persecution has generally been interpreted to include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.⁴⁶ When the applicants are children, the Ninth Circuit has held that age can be considered in determining whether abuse has risen to the level required to be deemed persecution.⁴⁷ Unaccompanied minors such as Olga, Sofia, Teresa, and Jose must testify to specific incidents of physical and sexual assault they endured and the cumulative effect of years of abuse to show that their abuse constituted past persecution.⁴⁸

In *Matter of A-R-C-G-*, the Board of Immigration Appeals held that the applicant suffered past harm rising to the level of persecution where a woman endured weekly beatings at the hands of her husband.⁴⁹ The adult woman in that case was raped, burned, stalked, and harassed when she attempted to move away. She was threatened with death if she called the police or tried to escape.⁵⁰ Similarly, the BIA in the case of *In re S-A-* found that a child applicant established past persecution and well-founded fear of future persecution where the father beat the applicant on a weekly basis (using his hands, feet, and objects), verbally abused her, and controlled her whereabouts and appearance.⁵¹

2. *A Showing Of Past Persecution Gives Rise To A Presumption Of Future Persecution*

Once a child asylum applicant has demonstrated past persecution, she is presumed to have a well-founded fear of future persecution.⁵² This presumption can be rebutted only if the government can establish by a preponderance of the evidence that there has been a fundamental

⁴⁵ 8 C.F.R. § 1208.13(b)(1) (2015).

⁴⁶ *Acosta*, 19 I & N Dec. 211, 222 (B.I.A. 1985).

⁴⁷ *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007) (reasoning that the child’s perception of the persecution of herself or her family members differs from an adult’s because “[t]he child is part of the family, the wound to the family is personal, [and] the trauma apt to be lasting”).

⁴⁸ *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (“Physical harm has consistently been treated as persecution. . . . Where an asylum applicant suffers such harm on more than one occasion, and . . . is victimized at different times over a period of years, the cumulative effect of the harms is severe enough that no reasonable fact-finder could conclude that it did not rise to the level of persecution.”) (citation omitted); *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) (citing *Surita v. INS*, 95 F.3d 814 (9th Cir. 1996)) (“The key question is whether, looking at the cumulative effect of all the incidents Petitioner has suffered, the treatment she received rises to the level of persecution.”).

⁴⁹ *A-R-C-G-*, 26 I & N Dec. 388, 389 (B.I.A. 2014).

⁵⁰ *Id.*

⁵¹ *S-A-*, 22 I & N Dec. 1328, 1329 (B.I.A. 2000).

⁵² 8 C.F.R. § 208.13(b)(1) (2015).

change in circumstances such that the applicant no longer has a well-founded fear on the basis of a protected ground.⁵³ Minors applying for asylum are not required to show that internal country relocation is not possible.⁵⁴ However, student attorneys should utilize comprehensive country conditions evidence to demonstrate that future persecution is likely. In cases of domestic violence, evidence shows that women and children in El Salvador, and other Central American countries, are routinely beaten, raped, and tortured by family members, especially fathers, with no protection under the law.⁵⁵

The use of persuasive country conditions evidence is critical in contradicting the common notion that children like Olga, Sofia, Teresa, and Jose are simply economic migrants.⁵⁶ Country conditions reports enable counsel to argue that these children are often victims of societally endorsed persecution and that deportation would be a death sentence. Furthermore, such reports relieve the children, to a small degree, of having to testify to events in their home country.⁵⁷

For example, according to the United Nations, El Salvador is characterized by a pervasive patriarchal *machista* culture where judicial and criminal impunity for crimes offers little, if any, protection for children and women, who are often the targets of sexual abuse, incest, and violence.⁵⁸ The 2013 U.S. State Department Report concludes

⁵³ 8 C.F.R. § 208.13(b)(1)(i) (2015).

⁵⁴ CTR. FOR GENDER & REFUGEE STUDIES, CHILDREN'S ASYLUM CLAIMS: CGRS PRACTICE ADVISORY 31 (2015) ("There is a strong argument that it is never reasonable for a child to relocate on his or her own, and the Asylum Office generally agrees with this position.").

⁵⁵ U.N. Children's Fund, Draft Country Programme Document for El Salvador to the Executive Board, ¶ 4, U.N. Doc. E/ICEF/2006/P/L.46 (July 5, 2006); U.S. DEP'T. OF STATE, 2010 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, EL SALVADOR 20 (2011), <http://www.state.gov/documents/organization/160164.pdf> [perma.cc/S5UY-4XAK]; BEATRIZ MANZ, U.N. HIGH COMM'R FOR REFUGEES, STATUS DETERMINATION AND PROTECTION INFO. SECTION, CENTRAL AMERICA (GUATEMALA, EL SALVADOR, HONDURAS, NICARAGUA): PATTERNS OF HUMAN RIGHTS VIOLATIONS 21 (2008), <http://www.refworld.org/pdfid/48ad1eb72.pdf> [perma.cc/K2CE-BSEV]; Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination against Women: El Salvador, ¶ 23, Nov. 7, 2008, U.N. Doc. CEDAW/C/SLV/CO/7 (Nov. 7, 2008) (noting that the high incidence of violence against women is rooted in intra-family violence and alarmingly extreme violence consists of gender-motivated murders of women); CTR. FOR GENDER & REFUGEE STUDIES, EL SALVADOR: DOCUMENTATION ON DOMESTIC VIOLENCE AND OTHER FORMS OF VIOLENCE AGAINST WOMEN 2 (2010).

⁵⁶ See generally Susan Terrio, *Dispelling the Myths: Unaccompanied, Undocumented Minors in U.S. Immigration Custody*, ANTHROPOLOGY TODAY, Feb. 2015, at 15 (dispelling the notion that children are migrating north "to win protective status").

⁵⁷ Bridgette A. Carr, *We Don't Need to See Them Cry: Eliminating the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants*, 33 PEPP. L. REV. 535 (2006) (articulating the difficulty children have in identifying their subjective fear of future persecution).

⁵⁸ Yakin Ertürk (Special Rapporteur on Violence Against Women, Its Causes and Con-

that Salvadoran children are particularly vulnerable to sexual abuse.⁵⁹ The United Nations Commission on Human Rights found that children in El Salvador are predominantly at risk of sexual abuse by their natural fathers or stepfathers.⁶⁰ Country conditions research shows that nine out of ten women in El Salvador have suffered from domestic violence⁶¹ and that familial violence is a deadlier threat to women and children than threats from gangs in El Salvador.⁶² Country conditions reports enable law students to document societally endorsed persecution.

3. *Unaccompanied Minors Must Be Members Of A Particular Social Group*

In order to argue that childhood domestic violence victims constitute a particular social group for purposes of applying for asylum, student attorneys must apply the August 2014 BIA precedential decision, *Matter of ARCG*, finding adult women domestic violence survivors to constitute such a group.⁶³ To claim persecution on account of membership in a particular social group, the child applicants, “must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”⁶⁴

Particular social group analysis requires that student attorneys not only articulate a legally sufficient case theory, but that the children’s testimony is crafted to support it. In the case study, the Clinic

sequences), *Integration of the Human Rights of Women and a Gender Perspective: Violence Against Women (Addendum) Mission to El Salvador*, U.N. Doc. E/CN.4/2005/72/Add.2 (Dec. 20, 2004).

⁵⁹ U.S. DEP’T OF STATE, EL SALVADOR 2013 HUMAN RIGHTS REPORT (2014), <http://www.state.gov/documents/organization/220654.pdf> [perma.cc/AG4A-N5JH] (finding forty-one percent of first pregnancies in El Salvador between the ages of ten and nineteen resulted from sexual abuse, and twelve percent of such pregnancies resulted from sexual abuse by a family member and concluding that “[c]hild abuse was a serious and widespread problem. Incidents of rape continued to be underreported for a number of reasons, including societal and cultural pressures on victims, fear of reprisal against victims, ineffective and unsupportive responses by authorities toward victims, fear of publicity, and a perception among victims that cases were unlikely to be prosecuted.”).

⁶⁰ Ertürk, *supra* note 58, at ¶ 30.

⁶¹ *Id.* at ¶ 28; *see also* Rashida Manjoo (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *(Addendum) Follow-up Mission to El Salvador*, ¶ 18, U.N. Doc. A/HRC/17/26/Add.2 (Feb. 14, 2011) (reporting “31 per cent of women interviewed [in a 2008 national survey] declared having been subjected to physical violence before the age of 18 . . . [and] 44 per cent of women who had been married or lived with a partner had suffered psychological violence, 24 per cent physical violence and 12 per cent sexual violence . . . [and there was] an increase in domestic violence reports by women and girls from 3,698 in 2004 to 6,073 in 2008”) (citation omitted).

⁶² U.N. Children’s Fund, *supra* note 55, at ¶ 2, ¶ 4.

⁶³ A-R-C-G-, 26 I & N Dec. 388, 392 (B.I.A. 2014).

⁶⁴ *Id.*

articulated the clients' particular social group as Salvadoran children abandoned by their mother and left with their father who viewed them as property, or alternatively, children of their particular family whose father viewed them as property.

A "common immutable characteristic" is one that is either beyond the power of the individual members to change or one that is so fundamental to their identities or consciences that it should not be required to be changed to avoid persecution.⁶⁵ The defining immutable characteristic can be an innate characteristic or shared past experience.⁶⁶

The Clinic students argued that Olga, Sofia, Teresa, and Jose belonged to a particular social group that shared the characteristics of being children, siblings, and of Salvadoran nationality. The Clinic students argued alternatively that the clients belonged to a social group that shared the immutable characteristic of being the children of Fernando, a powerful man who was both known and hated in his community. Members of this social group shared the past experiences of being abandoned by their mother and left without familial protection.

The children in the case study had no power to change their age; they were dependent on others for financial support. The children could not change the way the police and court failed to protect them because of their familial association. Olga, Sofia, Teresa, and Jose were born in El Salvador, children of the nation's laws, political systems, and cultural norms. They could not alter the patriarchal *machista* culture that accepts the use of violence by a father.

"Particularity" requires the "particular social group to be defined by characteristics that provide a clear benchmark for determining who falls within the group."⁶⁷ It is a question of delineation, or the need to put well-defined boundaries on the definition of the particular social group. Courts are reluctant to grant asylum where the group is amorphous and overbroad.⁶⁸ Courts' limited interpretation of particularity leave many unaccompanied minors without sufficiently discrete social groups, such that valid claims of asylum are denied because the children failed to frame the group as required under the law.⁶⁹

In preparing an unaccompanied minor's domestic violence-based asylum case, it is critical for student attorneys to carefully craft the social group so that the arbiter could conclude that an average person in the society in question would know who fell inside and outside of

⁶⁵ Acosta, 19 I & N Dec. 211, 233–34 (B.I.A. 1985).

