

# When In Doubt, Take Them Out: Removal of Children from Victims of Domestic Violence Ten Years After *Nicholson v. Williams*<sup>1</sup>

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## INTRODUCTION

“[C]onsider what it means when the same court system that threatens to remove a woman’s children because she has exposed them to an abusive partner also tells her, if only by example, that they will not punish a man who has assaulted her dozens, perhaps hundreds of times.”<sup>2</sup>

Domestic violence is the leading cause of injury to women in the U.S.<sup>3</sup> Far more Americans, mostly women, have been killed in the last dozen years at the hands of their partners than in the wars in Iraq and Afghanistan.<sup>4</sup> Worldwide, women ages 15 to 44 are more likely to die or be maimed as a result of male violence than as a consequence of war, cancer, malaria and traffic accidents combined.<sup>5</sup>

Since the passage of the Violence Against Women Act in 1994, federal, state and city agencies have made efforts to combat domestic violence. In New York State in particular, Governor Andrew Cuomo created the Office for the Prevention of Domestic Violence<sup>6</sup> and former Mayor Michael Bloomberg created the Mayor’s Office to Combat Domestic Violence.<sup>7</sup> Until 2002, however, mothers who had been victims of domestic violence in New York were often victimized

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1. 203 F. Supp. 2d 153 (E.D.N.Y.2002).

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2. Evan Stark, *Nicholson v. Williams Revisited: When Good People Do Bad Things*, 82 DENV. U. L. REV. 691, 706 (2005).

3. *National Domestic Violence Statistics*, ARKANSAS COALITION AGAINST DOMESTIC VIOLENCE, [http://www.domesticpeace.com/ed\\_nationalstats.html](http://www.domesticpeace.com/ed_nationalstats.html) (last visited Feb. 16, 2015).

4. Nicholas Kristof, Op-Ed., *To End the Abuse, She Grabbed a Knife*, N.Y. TIMES, Mar. 8, 2014, at SR1.

5. *Id.* Although this Article focuses solely on female victims of domestic violence since women comprise the majority of victims, there are clearly instances of male victims. There are also incidences of domestic violence in LGBT relationships which are not explored in this Article.

6. OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, <http://opdv.state.ny.us/aboutopdv/index.html> (last visited Feb. 11, 2015).

7. NYC MAYOR’S OFFICE TO COMBAT DOMESTIC VIOLENCE, <http://www.nyc.gov/html/ocdv/html/about/about.shtml> (last visited Feb. 11, 2015).

twice: first by their abusers, and then by having their children taken away from them..

On March 18, 2002, Judge Jack Weinstein dramatically changed New York policy towards victims of domestic abuse.<sup>8</sup> With his sweeping decision in *Nicholson v. Williams*,<sup>9</sup> he concluded that a mother's inability to prevent her children from witnessing domestic violence does not in itself constitute neglect, and therefore cannot be the sole basis for an administrative agency's removal of her children from their family home.<sup>10</sup> The court found that administrative agencies in New York had perpetrated a number of wrongs against battered mothers, including failing to provide the necessary services to ensure the protection of the mothers and children, and "unnecessarily routinely prosecut[ing] mothers for neglect and remov[ing] their children where the mothers have been the victims of significant domestic violence, and where the mothers themselves have done nothing wrong."<sup>11</sup> This decision was subsequently upheld by the New York Court of Appeals, which held that merely witnessing violence does not rise to the level of neglect that automatically necessitates emergency removal, even though the emotional injury to a child that results from witnessing domestic violence can satisfy the definition of a "neglected child" and require the emergency removal of that child without a court order.<sup>12</sup>

The plaintiffs' circumstances in the *Nicholson* case were illustrative of the "flawed understanding of domestic violence"<sup>13</sup> that permeated the child welfare system and prevented the appropriate treatment of mothers who were victims of domestic violence. This article explains the holdings of the *Nicholson* cases and explores why there are still instances where the practices of New York State's Administration for Children's Services ("ACS") victimize mothers. ACS has changed its policies and practices in the past ten years and has made some improvement in holding abusers accountable. Nevertheless, ACS employees continue to regularly allege neglect against battered mothers, who are much easier targets. ACS still consistently fails to offer adequate services to victims of domestic violence before prosecuting them or removing their children. ACS employees are often too ready to judge victims and are frequently not equipped to make sensitive decisions.

To understand why these practices continue even after the clear holding in *Nicholson*, we must examine the institutional and psychological factors that provide resistance to change. As with any large bureaucracy, ACS policies are inevitably designed to preserve the organization. The risk to the organization of leaving a child in a family environment that ends up being fatal with the ensuing headline-grabbing publicity lurks in the background of the decision-making

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8. Dorchen A. Leidholdt, Director, Center for Battered Women's Legal Services,, Sanctuary for Families, Remarks at the Edith I. Spivack Award Ceremony, New York County Lawyers' Association's Women's Rights Committee (Apr. 4, 2013) (transcript available at [https://www.nycla.org/siteFiles/Publications/Publications1607\\_0.pdf](https://www.nycla.org/siteFiles/Publications/Publications1607_0.pdf)).

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

10. *Id.* at 163-64.

11. *Id.* at 228-29.

12. *Nicholson v. Scopetta*, 820 N.E.2d 840, 854 (N.Y. 2004).

13. Stark, *supra* note 2, at 691.

process. This risk may place unconscious pressure on ACS employees to err on the side of caution. In addition, a large case load adds to the pressure to resolve situations rapidly, without gaining a full understanding of the dynamics of domestic violence. Without such an understanding, it is difficult to evaluate whether the violence is a one-time event or a continuing pattern of abuse and to develop alternatives for the family.

Part I of this article reviews the dynamics of the “stubborn problem” of domestic violence and why abused women are often unable to leave their batterers. Part II examines the system of child welfare in New York and explains the ways in which aspects of the system have influenced the approach child protective workers take to resolve the problem. Part III explores the holdings of the *Nicholson* cases and their influence on the policies regarding removal of children. Part IV examines several recent instances where victims have been improperly treated by ACS employees. Part V concludes with recommendations for potential improvements to the system.

### I. UNDERSTANDING DOMESTIC VIOLENCE

“His jealousy soon escalated to violence, and Camila was trapped in cycles of abuse, separation, reunion and greater abuse. She suffered a slow destruction of her sense of self: “I felt like a worm,” she says, “ugly, black, good for nothing. I felt no one else would love me.”<sup>14</sup>

Domestic violence is a pattern of gender-based intimate partner abuse, designed to harm the physical and psychological well-being of the victims. Despite increased awareness of the effects of domestic violence in the legal system and society at large, and despite efforts of advocacy organizations like Sanctuary for Families,<sup>15</sup> Legal Momentum, and Safe Horizons, domestic violence remains a challenging problem. According to the World Health Organization, “thirty-five percent of women worldwide have been sexually assaulted or subjected to domestic violence.”<sup>16</sup> Domestic violence “strikes one American woman in four and claims a life in the United States every six hours. . . American women are twice as likely to suffer domestic violence as breast cancer, and the abuse is particularly shattering because it comes from those we have loved.”<sup>17</sup> A woman is beaten every 15 seconds in the United States.<sup>18</sup> As Manhattan District Attorney Cyrus R. Vance noted recently, “domestic violence [has] remained a stubborn problem in the city even as murder, assault and other violent crimes have fallen significantly in the last decade. The office prosecuted 6,500 cases in 2013, up from 5,600 a decade ago.”<sup>19</sup> The movement to combat domestic violence in the U.S. began in the 1970s when advocates for women

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14. SANCTUARY FOR FAMILIES, [http://www.sanctuaryforfamilies.org/index.php?option=com\\_content&task=view&id=153&Itemid=176](http://www.sanctuaryforfamilies.org/index.php?option=com_content&task=view&id=153&Itemid=176) (last visited Feb. 16, 2015).

