

THE BATTERED MOTHER'S STRUGGLE IN NEW YORK: THE LAWS AND POLICIES THAT LED TO THE REMOVAL OF CHILDREN FROM THEIR ABUSED MOTHERS BAED ON THE CHILD'S EXPOSURE TO DOMESTIC VIOLENCE

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I. INTRODUCTION: THE VIOLENCE AT HOME AND THE BATTLE IN THE COURTROOM

Ms. Sharwline Nicholson probably did not realize that what she experienced on January 7, 1999 would change her life, the lives of her two children, and ultimately, the lives of many other battered mothers and children in New York. A thirty-two-year-old mother of two, Ms. Nicholson worked as a full-time cashier and attended classes full-time at Mercy College.¹ Mr. Barnett, the father of Ms. Nicholson's children, lived in South Carolina but visited the children in New York on a monthly basis.² Ms. Nicholson told Mr. Barnett she was ending their relationship during one of his visits in early 1999.³ Mr. Barnett, who had never behaved violently toward Ms. Nicholson, "punched her, kicked her, and threw objects at her. When he left, her head was bleeding profusely."⁴ During this brutal assault, one of her children slept in her crib in another room and the other child was at school.⁵ In the emergency room, Ms. Nicholson provided police with the phone numbers of her cousins who could care for her children, then remained in the hospital overnight.⁶

That night, while Ms. Nicholson lay in her hospital bed, caseworkers from New York City Administration for Children's Services (ACS) removed her two children from a babysitter's home.⁷ ACS charged Ms. Nicholson with child neglect, alleging that her children were in "imminent risk if they remained in the care of Ms. Nicholson because she was not, at that time, able to protect herself nor her children because Mr. Barnett had viciously beaten her."⁸

Sharwline Nicholson and several battered mothers, whose children were similarly removed by child welfare caseworkers, filed a class-action lawsuit against ACS and the City of New York. These abused mothers alleged that ACS's policy and practice of removing children from their mother's custody solely on the grounds that the mothers were victims of abuse violated substantive and procedural due process.⁹ The District Court enjoined ACS from its practices,

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¹ Nicholson v. Williams, 203 F. Supp. 2d 153, 168 (E.D.N.Y. 2002).

² *Id.* at 168-69.

³ *Id.* at 169.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 170 (quoting from the court transcript).

⁹ *Id.* at 153.

finding that ACS systematically and improperly removed children from battered mothers solely based on domestic violence.¹⁰ The Court also found that ACS regularly filed child neglect suits against mothers in family court without sufficient investigation and provided inadequate services to mothers before removing their children or prosecuting them.¹¹ After several appeals and almost four years of litigation, the New York Court of Appeals held in October 2004 that a child's exposure to domestic violence against his or her caretaker is, standing alone, insufficient to constitute child neglect under New York law.¹²

Several factors played a role in the development of laws and policies permitting the state to remove a child from a battered mother solely on the grounds that the child witnessed the mother's abuse. In this note, I examine the controversial debate about issues of child removal and findings of neglect against battered mothers based on domestic violence. In particular, I focus on the state of New York — the child welfare agency (ACS), the state legislature, and New York family courts — to evaluate the historical development of the laws and policies regarding charges of child neglect against battered mothers.

In Section II, I will examine how significant scientific research on the effects of exposure to domestic violence on children raised awareness of the issue of family violence in the 1980s and 1990s. Also, I will highlight that, while both child welfare groups and battered women's advocates worked to end violence and ensure safety in the home, these groups experienced tensions because of differing philosophies, approaches, and strategies for stopping violence. In Section III, I examine how the New York courts, legislature, and child welfare system confronted challenging legal and policy issues about domestic violence. Specifically, in 1996, studies documenting the harmful effects of domestic violence on children played a significant role in motivating the New York legislature to enact an amendment that mandated family courts to consider domestic violence as a factor in custody decisions. Although the amendment involved only custody cases, the New York family courts cited and relied upon the legislative findings of the 1996 bill to support findings of neglect against battered mothers. By the late 1990s, the courts had gradually expanded the definition of "child neglect" to include a child's exposure to domestic violence. Moreover, in addition to influencing legal expansion of the child neglect doctrine, growing public concern about child abuse in the 1990s also motivated ACS to change its policies; the agency replaced its goal of family preservation with principles favoring child removal when there was domestic violence in the home.

In Section IV, I will explore the influential role of advocates and experts who pointed out methodological flaws in the studies from the 1980s and early 1990s and challenged flawed assumptions in the reasoning behind findings of neglect against battered mothers. Finally, in Section V and VI, I will examine the groundbreaking decisions of *Nicholson v. Williams* and *Nicholson v. Scopetta*, and their implications for advocates, child welfare caseworkers, and the courts. These decisions address many of the issues and concerns of battered mothers, who may be unable to stop the violence against them, but do not want to lose their children. I will conclude by suggesting how these decisions may encourage greater collaboration among advocates and may motivate a more comprehensive approach to the issue in order to address both the needs of children and their battered mothers.

¹⁰ *Id.* at 228.

¹¹ *Id.* at 250.

¹² *Nicholson v. Scopetta*, 3 N.Y.3d 357, 359 (N.Y. 2004).

II. THE ROLE OF CHILD WELFARE ADVOCATES, BATTERED WOMEN'S GROUPS, AND SCIENTIFIC RESEARCH: TRACING THE ORIGINS OF LAW AND POLICY AFFECTING BATTERED MOTHERS

A. Dueling Philosophies Created Tensions Between Child Welfare Advocates and the Battered Women's Movement.

In the 1980s and 1990s, battered women's advocates and child welfare advocates maintained a strained relationship as they worked towards ending family violence. Tensions between the advocacy groups evolved from both the unique historical developments of each movement and the distinct, and often inconsistent, missions of each group.¹³ Different approaches toward abusive parents have further increased mistrust between the groups and have been a significant barrier towards collaboration.¹⁴

First, the unique histories of the child welfare movement and the battered women's movement set the foundation for differing philosophies and approaches to the problem of domestic violence. Child protection is a fundamental duty of state and local governments; federal law mandates and provides funding for states and cities to establish public child welfare agencies.¹⁵ The child welfare movement crystallized in the 1960s "when Dr. Henry Kempe 'rediscovered' the battered child" and public concern for abused children increased political attention to the issue.¹⁶ "By 1967, all states had enacted laws requiring certain persons to report child abuse and neglect . . ."¹⁷ The responsibilities of child welfare agencies are to investigate reports of child abuse and neglect, provide services to families to keep children safe, remove children from unsafe homes, make recommendations to the family court, and place children in foster care.¹⁸ The state supports and empowers the agencies' activities.

In contrast, the battered women's movement emerged more recently, in the 1970s, as a grassroots effort to empower abused women and provide community-based domestic violence services.¹⁹ "Early services focused primarily on providing shelter and advocacy to battered women."²⁰ While child welfare services are often court-ordered, participation in domestic violence programs is voluntary and funded by community groups.²¹ Findlater and Kelly note that

¹³ See Janet E. Findlater & Susan Kelly, *Child Protective Services and Domestic Violence*, 9 THE FUTURE OF CHILDREN 84, 87 (1999) (discussing the "difficult history" of child protection and domestic violence).

¹⁴ *Id.* ("[T]he relationship between child welfare workers and battered women's advocates has been difficult, at best. Mistrust has been common, non-collaboration the rule.")

¹⁵ *Id.* at 85.

¹⁶ Susan Schechter & Jeffrey L. Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies*, MINN. CENTER AGAINST VIOLENCE AND ABUSE ELECTRONIC CLEARINGHOUSE ¶ 2 (June 1994), <http://www.mincava.umn.edu/documents/wingsp/wingsp.html#id132741> (citing THE BATTERED CHILD (Ray E. Helfer & C. Henry Kempe eds., Univ. of Chicago Press 1968)).

¹⁷ Findlater & Kelly, *supra* note 13, at 85.

¹⁸ Lucy S. Carter et al., *Domestic Violence and Children: Analysis and Recommendations*, 9 THE FUTURE OF CHILDREN 4, 9 (1999).