⁶⁶ W-G-R-, 26 I & N Dec. 208, 213 (B.I.A. 2014).

⁶⁷ *Id.* at 212–13.

⁶⁸ Musalo, Frydman & Seay, *supra* note 27, at ch.10.

⁶⁹ *Id.*

the designated group.⁷⁰ For example, country conditions evidence was utilized in the case study to show that Salvadoran children have consistently been viewed as a distinct group by Salvadoran government and society.⁷¹ In the alternative articulation of the particular social group in the case study (one consisting of the specific family unit), it was important to use facts from the case to illustrate that the clients were singled out for poor treatment due to their specific familial situation.⁷² In the case study, this was the father's role in the court and criminal justice system. The Clinic students utilized country conditions reports to show a common cultural understanding in El Salvador about a father's ability to treat his family members like property.⁷³

The requirement that a group is "socially distinct" does not require ocular visibility. Rather, there must be evidence showing that society generally perceives or recognizes persons sharing the particular characteristic to be a group within the society in question.⁷⁴ Socio-political or cultural conditions in the country may support society's perception of the particular social group as sufficiently distinct from

⁷⁰ M-E-V-G-, 26 I & N Dec. 227 (B.I.A. 2014).

⁷¹ See U.S. DEP'T OF STATE, 2007 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EL SALVADOR (2008), <http://www.state.gov/j/drl/rls/hrrpt/2007/100639.htm> [perma.cc/9VN5-74XL] (finding the Salvadoran Institute for Children and Adolescents (ISNA) reported on statistics of child abuse and categorized as distinct and separate the 235 cases of abandonment of Salvadoran children reported in 2007. These figures were separated from the 353 cases of sexual abuse, 483 cases of mistreatment, 801 cases of negligence, and 304 cases of children living on the streets. ISNA defines policies, programs, and projects on child abuse; maintains shelters for victims of child abuse and commercial sexual exploitation; and conducts awareness campaigns for violence to combat child abuse). See also WHITE & CASE LLP, CHILD RIGHTS INT'L NETWORK (CRIN), ACCESS TO JUSTICE FOR CHILDREN: EL SALVADOR 1-2 (2015), https://www.crin.org/sites/default/files/el_salvador_access_to_justice_0.pdf [perma.cc/42MX-9Q8E] (stating that Salvadoran law has recognized the independent status of children, including El Salvador's ratification of the Convention on the Rights of the Child); Manjoo, *supra* note 61, at ¶ 53 (noting the First Lady of El Salvador chaired the Secretariat for Social Inclusion (formerly the National Secretariat for the Family), which was tasked with addressing the needs of Salvadoran children and young people); cf. W-G-R-, 26 I & N Dec. 208, 221 (B.I.A. 2014) (finding that the group defined as "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" does not meet the particularity requirement because the group could include persons of any age, sex, or background and does not define with specificity the duration or frequency of the former gang membership).

⁷² Gebremichael v. INS, 10 F.3d 28 (1st Cir. 1993) (finding a nuclear family was a cognizable "social group" such that persecution on account of family membership could serve as basis for asylum).

⁷³ U.C. HASTINGS CTR. FOR GEND. & REFUGEE STUDIES, CHILDHOOD AND MIGRATION IN CENTRAL AND NORTH AMERICA: CAUSES, POLICIES, PRACTICES AND CHALLENGES exec. summary (Karen Musalo, Lisa Frydman & Pablo Ceriani Cernadas eds., 2015), http://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_English.pdf [perma.cc/28YN-XCT2].

⁷⁴ W-G-R-, 26 I & N Dec. 208, 217 (B.I.A. 2014).

others who do not share a particular characteristic.⁷⁵ Recognition of the group is determined by the perception of the society rather than the perception of the persecutor.⁷⁶ Within the domestic violence context, specifically that of unaccompanied minors, the issue of social distinction will depend on facts from the child's case, documented country conditions, law enforcement statistics, and expert witnesses.⁷⁷

4. *Unaccompanied Minors Must Demonstrate A Nexus Linking Their Membership In The Particular Social Group To The Abuse*

An applicant for asylum must demonstrate “nexus”; that their membership in their particular group was at least one central reason for the persecution.⁷⁸ In the case study, the Clinic had to show that the children's father abused and tortured them “on account of” their membership in the articulated particular social group.

Demonstrating nexus is always the most challenging part of any asylum claim.⁷⁹ It is critical for law students to develop strong rapport with their child clients such that the clients will reveal not only specific incidents of persecution, but direct quotes from their persecutor. In the case of Olga, Sofia, Teresa, and Jose, their father used possessive language when sexually molesting and beating his children, which demonstrated nexus. The Clinic prepared the clients to testify to such direct quotes. Fernando told his children, “I own you.” While beating them, Fernando would say, “I am your father and you are my property. The law cannot stop me”; “I am your father, and I have every right to do whatever I want to you.” While sexually assaulting them, he would say, “These parts, whose are they?” Fernando would force his daughters to respond, “Your parts, because we are your daughters and you are our father.” He would reiterate, “This [their bodies] belongs to me, because I am your father. I am the King.” Country condition evidence showed that Salvadoran culture “normalized” such patriarchal attitudes and sexual violence against children and young girls. However, it was the direct quotes from the clients that directly supported the nexus requirement.

⁷⁵ M-E-V-G-, 26 I & N Dec. at 240, 241.

⁷⁶ *Id.* at 242.

⁷⁷ A-R-C-G-, 26 I & N Dec. 388, 394–95 (B.I.A. 2014).

⁷⁸ Immigration and Nationality Act § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2012); *see also* *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000) (showing that the motivation for persecution may be shown by inference where the inference is one that may clearly be drawn from facts in evidence).

⁷⁹ *See* Anjum Gupta, *Nexus Redux*, 90 *IND. L.J.* 465, 479–81 (2015).

5. *Unaccompanied Minors Can Apply Under An Alternative Political Opinion Argument*

Asylum law does not limit the number of protected categories under which an applicant can seek protection. It is thus strategically advisable when teaching an unaccompanied minor case to work with law students to articulate all viable case theories. In the event an asylum adjudicator rejects a particular social group articulation, a victim of domestic violence should prepare a claim for political asylum. To succeed in such a claim, the applicant must show through direct or circumstantial evidence that she held a political opinion, or that her persecutors believed that she held a political opinion.⁸⁰ Political opinion does not necessarily entail expression of allegiance to a certain political ideology. It may be much broader in meaning and may be expressed through actions as well as words.⁸¹ Courts have recognized a woman's act of fleeing her persecutor as an expression of a political opinion—one that a man does not have a right to dominate a woman or treat her as his property.⁸² Clinicians representing unaccompanied minors in domestic violence-based asylum claims can evaluate with their students whether the act alone of fleeing their persecutor demonstrates a political opinion.

To demonstrate nexus between the harm an asylum applicant has suffered and political opinion, the applicant must show (1) that she held, or her persecutors believed that she held, a political opinion, and (2) that she was harmed because of that political opinion.⁸³ When assessing political opinion, the adjudicator looks at the asylum applicant from the perspective of the persecutor. If the persecutor believes the applicant holds a political opinion, then the applicant can be at risk for persecution on that assumption.⁸⁴ The Department of Homeland Security has held that the harm must be on account of the political opinion, not despite it.⁸⁵ Under the Real ID Act of 2005, an

⁸⁰ 8 U.S.C. § 1158(a)(2) (2012); *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000) (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)).

⁸¹ *Rivas-Martinez v. INS*, 997 F.2d 1143 (5th Cir. 1993); *Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir. 1997) (ruling that an applicant can establish his “political beliefs by testimony, or as evidenced by his past activities”).

⁸² See *Lazo-Majano v. INS*, 813 F.2d 1432, 1432–35 (9th Cir. 1987), *overruled on other grounds* by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (finding that the applicant, who resisted sexual violence perpetrated against her by her employer, was expressing a political opinion. The Court reasoned that the applicant was not permitted to hold an opinion and that when by flight, she asserted one, she became exposed to persecution for her assertion. The Court found that in the context of Salvadoran society, her refusal to accept her aggressor's opinion was tantamount to a political opinion for which she was persecuted).

⁸³ *Zhiqiang Hu v. Holder*, 652 F.3d 1011, 1017 (9th Cir. 2011).

⁸⁴ *Lazo-Majano*, 813 F.2d at 1436.

⁸⁵ Department of Homeland Security's Position on Respondent's Eligibility for Relief

applicant must show that her actual political opinion or a political opinion her persecutors imputed to her “was at least one central reason” for her mistreatment.⁸⁶

In the case study, as will be true with many childhood domestic violence survivors, a strong political opinion argument could be formulated. By attempting to flee their father’s domination, reporting his abuse to the police, and filing for a restraining order, the Clinic’s clients refused to accept, and overtly challenged the Salvadoran political and social structure that considered them to be their father’s property, without rights to life, safety, and bodily integrity.⁸⁷ The severity of abuse the clients suffered increased after they expressed their political opinion - an opinion that challenged patriarchal and misogynistic societal norms. It was only after Olga filed the Restraining Order that she began to believe her father would truly kill her. He was angry that Olga had called the police and reported his abuse. He told his children he would never let them leave El Salvador, stating, “I would rather have you dead than allow you to leave El Salvador.” Fernando’s direct quotes expressing ownership over his children, combined with the country conditions research, demonstrated that the children’s actions, within the context of Salvadoran society, amounted to a political opinion: resisting patriarchal domination and misogyny.

It is also possible to articulate an imputed political opinion argument that can be utilized in unaccompanied minor cases. An imputed political opinion is a political opinion attributed to the applicant by his persecutors.⁸⁸ In establishing an imputed political opinion, the focus of inquiry turns away from the views of the victim to the views of the persecutor. Courts consider the “political views the persecutor rightly

at 14, R-A-, 22 I & N Dec. 906 (B.I.A. 1999; A.G. 2001), *remanded* 23 I. & N. Dec. 694 (A.G. 2004) (emphasis in original) (citing Chang, 20 I & N Dec. 38 (B.I.A. 1989), *superseded on other grounds*, X-P-R-, I & N Dec. 634 (B.I.A. 1996)).

⁸⁶ Zhiqiang Hu, 652 F.3d at 1017 (citing 8 U.S.C. § 1158(b)(1)(B)(I) and stating “[t]here may be more than one central reason, and an asylum applicant is not required to prove which reason is dominant”); Parussimova v. Mukasey, 555 F.3d 734, 741 (9th Cir. 2009) (finding “[A] motive is a ‘central reason’ if the persecutor would not have harmed the applicant if such motive did not exist”); Navas, 217 F.3d at 657 (holding “In some cases, factual circumstances alone may provide sufficient reason to conclude that acts of persecution were committed on account of political opinion”); Sangha, 103 F.3d at 1490 (finding persecution on account of political opinion when there is no other logical reason for the persecution).