15. The author of this article served on the Board of Trustees for Sanctuary for Families from 2004-2013.

16. Nicholas Kristof, *How Brave Girls Helped Crack a Taboo*, N.Y. TIMES, Jan. 15, 2014, at A27.

17. *Id.*

18. National Domestic Violence Statistics, *supra* note 3.

19. James C. McKinley, Jr., *Center That Aids Domestic Violence Victims Opens in Manhattan*, N.Y. TIMES Mar. 12, 2014, at A25.

began to focus on creating emergency shelters for victims of domestic violence and their children.<sup>20</sup> Activists began to turn to the civil and criminal justice systems to hold abusers accountable. Non-profit organizations focusing for the first time on this issue effectively implemented societal, cultural, and legal changes to improve the safety and security of women in intimate relationships. Legal efforts included enforcement of existing civil and criminal legal remedies for victims of domestic violence, and the development of additional remedies to respond to the needs of victims. Training of police, prosecutors, and judges in ways to identify domestic violence, and how to collect evidence and present it in court, led to improved enforcement of state and federal criminal laws.<sup>21</sup>

The 1990s brought further dramatic improvements for victims. In 1994, Congress passed the Violence Against Women Act (VAWA), which was the first national-level, comprehensive legal response to domestic violence and required the interstate enforcement of civil protection orders.<sup>22</sup> In the same year, New York State passed the Family Protection and Domestic Violence Intervention Act, which eliminated the need for victims to choose between civil and criminal remedies. This act also “imposed a state-wide mandatory arrest law, requiring police officers to make an arrest for domestic violence felonies, violations of stay-away orders of protection, and family offenses committed in violation of an order of protection.”<sup>23</sup>

Despite these achievements, there is a continued lack of understanding of the dynamics of domestic violence on the part of the judiciary, law enforcement, welfare agencies and the general public. Domestic violence manifests not only in physical assault, but also through a pattern of intimidation, isolation and control over victims. As Dr. Evan Stark has stated:

[W]e have come to realize that the most devastating context for battering is when minor physical abuse is embedded in a pattern that deprives women of basic rights and resources, exploits them sexually and often monetarily, isolates them from friends, family, professionals and other potential sources of support, and implements a regime of regulation over everyday affairs.<sup>24</sup>

This kind of coercive control is not always apparent to an outside viewer. The abuser gains access to an intimate knowledge of the victim’s life, and uses that knowledge to control the victim even he is not with her. He knows her habits, her fears, and her extended family. This intimate knowledge allows batterers to manipulate the emotions of victims and to use their knowledge to create problems in their lives.

Domestic violence encompasses many kinds of abusive behavior. Perpetrators use a variety of psychological activities to intimidate their victims, including brandishing weapons, threats of harm against the victim and her family, and threats to kidnap the victim’s children. Abusers try to isolate their

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20. Julie A. Domonkos, *The Evolution of the Justice System’s Response to Domestic Violence in New York State* in *LAWYER’S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM*, 1 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 5th ed. 2006).

21. *Id.*

22. *Id.*

23. Domonkos, *supra* note 20, at 1-2.

24. Stark, *supra* note 2, at 713.

victims and limit their contact with others.<sup>25</sup> They misinform their victims, through tactics such as lying and withholding information about the victims' ability to legally remain in the U.S. or their ability to retain custody of their children. Coercive and violent sex, as well as other forms of physical abuse, are typical. Batterers also often use the legal system against the victim, by threatening deportation, as well as by threatening to report drug abuse and falsely reporting the victim to law enforcement so the victim is forced to defend herself instead of protecting herself from the abuser. As we will see in detail below, the abuser may threaten to file reports or actually file reports with social service agencies to make the victim appear to be a neglectful mother. The abuser may also prevent the victim from becoming financially self-sufficient in order to maintain power and control.

A common misconception of outside observers is the belief that a battered woman can leave an abusive relationship if she really wants to. This view makes intuitive sense, but it ignores emotional, financial and other barriers that prevent women from leaving.<sup>26</sup> For example, if the abuser is the sole income provider in the family, a mother may reject leaving as an option and put the financial well-being of her children ahead of her own safety. There is a shortage of shelters specifically for women and children fleeing an abuser, and they are often forced to stay in homeless shelters. Rather than subjecting her children to such a dangerous environment, a woman may decide to remain with her abuser. A woman may also stay in a violent relationship because she believes that leaving would place her and her children at an even greater risk of harm. There is evidence to support such fears, since "the risk of femicide increases directly after separation."<sup>27</sup> Batterers escalate the violence when a woman tries to leave or shows signs of independence.<sup>28</sup> Studies show that "[N]early 90 percent of intimate partner homicides by men have been shown to involve a documented history of domestic violence, and a majority of these killings take place during or following separation."<sup>29</sup>

Women often stay due to legal and immigration concerns, fear of losing their children, cultural or religious prohibitions on divorce, or a lack of family support for the transition.<sup>30</sup> Some victims start off as victims of sex trafficking and don't speak English.<sup>31</sup> Some victims reason that they will sacrifice themselves so their children will have a father or a home: "She stayed with a

25. See *infra* Part 5(c).

26. Susan McGee, *Why Battered Women Stay [Actually, Why Some Battered Women Sometimes Stay]*, STOPVIOLENCE.COM, <http://stopviolence.com/domviol/whytheystay.htm> (last visited Feb, 16, 2015).

27. Colleen Friend, Aron Shlonsky & Liz Lambert, *From Evolving Discourses to New Practice Approaches in Domestic Violence and Child Protective Services*, 30 CHILD. & YOUTH SERVICES REV. , 689, 690 (2008). See also Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65-6 (1991) (developing the term "separation assault" to describe the intensified violent assault an abuser inflicts upon his victim as punishment for her attempting to leave the relationship).

28. LUNDY BANCROFT, JAY G. SILVERMAN & DANIEL RITCHIE, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 14 (2d ed. 2011).

29. *Id.* at 14.

30. *Id.*

31. Interviews with Dorchen Leidholdt, Director of the Center for Battered Women's Legal Services, Sanctuary for Families.

violent boyfriend for years, she said, because he was the father of her daughters and was always so apologetic afterward—and also because that was what she had been told was a woman’s lot in life.”<sup>32</sup> Even after they leave, victims may still believe that their children need involvement with the father. Some victims stay because there is no other place for them to go. There are also more subtle psychological reasons why victims remain in abusive situations. A batterer creates a feeling of powerlessness in his victim and may force her to believe she must choose between her own safety and that of her children. In conclusion, a woman who remains with her children in a violent environment is not necessarily neglecting her children. She may be weighing two bad alternatives and choosing the lesser of two evils.

## II. THE CONCEPT OF THE FAILURE TO PROTECT

“[C]hild protection is predisposed by its mission, programmatic structure and peculiar role in our society to allow and may even compel even its most progressive personnel to engage in morally and constitutionally indefensible practices with respect to mothers. . . .”<sup>33</sup>

In situations of abuse, law enforcement and advocacy efforts are focused on protecting the victim from the abuser. When the victim is a mother, such efforts intuitively should involve protection of the entire family. Unfortunately, a misplaced effort to protect children from the impact of witnessing domestic violence has resulted in an injustice perpetrated on mothers. In New York City, the Administration for Children’s Services (“ACS”), the nation’s largest Child Protective Services (“CPS”) agency, has engaged in the presumptive removal of children from battered mothers. CPS has charged these victims with neglect on the theory that they “engaged” in acts of domestic violence and failed to protect their children from witnessing such acts. Consequently, “victims of domestic violence often suffer dual abuse, first in the hands of their assailants, and then in the hands of the system.”<sup>34</sup>

### A. Child Protection in New York

While there are federal guidelines and requirements for child protection,<sup>35</sup> the primary responsibility for such protection rests with each state.<sup>36</sup> The system of child protection in New York is complicated and multilayered. Child abuse is defined in New York in the Social Services Law<sup>37</sup> and the Family Court Act.<sup>38</sup>

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32. Kristof, *supra* note 4.

33. Stark, *supra* note 2, at 693.

34. Beth A. Mandel, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholson v. Williams*, 73 U. CIN.LL. REV. 1131, 1131 (2005).

35. See *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption*, CHILD WELFARE INFORMATION GATEWAY 1 (April 2012), <https://www.childwelfare.gov/pubpdfs/majorfedlegis.pdf>. (“The Federal Government started providing grants to States for preventive and protective services and foster care payments in 1935 with the Child Welfare Services Program, Title IV-B of the Social Security Act.”)

36. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 165 (E.D.N.Y. 2002).

37. N.Y. Soc. Serv. Law § 412 (McKinney 2014).

Section 1012(f) of the New York Family Court Act defines a neglected child as 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 . . . to exercise a minimum degree of care.”<sup>39</sup> The minimum degree of care includes supplying the child with adequate food, clothing, shelter, and education as well as providing proper supervision.<sup>40</sup> The Act gives broad authority to the state to investigate and protect against child abuse and neglect.<sup>41</sup>

The failure-to-protect doctrine stems from the premise that parents have an obligation to protect their children from avoidable harm.<sup>42</sup> Prior to the *Nicholson* case, physical violence perpetrated by one parent against another could constitute child neglect.<sup>43</sup> As late as 1998, the statutory requirement that actual harm or substantial risk of harm to the child be proven could be met by the mere presence of domestic violence.<sup>44</sup> “‘Failure to protect’ [charges] . . . arise when parents do not prevent another person from abusing the children in their care, or even when they permit these children to watch *them* being abused.”<sup>45</sup> It is important to note that defendants charged and convicted with failure to protect are almost exclusively female. “As one advocate stated, ‘In the 16 years I’ve worked in the courts, I have never seen a father charged with failure to protect when the mom is the abuser. Yet, in virtually every case where Dad is the abuser, we charge Mom with failure to protect.’”<sup>46</sup> Cases involving “failure to protect” typically evidence the view that the mother did not perform her “maternal” role adequately to prevent the child from experiencing the abuse. Often the mother is herself a victim of abuse, and the courts may consider that she therefore knew or should have known about the batterer’s tendency to abuse. However, “[s]uch decisions ignore the special circumstances of battered women, which courts have considered in other contexts, such as when women are tried for murdering their abusers.”<sup>47</sup> Studies of state courts reveal a substantive gender bias in abuse proceedings:<sup>48</sup> “In 46.2% of the cases in which ACS files a petition of neglect or abuse involving domestic violence, the batterer is not listed at all, meaning that in these cases, the victim is held by the system to answer for the batterer’s abuse.”<sup>49</sup>

The predominance of women as persons charged with child abuse and neglect is often overlooked because we have become so accustomed to seeing

38. N.Y. Fam. Ct. Act § 1012 (McKinney 2014).

39. *Id.* at (f).

40. *Id.*

41. See N.Y. Fam. Ct. Act § 1012 practice cmt., (McKinney 2014).

42. Friend, Shlonsky & Lambert, *supra* note 27, at 690.

43. David Lansner, *The Nicholson Decisions: New York’s Response to ‘Failure to Protect’ Allegations*, ABA COMMISSION ON DOMESTIC VIOLENCE, [https://www.americanbar.org/newsletter/publications/cdv\\_enewsletter\\_home/vol12\\_expert1.html](https://www.americanbar.org/newsletter/publications/cdv_enewsletter_home/vol12_expert1.html) (last visited Feb. 16, 2015).

44. See N.Y. Fam. Ct. Act § 1012 practice cmt., (McKinney 2014).

45. Jeanne A. Fugate, Note, *Who’s Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 273 (2001).

46. *Id.* at 274.

47. *Id.* at 280.

48. *Id.* at 287.

49. Mandel, *supra* note 34, at 1143.

women in the courtrooms of Family Court. This ubiquity has led to an internalization of the “bad mother” as the “person who is brought into Family Court on child protection charges, and [a] compar[ison of] her to the mythical ‘ideal mother’ who would never be charged with any kind of child abuse or neglect.”<sup>50</sup> Commentators have noted that there is also an “implicit motherhood bias”<sup>51</sup> in the child welfare system.

For an example of an implicit motherhood bias being harmful in a Family Court proceeding, imagine that a judge carries stereotypes about a ‘good’ mother being selfless and subjugating her own needs to those of her children, and a ‘bad’ mother as one who is putting some other need before her children’s needs. Now, when that judge is presiding over actual cases, she is implicitly seeing a particular litigant as a ‘bad mother,’ if, for instance, the litigant uses illegal drugs, or if she is in love with and lives with a batterer, or, perhaps, even if she works the night shift.<sup>52</sup>

Similarly, when case workers interact with a mother who is a victim of abuse, they are unconsciously evaluating her parenting ability against an ideal image of the perfect mother.

In addition, the issue of racial bias plays a role in the system. Scholars observing the Family Court “have long criticized the overrepresentation of low-income litigants of color, characterizing Family Court as the ‘poor person’s court,’ and have questioned whether the family law system itself is inherently discriminatory toward persons of color.”<sup>53</sup> In 2002, black individuals constituted 13% of the population as a whole, while comprising 37% of the foster care population.<sup>54</sup> Various scholars and practitioners have referred to the child welfare system as an “apartheid institution.”<sup>55</sup> Discussion of this problem is beyond the scope of this article, but remains fertile ground for further exploration.

## B. ACS Policy in New York

The child protection system in New York State begins with the Office of Children and Family Services (“OCFS”), which regulates and monitors local service agencies and maintains the State Central Register for Child Abuse and Maltreatment (“SCR”). The State delegates responsibility for enforcing child protection laws to counties and municipalities.<sup>56</sup> New York State is divided into fifty-eight local social services districts. The five boroughs of New York City comprise one district. In New York City, the primary agency responsible for protecting children against abuse is ACS.<sup>57</sup>

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50. Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. LL. & SOC. CHANGE 555, 556 (2012).

51. *Id.* at 559.

52. *Id.* at 565-66.

53. *Id.* at 557.

54. Mandel, *supra* note 34, at 1150.

55. *Id.* at 1149.

56. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 166 (E.D.N.Y.2002).

57. NYC ADMINISTRATION FOR CHILDREN’S SERVICES, <http://www.nyc.gov/html/acs/html/home/home.shtml>.



The State Central Register is the conduit through which all investigations regarding child abuse and neglect are initiated. The Register maintains a hotline, and the most common way a case is initiated is when someone makes a report of abuse or neglect. Reports come in from “mandated reporters” or *anyone* who suspects or claims to suspect that a child is being abused or maltreated.<sup>58</sup> There is no screening of calls to the hotline, and therefore reporting can become an effective tool for batterers to keep control of their victims. For example, a caller can report a mother for allegedly neglecting to take her child on scheduled doctor’s visits. Victims can be subject to repeat ACS investigations triggered by calls to the hotline based solely on inventions of the batterers, and “[a] person who makes a report is immune from liability even if the report is eventually proven false.”<sup>59</sup>

Once a call comes in with allegations of suspected child abuse or neglect, the report is transmitted to the local child protective services, like ACS. When an ACS field office receives a report from SCR, an employee forwards it to a supervisor (“Supervisor”). The Supervisor assigns a caseworker to investigate. The investigation must take place within twenty-four hours of the report. A “Child Protective Manager” (“CPM”), who oversees the Supervisor-Caseworker team, “approves major decisions such as removing a child or prosecuting a mother.”<sup>60</sup>

ACS is responsible for completing its investigations of complaints referred by SCR within sixty days.<sup>61</sup> ACS caseworkers will visit the home, interview the parents and children and determine whether there is a risk of harm to the children. When the investigation is completed, ACS must determine whether any evidence supports the allegations. If ACS concludes there is such evidence, it declares the report “indicated” and transmits its conclusions and supporting reasons to SCR.<sup>62</sup> There is no formal hearing at which the parents have the right to be heard before the report is filed.<sup>63</sup>

If there is a risk, ACS must decide whether a child must be removed or whether provision of services may be sufficient to prevent removal. In theory, ACS may remove a child only if it first made appropriate and reasonable efforts to prevent or eliminate the need for removal.<sup>64</sup> The reality confronted by the *Nicholson* court was that ACS was routinely removing children without such efforts.<sup>65</sup>

No department has responsibility for independently assessing the ACS conclusion and there is no formal hearing to evaluate the decision.<sup>66</sup> A report of “indicated” can have severe consequences on an individual’s record. While SCR is required to keep report records confidential, many individuals and

58. Lecture notes of Dorchen Leidholdt, Adjunct Professor, Columbia Law School(Feb. 6, 2015).

59. *Nicholson*, 203 F. Supp. 2d at 166.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 167.