¹⁹ *Id.* at 7.

²⁰ *Id.*

²¹ *Id.* at 9.

women's rights advocates were motivated to build shelters and provide services because public institutions were not doing so;²² the movement was galvanized because of a void in social services and the legal system. For example, because domestic violence was not treated as a crime in the early 1980s, battered women's groups provided safety to abused women through community-based services.²³ Many battered women's advocates viewed child welfare agencies as "yet another public institution that overlooked domestic violence and the needs of battered women."²⁴ The distinct foundations and historical progressions of the child welfare and the domestic violence movements hindered collaboration between the two groups.

Second, the differing philosophies that child welfare advocates and battered women's groups have maintained furthered tensions and increased mistrust between the groups.²⁵ The principle goal of child welfare agencies is to ensure the "best interests of children."²⁶ Focusing on the safety of a child, child protection workers often screen *both* parents for unsafe or problematic behaviors.²⁷ Schechter and Edleson point out that from this perspective of child welfare, caseworkers who identify domestic violence in the home often ask of battered mothers: if she is unable to protect herself, "how will she be able to care for this child?"²⁸ Battered women's advocates have criticized this sole focus on the child's safety, contending that the definition of the "best interest of the child" is too narrow and does not consider that the best interests of children are also to keep their mothers safe.²⁹

While child welfare advocates concentrate on the child's safety, the battered women's movement focuses on protecting the battered woman from her abuser. Battered women's advocates criticized the child welfare system for not requiring caseworkers to ask about domestic violence during investigations into child abuse or neglect.³⁰ In addition, these groups argued that even where child protection caseworkers identified domestic violence, they revictimized abused mothers by often blaming them for violence in the home and holding "women to different, gender-biased standards of care for children."³¹ On the other hand, the child welfare movement criticized battered women's groups for providing shelters to mothers without services for their children or minimizing the harm to children from constant exposure to domestic violence.³²

Finally, in addition to distinct histories and conflicting philosophies, these two groups approached the role of the abusive parent differently. The role of child advocates is to ensure the child's safety by either preserving the family and offering services or removing the child from the home. To avoid child removal, caseworkers often assist other relatives and family members, often even an abusive parent, in the effort to establish a healthy family unit.³³ In contrast, battered women's advocates seek to empower abused women and separate them from violent and abusive

²² Findlater & Kelly, *supra* note 13, at 87.

²³ *Id.*

²⁴ *Id.*

²⁵ Schechter & Edleson, *supra* note 16, ¶ 20.

²⁶ *Id.* ¶ 21.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* ¶ 22.

³⁰ Findlater & Kelly, *supra* note 13, at 87.

³¹ Schechter & Edleson, *supra* note 16, ¶ 25.

³² *Id.* ¶ 26.

³³ *Id.* ¶ 28 (addressing the divergent way in which the domestic violence and the child welfare movements approach the role of the perpetrator).

partners. Viewing the abuser as a coercive force within the family unit, these groups provide abused family members with safe shelter and mental health assistance and help create a new social support network separate from the abuser.³⁴

Thus, as the child welfare and battered women's movements experienced unique historical progressions, these groups developed distinct philosophies, strategies, and treatment options to combat violence. Tension and mistrust between the advocacy groups established the foundation for conflicting approaches to the issue of child removal based on exposure to domestic violence.

B. Initiating the Legal Debate: Emergence of Scientific Research on Domestic Violence and Child Neglect.

Throughout the 1980s and into the early 1990s, scientists published several studies and articles documenting the risks to a child associated with exposure to domestic violence. The research involved two themes: 1) studies testing the overlap between spousal abuse and child abuse; and 2) reports demonstrating some of the behavioral and emotional problems in children exposed to domestic violence. As I describe below, these scientific studies and an increased awareness of the effects of domestic violence on children not only culminated in legislative reform for child custody cases, but also provided support for New York family courts to find battered mothers neglectful of their children when there was domestic violence in their homes.

Estimates of the number of children between three- and seven-years-old who witness domestic violence varied, ranging from 3.3 million³⁵ to 10 million children.³⁶ With respect to the prevalence of children's exposure, one study showed that "at least a third of American children have witnessed violence between their parents, and most have endured repeated instances."³⁷ Moreover, several studies found co-occurrence of spousal abuse and child abuse. For example, in 1988, a survey of one thousand women indicated that seventy percent of battered mothers reported that their children were also abused.³⁸ A 1990 study concluded not only that men who batter women also abuse their children, but also that "the rate of child abuse by those mothers who have been beaten is at least double that of [mothers] whose husbands did not assault them."³⁹

In addition to reports on the overlap of domestic violence and child abuse, between 1980 and 1992, dozens of studies illustrated the behavioral, emotional, cognitive, and developmental problems associated with witnessing domestic violence.⁴⁰ For example, several studies in 1986

³⁴ *Id.*

³⁵ B.E. Carlson, *Children's Observations of Interparental Violence*, in *BATTERED WOMEN AND THEIR FAMILIES* 160 (A.R. Roberts ed., Springer Press 1984).

³⁶ MURRAY A. STRAUS, *CHILDREN AS WITNESSES TO MARITAL VIOLENCE: A RISK FACTOR FOR LIFELONG PROBLEMS AMONG A NATIONALLY REPRESENTATIVE SAMPLE OF AMERICAN MEN AND WOMEN*, REPORT AT THE ROSS ROUNDTABLE ON CHILDREN AND VIOLENCE (Sept. 21, 1991).

³⁷ Jeffrey Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 *J. OF INTERPERSONAL VIOLENCE* 839, 843 (1999). See J.W. Fantuzzo et al., *The Effects of Observing Conjugal Violence on Children*, 4 *JOURNAL OF FAM. VIOL.* 77-94 (1989).

³⁸ L.H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 162 (K. Yllo & M. Bograd eds., 1988).

³⁹ Schechter & Edleson, *supra* note 16, ¶ 9 (citing MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES* (1990)).

⁴⁰ See Edleson, *supra* note 37, at 839-70.

and 1987 found that child witnesses are more aggressive, antisocial, fearful, and inhibited.⁴¹ Reports showed that these children have more anxiety, depression, and temperamental problems.⁴²

In 1991, a high-profile study by Murray Straus concluded that exposure to domestic violence “has a wider variety of adverse outcomes” than had previously been found.⁴³ Straus noted that “[i]t seems reasonable to conclude that being a witness of violence between parents puts a child at risk of a number of serious mental health and other problems”⁴⁴

Social scientists highlighted some of the methodological weaknesses of these studies, criticizing their failure to differentiate between children who only witnessed abuse and children who were also abused.⁴⁵ Nevertheless, the large number and variety of these studies had a powerful impact. By the mid to late 1990s, the New York courts and legislature used and relied upon these studies to promote legislative change and to support findings of child neglect against battered mothers.

III. THE TREND TOWARDS CHILD REMOVAL AND FINDINGS OF NEGLECT AGAINST BATTERED MOTHERS: NEW YORK’S LEGAL AND POLICY CHANGES IN THE 1990S

With research revealing the potential harm to children of witnessing domestic violence, New York courts, the state legislature, and New York child welfare services faced challenging new legal and policy issues with respect to domestic violence. First, these studies and growing concern about the effects of domestic violence on children played a significant role in motivating the state legislature to adopt an amendment in 1996, which required the family courts to consider domestic violence as a factor in custody and visitation decisions. Second, as research surfaced on the effects of violence in the home, New York courts adjudicating child neglect proceedings were confronted with two new issues: 1) whether a child’s exposure to domestic violence is an “imminent danger”⁴⁶ that supports a finding of child neglect; and 2) whether a battered mother has “failed to exercise a minimum degree of care”⁴⁷ to protect her child because there is domestic violence in her home. Finally, although scientific studies did not directly influence policy changes within New York’s child welfare agencies, growing public concern about child abuse in 1995 motivated drastic reforms of New York City’s Administration for Child Services. ACS

⁴¹ See Schechter & Edleson, *supra* note 16, ¶ 11 (citing P.G. Jaffe et al., *Similarities in Behavioral and Social Maladjustment Among Child Victims and Witnesses to Family Violence*, 56 AMER. J. ORTHOPSYCHIATRY 142-46 (1986) and Christina Christopheropoulos et al., *Children of Abused Women*, 49 J. MARRIAGE AND FAM. 611, 611-19 (1987)).