⁸⁷ U.C. HASTINGS CTR. FOR GEND. & REFUGEE STUDIES, *supra* note 73, at exec. summary; *see generally* Manjoo, *supra* note 61, at ¶ 11 (“Deeply rooted patriarchal attitudes and the pervasiveness of the *machista* culture reinforces stereotypes about the roles and responsibilities of women and men in the family, the workplace and society constitute serious obstacles to women’s rights, in particular their right to be free from all forms of violence.”).

⁸⁸ Sangha v. INS, 103 F.3d 1482, 1489 (9th Cir. 1997).

or in error attributes to his victims.”⁸⁹ If the persecutor attributed a political opinion to the victim, and acted upon the attribution, this imputed view becomes the applicant’s political opinion as required under the asylum statute.⁹⁰ Under an imputed political opinion case theory, children, like those in the case study, can be persecuted “on account of” the actions of other family members, like mothers, who resisted the domestic violence.

The theory the Clinic presented in the case study was that Fernando was persecuting the children for their mother’s political opinion, and that of the oldest sister, Victoria. When Patricia was in El Salvador, she filed a complaint against Fernando at the District Attorney’s office. Patricia expressed her political opinion by refusing to accept her husband’s domination and fleeing to the United States. After Patricia left El Salvador, Fernando’s physical and sexual abuse of the children increased. Fernando imputed the mother’s political opinion onto his children, increasing his violence to demonstrate that they were not entitled to resist his dominance or challenge his role in the family or society. Similarly, Victoria, the older sister, was killed for protesting her father’s abuse. She interfered when he abused the other siblings. In doing so, she expressed her political opinion against her father’s domination. After Victoria was murdered, Fernando threatened the other children telling them it was “their fault” that she disappeared and that the same thing would happen to them. Fernando imputed Victoria’s political opinion, her defiance, onto the other siblings.

6. *Unaccompanied Minors Must Show That The Government Of Their Home Country Is Unable And Unwilling To Control Their Persecutors*

An applicant for asylum must demonstrate that the persecution was perpetrated by the government or an individual or group that the government will not or cannot control.⁹¹ When asked about the threat of future violence in countries like El Salvador, children are likely to speak about the gang violence or general civil unrest. Though it is understandable for children to focus on the violence in the streets, testimony that strays from the legally sufficient case theory may defeat the child’s well deserving asylum claim. Testimony concerning the “unable and unwilling” to control element of asylum must be tailored to the domestic violence-based case theories. Evidence must demonstrate that children in their particular social group or children

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1071 (9th Cir. 2005).

that hold their political opinion are not protected. Evidence regarding generally dangerous conditions are not legally sufficient.

Persecution by family members has been found to be a basis for asylum relief where the government is unable or unwilling to take any action.⁹² The BIA has specifically found that a father who physically, verbally, and emotionally abused his daughter on a weekly basis was a persecutor that the government was unable or unwilling to control because in that culture, a father's power over his daughter was unrestrained.⁹³ Victims, particularly child victims, are not obligated to report persecution to the authorities for a finding of governmental inability or unwillingness to control persecution.⁹⁴ However, the authorities' lack of response to the applicant's attempts to report persecution or requests for protection provides powerful evidence with respect to the government's willingness or ability to protect the requestor.⁹⁵

In the case study, the children did in fact report the violence to no avail. Similar client testimony will be critical to succeed in domestic violence-based asylum cases. In the case study, Fernando accosted the children in the street and nearly choked Olga to death. She reported the incident to the police. The police did not believe Olga and told her that she herself must have made the choke marks on her neck. Despite this humiliation, Olga bravely went to the courthouse where her father worked and filed for a Restraining Order. The courthouse employees, who all knew Fernando, mocked Olga and issued a faulty order. Even when the children were eventually able to obtain a valid Restraining Order, Fernando continued to stalk and threaten his children. Olga called the police to report the violation of the Restraining Order, but the police said, "We can't do anything because of who he [the father] is, even though you have that order." After receiving the same response twice, Olga realized that there was no point in looking to the police for protection.

In the case study, and others like it, the children's father might be considered a government actor due to his position in the courthouse. His authority within the criminal justice system gave him complete immunity from the law.⁹⁶ However, where the persecutor is deemed to be a private actor, it is critical to provide specific facts in the indi-

⁹² Faruk v. Ashcroft, 378 F.3d 940, 943 (9th Cir. 2004) (attack by family members due to inter-faith marriage).

⁹³ S-A-, 22 I & N Dec. 1328, 1330 (B.I.A. 2000).

⁹⁴ Castro-Martinez, 674 F.3d 1074, 1081 (9th Cir. 2011) (child victim of sexual assault).

⁹⁵ Afriyie v. Holder, 613 F.3d 924, 931 (9th Cir. 2010).

⁹⁶ See Lazo-Majano v. INS, 813 F.2d 1432 (finding that an individual who threatened and abused the applicant explicitly using his position as sergeant of the Salvadoran Armed Force was considered a government persecutor).

vidual children's cases to show that the home government will not protect the children.⁹⁷

Where no attempts to report violence to authorities have been made, student attorneys in unaccompanied minor cases must also utilize United Nations reports, U.S. State Department reports, and those of international human rights organizations to show that a particular government fails to investigate or prosecute crimes of physical and sexual violence by private actors.⁹⁸

C. Preparing Student Attorneys For An Asylum Adjudication

Clinicians endeavoring to represent children in domestic violence asylum cases must work with law students to tailor the asylum case theories to the specific facts of familial violence and country conditions. However, even after law students have digested and applied the complex asylum law to their cases, the student attorneys must then prepare the clients to themselves testify to the specific case theories.

Asylum law requires children to provide hours of grueling testimony about their persecution to an administrative agency officer or Immigration Judge. Law students will gain invaluable counseling experience in preparing their clients for such testimony. In preparing clients for an asylum adjudication, student attorneys will likely see that the children's testimony is strained by the clients' youth and inability to articulate sociopolitical factors in their country of origin, as mandated by asylum law's nexus requirement. Case theories of particular social group and political opinion are abstracted from human nature. It is not common for children to immediately connect intimate familial violence to political forces. It is similarly challenging to ask a victimized child to conceptualize the motivations of his or her persecutor.

Clinicians must guide students to properly decipher the blurry line between eliciting testimony and "coaching" a client. The struggle of preparing a child asylum client to testify to a legally sufficient case theory invites clinicians and law students to enter a dialogue about the

⁹⁷ See, e.g., *Villalta*, 20 I & N Dec. 142, 147 (B.I.A. 1990); *Afriyie v. Holder*, 613 F.3d 924, 931–36 (9th Cir. 2010) (finding a government's inability or unwillingness to control persecution by private actors can also be established by demonstrating that a country's laws or customs effectively deprive the alien of any meaningful access to governmental protection).

⁹⁸ See generally U.N. Children's Fund, *supra* note 55, at ¶ 2, ¶ 4; U.S. DEP'T OF STATE, 2010 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, EL SALVADOR, *supra* note 55; U.N. HIGH COMM'R FOR REFUGEES, *supra* note 38, at 44; Comm. on the Elimination of Discrimination against Women, *supra* note 55, at ¶ 23; CTR. FOR GEND. & REFUGEE STUDIES, *supra* note 55; Ertürk, *supra* note 58, at ¶ 29; U.S. DEP'T OF STATE, EL SALVADOR 2013 HUMAN RIGHTS REPORT, *supra* note 59; Manjoo, *supra* note 61, at ¶ 24, ¶ 58.

effectiveness and humanity of the current legal framework in which domestic violence survivors seek immigration relief. The complex case theories that child clients must further through their own testimony calls for a discussion regarding the aptness of the asylum remedy for child clients.

The clinical representation of unaccompanied minors provides law students with an opportunity to develop critical case theory analysis skills, counsel clients, and prepare clients for detailed testimony; all while critiquing the current legal paradigm.

PART III. TEACHING UNCLEAR ATTORNEY OBLIGATIONS, PRACTICAL REALITIES, AND THE ILLUSIVE BEST INTERESTS OF THE CLIENTS

In representing unaccompanied immigrant minors, law school clinics will often contend with the simultaneous representation of multiple clients, young siblings who arrive in the United States together. Potential conflict of interests and complications of confidentiality are always present when representing multiple clients.⁹⁹ These tensions are magnified in the representation of victimized children who have overlapping and inter-related cases. Furthermore, childhood victims of domestic violence often need and are receiving psychological counseling concurrent to their legal representation. Therapists and attorneys do not always share the same objectives for their clients.

Questions regarding the ethical and moral duties of attorneys in the representation of unaccompanied minors translate into rich pedagogical opportunities for clinicians.¹⁰⁰ The cases lend themselves not only to the effective teaching of rules of professional responsibility, but a thoughtful examination of an attorney's broader moral obligations, and counsel's role in representing young and vulnerable clients. Students will be exposed to the power inequities that underlie seemingly neutral rules of professional ethics.

Each unaccompanied minor seeking asylum must present her own standalone claim. In representing unaccompanied minors, student attorneys will prepare separate applications with distinct affidavits for each child. However, major discrepancies in the stories of the children could impinge on each client's credibility. How much confidentiality can a law school clinic promise each individual client? Conversely, what information can and should be shared between clients to

⁹⁹ See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmts. 29–33 (AM. BAR ASS'N 2014).

¹⁰⁰ See generally Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 CLIN. L. REV. 43 (2009) (arguing that an essential role of law schools is the teaching of attorney ethics and that supervised live client representation is the most effective manner of engaging students in this learning objective).

verify accuracy and ensure consistency? Should student attorneys use facts from one child's affidavit to benefit the case of the other? To what extent can parents or guardians be brought into the process to fill in missing facts and help the children gather critical evidence?

Further complicating the ethical representation of unaccompanied minors is the reality that many such clients are often assigned therapists through the Office of Refugee and Resettlement or other non-governmental organizations. How much information can and should be shared with mental health professionals who are specifically trained to attend to the psychological needs of unaccompanied children? Should attorneys work collaboratively with therapists to determine whether a child is in a sufficiently stable mental condition to continue with the legal process? Who in fact is in the best position to make such a determination: the therapist or the child herself?

This section will examine how current rules of professional conduct do not adequately address ethical tensions in matters of confidentiality and counsel's duty of loyalty that commonly arise in unaccompanied minor cases. The author will illustrate how these children often fall between the cracks of immigration rules designed for adults and state court rules designed for children in abuse and neglect proceedings. The intersectional disempowerment faced by unaccompanied minors due to their youth, poverty, gender, and immigration status is not accounted for in current governing ethical rules. The section will argue that the ethical ambiguity in these cases presents rich teaching platforms for clinicians to explore principled legal practice. The section then uses the case study to explore potential means of resolving common ethical conflicts in the clinical representation of unaccompanied minors.