64. *Id.*

65. *See id.* at 211 (explaining that ACS fails to offer adequate services to mothers before prosecuting them or removing their children).

66. *Id.* at 166.

organizations are statutorily authorized to access the records.<sup>67</sup> Therefore, a report of “indicated” may have consequences for an individual’s employment, educational and financial opportunities.

If ACS determines that a child is at risk of harm, there is an obligation to prepare a “family service plan” to attempt to avert that risk. The agency must provide preventive services, including cash assistance, the assignment of a homemaker, and provision of parenting classes and rent subsidies. If there is domestic violence, the caseworker can assist the victim to obtain an order of protection, provide counseling services and find an emergency shelter.<sup>68</sup>

The evidence in the *Nicholson* case revealed that many caseworkers displayed a lack of understanding or awareness of domestic violence. As Judge Weinstein noted:

[T]he father claimed the inherent right to beat his wife and children. . . He claims that he is verbally and physically abusive for the cardinal reason of maintaining order and good behavior among his family members. Despite this report, ACS did not help Ms. Udoh [one of the plaintiffs] leave or attempt to remove Mr. Udoh from the household, or limit his contact with his wife or children.<sup>69</sup>

If a caseworker believes that there is a risk of physical injury or harm to a child, they are permitted to remove the child from the household. Removal for more than twenty-four hours requires the commencement of an Article 10 proceeding in Family Court to have the child adjudicated as abused or neglected.<sup>70</sup> As the petitioner, ACS prosecutes actions brought in Family Court.<sup>71</sup> Once a child is removed, the parent can petition for a hearing which must be held within three court days of the application. Once ACS has filed a petition, the Family Court is required to hold a preliminary hearing “as soon as practicable” to determine whether the child’s interests require protection.<sup>72</sup> The court has the power to order removal of the child if that is judged necessary to avoid imminent danger to the child’s life or health.<sup>73</sup> Among other factors, the court must consider whether ACS made appropriate and reasonable efforts to prevent or eliminate the need for removal.<sup>74</sup> The court also determines whether imminent risk would be eliminated by a temporary order of protection directing the removal of a person from the child’s residence.<sup>75</sup>

If ACS determines that there is not enough time to file a petition and hold a preliminary hearing, it is authorized to seek, and the Family Court is empowered to issue, a preliminary order of removal.<sup>76</sup> In deciding whether to issue such an order, the court considers available protective services, including the removal of

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67. *Id.* at 167.

68. Leidholdt, *supra* note 58.

69. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 178 (E.D.N.Y. 2002).

70. *Id.* at 167. *See also* N.Y. FAM. CT. ACT § 1032(a) (McKinney 2014); N.Y. SOC. SERV. LAW §§ 397(2)(b), 424(11) (McKinney 2014).

71. *Nicholson*, 203 F.Supp. 2d. at 167.

72. *Id.*; *see also* N.Y. FAM. CT. ACT § 1027(a) (McKinney 2014).

73. NY FAM. CT. ACT § 1027(b)(i) (McKinney 2014).

74. *Id.*

75. *Id.*

76. N.Y. FAM. CT. ACT § 1022.

offending persons from the residence.<sup>77</sup> The court must consider whether the agency made reasonable efforts to prevent the removal of the child; if not, the court can order that these efforts be made.<sup>78</sup> If the court orders removal, then it will either send the child to a foster care agency or find a “suitable” person to take care of the child other than the respondent parent.

It would appear that the Family Court Act provides victims of domestic violence with adequate safeguards to prevent unnecessary removal of their children. However in reality its protections are often ignored.<sup>79</sup> As Judge Weinstein noted, “In many other cases, petitions in Family Court allege neglect and domestic violence against the mother even when she has herself committed no violence and is separated from the batterer, and is caring for her child with no evidence of harm to the child.”<sup>80</sup>

If ACS decides that there is inadequate time to obtain this expedited preliminary order, it may remove a child from her parents without a court order.<sup>81</sup> If ACS removes a child without a court order it must file a petition “forthwith,” which is generally taken to mean within twenty-four hours and no more than three business days.<sup>82</sup> However, as we will see below, ACS often interprets the rules loosely. If a child is removed prior to a court order (which must be issued only following a hearing where the parents were present and had the opportunity to be represented by counsel), the parents have the right to apply for a court hearing to secure the child’s return.<sup>83</sup> This can lead to a long and arduous fact-finding stage which places a tremendous burden on families. As Nicholas Scoppetta, former Commissioner of ACS, remarked, “Once you are in the Family Court, you are in it very often for many months before you can get to the substance of the case.”<sup>84</sup>

After provisional arrangements for the child have been determined, the court proceedings move to the fact-finding stage. At the fact-finding hearing to determine whether a child has been abused or neglected, ACS has the burden of proving its case by a preponderance of the evidence. A finding that a child is abused or neglected means that the State will continue its involvement in the family’s life for a long time. The dispositional hearing is the last phase of the proceeding. Courts have great discretion in determining whether to place the children in foster care or to return them to the custody of their parents with certain specified conditions.<sup>85</sup>

77. *Id.*

78. Leidholdt, *supra* note 58.

79. *Id.*

80. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 192 (E.D.N.Y. 2002).

81. *Id.* at 167. *See also* N.Y. SOC. SERV. LAW § 1024 (McKinney 2014) (providing for the emergency removal of children without a court order); N.Y. SOC. SERV. LAW § 417 (detailing the process by which children are taken into protective custody); *Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999) (stating that a child may be taken into protective custody without parental consent).

82. *See* N.Y. SOC. SERV. LAW § 1024(b)(iii) (McKinney 2014).

83. N.Y. SOC. SERV. LAW § 1028.

84. Jaime Perrone, Note, *Failing to Realize Nicholson’s Vision: How New York’s Child Welfare System Continues to Punish Battered Mothers*, 20 J.L. & POL’Y 641, 647 (quoting *Nicholson*, 203 F. Supp. 2d at 168).

85. *Child Protective Proceedings (Abused or Neglected Children)*, New York City Family Court, [http://www.nycourts.gov/courts/nyc/family/faqs\\_abusedchildren.shtml](http://www.nycourts.gov/courts/nyc/family/faqs_abusedchildren.shtml) (last accessed Mar. 21,

In 2002, at the time of the *Nicholson* case, the approach of child welfare agencies to battered women was embodied in a standing directive that instructed caseworkers to resolve “any ambiguity regarding the safety of the child . . . in favor of removing the child from harm’s way.”<sup>86</sup> In other words, when there is doubt about the safety of the child, remove the child immediately. In addition, there was no accountability for punitive practices in domestic violence cases, no technical assistance available to help resolve any ambiguities, and an overburdened legal staff.<sup>87</sup> Therefore, removal (with or without a court order) became the effective policy of child welfare agencies.<sup>88</sup>

An example of this approach can be seen in ACS’s treatment of Shiqipe Berisha, the mother of a two-year old child. The child’s father suddenly attacked her and dragged her across the apartment while she held her son.<sup>89</sup> The police arrested both Ms. Berisha and her batterer. The District Attorney declined to prosecute her and she was released. Despite the D.A. decision, ACS took the child into custody without a court order. Two weeks after removal of the child, Ms. Berisha went to Family Court in an attempt to get her child back. The court was unable to provide her with an attorney and refused to consider the case without one. Finally, more than a month after removal, the child was ultimately returned to his mother, but ACS continued to prosecute the mother for neglect in Family Court.<sup>90</sup>

### C. Effects on Children of Exposure to Domestic Violence

The presumption that there are traumatic effects on children of exposure to domestic violence is based on findings that “[c]hildren of battered women have been found to be at increased risk for a broad range of emotional and behavioral difficulties, including suicidality, substance abuse, depression, developmental delays, education and attention problems, and involvement in violence.”<sup>91</sup> However, there has been a “consistent failure of researchers, including the range of advocates who consulted with ACS, to conceptualize the widely documented ‘over-lap’ between domestic violence and harms to children’s welfare.”<sup>92</sup> Studies have shown that the psychological impact of being wrenched from the home and care of the mother can cause even greater damage.<sup>93</sup> Indeed, removing a child from his mother may be “more damaging to the child than doing nothing at all.”<sup>94</sup>

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86. Stark, *supra* note 2, at 693

87. *Id.* at 693–94.