⁴² *Id.*

⁴³ *Id.* ¶ 12 (quoting STRAUS, *supra* note 36, at 5).

⁴⁴ *Id.*

⁴⁵ *Id.* ¶ 13.

⁴⁶ For a finding of child neglect under the Family Court Act, the state must prove that the child’s physical, mental, or emotional condition has been impaired or is in “imminent danger of becoming impaired.” N.Y. DOM. REL. LAW § 1012(f)(i) (McKinney 2009).

⁴⁷ As described below, a finding of child neglect under the Family Court Act requires that the child’s impairment or imminent danger of impairment be “a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care.” N.Y. DOM. REL. LAW § 1012(f)(i) (McKinney 2009). The impairment “must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.” N.Y. DOM. REL. LAW § 1012(h) (McKinney 2009).

transformed its principles and adopted policies favoring removal of children from battered mothers based on domestic violence.⁴⁸

A. The 1996 Amendment to New York Law

In 1996, the New York legislature amended Section 240(2) of the Domestic Relations Law to require that courts in custody and visitation disputes consider the effects of domestic violence on the best interests of a child. The amendment stated that where allegations of domestic violence are proven by a preponderance of the evidence, “the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a [decision]”⁴⁹

The amendment was enacted in response to increasing evidence and “a growing national concern about the negative effects of domestic violence on children.”⁵⁰ Specifically, in 1990 a joint resolution of Congress urged states to enact legislation that would create a presumption against awarding child custody to an abusive spouse.⁵¹ The National Council of Juvenile and Family Court Judges and the American Bar Association supported this congressional recommendation.⁵² By 1996, thirty-eight states had passed legislation about domestic violence in custody disputes.⁵³ Although New York’s amendment explicitly rejected a presumption against custody for the abuser, it provided guidance to the courts by mandating consideration of domestic violence in custody determinations. While the amendment does not precisely state *how* domestic violence should be considered, the bill’s legislative findings note that “domestic violence should be a weighty consideration in custody and visitation cases.”⁵⁴

The legislature’s Memorandum in Support (hereinafter “MIS”), included in the bill, not only addresses the purpose of the amendment, but also reveals the degree to which recent scientific research influenced New York legislators. The legislature intended to expand existing New York law by explicitly emphasizing the harm to children who are exposed to domestic violence:

The legislature recognizes the wealth of research demonstrating the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed the violence. Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer

⁴⁸ See *infra* pp. 21-24 (detailing ACS policy reforms and discussing the ACS *Plan of Action* report, which established the framework for ACS’s practice to resolve all ambiguity in favor of removing the child from harm’s way). See also NICHOLAS SCOPETTA, PROTECTING THE CHILDREN OF NEW YORK: A PLAN OF ACTION FOR THE ADMINISTRATION OF CHILDREN’S SERVICES 6 (1996), available at http://www.nyc.gov/html/acs/downloads/pdf/pub_reform_plan_1996.pdf.

⁴⁹ 1996 N.Y. LAWS ch. 85, § 1 (codified at N.Y. DOM. REL. LAW § 240) (McKinney 1996).

⁵⁰ Honorable Judith Gische, *Domestic Violence as a Factor in Custody Determinations in New York State*, 27 FORDHAM URB. L.J. 937, 939 (2000).

⁵¹ *Id.* (citing H.R.J. Res. 172, 102d Cong. (1990)).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Legislative Memorandum in Support of Chapter 85, at 2-3 [hereinafter “MIS”].

anxiety, depression, somatic symptoms, low self-esteem, and developmental and socialization difficulties.⁵⁵

Also, citing several reports and studies, the legislature specifically highlighted the increased risk of child abuse where a child is raised in a violent home:

Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse . . . It is well documented that family violence is cyclical and self-perpetuating. . . . Domestic violence does not terminate upon separation or divorce. Studies demonstrate that domestic violence frequently escalates and intensifies upon the separation of the parties.⁵⁶

Scientific research showing the effects of domestic violence on children played an important role in shaping and expanding New York’s law in custody and visitation disputes. Using these studies as evidentiary support, the legislature concluded that “great consideration should be given to the corrosive impact of domestic violence and the increased danger to the family”⁵⁷ It is likely that the proponents of this amendment hoped to achieve more consistent and informed analyses of “the best interests of the child” in custody and visitation determinations. Perhaps this objective was realized — in future custody cases, the courts increasingly cited and relied upon these legislative findings of the effects of domestic violence to support custody awards in favor of battered mothers.⁵⁸

Research on the effects of domestic violence and the legislative findings to the 1996 amendment may have helped battered women in the *custody* context. However, in the *child dependency* context, growing concern about the harm to children of exposure to domestic violence enabled the courts to make findings of neglect against battered mothers.

B. Bringing the Issue into the Courtroom: Expansion of the Child Neglect Statute Holds Battered Mothers Responsible for Domestic Violence.

As reports surfaced about the effects of exposure to domestic violence on children, New York family courts debated two key issues. First, is a battered mother neglectful of her child because she is unable — or “failed” — to stop the domestic violence? Second, does domestic violence create a harm — or “imminent danger” of harm — to the child that constitutes neglect?

⁵⁵ *Id.* at 4. See Nancy Erickson, *The Role of the Law Guardian in a Custody Case Involving Domestic Violence*, 27 *FORDHAM URB. L.J.* 817, 829 (2000) (detailing the legislative history and findings of Chapter 85 of the Laws of 1996, with specific descriptions of the Legislative Memorandum in Support).

⁵⁶ *MIS*, *supra* note 54, at 4; See generally LENORE WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

⁵⁷ *MIS*, *supra* note 54, at 2.

⁵⁸ See *In re J.D. v. N.D.*, 648 N.Y.S.2d 877, 884 (Fam. Ct. 1996) (highlighting the detrimental effects of domestic violence and holding that, given the overwhelming evidence of psychological abuse inflicted upon the mother by the child’s father, it would not be in the child’s best interest to place him in the father’s custody); *In re E.R. v. L.G.*, 648 N.Y.S.2d 257, 262 (Fam. Ct. 1996) (awarding custody to the mother and emphasizing the statutory mandate to consider the effects of domestic violence in determining the best interest of the child).

By the late 1990s, New York courts expanded the definition of child neglect to include exposure to domestic violence and found battered mothers liable for “failing to protect” their children from witnessing the abuse.⁵⁹

The legal basis for finding a battered mother guilty of neglect is found in Article 10 of the New York Family Court Act. Under Section 1012(f) of the Family Court Act, a “neglected child” is one “whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care.”⁶⁰ To establish neglect, the state must prove two elements. First, it must show that a child’s physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired. Although the statute does not define “imminent danger of becoming impaired,” the statute clarifies that “impairment” is “a state of substantially diminished psychological or intellectual functioning.”⁶¹ Second, the child’s injury, impairment, or risk thereof must be “a result of the failure of his parent . . . to exercise a minimum degree of care.”⁶² The “impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.”⁶³

The statute lists several examples of a failure to exercise care that may constitute neglect, including the failure to supply food, clothing, education, shelter, and proper supervision.⁶⁴ A parent may also neglect a child if he or she fails to exercise minimum care “by unreasonably inflicting or *allowing to be* inflicted harm, or a substantial risk thereof.”⁶⁵ This clause is particularly relevant to child neglect cases that involve domestic violence. A court may find that the abused mother, by permitting domestic violence in the home, was “allowing to be inflicted harm or a substantial risk” of harm to the child.⁶⁶

The statute does not define “harm” or “substantial risk” of harm except through examples, including excessive use of corporal punishment, misuse of drugs or alcohol to the extent that the parent loses control, and “any other acts of a similarly serious nature requiring the aid of the court.”⁶⁷ As described below, courts have cited this last catch-all provision to interpret a child’s witnessing of domestic violence as a “harm” or “substantial risk” of harm that is of sufficiently “serious nature requiring the aid of the court.”⁶⁸

⁵⁹ *In re Lonell J.*, 673 N.Y.S.2d 116, 118 (App. Div. 1st Dept. 1998) (ruling that evidence of domestic violence in the presence of children is sufficient to establish child neglect); *In re Deandre T.*, 676 N.Y.S.2d 666, 666 (App. Div. 2d Dept. 1998) (ruling that expert testimony is not required to make a finding of neglect based on a child’s exposure to domestic violence).