A. The Legal Mandates Of Confidentiality And Loyalty Between Child Clients And Their Parents

The ABA Model Rules of Professional Conduct prohibit a lawyer from disclosing confidential information gained in the course of representing her client.¹⁰¹ The Model Rules provide that a lawyer shall not reveal confidential information without the informed consent of the client or implied authorization for duties necessary to carry out the representation.¹⁰² However, the Model Rules also instruct an attorney to inform each client of all pertinent aspects of representation, and warn an attorney who is representing multiple clients that the attorney has an equal duty of loyalty to each client, such that counsel

¹⁰¹ MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2014).

¹⁰² *Id.*

cannot keep confidential information that could bear on the representation and best interests of a concurrent client.¹⁰³ The Model Rules also have an exception to confidentiality permitting an attorney to reveal client information reasonably necessary to prevent death or substantial bodily harm.¹⁰⁴ This exception can readily come into play in cases involving childhood domestic violence survivors who are under threat of further harm by their abuser and are at risk for suicidal ideations.

The Model Rules of Professional Conduct stress that lawyers for clients with diminished capacity, such as children, must to the greatest extent possible maintain a normal attorney-client relationship.¹⁰⁵ The Model Rules of Professional Conduct provide that a lawyer shall “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”¹⁰⁶ The ABA Commission on Immigration specifically directs attorneys who represent unaccompanied minors not to assume that children lack capacity to make decisions or participate meaningfully in case preparation.¹⁰⁷ Indeed, attorneys ap-

¹⁰³ MODEL RULES OF PROF’L CONDUCT r. 1.4, r. 1.7 cmt. 31 (AM. BAR ASS’N 2014) (“As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use that information to that client’s benefit.”).

¹⁰⁴ MODEL RULES OF PROF’L CONDUCT r. 1.6(b) (AM. BAR ASS’N 2014) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services; (4) to secure legal advice about the lawyer’s compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; [or] (6) to comply with other law or a court order. . . .”).

¹⁰⁵ See MODEL RULES OF PROF’L CONDUCT r. 1.14(a) (AM. BAR ASS’N 2014) (“When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”).

¹⁰⁶ MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR ASS’N 2014).

¹⁰⁷ See AM. BAR ASS’N, STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES (2004) http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/immigrant_childrens_standards.authcheckdam.pdf [perma.cc/2H35-KDVD].

pearing before United States Citizenship and Immigration Services or the U.S. Department of Justice's Executive Office of Immigration Review in unaccompanied minors cases are also bound by the Federal Rules of Professional Conduct and can be sanctioned for failure to properly communicate with clients, including adequately seeking waivers of confidentiality.¹⁰⁸

To complicate matters, the EOIR established special guidelines in 2007 for cases involving unaccompanied minors. These provisions allow a parent or other trusted adult to testify on the child's behalf where the age or trauma of a child inhibits her from fully presenting her case.¹⁰⁹ Similarly, the Model Rules of Professional Conduct recognize that "fully informing the client . . . may be impracticable, for example, where the client is a child or suffers from diminished capacity"¹¹⁰ and that "a client with diminished capacity may wish to have family members or other persons participate in discussions with the lawyer."¹¹¹

In sum, current rules of confidentiality and loyalty do not clearly delineate for law students when information can or should be shared between child clients simultaneously litigating asylum claims. The rules similarly do not provide easy answers as to whether the law student can or should elicit assistance from the child's parent or guardian. The ambiguity produced by these conflicting rules creates a space in which law students can struggle with their own moral expectations of attorneys.

The rules explicated above instruct an attorney to consult a child

¹⁰⁸ 8 C.F.R. § 1003.102 (2015).

¹⁰⁹ U.S. CITIZENSHIP AND IMMIGR. SERV., ASYLUM OFFICER BASIC TRAINING COURSE [AOBTC], GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS, LESSON PLAN OVERVIEW 19 (2009) [AOBTC 2009], <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf> [perma.cc/QH9V-3ATJ]; Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Div. to All Asylum Office Directors, Deputy Directors, Supervisory Asylum Officers, Quality Assurance/Training Asylum Officers, and Asylum Officers on Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS 7 (Aug. 14, 2007), <http://www.uscis.gov/files//Humanitarian/%%/Minor%20Children%20Applying%20for%%/procedures-minor-children-raps.pdf> [perma.cc/6S5L-RGUH]; Memorandum from Jeff Weiss, Acting Dir., Office of Int'l Affairs, to Asylum Officers, Immigration Officers, & Headquarters Coordinators (Asylum and Refugees), Guidelines for Children's Asylum Claims 6 (Dec. 10, 1998), <http://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf> [perma.cc/D5TE-LGP8].

¹¹⁰ MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 6 (AM. BAR ASS'N 2014).

¹¹¹ MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 3 (AM. BAR ASS'N 2014) (indicating that even where the rules acknowledge that other family members or trusted adults might need to be brought into attorney-client meetings, the Rules do dictate that the client's interest, and not that of the other family members, be foremost in the attorney's mind when making decisions for the client).

client as to whether the child wishes to waive confidentiality. Clinicians can engage student attorneys in a robust discussion of whether true consent is possible in the context of a traumatized child who places her life and liberty in the hands of her counsel. Many clinicians have highlighted the problematic reality of obtaining consent to waive confidentiality from a child client who lacks mental maturity.¹¹² It can be difficult to ascertain whether unaccompanied minors truly understand the personal and litigation consequences of agreeing to a request to waive confidentiality. Often, the children simply want their student attorney to do “whatever is best.”

Clinicians can engage law students in a critique of the Rules of Professional Conduct and a discussion of steps that ought to be taken to verify that a child client understands the concept of confidentiality and a waiver of such protection. In doing so, clinicians can lead the students through best practices, despite unclear attorney obligations. Clinicians will simultaneously call upon law students to evaluate the power structure and social biases laden within existing rules of professional responsibility.

*B. Navigating The Ethical Dilemmas: The Case Study’s Resolution
On Issues Of Confidentiality And Loyalty
Between Family Members*

Clinicians teaching unaccompanied minors cases can engage students in a principled discussion of the doctrines of confidentiality, as elucidated in the Model Rules of Professional Conduct, and the conflicting mandates prescribed in the specific immigration related professional responsibility provisions. Such rules can then be weighed against the practical realities of effective representation of children – who can obtain evidence and who can provide necessary information, for example. The case study will be used again here to illustrate one potential means of harmonizing such tensions.

In the case study, the student attorneys made a preliminary determination as to whether any material could in fact be kept confidential between the siblings. In the case study, the student attorneys rightfully concluded that as the cases were different matters (though highly related), that there was not a direct conflict of interest between clients, and that confidentiality could be maintained with each client’s consent, unless to do so would negatively impact another sibling’s case.¹¹³ The clients were provided with an explanation of confidentiality and told that if necessary, with their consent, information may be

¹¹² Theo S. Liebmann, *Confidentiality, Consultation, and the Child Client*, 75 TEMP. L. REV. 821, 824–25 (2002).

¹¹³ See MODEL RULES OF PROF’L CONDUCT r. 1.7, r. 1.6 (AM. BAR ASS’N 2014).

shared between the siblings and with the mother. The promise of confidentiality, even weakened, became essential as the children ultimately divulged information to the student attorneys they had not disclosed to each other, their mother, or their therapists.

Ultimately, however, the student attorneys did conclude that it was necessary to partially waive confidentiality both between the siblings and with the mother. The Clinic relied on the American Immigration Lawyers Association practice advisory regarding the representation of unaccompanied minors, which directs lawyers that immigrant children are capable of granting consent to waive or partially waive confidentiality.¹¹⁴ The law students logically concluded that the real-world realities of representing children dictated their mother's involvement. The children simply could not get the police records, restraining orders, and other documents from El Salvador; an adult had to be involved. The children consented to waive confidentiality sufficient to inform the mother of facts about the case necessary for her to gather critical documentary evidence. The mother was never present during any client interviews. She did not know what the children told their attorneys, but she did have to be informed of the legal strategy in order to assist her children. The student attorneys also worked with the mother to draft an affidavit to support her children's cases. The mother provided helpful information about her own abuse and her own attempts to flee the persecutor.

There was a pressing need in the case study to minimize client re-victimization by limiting the number of times each child had to tell his or her story. The priority of reducing re-victimization called for facts to be shared between siblings. The student attorneys' decision to use information from the oldest and most vocal sibling was strategically necessary to win the cases and to help safeguard the mental health of the other children.

In the case study, as will often be the case when representing multiple siblings, the three younger siblings could not offer sufficient facts to carry their own cases. Olga, the oldest client, was more mature and best able to articulate herself. Olga had a clear memory of the children's life chronology and dates of specific attacks, as well as a keen understanding of what was at stake in each sibling's legal case. She understood the legal elements of the case and could help explain facts in a way that would satisfy the nexus requirement of asylum law. It

¹¹⁴ AM. IMMIGRATION LAWYERS ASS'N, PRACTICE ADVISORY: ETHICAL ISSUES IN REPRESENTING CHILDREN IN IMMIGRATION PROCEEDINGS 8 (2014), <http://www.aila.org/practice/ethics/ethics-resources/ethical-issues-representing-children> [perma.cc/s9HS-WLYK] (but noting that obtaining informed consent "may require heightened vigilance and a more detailed explanation of the concerns").

was Olga who could recall the exact quotes of her father. In the case study, the student attorneys asked Olga for consent to waive confidentiality to allow the Clinic to file a “support affidavit” with her words and memories to bolster each of her sibling’s cases. The law students explained that the waiver of confidentiality was necessary for the legal strategy of her siblings’ cases. She agreed to such a waiver.

Olga never saw what was in her sibling’s applications, and Patricia, the mother, never had access to any of the children’s files. The Clinic was thus able to limit the scope of confidentiality that was waived. Olga’s and Patricia’s support affidavits allowed the younger siblings to submit shorter affidavits limited to information they could readily recall. This strategy reduced the extent of questioning the younger clients had to endure both from the student attorneys and ultimately from the asylum officer. It also worked to ensure consistency and credibility between the applicants during the asylum interviews.