88. *Id.*

89. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 189 (E.D.N.Y. 2002).

90. *Id.* at 189–90.

91. Bancroft et al., *supra* note 28, at 1.

92. Stark, *supra* note 2, at 699.

93. *Id.*

94. *Nicholson*, 203 F. Supp. 2d at 204; *see also* MICHAEL S. WALD, S. WALD, J.M. CARLSMITH & P.H. LEIDERMAN, PROTECTING ABUSED AND NEGLECTED CHILDREN 10–11 (1988). (“Attachment theory predicts several different ways in which removal from home may be harmful to a child. In addition to the pain of separation, which often is very profound, a lengthy separation from a primary caretaker may permanently impair the child’s attachment to that person, even if the separation is not

The presumption in favor of removing children from domestic violence situations unfairly places the onus on a mother to remove herself and her children from an abusive situation.<sup>95</sup> Child welfare agencies interact primarily with women with the stated objectives of creating better mothers and better environments for the children. Fathers and father-surrogates are essentially ignored. Parenting skills programs have also typically been aimed at mothers: “Given its historical tendency to define mothers as its clients, but not fathers, once CPS determined to treat exposure to domestic violence as an emergent situation requiring removal, the third background factor followed—the application of the failure to protect and neglect doctrines to non-offending parents.”<sup>96</sup> In addition to the systemic and psychological factors, political and historical factors put additional pressure on child welfare workers to err on the side of over-protecting children at the expense of their mothers.

At the time of the *Nicholson* case, the New York City child-welfare system was ripe for change.<sup>97</sup> Despite a number of previous attempts to reform the child-welfare system, there had been no lasting structural impact. For most of the 20<sup>th</sup> century, the philosophical goals of child welfare had centered on the objective of keeping families intact and providing services to help impoverished families support their children.<sup>98</sup> With the publication of research about the “battered child syndrome”<sup>99</sup> in 1962, [t]he ‘battered child’ became the subject of numerous news articles, and within a decade every state passed laws that required medical professionals to report children who showed possible signs of mistreatment. The responsibility to look into all allegations of mistreatment soon overwhelmed the resources of child-welfare agencies. They largely cast aside their mission of easing child poverty and eventually began investigating the dysfunctions surrounding more than two million children a year. The interests of children were often pitted against those of their parents, who were treated as potential suspects.”<sup>100</sup>

During the 1980s and 1990s, the approach of child welfare agencies was to remove children from substance abusing parents and “to swiftly find new permanent families for children whose parents were unable or unwilling to assume responsibility.”<sup>101</sup> This policy eventually became a subject of intense dispute between two academics, Elizabeth Bartholet and Martin Guggenheim. Professor Bartholet argued that the approach of child welfare agencies failed to protect children from abuse and neglect and advocated removing children from their biological families and placing them for adoption. Professor Guggenheim responded that future generations would regard the policy of “banishing

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permanent. Perhaps the greatest threat, however, occurs when the child is separated permanently from an attachment figure and is either unable to develop a new relationship or is denied the opportunity to do so.”)

95. *Nicholson*, 203 F. Supp. 2d at 204.

96. Stark, *supra* note 2, at 703.

97. Interview with Jane Spinak, Professor, Columbia Law School (Aug. 1, 2013).

98. Rachel Aviv, *Where is Your Mother?: A Woman's Fight to Keep Her Child*, *NEW YORKER*, Dec. 2, 2013, at 52, 55.

99. *Id.*

100. *Id.*

101. *Id.* at 56.

children from their birth families” as a tragic social experiment.<sup>102</sup> He argued that “the use of coercive state power to redistribute children from their biological parents to others deemed by the state to be superior caregivers should be restricted to rare and extreme cases, and resorted to only when less drastic measures had failed.”<sup>103</sup> The failure of policy-makers to heed his advice is evidenced by the dramatic increase in the number of children placed in foster care during that time period: the number of children entering foster care rose by nearly 250,000 children from 1980 to 2000.<sup>104</sup>

In the 1970s and early 1980s, public attention also began to be focused on the impact of domestic violence on women, leading to the creation of services to protect victims. There was developing research on the impact on victims, and in the 1980s and 1990s, a body of evidence expanded the notion of who counted as a victim: research suggested that it was harmful for children to be exposed to domestic violence.<sup>105</sup> This research led to some child protection agencies “defining exposure to domestic violence as a form of child maltreatment.” . . .<sup>106</sup> Children previously had not had not been included in the domestic violence equation as victims. The philosophical divide between advocates for domestic violence victims and advocates for children resulted in the development of child welfare policies and practices around children’s exposure to domestic violence without adequate input from experts in domestic violence. “Following the presumption that being ‘exposed’ to domestic violence harms children, CPS [ACS] and courts in many states...instituted a policy of charging battered mothers with neglect and temporarily removing their children if it was alleged that the children witnessed the violence or were otherwise exposed to it.”<sup>107</sup>

The language used in these allegations was “engaging in domestic violence”. This language implied that there were two actors engaging in the violence, instead of one batterer and one victim, and that both actors made the choice to engage in the act. For example, the language used in the neglect petition filed by ACS against Sharlene Tillett, as cited in the *Nicholson* decision, alleged that she “engage[d] in acts of domestic violence in the presence of subject child.”<sup>108</sup> The facts revealed that she had been choked by her batterer.

These child welfare policies had devastating consequences for victims of domestic violence who were “re-victimized and re-cast as potentially harmful to their offspring by the very system designed to protect their children.”<sup>109</sup>

#### D. Influence of Child Abuse Cases

Against this background, there were several headline-grabbing incidents of

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102. *Id.* at 58.

103. *Id.*

104. Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 75, 77-79 (2004).

105. Friend, Shlonsky & Lambert, *supra* note 27, at 690.

106. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 198 (E.D.N.Y. 2002).

107. Stark, *supra* note 2, at 696-97.

108. *Nicholson*, 203 F. Supp. 2d at 171. *See also, infra* Part IV (discussing the *Nicholson* decision in detail).

109. Friend, Shlonsky & Lambert, *supra* note 27, at 690.

child abuse that would reinforce the default view that removing children was the appropriate response to situations of domestic abuse.

In 1995, the story of Elisa Izquierdo made city and national headlines. Six-year old Elisa, having suffered a lifetime of abuse, was finally murdered by her mother.<sup>110</sup> Despite repeated complaints to child welfare authorities, the system missed numerous opportunities to intervene with her family and save her life.<sup>111</sup> Elisa became a symbol of a dysfunctional bureaucracy, one that allowed a drug addict to retain custody of her daughter despite numerous reports of abuse.<sup>112</sup> The resulting outcry led to an overhaul of New York City's child welfare system and the passage in Albany of Elisa's Law,<sup>113</sup> a measure that loosened the secrecy regulations in child-abuse investigations.<sup>114</sup> Among other reforms, the law required a public accounting of the events leading up to the death of any child in New York State who had been reported as abused or neglected.<sup>115</sup> An additional change was the decision of Mayor Rudolph W. Giuliani, who had cut funds from the city's child welfare agency early in his tenure, to provide funds to hire two hundred new caseworkers, reorganize the children's agency, and make it directly accountable to the Mayor. He hired Nicholas Scoppetta, who was himself raised in foster care, as the Commissioner of the newly-created Administration of Children's Services.<sup>116</sup> Commissioner Scoppetta increased the required training for caseworkers and mandated refresher courses in "risk assessment."<sup>117</sup>

Nonetheless, one year later, a judicially appointed panel of specialists found that ACS employees continued to endanger the lives of children with the same errors that led to Elisa's death.<sup>118</sup> The panel found no improvement in the quality of investigations of abuse, finding that the city failed to perform even the most rudimentary tasks required by the law.<sup>119</sup> The events and publicity inevitably created a risk-averse approach, on the part of ACS employees, towards assessing children and their families. Over the course of one year, the number of children removed by the City from their parents increased by almost 50%:<sup>120</sup> "Overwhelmed, panicked workers [were] more likely to make bad, snap

110. See Joyce Purnick, *Elisa's Death: A Year Later, Hints of Hope*, N.Y. TIMES (Nov. 21, 1996), <http://www.nytimes.com/1996/11/21/nyregion/elisa-s-death-a-year-later-hints-of-hope.html>.