⁶⁰ N.Y. DOM. REL. LAW § 1012(f) (McKinney 2009).

⁶¹ N.Y. DOM. REL. LAW § 1012(f)-(h) (2009). *See* Honorable L. Elkins & Jane Fosbinder, NEW YORK LAW OF DOMESTIC VIOLENCE § 4.29 (1990), available at WL NYLDOMVIOL § 4:29 (explaining each provision of Section 1012 of the New York Family Court Act).

⁶² N.Y. DOM. REL. LAW § 1012(f)(i) (McKinney 2009).

⁶³ N.Y. DOM. REL. LAW § 1012(h) (McKinney 2009).

⁶⁴ N.Y. DOM. REL. LAW § 1012(f)(i)(A-B) (McKinney 2009).

⁶⁵ N.Y. DOM. REL. LAW § 1012(f)(i)(B) (McKinney 2009) (emphasis added).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See generally In re Glenn G.*, 587 N.Y.S.2d 464 (Fam. Ct. 1992); *In re Lonell J.*, 673 N.Y.S.2d 116 (App. Div. 1st Dept. 1998). *But see In re Bryan L.*, 565 N.Y.S.2d 969, 972-73 (Fam. Ct. 1991) (finding no imminent risk absent expert testimony regarding the impact of witnessing domestic violence).

A series of cases in the 1990s in New York transformed the court's approach to domestic violence issues in child neglect proceedings. Through this succession of cases, the New York family courts and appellate courts broadened the definition of child neglect under the Family Court Act. As detailed below, in *In re Glenn G.*, the courts dismissed child abuse charges against an abused mother for her failure to protect her child because "Battered Woman Syndrome" made her unable to prevent or control potential harm to the child.⁶⁹ Also, in *In re Lonell J.*, the appellate court ruled that the definition of child neglect under the statute was broad enough to encompass a child's exposure to domestic violence.⁷⁰ Finally, in *In re Deandre T.*, the appellate court ruled that an older child's exposure to domestic violence was sufficient, even in the absence of expert testimony, to establish neglect under the Family Court Act.⁷¹

The courts' inclusion of witnessing domestic violence as a basis for a neglect charge against a battered mother only emerged in the mid to late 1990s.⁷² In the early 1990s, many family courts did not consider witnessing domestic violence a basis for a finding of child neglect against a parent.⁷³ Courts required evidence proving the child showed symptoms of actual physical, mental, or emotional impairment or the child was in "imminent danger" of harm.⁷⁴ Courts required expert testimony from psychiatrists, social workers, and mental health professionals to confirm claims of harm or imminent risk of harm.⁷⁵

The series of cases in the 1990s altered the approach in New York to issues of domestic violence in child neglect proceedings. In *In re Glenn G.*, the family court found an abused mother who suffered from "Battered Woman Syndrome" strictly liable of child neglect because she failed to protect her children from their father's abuse, regardless of her inability to control or escape the abuse.⁷⁶ Although this case did not exclusively involve a child witnessing domestic violence, the Court's legal reasoning would impact future neglect cases against battered mothers based solely on exposure to domestic violence. After an incident of domestic violence, Ms. G went to the police precinct for assistance.⁷⁷ She asked authorities whether "it was normal for a father to grab his children in the groin area, dance naked with them and take photos of them naked."⁷⁸ The mother was relocated to a battered woman's shelter and a hospital social worker reported

⁶⁹ *Glenn G.*, 587 N.Y.S.2d at 470.

⁷⁰ *Lonell J.*, 673 N.Y.S.2d at 118.

⁷¹ *Deandre T.*, 676 N.Y.S.2d at 666.

⁷² Melissa Trepiccione, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother With Failure to Protect Her Child an Acceptable Solution When Her Child Witnesses Domestic Violence?* 69 FORDHAM L. REV. 1487, 1492 (2001).

⁷³ See, e.g., *Bryan L.*, 565 N.Y.S.2d at 972-73 (dismissing neglect petitions against parents where the father abused the children's mother in their presence, and requiring evidence of "imminent danger" to support a finding of neglect); *Lonell J.*, 673 N.Y.S.2d at 117 (finding the family court decision, which concluded that the child neglect statute does not cover exposure to domestic violence, in error).

⁷⁴ *Bryan L.*, 565 N.Y.S.2d at 972-73. See also Trepiccione, *supra* note 72, at 1492 (discussing the legal requirements and interpretations of the Family Court Act in the early 1990s).

⁷⁵ Trepiccione, *supra* note 72, at 1492.

⁷⁶ *In re Glenn G.*, 587 N.Y.S.2d 464, 470 (Fam. Ct. 1992) (citing N.Y. DOM. REL. LAW § 1012(f)(i)(B) to impose strict liability finding of neglect on the abused mother).

⁷⁷ *Id.* at 465.

⁷⁸ *Id.*

suspected child maltreatment after the hospital medically examined the children.⁷⁹ The mother was charged with child abuse and child neglect based on her failure to protect the children.⁸⁰

This was the first case in New York in which expert testimony on “Battered Woman Syndrome” was permitted during the fact-finding stage of child dependency proceedings.⁸¹ Two experts testified at the hearing and described the cycle of violence typical in domestic violence situations.⁸² After Ms. G testified that her mother-in-law repeatedly advised her to “just endure her situation,”⁸³ the second expert helped explain reasons why Ms. G did not leave.⁸⁴ The expert concluded that comments from relatives were instrumental in reinforcing Mrs. G’s helplessness in the situation.⁸⁵

The case of *In re Glenn G.* highlights some of the misconceptions about a battered mother’s efforts to protect her children. In the mid-1990s, the case also provided a basis and justification for ACS to adopt practices of child removal based on the assumption that an abused mother is “unable” to protect her children. Ms. G had moved to Florida to escape her abuser. She only returned to her abuser after he located her, admitted fault, resolved to change, and initiated a “campaign of telephonic harassment” that made her feel that she was imposing upon her sister.⁸⁶ Once Ms. G. was back in New York, the abuse continued and the Court stated that the mother’s efforts to protect herself and her children were “meager.”⁸⁷ Experts testified that she stayed only because she believed she had few options to protect herself and her children.⁸⁸ However, the Court reasoned that since she was powerless to stop the abuse, her “actions were manifestly inadequate to protect her children”⁸⁹ Essentially, she was guilty of “failure to protect” due to her inability to stop the dangers that her abuser posed.⁹⁰ By the mid-1990s, New York case law’s broad definition of a parent’s failure to protect under the neglect statute would pave the way for ACS to remove children and sustain charges of neglect against battered mothers who did not leave their abusers.

Moreover, in the mid-1990s New York courts ruled that a child’s exposure to domestic violence could constitute child neglect under the Family Court Act. Two factors played a significant role in the expansion of the law during this period: 1) the influence of social science research on the effects of exposure to domestic violence on children; and 2) the legislative findings in the Memorandum in Support for the 1996 amendment. Court decisions from the mid-

⁷⁹ *Id.*

⁸⁰ *Id.* at 466.

⁸¹ See Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the “Protected Child” in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1101 (1995).

⁸² *Glenn G.*, 587 N.Y.S.2d at 469.

⁸³ *Id.* at 465.

⁸⁴ *Id.*

⁸⁵ *Id.* at 469.

⁸⁶ *Glenn G.*, 587 N.Y.S.2d at 468.

⁸⁷ *Id.*

⁸⁸ *Id.* at 469.

⁸⁹ *Id.* at 470.

⁹⁰ See generally V. Pualani Enos, *Prosecuting Battered Mothers: State Law’s Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN’S L.J. 229 (discussing criminal prosecutions for failure to protect and criticizing the strict liability standard of the child neglect statute set forth in *In re Glenn G.*).