During the asylum interviews, the United States Citizenship and Immigration Service asylum officer indicated that she wanted to use the testimony of all three sisters to bolster Jose’s claims. As stated above, Department of Homeland Security (DHS) internal policy memorandum permits an asylum officer to interview or obtain information from family members to assist a child’s asylum case where that child is unable to articulate sufficient facts of persecution or nexus necessary to establish asylum.¹¹⁵ The well-intentioned officer suggested that Jose utilize this mechanism since he was the youngest child and least able to communicate his past trauma. The law students once again struggled with the ethical dilemma presented by the asylum officer’s request. The sisters had not testified in Jose’s case, as the DHS policy envisions; rather, their testimony had been given for their own separate asylum cases. The Clinic had not sought a blanket release of confidentiality from all of the sisters. Indeed, the student attorneys had spent the entire representation trying to preserve their confidentiality to the greatest extent possible. In particular, there was real concern over releasing Sofia’s testimony where she revealed that her father had raped her. Instead, the student attorneys asked that the officer use only the information from Olga’s case to assist Jose’s application. Olga had already waived confidentiality with her support affidavit and had agreed to share her story with her siblings. The asylum officer agreed and the Clinic obtained explicit consent for this action from Olga.

The asylum officer’s request to use the testimony of one applicant

¹¹⁵ AOBTC 2009, *supra* note 109, at 19; Memorandum from Joseph E. Langlois, *supra* note 109.

in another applicant's case appears to be at odds with statutory requirement that each applicant produce sufficient independent evidence of persecution.¹¹⁶ However, in pursuing what the law students believed to be the best legal strategy for Jose, and with the direct consent of Olga to use her testimony, the student attorneys happily took advantage of the opportunity. Counsel's duty of loyalty to Jose required that all available helpful information in his case be utilized for his advantage. The ability to waive one sibling's confidences to be used in another's case ultimately secured the case, and in turn, may have saved the client's life.

In litigating unaccompanied minor cases with multiple siblings, law students will often be able to obtain direct consent to waive confidentiality. However, partial waivers of confidentiality likely fall within the Model Rules exception to prevent "death or substantial bodily harm" as deportation for such children will, with near certainty, result in grave injury.¹¹⁷ The Clinic's compromises of confidentiality in the case study provide a guide for clinicians wishing to teach students how to reconcile the Model Rules of Professional Conduct and immigration professional guidelines while maintaining the highest levels of attorney ethics.

C. Tension Between The Goals Of Therapists, The Goals Of Clients, And The Ethical Obligations Of Attorneys

Counsel's duty of loyalty and confidentiality in unaccompanied minors cases can be further strained by the very fragile mental health of many of these children. Child victims of domestic violence are susceptible to anxiety, depression, and even suicidal ideations. Student attorneys must be sensitive to the psychological needs of their clients and balance the attorney's ethical obligations to safeguard the client's confidences against a mental health professional's goal of protecting the overall well-being of a child. Tensions can arise for student attorneys when therapists seek confidential client information about the mental health of clients and express goals for the children that are not aligned with goals the child clients set for themselves.

The ABA Commission on Immigration, in establishing its 2004 standards for legal representation of unaccompanied children specifically states that attorneys should "not assume that children below a certain age lack competence to determine their wishes in litigation."¹¹⁸ Yet, the ABA Commission also states that such competency is "con-

¹¹⁶ 8 C.F.R. § 1208.13(b) (2015).

¹¹⁷ MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2014).

¹¹⁸ AM. BAR ASS'N, *supra* note 107.

textual and incremental, and may also be intermittent.”¹¹⁹

Despite the fact that confidentiality is a core value of legal and mental health professionals, different standards and rules can create conflicts regarding the range and degree of confidentiality owed to a client.¹²⁰ Theo Liebmann has argued that the ethical mandates of the Model Rules for Professional Conduct implicitly require lawyers to consult mental health professionals both to assess the child’s capacity to make decisions for herself and to act in the child’s best interest.¹²¹ However, Liebmann acknowledges that under current rules, disclosure of client confidences to therapists who do not enjoy attorney-client privilege increases the chance of further exposure of the information.¹²²

Those writing about confidentiality in representing children in domestic violence-related cases largely focus on the tension that can arise out of the mandatory reporting of suspected child abuse in a home.¹²³ In such cases, an attorney, when she is not a mandatory reporter, is left to freely advocate for her client’s expressed goals where a mental health specialist may be required by law to report abuse.¹²⁴ Such distinctions can impede communication between attorneys and social workers.¹²⁵ A small minority of U.S. states do require attorneys and judges to report child abuse.¹²⁶ Adrienne Jennings Lockie has written to explicitly argue that attorneys should be exempt from mandatory reporting of child abuse precisely because such requirements impede effective legal representation of domestic violence survivors by diminishing confidentiality and exposing victims to potential criminal and civil liability.¹²⁷ These writings, which largely focus on

¹¹⁹ *Id.*

¹²⁰ Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 *FORDHAM L. REV.* 2123, 2135 (1999).

¹²¹ Liebmann, *supra* note 112, at 827–45.

¹²² *Id.* at 823–24.

¹²³ See also Peter Margulies, *Lawyering for Children: Confidentiality Meets Context*, 81 *ST. JOHN’S L. REV.* 601, 638–39 (2007).

¹²⁴ Liebmann, *supra* note 112, at 825; Margulies, *supra* note 123, at 636.

¹²⁵ *Id.*

¹²⁶ AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE, MANDATORY REPORTING OF CHILD ABUSE (2009), http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/mandatory_reporting_statutory_summary_chart.authcheckdam.pdf [perma.cc/R822-AH64] (compiling a list of each state’s statutory authority concerning mandatory reporters); U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2013), <https://www.childwelfare.gov/pubPDFs/manda.pdf> [perma.cc/5GGR-W26A] (reviewing mandatory and permissive reporting requirements along with a summary of each state’s statutory authority).

¹²⁷ Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse*, 36 *N.M. L. REV.* 125, 154 (2006); *contra* Katharyn I. Christian, Comment, *Putting Legal Doctrines to the Test: The Inclusion of Attorneys as Mandatory Reporters of Child Abuse*, 32 *J. LEGAL PROF.* 215 (2008) (providing a history of

state abuse and neglect cases, do not provide direct parallels for the issues of confidentiality that arise in the immigration representation of unaccompanied minors.

In the case of child domestic violence survivors seeking asylum, the conflict between the therapists and legal counsel is not around the potential sharing of information to disclose the existence of abuse to law enforcement, but around what information attorneys can or should share with therapists to safeguard the children's mental well-being during the legal process.

During the representation of unaccompanied minors, it is common for therapists and attorneys to disagree about whether the children should be discouraged from continuing their legal cases due to their fragile mental state. An attorney's obligation to provide zealous representation arguably demands that counsel continue an asylum case where the child client wishes to pursue a claim despite the mental health risks of doing so.¹²⁸ However, where an attorney representing an unaccompanied minor can see clear signs that the legal process is straining the client's mental health, does the attorney have a personal moral obligation to consult with the child's therapist?

Jeffrey Baker advocates for an extension of attorney confidentiality and privilege to cover therapists, case workers, and other professionals who he argues must be present during attorney-client meetings to effectively and holistically represent child survivors of family violence.¹²⁹ Mary Kay Kisthardt advocates for a system change to allow for more cooperation among attorneys and other caring professionals in the service of common clients.¹³⁰ Jacqueline St. Joan, Sara R. Benson, and others also have extolled the virtue of interdisciplinary domestic violence law work arguing that careful design can alleviate concerns around confidentiality and privilege and best serve the interests of victimized clients.¹³¹ However, even those who have written to promote the benefits of multidisciplinary collaboration in the repre-

mandatory attorney reporting, and advocating that attorneys should be required to report).

¹²⁸ See MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2014) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.").

¹²⁹ See generally Jeffrey R. Baker, *Necessary Third Parties: Multidisciplinary Collaboration and Inadequate Professional Privileges in Domestic Violence Practice*, 21 COLUM. J. GENDER & L. 283 (2011).

¹³⁰ See generally Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REC. 1 (2006).

¹³¹ Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLIN. L. REV. 403 (2001); Sara R. Benson, *Beyond Protective Orders: Interdisciplinary Domestic Violence Clinics Facilitate Social Change*, 14 CARDOZO J.L. & GENDER 1 (2007).

sensation of domestic violence victims and children acknowledge that current rules of confidentiality and privilege currently make full collaboration between lawyers and mental health professionals challenging.¹³²

Jean Koh Peters articulates a strong argument that even if rules allowed for greater collaboration, social workers and lawyers have potentially inconsistent ethical obligations, with the lawyer attempting to zealously advocate for the client's wishes and the social worker working to safeguard the client's "best interest."¹³³ Clinicians take great care to teach client-centered lawyering to students, encouraging law students to represent their client's wishes, not their own. This is true even with child clients. As Peter Margulies has argued, it is critical that attorneys do not deprive child clients of their right to set their own litigation goals.¹³⁴

Scholars such as Linda Elrod and Katherine Hunt Federle criticize the paternalistic view that attorneys, not children, are best able to decide what is in their best interest.¹³⁵ Suparna Malempati argues that "[p]reconceptions about a child's lack of capacity [to make decisions in their own best interest] have led to a paternalistic approach to the representation of children."¹³⁶ Indeed, the Model Rules of Professional Conduct relating to the representation of clients with diminished capacity dictate that clients, not counsel, make such decisions.¹³⁷

Alexis Anderson, Lynn Barenberg, and Paul Tremblay have challenged the presumption that tension inherently exists when social workers and lawyers join forces to represent a client.¹³⁸ Writing in the specific context of a law school clinic, Anderson, Barenberg, and

¹³² Baker, *supra* note 129, at 324.

¹³³ Jean Koh Peters, *Concrete Strategies for Managing Ethically-Based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve the Same Client*, KY. CHILD. RTS. J., Mar. 1991, at 15, 15–18.

¹³⁴ Margulies, *supra* note 123, at 617–22 (arguing for a dialogue between lawyers and child clients to avoid the hubris of attorneys making decisions for the clients about what is in the client's own best interest without appropriate input from the child).

¹³⁵ Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 PACE L. REV. 869 (2007); Katherine Hunt Federle, *Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment*, 37 FORDHAM URB. L.J. 93 (2010). *But cf.* Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381 (2011) (arguing that "best interest lawyering" can be necessary in specific contexts for the non-directive child client).

¹³⁶ Suparna Malempati, *Ethics, Advocacy, and the Child Client*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 633, 634 (2014).

¹³⁷ MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2014); *see also* Margulies, *supra* note 123 (discussing a "local competence approach" model and factors to consider when contemplating disclosure of a child's confidential information).

¹³⁸ Alexis Anderson, Lynn Barenberg & Paul R. Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLIN. L. REV. 659 (2007).