111. See Joe Sexton, *Mother of Elisa Izquierdo Pleads Guilty to Murder in a Pivotal Child Abuse Case*, N.Y. TIMES (June 25, 1996), <http://www.nytimes.com/1996/06/25/nyregion/mother-of-elisa-izquierdo-pleads-guilty-to-murder-in-a-pivotalchild-abuse-case.html>. ("That Elisa was at risk had been known for years to child welfare officials, the Family Court, social workers, schoolteachers and others.").

112. Jo Craven McGinty, *State Keeps Death Files of Abused Children Secret*, N.Y. TIMES, Feb. 28, 2012, at A21.

113. N.Y. SOC. SERV. LAW § 422(a) (McKinney2014).

114. *Id.*

115. *Id.*

116. Purnick, *supra* note 110.

117. Barbara Stack, *Open Justice: Little Girl's Murder Brought New York's Juvenile Court Proceedings into the Light*, PITTSBURGH POST-GAZETTE (Sept. 24, 2001), <http://old.post-gazette.com/regionstate/20010924d2courtmainreg2.asp>.

118. Rachel L. Swarns, *Panel Faults Caseworkers in Child Abuse*, N.Y. TIMES (Aug. 14, 1997), <http://www.nytimes.com/1997/08/14/nyregion/panel-faults-caseworkers-in-child-abuse.html>.

119. *Id.*

120. Nina Bernstein, *2 Deaths Narrow Focus on Child Welfare Agency's Changes and Limits*, N.Y. TIMES, (Nov. 18, 2001), <http://www.nytimes.com/2001/11/18/nyregion/2-deaths-narrow-focus->

decisions in both directions. So more children [were] needlessly taken from homes that [were] safe, or could be made safe with the right services, even as other children [were] left in danger."<sup>121</sup>

In 1996, another incident sparked a class action lawsuit on behalf of a class represented by Marisol, a child who had been confined to a closet for several months, deprived of sustenance and both physically and sexually abused.<sup>122</sup> Marisol's aunt and foster mother had both filed reports of abuse with ACS with no response from the agency.<sup>123</sup>

Representatives of eleven children who had suffered abuse and neglect because of the failures of ACS filed a civil rights action for violation of the children's rights under the state child welfare laws, in *Marisol A. ex rel. Forbes v. Giuliani*<sup>124</sup> Marisol had originally been placed in foster care while her mother was incarcerated on drug charges. However, in 1994 ACS restored Marisol to her mother's care, despite reports that she had continued to abuse Marisol even during visits while she was in foster care. The *Marisol* case was settled in 1999 with the establishment of an advisory panel of child welfare experts that would oversee ACS's reform efforts.<sup>125</sup> In 2003, a report published by attorneys at Children's Rights entitled "Continuing Danger: A Report on Child Fatalities in New York City" concluded that there was a recurrent pattern of caseworker and agency mistakes:<sup>126</sup> "Many critics say the emphasis on removing children from their home to protect them –'When in doubt, take them out' caseworkers say— has gone too far, hurting children who, with help, would be safer with their own parents than in foster care."<sup>127</sup>

Against this background, there have been continuing incidents of parental violence towards children, reinforcing the approach of removing children to prevent abuse. In 2008, seven-year-old Nixzmary Brown was tortured, beaten and killed by her stepfather, César Rodriguez.<sup>128</sup> Her mother, Nixzaliz Santiago, ignored Rodriguez as he slammed Brown's head into a bathtub and doused her with cold water. Both Santiago and Rodriguez were charged with second-degree murder and child endangerment. Rodriguez was convicted on a verdict of first-degree manslaughter and other charges, and was sentenced to 29 years in prison. Santiago was convicted of manslaughter, assault and other charges.<sup>129</sup>

Evidence of previous abuse inflicted on Nixzmary came to light, and the news coverage of her murder case later drew public attention. Again, it was

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on-child-welfare-agency-s-changes-and-limits.html.

121. *Id.* (quoting Richard Wexler, director of the National Coalition for Child Protection Reform).

122. *Marisol A. ex rel Forbes v. Giuliani*, 929 F. Supp. 662, 670 (S.D.N.Y. 1996).

123. *Id.*

124. 126 F.3d 372 (2d Cir. 1997).

125. *Marisol A. ex rel. Forbes v. Giuliani*, 185 F.R.D. 152 (S.D.N.Y.1999), *aff'd* 218 F.3d 132 (2d Cir. 2000).

126. Continuing Danger: A Report on Child Fatalities in New York City, CHILDRENSRIGHTS.ORG, [http://web.archive.org/web/20101225073632/http://www.childrenrights.org/wp-content/uploads/2008/06/continuing\\_danger\\_february\\_2003.pdf](http://web.archive.org/web/20101225073632/http://www.childrenrights.org/wp-content/uploads/2008/06/continuing_danger_february_2003.pdf).

127. Nina Bernstein, *Pattern Cited in Missed Signs of Child Abuse*, N.Y. TIMES (July 22, 1999), <http://www.nytimes.com/1999/07/22/nyregion/pattern-cited-in-missed-signs-of-child-abuse.html>.

128. Kareem Fahim, *Mother Gets 43 Years in Death of Child*, 7, N.Y. TIMES (Nov. 12, 2008), [http://www.nytimes.com/2008/11/13/nyregion/13nixzmary.html?\\_r=0](http://www.nytimes.com/2008/11/13/nyregion/13nixzmary.html?_r=0).

129. *Id.*



found that ACS had received previous complaints about Brown's family, and ultimately disciplined six employees who were working on the investigation.<sup>130</sup> In March, 2006, a City panel created by Mayor Michael Bloomberg in response to Brown's death, advocated changes in the system.<sup>131</sup> "Nixzmary's Law" was passed in 2009, making life without parole the maximum sentence for killing a child in an "especially cruel and wanton manor."<sup>132</sup>

In 2010, in another incident of ACS failure, Marchella Pierce was found dead, after having been drugged, beaten and tied to a bed by her mother and grandmother.<sup>133</sup> The family was already under the supervision of ACS when the events unfolded, "[a]nd when she came under the watch of the city's Administration for Children's Services, an agency remade a number of times after child deaths, her well-being fell to caseworkers who, prosecutors say, essentially ignored the family."<sup>134</sup> Two former employees of the agency pleaded guilty to misdemeanor charges in December 2013.<sup>135</sup>

These repeated incidents of abuse in families under the supervision of ACS heighten the pressure on ACS workers when they encounter a situation of domestic violence. It is understandable and appropriate that ACS workers view removal of children as a possible response if they perceive potential harm to the child. However, the nuanced approach required in a situation of domestic violence involves evaluating the extent to which the abuse is directed only against the mother, whether the abuse is likely to happen again, and whether removing a child is really the optimal solution. The headline-grabbing errors in judgment increase the perceived dangers of leaving a child in a dangerous situation. However, without an adequate understanding of the dynamics of domestic violence and experience in dealing with those types of situations, it is difficult to accurately assess the actual risk to a child. For example, it is important to be able to distinguish between a one-time violent event, and a continued pattern of domestic violence. It is essential to recognize a situation of abuse where intervention could prevent future incidents. The impact of removal on a child's psychological and emotional well-being must be measured against the potential harm resulting from viewing an incident of domestic violence.<sup>136</sup> This

130. Press Release, N.Y.C. Administration for Children's Services, ACS Disciplines Staff in Brooklyn Fatality, Reorganizes Administration to Improve Child Protection Services, and Initiates DOI Investigation (Jan. 18, 2006), available at [http://www.nyc.gov/html/acs/html/pr\\_archives/pr06\\_01\\_18.shtml](http://www.nyc.gov/html/acs/html/pr_archives/pr06_01_18.shtml).