1990s reveal how the court broadly interpreted and applied the child neglect statute to encompass the growing concern that a child's exposure to domestic violence is harmful.⁹¹

In *In re Lonell J.*, the New York Appellate Division expanded the definition of child neglect and ruled that evidence of domestic violence in the presence of children is sufficient to establish child neglect.⁹² The court further held that expert testimony was not required to prove that exposure to domestic violence impaired a child's mental or emotional condition or created an imminent danger of such impairment.⁹³ The court reasoned that exposure to domestic violence was covered by the statute under its "catch-all provision."⁹⁴ Under the Family Court Act, a child may be neglected if a parent fails to exercise minimum care "by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof."⁹⁵ The statute does not define "harm" or "substantial risk" of harm except by example; the last clause in this series of examples is the catch-all phrase: "any other acts of a similarly serious nature requiring the aid of the court."⁹⁶ The court in *Lonell J.* asserted that the legislature added this catch-all provision intending that the examples in the statute are not an exhaustive list.⁹⁷ Therefore, explaining that exposure to domestic violence is a harm "of a similarly serious nature," the court concluded that allowing a child to witness domestic violence could constitute a finding of neglect.⁹⁸

What is significant about this case is that the court supported its analysis by citing and relying upon the 1996 legislative Memorandum in Support and several studies showing the effects of domestic violence on children. For example, the court stated that "[t]he hearing court's interpretation of Family Court Act § 1012 was unnecessarily narrow, especially in light of the legislative pronouncements on domestic violence"⁹⁹ The court stressed that in the 1996 legislative findings, "the Legislature cited several studies proving that children in violent homes experience delayed development [and] . . . depression, and often become the victims of abuse themselves"¹⁰⁰ Also, ruling that expert testimony is not required to find neglect, the court cited research articles and stated, "[w]hile violence between parents adversely affects all children, younger children in particular are most likely to suffer from psychosomatic illnesses and arrested development"¹⁰¹

At this point in the historical progression of the issue, the courts view exposure to domestic violence as a well-established harm to children — a well-documented fact and a problem of great public concern. Scientific research from the 1980s and early 1990s and the legislative findings in the 1996 legislative Memorandum in Support likely influenced legal analysis in the courtroom. As the New York family courts used this evidence to support broader interpretations of the law defining child neglect, this shift in the law later made it easier for ACS caseworkers to

⁹¹ See *In re Lonell J.*, 673 N.Y.S.2d 116, 118 (App. Div. 1st Dept. 1998); *In re Deandre T.*, 676 N.Y.S.2d 666, 666 (App. Div. 2nd Dept. 1998).

⁹² *Lonell J.*, 673 N.Y.S.2d at 118.

⁹³ *Id.* at 117.

⁹⁴ *Id.*

⁹⁵ N.Y. DOM. REL. LAW § 1012(f)(i)(B).

⁹⁶ *Id.*

⁹⁷ *Lonell J.*, 673 N.Y.S.2d. at 117.

⁹⁸ *Id.* at 118 (quoting N.Y. DOM. REL. LAW § 1012(f)(i)(B)).

⁹⁹ *Id.* at 117 (citation omitted).

¹⁰⁰ *Id.* at 118 (citation omitted).

¹⁰¹ *Id.* (citation omitted).

justify removing children from violent homes and supported charges of neglect against battered mothers.

In addition to the decision in *Lonell J.*, the courts continued to broadly interpret the neglect statute using the legislative findings or arguments about the effects of domestic violence. In *In re Deandre T.*, the appellate court reversed the family court and ruled that evidence that an older child witnessed a pattern of domestic violence was sufficient, even in the absence of expert testimony, to establish neglect under the Family Court Act.¹⁰² In its reasoning, the court pointed out that “[g]iven the Legislature’s awareness of and concern for the detrimental effects of domestic violence on children,” a court could find neglect based on exposure to domestic violence without expert evidence.¹⁰³ Similarly, in *In re Athena*, the appellate court held, in a two-sentence opinion, that evidence of a child witnessing domestic violence “is sufficient to show, ‘as a matter of common sense,’ that the children were in imminent danger of becoming impaired within the meaning of [the child neglect statute.]”¹⁰⁴

Thus, emphasis on the effects of domestic violence and the 1996 legislative findings enabled the court to expand the definition of “child neglect” and hold a battered mother liable for failing to prevent her child’s exposure to domestic violence. As the next section will describe, in 1996, ACS redefined its policies and practices with respect to child removal as a result of rising public concern about child abuse and neglect. As ACS reorganized, New York court decisions expanded the definition of “child neglect” to include witnessing domestic violence and enabled ACS caseworkers to remove children from battered mothers solely based on domestic violence incidents.¹⁰⁵

C. *Major Reforms in Child Welfare Services: Public Outrage, Political Choices, and Policy Reforms in the Child Welfare System.*

As the family courts found abused mothers neglectful for failing to protect their children from exposure to domestic violence, New York’s child protection caseworkers were assessing on a daily basis whether to remove children from mothers who were victims of domestic violence. Although scientific reports on domestic violence did not directly motivate policy changes in New York’s child welfare agencies, increasing public concern about child neglect and abuse motivated drastic reforms in 1996. Mayor Rudolph Giuliani of New York renamed and restructured the city’s child welfare agency and redefined the agency’s mission, implementing more policies and practices that favored child removal.

A significant factor in the acceleration of the city’s child welfare system reforms was public outrage over the abuse and fatal beating of Elisa Izquierdo at the hands of her mother in November 1995.¹⁰⁶ After Elisa was born with cocaine in her system, she was removed from her mother, Ms. Lopez, but her mother later regained custody of Elisa.¹⁰⁷ School officials, neighbors, and relatives notified the police and the city’s child welfare agency about possible neglect of the

¹⁰² *In re Deandre T.*, 676 N.Y.S.2d 666, 666 (App. Div. 2d Dept. 1998).

¹⁰³ *Id.*

¹⁰⁴ *In re Athena M.*, 253 A.D.2d 669, 669 (N.Y. App. Div. 1998).

¹⁰⁵ See generally SCOPPETTA, *supra* note 48 (describing some of the reasons for ACS policy reforms and detailing the framework for ACS systems and culture).

¹⁰⁶ *Cries for Help that Went Unanswered*, N.Y. TIMES, Nov. 27, 1995, at B3.

¹⁰⁷ *Id.*

Lopez children.¹⁰⁸ Caseworkers visited the home several times, but on the last visit either missed the signs of trouble or saw no reason to take action.¹⁰⁹ Elisa was found dead at the age of six in her mother's apartment on November 22, 1995.¹¹⁰ Elisa's tragic death outraged the New York community, and many blamed the child welfare system that was in charge of monitoring the Lopez family. One community member criticized: "How many kids have to be returned to their family only to wind up here? She's just another file to them, not a human."¹¹¹

Responding to public outcry, Mayor Giuliani established new child protection initiatives, revamped the city's child welfare agency, and attempted to calm public concerns. First, in January 1996, the Mayor created a new agency, the Administration for Children's Services (ACS), which was responsible for foster care and child-protection programs.¹¹² Child welfare services would no longer be part of the large umbrella agency of the Human Resources Administration; ACS would be a department that reported directly to Mayor Giuliani.¹¹³ Restructuring child welfare services, Mayor Giuliani stressed a new focus on children's issues.¹¹⁴

Second, in addition to structural changes, the Mayor reversed the city's basic child welfare philosophy; child welfare previously emphasized family preservation, but Giuliani replaced this principle "with an approach more oriented toward criminal justice and the protection of children."¹¹⁵ Since 1976, New York's child welfare policies and programs stressed "preventative services" for families, designed to maintain family relationships instead of removing children during family crisis.¹¹⁶ In his annual address to the City Council, Mayor Giuliani declared: "The philosophy of child welfare has been too rigidly focused on holding families together, sometimes at the cost of protecting babies and children The philosophy first, last and always has to be the protection of children."¹¹⁷ Prompted by public concern, Giuliani transformed the policy and approach of ACS from one that was preventative and family preservationist to one focused solely on the safety of the child.