Tremblay argue that a clear definition of professional roles and intra-team communication can alleviate perceived conflict in the goals and obligations of the relevant professionals.¹³⁹ Mary Kay Kisthardt argues that a hybrid approach combining traditional lawyering where counsel advocates for the client's wishes and "best interest" counseling is possible.¹⁴⁰ This literature, while again largely focusing on custody and intra-familial disputes, provides guidance to clinicians supervising law students in the representation of unaccompanied minors in the immigration context.

Clinicians can engage students in a robust discussion of whether the student attorney can or should exchange confidential client information with a therapist, and what it means to be constrained by professional rules of conduct that might not align themselves with one's own personal sense of duty or morality. It is possible for counsel representing unaccompanied minors to share some limited client information with therapists. In the subsection that follows, the case study will be used to illustrate a limited sharing arrangement that afforded the students the professional space to present a successful legal claim while simultaneously caring for their client's mental welfare. Regardless of the individual choices that clinics make regarding the sharing of information with therapists, the inconsistent mandates in applicable ethical rules on confidentiality, loyalty, and client competency create deep ambiguity for law students. This ambiguity is a treasure trove of teaching material.

D. Navigating The Ethical Dilemmas: The Case Study's Resolution Of Issues Of Confidentiality With Mental Health Professionals

The common ethical tensions that arise between attorneys and therapists in unaccompanied minors' cases will again be explored here through the use of the case study. In the case study, concerns over the mental health of the children pervaded the entire legal representation. Approximately two months into the Clinic's representation of these clients, the two oldest children each attempted to take their own lives. One night, mere hours after concluding a very difficult attorney/client interview in which the clients disclosed details of physical and sexual abuse to their student attorneys, Olga and Sofia each attempted suicide. Olga attempted to overdose on pills. Sofia, who had a history of cutting herself, slit her wrists. Both children were hospitalized. Olga and Sofia both had therapists. The clients had told their therapists

¹³⁹ *Id.* at 670–71.

¹⁴⁰ *See generally* Kisthardt, *supra* note 130.

that they were filing for asylum and briefly described their work with the Clinic. After the suicide attempts, the student attorneys got angry calls from the therapists. The therapists scolded the law students for forcing the children to disclose facts of their abuse before the children were truly ready. The therapists expressed grave concerns that the legal process was not in the best interests of the clients' health and overall well-being. The therapists wanted to be informed of the exact line of questioning conducted by the student attorneys and requested to be present for future attorney-client meetings.

There is no doubt that the clients' suicide attempts had a profound effect on the law students working on these cases.¹⁴¹ The Clinic utilized many methods to address the vicarious trauma to the student attorneys.¹⁴² While this article focuses on the trauma experienced by the clients, it is worth noting that law students and attorneys representing unaccompanied minors must be careful to attend to their own needs, taking time for self-care, to assure that they can competently represent their clients without undue attorney/client transference.¹⁴³ In this section, the suicide attempts will be discussed purely as they relate to attorney/client confidentiality and ethics more broadly.

In the case study, the student attorneys knew their duty of confidentiality to their clients prevented them from immediately answering all of the therapists' questions.¹⁴⁴ The therapists, bound by different ethics codes, like those of the American Psychological Association¹⁴⁵

¹⁴¹ See generally Jennifer Brobst, *The Impact of Secondary Traumatic Stress Among Family Attorneys Working with Trauma-Exposed Clients: Implications for Practice and Professional Responsibility*, 10 J. HEALTH & BIOMEDICAL L. 1 (2014) (addressing the psychological impact felt by attorneys working with victims of domestic violence and child abuse).

¹⁴² Students were asked to share their feelings of anxiety and sadness and were validated both by their peers and faculty that such reactions were to be expected. Students were asked to write journals reflecting their personal reactions to the clients' trauma. Students were given materials to read about the existence of attorney-client transference and the very real concern of Post-Traumatic Stress Disorder in attorneys working with victims of physical and sexual assault. Students were encouraged to take a break from the case and enjoy lighthearted diversions. See generally M. Lynne Jenkins, *Teaching Law Students: Lessening the Potential Effects of Vicarious Trauma*, 37 MAN. L.J. 383 (2013) (offering a vicarious trauma action plan for law students who were placed in a domestic violence clinic).

¹⁴³ See Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 984 (2007) ("While the Rules of Professional Conduct do not directly address self care, it is an implicit part of the basic notion of fitness to practice law."); Marjorie A. Silver, Sanford Portnoy & Jean Koh Peters, *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion*, 19 TOURO L. REV. 847, 871-72 (offering three suggestions for self-care).

¹⁴⁴ See generally MODEL RULES OF PROF'L CONDUCT R. 1.6 (AM. BAR ASS'N 2014).

¹⁴⁵ See ETHICAL PRINCIPLES OF PSYCHOLOGISTS & CODE OF CONDUCT princ. B. (AM.

or the American Counseling Association,¹⁴⁶ found the students' silence to be obstinate, if not downright obstructionist.

The student attorneys had done their very best to conduct these interviews in the most client-centered and empathetic way possible.¹⁴⁷ The children's suicidal ideations were a result of their life of trauma, not the law students' interview techniques. Yet, the therapists' concerns were legitimate. The extremely fragile mental state of the children called into question the appropriateness of questioning the children on details of their abuse before they were emotionally ready to discuss it, even if such questioning was necessary for their legal case.¹⁴⁸ The concerns of the therapists, and their demands for confidential information, presented the Clinic with the ethical and moral dilemma of when and how to reveal clients' secrets to the mental health professionals who were trained to best promote the health and overall well-being of the children.

In the case study, the student attorneys asked the children how they wished to proceed. The children insisted they wanted to continue with their asylum applications. The children clearly stated to the law students that not returning to El Salvador took precedence over all else. The student attorneys were convinced that the therapists' primary motive was to protect the immediate mental health of the clients, even at the expense of losing their asylum case. The law students were concerned that losing the asylum case would be a death sentence and prohibit any future possibility of the clients' mental health recovery.

The Clinic decided to collaborate with the mental health professionals, albeit in a very limited manner, to help protect the welfare of the children. The Clinic determined that some client confidences could be waived under the Model Rules of Professional Conduct's exception to prevent death or substantial bodily harm.¹⁴⁹ However, as instructed by the Model Rules, the student attorneys first sought and

PSYCHOLOGICAL ASS'N 2002), <http://www.apa.org/ethics/code/>.pdf [perma.cc/9QNV-M8E3].

¹⁴⁶ See CODE OF ETHICS § A (AM. COUNSELING ASS'N 2014), <http://www.counseling.org/resources/aca-code-of-ethics.pdf> [perma.cc/3VV8-T7XP].

¹⁴⁷ See generally Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163 (2007) (exploring best practices for client centered lawyering in the context of law school clinical students representing victims of domestic violence).

¹⁴⁸ *Id.* at 170–72 (discussing the impact of client trauma on case preparation).

¹⁴⁹ MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (AM. BAR ASS'N 2014) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm.").

received the consent of the client to discuss limited issues with their therapists.¹⁵⁰ The student attorneys in the case study went to great lengths to ensure that the child clients understood their decision to waive confidentiality. The students utilized age appropriate language and explained the consequences of a confidentiality waiver. It is important for clinicians guiding law students in such cases to stress how important it is that unaccompanied minors' consent be meaningful to the greatest extent possible given the age and mental state of the children.¹⁵¹

In litigating unaccompanied minor cases, clinics need not disclose all details of attorney-client meetings to therapists or other mental health professionals to promote the best interests of the children. It would detrimentally compromise the fundamental relationship between counsel and client to allow therapists to be present during any attorney-client meetings.¹⁵² Rather, as was done in the case study, counsel can explain the contours of any domestic violence-based asylum application to the therapists, explaining the legal requirements the children need to prove and the final adjudicatory interview process.

In the case study, the Clinic explained the litigation strategy of the case in a general way, limiting the number of client details disclosed to the therapist. With permission of the clients, the Clinic informed the therapists of the date the student attorneys intended to read back the client affidavit to the child, so that the therapist could meet with the clients both before and after the attorney meeting to best address the emotional needs of the children. Client confidentiality was compromised only to the extent that it allowed therapists access to the contours of the process. Therapists were not invited into the sanctity of the attorney-client relationship.

In another example of limited collaboration, the Clinic did not allow the therapists to be present during the clients' asylum interviews, but did ask that the therapist sit with the children both before and after the adjudications to offer mental health support.

Although Department of Homeland Security procedure allows for a "safe-adult" to accompany a minor in an asylum interview,¹⁵³ the Clinic was concerned both about compromising attorney-client confidentiality and the practical reality that the children would be reticent

¹⁵⁰ *Id.*

¹⁵¹ *But see* Liebmann, *supra* note 112, at 824–25 (noting that some children may lack the ability to comprehend their situation, making informed consent difficult or impossible to obtain).

¹⁵² *But see* Baker, *supra* note 129.

¹⁵³ *See* AOBTC 2009, *supra* note 109, at 19; Memorandum from Joseph E. Langlois, *supra* note 109.

to fully disclose the details of their persecution if their therapists were present during the asylum adjudication. At the time of the asylum interviews, the therapist did not know as much about the abuse as the student attorneys. The student attorneys were rightfully concerned that the therapists might also try to shield the children from the process and encourage them not to speak out if doing so was difficult. The mere presence of the therapist could serve as a barrier to complete disclosure of the past persecution and undermine the case. The clients had developed tremendous rapport with their student attorneys and the Clinic thus concluded that the clients would be sufficiently comfortable to offer testimony without an additional “safe adult” in the adjudication.

Though the student attorneys did not disclose the contents of the actual asylum adjudication to the therapists, the student attorneys did assure the therapists that the children had done an excellent job and had spoken about everything the law required of them. The student attorneys asked the therapists to debrief with their clients immediately after the asylum interviews. The law students similarly encouraged the clients to reach out to their therapists in the days and weeks that followed if at any point they were feeling overwhelmed or saddened by the process.

The deportation of child domestic violence survivors is nothing short of a death sentence. It is sending children back into the hands of their persecutors. Accordingly, student attorneys must adhere to their obligation to pursue a course that will most likely result in a successful grant of asylum. A law student’s decision to temporarily sacrifice the mental health of a child for the betterment of a legal case is a trying one. Yet, such action is likely to be consistent with the client’s wishes to pursue asylum at all costs. Furthermore, it avoids a paternalistic determination by legal counsel of what is in fact in the client’s “best interest” and adheres to professional ethics mandates to pursue a client’s stated litigation objective. Clinicians engaging in the representation of unaccompanied minors can use the case study’s limited collaboration with mental health professionals as a model of blending personal morality with professional obligations to protect confidentiality, adhere to client loyalty, and zealously advocate for asylum.¹⁵⁴

PART IV. CLIENT RE-VICTIMIZATION AND THE ASYLUM PROCESS

A. *Teaching Law Students To Minimize Client Re-Victimization*

In adjudicating unaccompanied minor cases, asylum officers are

¹⁵⁴ MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR ASS’N 2014); AM. BAR ASS’N, *supra* note 107; 8 C.F.R. § 1003.102 (2015).

asked to take into account the age of the applicant. However, children are forced to articulate the same evidence of persecution as adult victims.¹⁵⁵ There is no childhood standard for asylum.¹⁵⁶ In evaluating whether persecution has occurred, the law specifically looks to the cumulative effect of events.¹⁵⁷ Thus, it is often not sufficient for child domestic violence survivors to reveal the existence of physical assaults and emotional abuse. Children are asked to reveal the frequency of these events, the duration of the violence, and the ongoing psychological trauma created by the fear of future abuse.¹⁵⁸ As rape and sexual assault support a finding of persecution in a claim for asylum,¹⁵⁹ each child will be asked to describe in graphic details all sexual assaults.