131. Sewell Chan, *City to Adopt Changes in Handling of Abuse Cases*, N.Y. TIMES (March 30, 2006), <http://www.nytimes.com/2006/03/30/nyregion/30abuse.html>.

132. Glenn Blain, *Gov. Paterson signs Nixzmary's Law*, N.Y. DAILY NEWS (Oct. 9, 2009), <http://www.nydailynews.com/news/gov-paterson-signs-nixzmary-law-article-1.381561#ixzz30UbMTG00>.

133. N.R. Kleinfield & Mosi Secret, *A Bleak Life, Cut Short at 4, Harrowing from the Start*, N.Y. TIMES (May 8, 2011), <http://www.nytimes.com/2011/05/09/nyregion/short-bleak-life-of-marchella-pierce-emaciated-4-year-old.html?pagewanted=all&r=0>.

134. *Id.*

135. Al Baker, *State Official Appointed by de Blasio as Leader of Child Welfare Agency*, N.Y. TIMES (Dec. 22, 2013), <http://www.nytimes.com/2013/12/23/nyregion/de-blasio-picks-state-social-services-official-to-lead-city-childrens-agency.html>.

136. See *Nicholson v. Williams*, 203 F. Supp. 2d 153, 199 (E.D.N.Y. 2002) ("For those children who are in homes where there is domestic violence, disruption of that bond can be even more traumatic than situations where there is no domestic violence. Dr. Stark asserted that if a child is placed in

kind of balanced reflection is difficult to do in an atmosphere of fear, time pressure and restricted resources.

The history of child abuse in New York and the recurrent errors of judgment on the part of ACS, are likely to provide a fearful and risk-averse environment for those involved in protection of children. This fear can outweigh a balanced assessment for child protective workers who “recognize that if they recommend returning a child to a deadly home ‘it will be a career ender...It will sully their reputations forever.’ They may choose a knowable tragedy, the separation of a parent and child, in order to prevent an unknowable one.”<sup>137</sup> The key is having the judgment to distinguish between a home that presents dangers for a child and a home where the mother is the victim of an abuser but a suitable mother for the child.

### III. THE ABUSIVE PRACTICES UNCOVERED BY *NICHOLSON*

“ACS unnecessarily routinely prosecutes mothers for neglect and removes their children where the mothers have been the victims of significant domestic violence, and where the mothers themselves have done nothing wrong.”<sup>138</sup>

#### A. *Nicholson v. Williams*

The case of *Nicholson v. Williams*<sup>139</sup> illustrates the ways in which ACS routinely removed children from mothers who were victims of abuse, in violation of the mothers’ and children’s substantive and procedural due process rights. The case began in 2000, when Sharwline Nicholson filed a complaint against ACS and New York City alleging that ACS had removed her children simply because she had been the victim of domestic assault, and that this removal was unwarranted and violated her and her children’s constitutional rights.<sup>140</sup> A few months later, Ekaete Udoh and Sharlene Tillett filed similar complaints.<sup>141</sup> These three women were the lead plaintiffs of a class action lawsuit involving all mothers and children similarly situated. Seventeen battered mothers provided testimony.<sup>142</sup> The court certified class action, and granted a preliminary injunction to the plaintiffs, holding that “ACS’s conduct substantially infringed on fundamental liberty interests of mothers and children without advancing compelling or substantial state interest.”<sup>143</sup> Judge Weinstein strongly criticized ACS’s “pitiless double abuse” of battered mothers.<sup>144</sup>

The injunction resulted from a 24-day trial, during which the court heard

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foster care as a result of domestic violence in the home, then he or she may view such removal as a ‘traumatic act of punishment...’”)

137. Aviv, *supra* note 98, at 54.

138. *Nicholson*, 203 F. Supp. 2d. at 228.

139. *Id.*

140. Maureen K. Collins, Comment, *Nicholson v. Williams: Who Is Failing To Protect Whom? Collaborating The Agendas of Child Welfare Agencies And Domestic Violence Services To Better Protect And Support Battered Mothers And Their Children*, 38 NEW ENG. L. REV. 725, 731 (2004).

141. *Id.*

142. *Id.*

143. *Nicholson*, 203 F. Supp. 2d. at 266.

144. *Id.* at 162–63.

testimony regarding the policies and practices of ACS, domestic violence and child welfare, and the effects of domestic violence and removal from the home on children.<sup>145</sup> The opinion included an account of the experiences of ten different women who had similar interactions with ACS.

The three lead plaintiffs' stories illustrate how the "ACS system results in the forcible and unjustified separation of abused mothers and their children."<sup>146</sup>

#### 1. Sharwline Nicholson

In 1999 Sharwline Nicholson was a single working mother of two young children.<sup>147</sup> She had an eight-year-old son from a previous relationship and a three-year-old daughter from her relationship with Claude Barnett. Mr. Barnett lived in South Carolina and made monthly visits to Brooklyn to visit the family.<sup>148</sup> On one of his visits, Ms. Nicholson told him she wanted to end their relationship and Mr. Barnett assaulted her. He had never previously acted violently towards her. This was an isolated attack, provoked by his rage that she was leaving him.

The assault had occurred during the day. Ms. Nicholson's son was at school and her daughter was in her crib sleeping in the next room. When Mr. Barnett left, Ms. Nicholson called 911, and arranged for a neighbor to care for her children while she went to the hospital. In the emergency room she discovered that she had suffered a broken arm, fractured ribs and head injuries.

Three police officers came to see her in the hospital. When she found out that she would have to stay in the hospital overnight, she gave them the names of two family members who could care for her children. Instead of bringing the children to these relatives, however, representatives of ACS removed Ms. Nicholson's children from the neighbor's home, and brought them to a temporary residence. The following day an ACS worker refused to tell Ms. Nicholson where her children were, and told her that if she wanted to see her children again she had to appear in court the next week. Despite requests from Ms. Nicholson to allow her children to stay with relatives, they were eventually placed in foster care with strangers.<sup>149</sup>

An ACS caseworker was assigned to the Nicholson case. In his deposition at trial, he conceded that it is common in domestic violence cases for ACS to wait a few days before going to court after removing a child (which is not permissible according to §1026<sup>150</sup>), because as the mother gets increasingly desperate to get her children back, she will agree to any and all of the conditions required by ACS for the children's return without the matter going to court.<sup>151</sup> The caseworker testified that he did not believe that Ms. Nicholson was actually neglectful but

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145. *Id.* at 163.

146. *Id.* at 168.

147. *Id.*

148. *Id.* at 168-69.

149. *Id.* at 170.

150. *Id.* at 168 ("If the ACS removes a child without a court order, it file[s] a petition "forthwith," which is generally taken to mean within twenty-four hours and no more than three business days.")

151. *Id.* at 170.

hoped that she would be *forced* to cooperate to protect herself and her children.<sup>152</sup> He did not file a petition with the Family Court until three business days after the children were placed in foster care.<sup>153</sup> In his testimony, he tried to justify his approach by stating that he believed it would not be safe for Ms. Nicholson and her children to return to the residence and that she had never obtained an order of protection.<sup>154</sup> If he had properly investigated the family situation, he would have discovered that Mr. Barnett lived in South Carolina, did not have a key to the apartment, and that Ms. Nicholson had tried to obtain an order of protection that had been denied because Mr. Barnett lived out of state.

Judge Weinstein concluded, "The allegations of neglect on the part of Nicholson resulting from [the case manager's] failure to properly investigate the situation evince either blatant bias against victims of domestic abuse or inexcusable ignorance of what abuse victims face."<sup>155</sup> The allegations implied that both Ms. Nicholson and Mr. Barnett engaged in acts of domestic violence in the presence of the children, when the facts clearly showed that Ms. Nicholson was merely the victim. In addition, ACS claimed that Ms. Nicholson failed to cooperate with services offered by ACS, when in reality none were offered.