Although ensuring the safety of the child is of fundamental importance, the 1996 initiatives highlight some of the key struggles and philosophical differences between child welfare advocates and battered women's advocates. Should child removal be preferred over providing services to the family to prevent foster care? Battered women's advocates argue that the "best interest of the child" also includes ensuring the safety of the abused mother.¹¹⁸ A quick, sweeping

¹⁰⁸ Frank Bruni, *Judge Told City Welfare Agency to Monitor Girl Who Was Slain*, N.Y. TIMES, Nov. 28, 1995, at A1. See David Firestone, *Two Child Welfare Employees Are Suspended in Abuse Death*, N.Y. TIMES, Apr. 30, 1996, at A1.

¹⁰⁹ Lizette Alvarez, *With Anger and Shame, a Child is Buried*, N.Y. TIMES, Nov. 30, 1995, at B1.

¹¹⁰ *Cries for Help that Went Unanswered*, N.Y. TIMES, Nov. 27, 1995, at B3.

¹¹¹ Lizette Alvarez, *In Brooklyn, Wake for Slain Child is a Forum of Grief, Shock and Rage*, N.Y. TIMES, Nov. 28, 1995, at B3.

¹¹² David Firestone, *Giuliani is Forming a New City Agency on Child Welfare*, N.Y. TIMES, Jan. 12, 1996, at A1.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Alison B. Vreeland, Note, *The Criminalization of Child Welfare in New York City: Sparing the Child or Spoiling the Family?*, 27 FORDHAM URB. L.J. 1053, 1071 (2000) (citing Governor's Memorandum, 1979 N.Y. Laws 1814 Child Welfare Act (codified at Soc. Serv. Act § 409)).

¹¹⁷ Firestone, *supra* note 108, at A1.

¹¹⁸ Schechter & Edleson, *supra* note 16, ¶ 22.

transformation from principles of “family preservation” to “child protection” may be too narrow and ineffective in practice. Individualized and case-by-case analysis of domestic violence issues and child neglect in the home may better gauge the needs of children and their battered mothers.

ACS's policy reforms led to more child protective services involvement in domestic violence cases — and consequently, resulted in greater removal of children and charges of neglect against battered mothers solely based on the child's exposure to domestic violence. In 1996, the ACS Commissioner, Nicholas Scoppetta, published a report entitled *Protecting the Children of New York: A Plan of Action* (“*Plan of Action*”), which unveiled the “framework for the transformation of ACS's practices, systems, and culture”¹¹⁹ The mission and operating principles articulated in the 1996 *Plan of Action* laid the groundwork for the future of the agency — and set the stage for systematic practices of child removal and charges of neglect against battered mothers simply because the mother is abused. Specifically, the operating principle of ACS was to “use all available means to be certain that children do not live in danger of abuse or neglect. *Any ambiguity regarding the safety of the child will be resolved in favor of removing the child from harm's way.*”¹²⁰ Following the *Plan of Action*, between 1996 and 2002, the applied practice of ACS caseworkers was often to remove a child when domestic violence was identified and to file a child neglect petition against the abused mother.¹²¹

In 2002, in *Nicholson v. Williams*, the Eastern District Court of New York put a stop to these ACS policies and practices.¹²² Trial testimony from ACS caseworkers demonstrates that the operating principles set forth in the 1996 *Plan of Action* played a significant role in the day-to-day practices of ACS caseworkers.¹²³ The court in *Nicholson* held that ACS failed to adequately train its employees regarding domestic violence and that ACS policies did not provide a “clear set of standards and guidelines to aid a caseworker in determining when the danger from domestic violence in a household reaches the point of creating imminent danger.”¹²⁴ One ACS caseworker, assigned to the case of a plaintiff in *Nicholson*, testified that the removal of the children “was in accord with ACS's stated policy of resolving any ambiguity regarding the safety of the child in favor of removing the child.”¹²⁵ The court found that, in the absence of clear guidelines, “caseworkers fall back on ACS's mission statement of resolving all ambiguity in favor of removing the child and perform many unnecessary removals.”¹²⁶

In addition to ACS's stated principles, caseworkers justified decisions to remove children in ways that paralleled the reasoning of the courts on this issue. In *Glenn G.*, the court found Ms.

¹¹⁹ SCOPPETTA, *supra* note 48, at 6.

¹²⁰ *Id.* (emphasis added).

¹²¹ See The “Failure to Protect” Working Group, *Charging Battered Mothers with ‘Failure to Protect’: Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 855 (2000) (describing the current ACS practice of removing children from battered mothers without offering appropriate services and filing neglect petitions against the mother).

¹²² *Nicholson v. Williams*, 203 F. Supp. 2d 153, 252 (E.D.N.Y. 2002). In *Nicholson*, a class-action suit was brought against ACS on behalf of Ms. Nicholson and other battered mothers who were charged with child neglect solely because their children witnessed domestic violence.

¹²³ *Id.* at 215 (“Testimony of ACS personnel demonstrates an agency-wide practice of removing children from their mother without evidence of a mother's neglect and without seeking prior judicial approval.”).

¹²⁴ *Id.* at 220.

¹²⁵ *Id.* at 179 (citing Trial Record at 1034).

¹²⁶ *Id.* at 220.

G. neglectful because she stayed in the abusive relationship; she failed to protect her child because she was unable to leave her abuser and prevent exposure of her child to violence.¹²⁷ The trial testimony from ACS caseworkers in *Nicholson* reveals that caseworkers reasoned in ways very similar to the court's legal analysis. In the vast majority of neglect petitions, the court found that ACS made "no specific indications" about the *reasons* for imminent danger to the child or *how* the battered mother failed to protect her children.¹²⁸ From the testimony, it is clear that many ACS caseworkers supported neglect petitions against battered mothers *simply* because the mothers did not leave their abusers. Specifically, one caseworker testified that she decided an infant was in "imminent danger" because the mother remained living in an apartment paid for by the abuser and was financially dependent on the abuser.¹²⁹ Another caseworker testified that she removed a mother's children because she rejected shelter services.¹³⁰ Essentially, similar to the court's analysis in *Glenn G.*, ACS caseworkers deemed a battered mother unable to protect herself and her children because she stayed with the abuser.

As New York courts found abused mothers neglectful for failing to protect their children from witnessing domestic violence, in the city's child welfare agency, ACS caseworkers were removing children from abused mothers who "allowed" exposure to domestic violence. Thus, the transformation of ACS policies in 1996 demonstrates that the operating principles of the 1996 *Plan of Action* and the court's legal analysis about battered mothers influenced the policies and practices of ACS caseworkers.

IV. RAISING DOUBTS: EXPERTS AND ADVOCATES LOOK CRITICALLY AT THE PRACTICE OF CHILD REMOVAL BASED ON EXPOSURE TO DOMESTIC VIOLENCE

In the late 1990s, experts, child advocates, and women's rights groups challenged the policy and practice of removing children and filing neglect petitions against battered mothers solely based on exposure to domestic violence. Experts disputed the widely-held view that witnessing domestic violence harms children. Also, advocates pointed out several flawed assumptions that guided findings of neglect against abused mothers. Specifically, caseworkers and courts had assumed that battered mothers had safe, viable options to leave and that battered mothers must leave their homes to be safe and ensure their children's safety.

First, experts pointed out several methodological flaws in the studies from the 1980s and early 1990s, which reported the effects on children from witnessing domestic violence. For example, Jeffrey Edleson, an expert in social work and Director of the Minnesota Center Against Violence and Abuse, published a report in 1999 reviewing many of the weaknesses in the studies.¹³¹ Although in 1994 Schecter and Edleson had mentioned in a briefing paper that "[a]

¹²⁷ *In re Glenn G.*, 587 N.Y.S.2d 464, 464 (Fam. Ct. 1992).

¹²⁸ *Nicholson v. Williams*, 203 F. Supp. 2d at 171. The court notes that the petition claimed that Ms. Nicholson "engage[d] in acts of domestic violence" and simply alleged that "she fail[ed] to cooperate with offered services designed to insure the safety of the children." *Id.* (internal quotations omitted). The court emphasized that the petition made "no specific indications of what services she had failed to cooperate with, or how any failure constituted neglect." *Id.*

¹²⁹ *Id.* at 181 (citing Trial Record at 1063-64).