In the case study, when the children acknowledged that their father had touched their naked bodies in the shower, was it really necessary for the student attorneys to follow up with a question of “Where and how did he touch you?” Clinicians can explain that the law of asylum says, “Yes.” The painful details of persecution bolstered the clients’ cases. The consistency with which each child told the story during the adjudication helped to build credibility.¹⁶⁰ The more gruesome the abuse a child asylum seeker reveals, the stronger an asylum claim becomes. Clinicians should seize this disorientating moment to dive into a deeper discussion about the aptness of the asylum remedy for these children.¹⁶¹ What is the human cost of an attorney gaining

¹⁵⁵ See AOBTC 2009, *supra* note 109, at 34–35 (noting that while children, like adults, may rely solely on testimony, certain elements may require corroborating evidence).

¹⁵⁶ Musalo, Frydman & Seay, *supra* note 27, at ch. 10.

¹⁵⁷ *E.g.*, Rodriguez v. U.S. Atty. Gen., 735 F.3d 1302, 1308 (11th Cir. 2013); Donchev v. Mukasey, 553 F.3d 1206, 1221 (9th Cir. 2009); Manzur v. U.S. Dep’t of Homeland Sec., 494 F.3d 281, 290 (2d Cir. 2007).

¹⁵⁸ Carr, *supra* note 57, at 554 (articulating the difficulty children have in identifying their subjective fear of future persecution).

¹⁵⁹ See Silaya v. Mukasey, 524 F.3d 1066, 1070 (9th Cir. 2008) (holding that the repeated rape, beatings, verbal abuse, cigarette burns, and death threats endured by the applicant supported a finding of past persecution “as a preliminary matter”); Lopez-Galarza v. INS, 99 F.3d 954, 959 (9th Cir. 1996) (finding past persecution where applicant was raped repeatedly by military officers while imprisoned); *see also* Lazo-Majano v. INS, 813 F.2d 1432, 1434 (9th Cir. 1987) (finding persecution “stamped on every page of this record” where the applicant “has been singled out to be bullied, beaten, injured, raped, and enslaved”).

¹⁶⁰ The REAL ID Act allows asylum officers and Immigration Judges to consider any inconsistency (regardless of whether it goes to the heart of the claim) in an applicant’s statement or between a written and oral statement in determining whether an asylum applicant is credible. 8 U.S.C. § 1158 (b)(1)(B)(iii). *See* Stephen Paskey, *Credibility, Trauma, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L.R. (forthcoming 2016) (manuscript at 15), <http://ssrn.com/abstract=2677317> (analyzing Executive Office of Immigration Review data and concluding that “[i]nternal inconsistencies within and among an applicant’s written and oral statements are by far the dominant factor in negative credibility findings”).

¹⁶¹ *See* Fran Quigley, *Seizing the Disorientating Moment: Adult Learning Theory and the*

such details? Clinicians can engage students in a meaningful discourse about the detrimental nature of forcing domestic violence survivors to re-tell their story for purposes of seeking legal assistance.¹⁶² Clinicians and law students can consider the psychological impact on a child of being forced to disclose excruciating details of abuse in hours of testimony at an asylum adjudication. Students will be called upon to examine the viability of a child succeeding in such an adjudication without legal counsel.¹⁶³

Given the current legal framework and the demands it places on child victims of domestic violence, clinicians teaching such cases must work closely with law students to utilize a range of client-centered tools to minimize client re-victimization. Clinicians should work with students to shape litigation decisions with an eye towards limiting client trauma. It is unlikely that even the best trained and well-intentioned attorney can entirely avoid the re-traumatization of a child seeking asylum. However, teaching law students to better understand the dynamics of trauma and instilling lawyering techniques to respond to those dynamics can soften the legal system's harsh requirements.¹⁶⁴

Lynette Parker has specifically written about the need to train students enrolled in law school clinics about the manifestations of trauma so that they may effectively represent clients and minimize client re-victimization.¹⁶⁵ Parker articulates how sufficient training can lead students to understand why a traumatized client may be reticent to speak.¹⁶⁶ She encourages law students to approach sensitive subjects slowly and as infrequently as possible, and gain an ability to elicit information from clients without unduly painning them in the process.¹⁶⁷

Teaching of Social Justice in Law School Clinics, 2 CLIN. L. REV. 37 (1995) (advocating for adult learning techniques to be utilized by clinicians to maximize the opportunity in social justice teaching presented by a "disorientating moment" in law student clinical representation of clients).

¹⁶² See Andrea E. Bopp Stark, *Posttraumatic Stress Disorder in Refugee Women: How to Address PTSD in Women Who Apply for Political Asylum Under Grounds of Gender-Specific Persecution*, 11 GEO. IMMIGR. L.J. 167 (1996).

¹⁶³ See generally King, *supra* note 25; W. Warren H. Binford, *Giving Voice to Unaccompanied Children in Removal Proceedings*, 21 WILLAMETTE J. INT'L L. & DISP. RESOL. 34 (2013).

¹⁶⁴ See generally Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J. 235 (2007) (articulating techniques to develop rapport and effectively elicit information from an asylum seeker suffering from Post-Traumatic Stress Disorder).

¹⁶⁵ Parker, *supra* note 147, at 167 (detailing law student training mechanisms adopted by the Katharine & George Alexander Community Law Center (KGACLC) at Santa Clara Law School).

¹⁶⁶ *Id.* at 171.

¹⁶⁷ *Id.* at 175-76.

Reducing the traumatization of clients must begin at the inception of the representation of unaccompanied minors.¹⁶⁸ Law students should engage in exercises to develop rapport with clients, asking the children about their hobbies, talking about their mutual admiration of certain music, reminiscing about their own junior high and high school experiences.¹⁶⁹ Student attorneys representing unaccompanied minors must empathize with their clients to instill rapport sufficient to allow the children to reveal the details of the trauma they had endured.¹⁷⁰ Law students should solicit the information in a client-centered manner that minimizes, to the greatest extent possible, the re-traumatization of the clients.¹⁷¹ Students should proceed slowly when questioning the clients on matters of trauma, constantly assuring the children that they have the right to take a break or completely stop the conversation.¹⁷² Questions should be asked in an open-ended manner so that the clients can discuss details of past trauma at their own pace and on their own terms.¹⁷³ Law students should utilize empathetic responses to convey concern not just with the children's legal case, but with their health and overall well-being.¹⁷⁴

In litigating unaccompanied minors cases, clinicians must work with student attorneys to provide full preparatory explanations to inform the clients of the purpose of a particularly painful line of questions.¹⁷⁵ For example, law students can explain the requirements of asylum law, assuring the clients that the information the attorney is seeking is necessary for the case, not designed to inflict further harm or provide the law student with some perverse voyeuristic pleasure.¹⁷⁶ Details of persecution should be gathered over a series of interviews

¹⁶⁸ See Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLIN. L. REV. 321 (1998) (discussing the importance of building rapport for the initial client interview).

¹⁶⁹ See generally Laurie Shanks, *Whose Story Is It, Anyway? — Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 CLIN. L. REV. 509 (2008) (discussing rapport building).

¹⁷⁰ See Kristen B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1 (2008) (discussing the importance of empathy in effective attorney-client relationships).

¹⁷¹ DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (3d ed. 2012).

¹⁷² Suzuki, *supra* note 164 (articulating techniques to develop rapport and effectively elicit information from an asylum seeker suffering from Post-Traumatic Stress Disorder); BINDER ET AL., *supra* note 171.

¹⁷³ *Id.*

¹⁷⁴ See Ian Gallacher, *Thinking Like Nonlawyers: Why Empathy Is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 LEGAL COMM. & RHETORIC: JALWD 109 (2011) (discussing the importance of instilling and teaching empathy in law students as part of the law school curriculum).

¹⁷⁵ See generally Suzuki, *supra* note 164.

¹⁷⁶ *Id.*

with the clients, not elicited in a single meeting. Children should be allowed to stop for breaks outside and bites of food. If a particular line of questioning becomes too difficult for a client, law students should temporarily turn to a less difficult task, such as filling out immigration forms, and later return to the task of gathering more information about the persecution.¹⁷⁷

In the case study, these counseling techniques allowed the clients to develop unconditional trust in their student attorneys, disclosing incidents of abuse they did not even tell their therapists. Such rapport furthered the client's ultimate goal of building a strong asylum case.

The risk for traumatization is so great in the representation of unaccompanied minors, that efforts to mitigate client trauma must inform not only lawyering techniques but actual legal strategy. For example, in the case study, the Clinic decided to forgo an expert psychological evaluation, as is common practice in litigating asylum claims, because the psychological risk of forcing the children to tell their story to yet another stranger was just too great.¹⁷⁸ Similarly, in the case study, the Clinic found that concerns about trauma eclipsed a detailed preparation for the asylum interviews. The best legal strategy calls for counsel to review the affidavits, line by line, with the child clients before the interview.¹⁷⁹ However, in the case study, the student attorneys were appropriately concerned that forcing the children to re-tell their story a day or two before the adjudication could result in the children shutting down and refusing to speak during the actual asylum interview. In order to mitigate the risk of further victimization, the student attorneys conducted an abbreviated interview preparation session with the clients the day of their asylum interviews. The children literally did not have enough time to mentally process the preparation session before the asylum adjudication began.

Unaccompanied minor cases present rich opportunities for students to practice client-centered lawyering. They are excellent tools for law students to gain a firsthand appreciation of how trauma affects clients and shapes litigation decisions.

When working with law students to minimize client re-victimization, clinicians can simultaneously explore the fundamental flaws underlying the current legal regime. Even with the utilization of

¹⁷⁷ *Id.*

¹⁷⁸ Organizations such as Physicians for Human Rights often offer pro bono professional psychological evaluations and affidavits to further document asylum applicants. *Asylum*, PHYSICIANS FOR HUMAN RIGHTS, <http://www.physiciansforhumanrights.org/asylum/perma.cc/B4MD-93V8> (last visited Nov. 20, 2015).

¹⁷⁹ PUBLIC COUNSEL, *ASYLUM MANUAL FOR PUBLIC COUNSEL'S VOLUNTEER ATTORNEYS* 75 (2012), <http://www.publiccounsel.org/publications/files/AsylumManual.pdf> [perma.cc/VJX6-RPUN].

techniques to mitigate the clients' re-victimization, the Clinic could not entirely avoid the traumatizing reality of the legal representation. Indeed, the asylum process took a serious toll on the mental health of the children in the case study. In light of the reality that the current legal regime is in itself so victimizing to childhood domestic violence survivors, the section that follows will review current calls for a better immigration system to serve unaccompanied minors.

B. Critique Of The Current System And Calls For A Better Legal Regime For Unaccompanied Minors

In working within the system, law students are well positioned to evaluate and critique the current paradigm in which such children seek immigration relief. The representation of unaccompanied minors provides an excellent springboard for in-depth clinic seminar discussions about the ways in which legal and social institutions affect women of color, children, immigrants, and other marginalized groups.¹⁸⁰ Kimberle Crenshaw and other critical race and feminist scholars have articulated how multiple dimensions of a victim's identity shape not only the personal experience of rape and abuse, but the intervention strategies necessary to effectively reach those marginalized victims.¹⁸¹ In the case study, the youth, poverty, gender, and race of the clients converged to deny the clients physical and legal autonomy. Exploring concepts of intersectionality through individual client representation exposes law students to critical race and feminist theory in a context where the real world implications of such theory can be seen.

The clients' many layers of disempowerment cry out for an immigration system that can adequately address such multifaceted victimization. Through the individual representation of unaccompanied children, law students can engage in a scholarly discourse on proposed

¹⁸⁰ See generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

¹⁸¹ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1246 (1991) ("Where systems of race, gender, and class domination converge, as they do in the experiences of battered women of color, intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles."); Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1183 (1994) ("Any ethical and political framework adequate to challenge gender inequality must similarly challenge the other structures of subordination with which gender intersects.").

changes in the immigration framework to better serve unaccompanied minors.

Bridget Carr has called for a “best interest of the child” standard to be adopted in immigration proceedings in lieu of the complicated and inapt asylum remedy.¹⁸² Carr argues that a best interest standard has deep roots in both domestic and international law and that the United States immigration system’s treatment of children runs counter to the prevailing norm.¹⁸³ Indeed, the Inter-American Commission on Human Rights issued a report following the 2014 unaccompanied minors surge calling all members of the Organization of American States, including the United States, “to ensure that the best interest of the child principle is the guiding principle in all decisions taken with respect to children, including in immigration proceedings.”¹⁸⁴

Scholars have argued that a best interest standard would soften the current legal regime’s failure to balance the immigration enforcement mandate with a child’s human rights and need for protection.¹⁸⁵ Karen Musalo, Lisa Frydman, and Misha Seay at the Center for Gender and Refugee Studies have supported a best interest standard where immigration adjudicators and judges would be required to take into account whether it is in the best interest of the child to remain in the U.S. or be deported into dangerous conditions.¹⁸⁶ Erin Corcoran has written to explicate how the best interest standard could be implemented for unaccompanied children from the Immigration and Customs Enforcement custody and placement phase through to the formal United States Citizenship and Immigration Services adjudication.¹⁸⁷ Andrew Schoenholtz has written to articulate how the Convention on the Rights of Children can properly guide governments in making the best interests of the child principle meaningful both procedurally and substantively.¹⁸⁸ Indeed, the immigration reform legislation that passed the Senate in 2013 adopted many of the “best

¹⁸² See Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009).

¹⁸³ *Id.* at 124.

¹⁸⁴ INTER-AM. COMM’N ON HUMAN RIGHTS, HUMAN RIGHTS SITUATION OF REFUGEE AND MIGRANT FAMILIES AND UNACCOMPANIED CHILDREN IN THE UNITED STATES OF AMERICA 11 (2015), <http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf> [perma.cc/E8FD-2QMQ].

¹⁸⁵ E.g., Jacqueline Bhabha, “Not a Sack of Potatoes”: *Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 197 (2006).

¹⁸⁶ See Musalo, Frydman & Seay, *supra* note 27, at ch.10.

¹⁸⁷ See Erin B. Corcoran, *Getting Kids out of Harm’s Way: The United States’ Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors*, 47 CONN. L. REV. ONLINE 1 (2014).

¹⁸⁸ Andrew I. Schoenholtz, *Developing the Substantive Best Interests of Child Migrants: A Call for Action*, 46 VAL. U. L. REV. 991 (2012).

interest” recommendations currently advocated by scholars.¹⁸⁹ The legislation would have required the Border Patrol, in making repatriation decisions, to give “due consideration” to the best interest of a child, family unity, and humanitarian concerns.¹⁹⁰

In addition to calls for a best interest standard, scholars have written to call for procedural changes in current asylum related statutes to properly accommodate children. For example, Jacqueline Bhabha notes that expedited removals and credible fear interviews at the border are particularly inapt for children who are unable to fully express themselves to border agents.¹⁹¹ Annie Chen and Jennifer Gill have called for changes in the formal adjudication process to accommodate the different competencies and developmental factors of children.¹⁹² A child-centered adjudication would recognize not just the age of the children, but their precarious mental health.¹⁹³

The recent report by the Inter-American Commission on Human Rights calls on all member states to “ensure migrant and refugee children and families enjoy due process guarantees and are provided with a lawyer, if needed, at no cost to them if they cannot cover the costs on their own.”¹⁹⁴ Although guaranteed counsel would not change the legal standard itself, or alter the flawed adjudication process, Ashley Pong, Shani King, and Warren Binford have effectively described how the current lack of representation for unaccompanied minors is indeed a violation of due process.¹⁹⁵

Sarah Buhler has written about the importance of incorporating a “pedagogy of suffering” into law school clinics such that students are not taught to simply empathize and “rescue” their clients, but rather appreciate the political and social underpinning of that suffering.¹⁹⁶ Immigrant survivors of domestic violence are more than just victims, their circumstance is a result of political and social forces both in their countries of origin and those underlying U.S. law.¹⁹⁷ The representa-

¹⁸⁹ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. §§ 1115(b)(1)(B)(i), 1115(c)(1)-(2), 2107(c)(1)(D), 3612(h)(2), 3804(2)(D) (2013).

¹⁹⁰ *Id.*

¹⁹¹ Bhabha, *supra* note 185, at 213–14.

¹⁹² Chen & Gill, *supra* note 7, at 127–28.

¹⁹³ *Id.*

¹⁹⁴ INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 184, at 11.

¹⁹⁵ See Pong, *supra* note 23; King, *supra* note 25; Binford, *supra* note 163.

¹⁹⁶ Sarah Buhler, *Painful Injustices: Encountering Social Suffering in Clinical Legal Education*, 19 CLIN. L. REV. 405, 416 (2013).

¹⁹⁷ G. Chezia Carraway, *Violence Against Women of Color*, 43 STAN. L. REV. 1301, 1308 (1991) (exploring the disproportionate violence against women of color in the United States and around the world and the wide-spread cultural acceptance of such violence); Chela Sandoval, *U.S. Third World Feminism: The Theory and Method of Oppositional Consciousness in the Postmodern World*, 10 GENDERS 1, 10–12 (1991) (proposing a typol-

tion of unaccompanied minors affords clinicians an excellent opportunity to explore current structures of power and how they influence United States immigrant-related policy choices.¹⁹⁸ Students can then reflect upon not only their own client's story of persecution, but the social justice implications of the system in which they practice and proposed changes to that system.¹⁹⁹

As clinicians and student attorneys explore the injustice of the current legal regime, they can effectively document the need for a paradigm shift. Clinics can then be instruments to not only represent individual unaccompanied minors, but catalysts for future social justice advocacy.

CONCLUSION

The representation of unaccompanied immigrant minors provides law school clinicians with endless pedagogical opportunities for the teaching of practical lawyering skills while engaging law students in a humanitarian catastrophe unfolding in the daily news. In representing child victims of domestic violence, students will practice case theory analysis and formation, interviewing, counseling, fact investigation, and writing. Students will simultaneously be exposed to structures of power and be called upon to examine the ways in which such systems subordinate unaccompanied minors due to age, race, class, and gender.

Student advocacy in unaccompanied immigrant minor cases requires a clear understanding of the law of asylum, particularly as it applies to child victims of physical and sexual abuse. Law students must take pains to balance the best legal theories with the capacity for

ogy of feminist theory which appropriately accounts for the historical and ongoing subordination of women of color in the United States); Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 147–48 (2013) (documenting the high rate of denials in domestic violence based asylum claims prior to the BIA decision of A-R-C-G and exploring the structural resistance to acknowledging domestic violence as a basis for asylum); Ange-Marie Hancock, *When Is Fear for One's Life Race-Gendered? An Intersectional Analysis of the Bureau of Immigration Appeals's In Re A-R-C-G- Decision*, 83 FORDHAM L. REV. 2977, 2988–95 (2015) (exploring the decision of A-R-C-G through the lens of critical feminist theory and arguing that a rigid reading of the BIA decision which parses particular social group analysis into delineated categories such as the type of violence experienced, nationality, and marital status diminishes the decision's capacity to aid women who experience violence in an intersectional environment).

¹⁹⁸ See generally Quigley, *supra* note 161 (advocating for adult learning techniques to be utilized by clinicians to maximize the opportunity in social justice teaching presented by a “disorientating moment” in law student clinical representation of clients).

¹⁹⁹ See generally Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLIN. L. REV. 317 (2014) (discussing a six-point strategy for clinicians to teach reflection to law students effectively).

children to effectively testify to such theories. Vague and conflicting rules of professional ethics, particularly those pertaining to an attorney's duties of loyalty and confidentiality, must be evaluated and applied in the context of the viable representation of minors who have endured substantial trauma.

Clinicians can guide students through litigation decisions with an eye to limiting client re-victimization. Case strategies should be evaluated and formulated to balance appropriately an attorney's professional duty to pursue the best legal case and a desire to promote the child's overall well-being. Client-centered lawyering strategies can be utilized to minimize client re-victimization. However, the inherently traumatizing immigration system will call upon law students to evaluate and critique the current legal framework.

In representing unaccompanied minors, law students must operate within an immigration system that does not readily transcend itself to children and does not properly account for the intersectionality of their victimization. In working within the system, law students will be well positioned to analyze current calls for a paradigm shift.

Unaccompanied immigrant minors are very much in need of counsel. Law school clinics can play an invaluable role in serving these children and advocating for procedures to better respond to this migration crisis.