¹³⁰ *Id.* at 173-74.

¹³¹ See Edleson, *supra* note 37.

number of methodological weaknesses are evident”¹³² the large number and variety of studies from the 1980s and 1990s likely overshadowed this note of criticism. Instead, the overall message of these studies — that witnessing domestic violence hurts children — maintained a powerful influence throughout the 1990s.

However, in 1999 Dr. Edleson reviewed the research studies and published a report that exposed many of the studies’ weaknesses and concluded that “defining witnessing as maltreatment is a mistake.”¹³³ In particular, he noted that a significant problem in the studies is that researchers failed to differentiate abused children from those who witness violence but are not themselves abused.¹³⁴ A second problem is that most studies drew on samples of children and their mothers who were located in shelters for battered women. Although samples from shelters are a good source of information, Dr. Edleson pointed out that living in shelters is a stressful point in a child’s life and “not representative of his or her mental health in the long run.”¹³⁵ In addition, Dr. Edleson stressed that the studies “all show *associations* between [witnessing domestic violence and the] variables, not *cause-effect* relationships.”¹³⁶ Essentially, the language of “effects” portrayed a situation and a causal relationship that was not fully supported in the research. While some children may develop problems from witnessing violence, some may not, and others may moderate problems through coping strategies.¹³⁷ Yet, after 1996, ACS caseworkers continued to remove children as a policy and practice.

The report attempted to raise awareness that a child’s exposure to violence should not be considered child neglect, but ACS caseworkers continued to file neglect petitions against battered mothers for exposing their children to domestic violence.¹³⁸ However, less than a year later, when battered mothers filed suit against ACS in *Nicholson v. Williams*, the federal court relied significantly on Dr. Edleson’s report.¹³⁹ The issues and doubts that experts raised about the effects of domestic violence on children made their way into the courtroom.

In addition to challenging the widely-held view that witnessing domestic violence harms children, scholars in the late 1990s pointed out flawed assumptions about the choices available to battered mothers. In 1999, Findlater and Kelly argued that “there is growing understanding that a battered woman” may choose to stay with a batterer because she believes it is safer for herself and

¹³² Schechter & Edleson, *supra* note 16, ¶ 13.

¹³³ Edleson, *supra* note 37, at 866.

¹³⁴ *Id.* at 844-45 (citing Karyl Silvern et al., *Retrospective Reports of Parental Partner Abuse: Relationships to Depression, Trauma Symptoms and Self-esteem Among College Students*, 10 J. FAM. VIOLENCE 177, 195 (1995) (stating that “the relationship between reported partner and child abuse should warn that research could be flawed if it is assumed that shelter samples of children have been exposed solely to partner abuse.”).

¹³⁵ *Id.* at 845.

¹³⁶ *Id.* at 865.

¹³⁷ *See Id.* at 861-63 (reviewing the literature on factors moderating the severity of problems associated with witnessing violence and describing coping strategies that children use as mechanisms to cope with violence exposure).

¹³⁸ *See Nicholson v. Williams*, 203 F. Supp. 2d at 175.

¹³⁹ *See Id.* at 197 (discussing Dr. Edleson’s report and expert testimony, which highlight that “children can be — but are not necessarily — negatively affected by witnessing domestic violence”).

her child.¹⁴⁰ Also, feminist scholars asserted that courts and caseworkers were mistakenly assuming that it is the *mother's* responsibility to leave and stop the abuse and that leaving is a safe and viable option.¹⁴¹ Scholars and advocates cited studies documenting the substantial risks to battered women upon leaving an abusive relationship, including stalking, harassment, abuse, murder, and homelessness.¹⁴²

Between 1996 and 2000, several articles and reports also exposed various flaws, mistaken assumptions, and problems associated with charging a battered mother for failure to protect her children. By pointing to weaknesses in the laws and policies, experts became advocates and raised awareness for the issue of domestic violence and child neglect. During the trial of *Nicholson v. Williams*, the plaintiffs utilized these studies, articles, and arguments to challenge ACS policies and practices.¹⁴³

V. *NICHOLSON V. WILLIAMS* AND *NICHOLSON V. SCOPPETTA*: LEGAL CHANGE FOR CHILDREN AND BATTERED MOTHERS.

In April 2000, Shawline Nicholson filed a complaint on behalf of herself and her two children, Destinee and Kendell, against officers and employees of ACS and the city of New York. Over the next few months, various mothers filed similar actions with the New York Eastern District Court. In January 2001, plaintiffs moved for class certification, which the court granted.¹⁴⁴ In *Nicholson v. Williams*, the battered mothers alleged that ACS's removal of children from their mothers' custody solely on the grounds that the mothers were victims of abuse violated substantive and procedural due process.¹⁴⁵ After a twenty-four day trial, in which forty-four witnesses testified and 212 documents were introduced, the Court enjoined ACS from removing or seeking to remove children from their mothers solely because the mothers are victims of domestic violence.¹⁴⁶ In March 2002, the District Court issued an opinion explaining the basis for the injunction.¹⁴⁷

¹⁴⁰ Findlater & Kelly, *supra* note 13, at 90 (citing Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) and JILL M. DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICES (1998)).

¹⁴¹ See Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89 (1999) (arguing that the socially constructed paradigm of mothering does not accommodate the battered mother); Jeanne A. Fugate, *Who's Failing Whom? A Critical look at the Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 279, 290-94 (2001) (asserting that courts presume a woman is an "all sacrificing mother," and expect a woman to shield her child from domestic violence in order to adequately perform her "maternal role").

¹⁴² See Randy H. Magen, *In the Best Interests of Battered Women: Reconceptualizing Allegations of Failure to Protect*, 4 CHILD MALTREATMENT 127, 131-32 (1999) (discussing several studies of separation assault and the risks associated with leaving an abusive relationship and analyzing assumptions and flaws underlying failure-to-protect cases against battered mothers).

¹⁴³ See, e.g., *Nicholson v. Williams*, 203 F.Supp. 2d at 197-98 (discussing plaintiff's expert witnesses who utilized research studies as evidence to challenge the effects of domestic violence on children).

¹⁴⁴ *Nicholson v. Williams*, 203 F.Supp. 2d at 165. The court divided the plaintiffs into two subclasses, placing the mothers into subclass A and the children into subclass B.

¹⁴⁵ *Id.* at 250.

¹⁴⁶ *Id.* at 165, 185.

¹⁴⁷ *Id.* at 153.

Judge Weinstein described each plaintiff's story of traumatic domestic abuse, sudden child removal, and tense family court proceedings. The court also carefully analyzed testimony and reports regarding: 1) the historical background of domestic violence and child welfare; 2) the views of experts on the effects of domestic violence; 3) best practices on dealing with children and abused mothers; and 4) the history of ACS policies and practices. In this hundred-page opinion, Judge Weinstein incorporated the testimony of several caseworkers, experts, and ACS officials in order to describe ACS current practices. The District Court found that, as a matter of policy and practice, ACS removed children from abused mothers in violation of their procedural and substantive due process rights solely because the mother had been abused.¹⁴⁸ The court ruled that ACS did not adequately investigate whether a mother had committed any acts of neglect before removing children.¹⁴⁹ Finally, the court found that ACS improperly prosecuted each woman for neglecting her children; ACS presumed "that [a woman] is not a fit parent and that she is not capable of raising her children" because of domestic violence at the hands of her abuser.¹⁵⁰

The case did not end there. On appeal, the Second Circuit certified several questions to the New York Court of Appeals, seeking the state court's interpretation of several provisions of the Family Court Act. The Second Circuit asked three questions upon certification:

1. Does the definition of a "neglected child" under N.Y. Family Ct. Act § 1012(f), (h) include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker?
2. Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or other caretaker constitute "danger" or "risk" to the child's "life or health," as those terms are defined in the N.Y. Family Ct. Act §§ 1022, 1024, 1026-1028?
3. Does the fact that the child witnessed such abuse suffice to demonstrate that "removal is necessary," N.Y. Family Ct. Act §§ 1022, 1024, 1027, or that "removal was in the child's best interests," N.Y. Family Ct. Act §§ 1028, 1052(b)(i)(A), or must the child protective agency offer additional, particularized evidence to justify removal?¹⁵¹

In October 2004, after almost four years of litigation, the New York Court of Appeals affirmatively answered a question that advocates, researchers, child welfare workers, and the courts had been struggling with for over a decade.¹⁵² In *Nicholson v. Scoppetta*, the court held that a child's exposure to domestic violence against his or her caretaker is, standing alone, insufficient to constitute "neglect" under New York law.¹⁵³ The court made clear that although emotional injury from witnessing domestic violence may rise to a level justifying removal, witnessing does not, by itself, presume injury or harm to the child.¹⁵⁴

¹⁴⁸ *Id.* at 250.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 252.

¹⁵¹ *Nicholson v. Scoppetta*, 344 F.3d 154, 176-77 (2d Cir. 2003).

¹⁵² *Nicholson v. Scoppetta*, 3 N.Y.3d 357 (N.Y. 2004).

¹⁵³ *Id.* at 359.

¹⁵⁴ *Id.*

The court stressed that the state must show evidence of actual impairment or imminent danger of impairment, and imminent danger “must be near or impending, not merely possible.”¹⁵⁵ As described above, one ACS caseworker testified at trial that she believed the infant was in “imminent danger” because the child’s mother lived in an apartment paid for by the abuser.¹⁵⁶ The ruling in *Nicholson v. Scopetta* would prohibit caseworkers from removing a child from her mother unless the caseworker can prove that the child faces “impending, not merely possible” danger.¹⁵⁷

In addition, the court clarified that the state must prove that the battered mother failed to exercise a minimum degree of care. It is not enough to merely show that a) the mother is a victim of abuse, and b) the children are exposed to that abuse.¹⁵⁸ For a finding of neglect, *Nicholson* requires evidence that the battered mother is responsible for the neglect.¹⁵⁹ One question left open by this causation requirement is whether a battered mother, who is unable to control the actions of her abuser, should be found responsible for causing the child’s exposure. Some might argue that the battered mother’s conduct should be evaluated with respect to what a *reasonable abused mother* might do. The court in *Nicholson* clarified this issue by imposing an objective, reasonable person standard; it stated that a parent will not be found liable of neglect if she has taken such measures as, viewed objectively, a reasonable and prudent parent would have taken to protect the child.¹⁶⁰ The court, apparently recognizing that this standard may not incorporate the difficult decisions specifically facing battered mothers, stated that what constitutes a parent’s “exercise of minimum care” may include several considerations:

[R]isks attendant to leaving, if the batterer has threatened to kill her if she does; risks attendant to staying and suffering continued abuse; risks attendant to seeking assistance through governmental channels, potentially increasing the danger to herself and her children; risks attendant to criminal prosecution against the abuser; and risks attendant to relocation.¹⁶¹

Thus, listing several factors to consider, the court explicitly addressed some of the obstacles and risks facing battered mothers and incorporated these specific concerns into the legal standard. This interpretation will likely provide valuable guidance for advocates, caseworkers, and family court judges in the future when evaluating a battered mother’s efforts to protect her children.

VI. *NICHOLSON* AND ITS IMPLICATIONS: REVERSING PAST POLICIES AND GUIDING THE FUTURE

The *Nicholson* decision not only has direct effects on New York’s family courts, child welfare system, and battered mothers, but also may have indirect implications for battered

¹⁵⁵ *Id.* at 369.

¹⁵⁶ *See Nicholson v. Williams*, 203 F. Supp. 2d at 181.

¹⁵⁷ *Nicholson v. Scopetta*, 3 N.Y.3d at 359.

¹⁵⁸ *Id.* at 368.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 370.

¹⁶¹ *Nicholson v. Scopetta*, 3 N.Y.3d at 371.

women's groups, child welfare workers, and family courts across the country as they assess domestic violence cases.

First, *Nicholson* demonstrates some of the positive effects of using class-action lawsuits to promote legal and policy changes. The fact-finding process revealed significant information about the structure, policies, and practices of ACS. Trial testimony from forty-four witnesses, including caseworkers, ACS officials, experts, and the plaintiff mothers, brought to life a story about ongoing policies and practices that affected many mothers and children. Child welfare advocate, Marcia Robinson Lowry, asserts that the "filing of a lawsuit . . . sets in motion a process that exposes the inner workings of closed systems to public scrutiny."¹⁶² Litigation raises the visibility of a set of issues and compels parties to get to the root of a problem. For example, in *Nicholson*, expert evidence was used to address a continuing question: does exposure to domestic violence *really* harm children? Use of expert evidence, such as Dr. Edleson's 1999 report, emphasized some of the weaknesses in scientific studies from the 1980s and early 1990s. Thus, the trial pressured fact-gathering and compelled a scientific, policy, and legal debate.

Second, the legal standard articulated in *Nicholson v. Scopetta* provides valuable guidance for courts and caseworkers as they evaluate domestic violence cases and assess the best interests of the family. The court ruled that a mother is not neglectful if she takes measures that a "reasonable and prudent parent" would have taken to protect the child.¹⁶³ Chief Judge Kaye further clarified this standard by listing several factors to consider in evaluating whether the mother has failed to exercise a minimum degree of care.¹⁶⁴ The court stressed that "[w]hether a particular mother in these circumstances has actually failed to exercise a minimum degree of care is necessarily dependent on facts such as the severity and frequency of the violence, and the resources and options available to her."¹⁶⁵ With these few sentences, the court provided several factors to guide caseworkers and courts in assessing domestic violence cases. But, more significantly, the court emphasized the need for an *individualized* analysis of each child and each family. With the *Plan of Action* in 1996, ACS policy became solely focused on child protection and rejected prior principles of preventative services or family preservation. The agency's operating principle, to resolve all ambiguities "in favor of removing the child from harm's way," overlooked specific concerns for battered mothers. But, *Nicholson* represents a significant effort to motivate courts and child welfare workers to look at the particular issues confronting each battered mother in a domestic violence case.

Finally, the court's decision in *Nicholson* provides incentive for greater collaboration between child welfare advocates and battered women's groups. The court stated that the elements of neglect are not satisfied when the sole allegation is that the mother has been abused and the child witnessed the abuse, but the court noted that "[t]his does not mean, however, that a child can never be 'neglected' when living in a household plagued by domestic violence."¹⁶⁶ There may be situations in which severe and continuous violence in the home causes the child to experience tremendous fear and distress; evidence of symptoms of emotional or psychological distress may lead to a finding of neglect.

¹⁶² Marcia Robinson Lowry, *How We Can Better Protect Children from Abuse and Neglect*, 8 THE FUTURE OF CHILDREN 1, 125 (Spring 1998).

¹⁶³ *Nicholson v. Scopetta*, 3 N.Y.3d at 370.

¹⁶⁴ *Id.* at 371. These factors include risks associated with leaving the abuser, risks of relocation, and risks of seeking assistance.

¹⁶⁵ *Nicholson v. Scopetta*, 3 N.Y.3d at 371 (internal citations omitted).

¹⁶⁶ *Id.*

With its careful legal analysis, the court not only motivated individualized review of the specific needs of each family, but also promoted a more comprehensive, holistic assessment to decide how best to help a family in crisis. For example, caseworkers and courts might ask: would family services or counseling help prevent foster care? Or, would shelter services be a safe and useful solution for the mother and child? Or, is violence in the home so severe and harmful to the child that state intervention is necessary? Historically, child welfare groups and battered women's advocates experienced tensions because of their differing approaches to the problem of violence. Perhaps the *Nicholson* decision reveals that a more collaborative approach could effectively protect the family as a whole. Training child welfare workers on domestic violence issues may help guide caseworkers when they investigate child neglect reports. Also, shelter programs could establish more services for children who have witnessed domestic violence at home. A single-operating principle, such as "remove all children" or "preserve all families," fails to incorporate the unique concerns and complexities of a battered mother's family. Future movement towards an integrated, collaborative approach that addresses both the needs of children and their battered mothers is truly in the best interests of the family.