On February 4, 1999, the Family Court ordered that Ms. Nicholson's children be returned to her, on the condition that she and the children stay at her cousin's home. Despite the court's ruling, there was a 14-day delay before Ms. Nicholson's children were returned to her because ACS claimed that they were concerned that there were not enough beds at the cousin's home. Although adequate housing is always a concern for managers evaluating family circumstances, this appears to have been a fabricated reason for keeping the children away from Ms. Nicholson. She was allowed to see the children only once during this time period and only under supervised visitation at an ACS foster agency. On February 18, 21 days after the removal and 14 days after the Family Court had paroled Ms. Nicholson's children to her, ACS returned her children to her.<sup>156</sup>

Following the return of Ms. Nicholson's children, ACS claimed to have difficulty visiting with her and her children and filed a warrant application. Fearing that ACS would take her children again, Ms. Nicholson sent them temporarily to Jamaica to live with her father. On April 7, Ms. Nicholson was *handcuffed* and arrested at a local post office and brought into Family Court. She explained that her children were in Jamaica and was ordered to return to court with them on April 24. She complied and the court permitted her to continue to live in her own apartment with her children, as long as she cooperated with supervision and the services offered by ACS. After Ms. Nicholson complied with these conditions, ACS eventually dropped the petition against her in August. Nevertheless, she continued to be listed on ACS records as a neglectful parent.<sup>157</sup>

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152. *Id.* at 171.

153. *Id.* at 170.

154. *Id.* at 171.

155. *Id.*

156. *Id.* at 172.

157. *Id.* at 173.

## 2. Ekaete Udoh<sup>158</sup>

Ekaete Udoh was born and raised in Nigeria, and, following an arranged marriage, came to the U.S. with her husband. She lived in Kentucky from 1977 to 1982. During that time, Ms. Udoh had five daughters and was routinely beaten by her husband. She testified that she called the police “many” times to report the abuse, but the police never arrested her husband.<sup>159</sup>

The family moved to New York in 1984, and the beatings continued. In 1985, Ms. Udoh called the police. The police came, but did not arrest Mr. Udoh and did nothing to assist Ms. Udoh or the children.<sup>160</sup> An ACS investigation in 1996 concluded that Mr. Udoh claimed that “under his Nigerian cultural upbringing, he was allowed to engage in corporal punishment as a means of controlling the ‘so-called unruly behavior of his children, and that this even extend[ed] to the disciplining of his wife’s behavior.’”<sup>161</sup> Despite this report, ACS did not help Ms. Udoh to leave or attempt to remove Mr. Udoh from the house or limit his contact with his family.

In 1999, Mr. Udoh physically assaulted one of his daughters. Ms. Udoh sent her daughter to school, but came to pick her up to take her to the doctor. When school officials discovered the cause of the injury, they reported the incident to ACS.<sup>162</sup>

On May 6, a caseworker came to interview the family and told Mr. Udoh that she would call the police if he continued to reside in the home. She brought Ms. Udoh and the children to the ACS office to file a complaint. When they returned to the home, Mr. Udoh had packed his clothes, left the house, and never came to the home again, returning to Nigeria the following year. While at the ACS offices, the caseworker told Ms. Udoh to appear in Family Court the following day. Although ACS testified that they did not consider the children to be in imminent danger if they remained with the mother, ACS filed a neglect petition against her the following day on the basis that she had “engaged” in domestic violence.<sup>163</sup> The caseworker testified that the basis for the neglect petition was the fear that no one would be home when the children (aged 12, 13, 16, and 17) returned home after school because the parents would be in Family Court. On May 7, the caseworker removed the children from school while the mother was at work. The petition filed by ACS with the court had only blank spaces where answers were required for why insufficient time was available to obtain a court order prior to removal and why removal of the children was necessary.<sup>164</sup>

On May 20, after an investigation, the Family Court ordered the children returned to the mother. Yet it took eight days for ACS to notify the foster care agency to return them. The delay prompted Legal Aid to file an application seeking immediate release of the children from ACS custody. Ironically, in this

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158. *Id.* at 176.

159. *Id.* at 177.

160. *Id.*

161. *Id.* at 177-78.

162. *Id.* at 178.

163. *Id.* at 179.

164. *Id.*

application the children's attorney noted that the delay was harming the children because, among other reasons, the foster mother refused to give the children house keys so they were *often locked out* of their foster home.<sup>165</sup>

### 3. Sharlene Tillett<sup>166</sup>

In 1995, Ms. Tillett moved from Belize to New York with her son to live with her husband.<sup>167</sup> Shortly thereafter, she and her husband separated. Ms. Tillett began a relationship with a man who grew increasingly jealous of her previous husband and became physically abusive. In August 1999, she entered the hospital to give birth to her second child, Uganda, and reported to the staff that there was a history of domestic violence against her by the father. After the birth of her child, the father drove her home but did not enter the apartment. The hospital made a report to SCR, and a caseworker from ACS visited Ms. Tillett at her apartment. The caseworker found satisfactory conditions and did not remove the child.<sup>168</sup>

The following day ACS removed Uganda without a court order based on their view that Uganda was in "imminent danger"<sup>169</sup> because Ms. Tillett and the baby were being supported by the batterer, even though Ms. Tillett reported that the batterer had moved out and that she expected family support. Ms. Tillett was breastfeeding the baby when she was removed. The following day ACS filed a neglect petition against Ms. Tillett and the father, alleging that they engaged in domestic violence in the presence of the child.<sup>170</sup> This was clearly fictitious since Uganda was *not even born* when Ms. Tillett reported the instances of abuse. On September 3, the Family Court remanded Uganda to ACS with privilege to parole, which meant that ACS could return Uganda to her mother if they determined that the residence was safe.<sup>171</sup>

Ms. Tillett had moved into a new residence in her own name, obtained employment and supported herself, and began classes in domestic violence and parenting. Nevertheless, ACS still refused to return Uganda to her mother because they thought Ms. Tillett should undergo a psychological evaluation. There had been no mention in the court order of such requirement. Ms. Tillett objected to the psychological evaluation, and it was not until two months after the separation, on October 20, that Uganda was ultimately returned to her mother.<sup>172</sup>

### 4. The Decision

"It desecrates fundamental precepts of justice to blame a crime on the victim."<sup>173</sup>

After a twenty-four day trial, including forty-four witnesses and two

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165. *Id.* at 180.

166. *Id.*

167. *Id.*

168. *Id.* at 181.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 182.

173. *Id.* at 252.

hundred and twelve documents, Judge Weinstein granted a preliminary injunction requiring ACS to implement certain conditions.<sup>174</sup> Judge Weinstein found that ACS policies and procedures violated a number of constitutional rights of battered mothers and their children. Judge Weinstein concluded that in many other cases, ACS filed petitions in Family Court alleging “neglect and domestic violence against the mother even when she has herself committed no violence and is separated from the batterer, and is caring for her child with no evidence of harm to the child.”<sup>175</sup>

Judge Weinstein reached the following conclusions: ACS regularly claimed neglect against battered mothers; they rarely held abusers accountable; they failed to offer adequate services to mothers before prosecuting them or removing their children; they regularly separated battered mothers and children unnecessarily; they failed to adequately train employees regarding domestic violence; and their mission statement and written policies provided insufficient and inappropriate guidance to employees.<sup>176</sup> The City’s own expert testified that the “documents ACS has produced related to assessing domestic violence do not earn a ‘passing grade.’”<sup>177</sup>

Judge Weinstein held that there was an agency-wide policy within ACS of removing children from their mothers without evidence of her neglect and without seeking prior judicial approval, and that the policy of removing children solely because the mother had been a victim of domestic violence violated both the mothers’ and the children’s substantive and procedural due process rights and infringed on the mothers’ fundamental liberty interests in family privacy.<sup>178</sup> Judge Weinstein found, “[t]he evidence reveals widespread and unnecessary cruelty by agencies of the City of New York towards mothers abused by their consorts, through forced unnecessary separation of the mothers from their children, on the excuse that this sundering is necessary to protect the children.”<sup>179</sup> The court found that unnecessary removals actually did more to harm than to help the children involved and that there was neither a compelling nor a substantial state interest to justify the policy.<sup>180</sup> Judge Weinstein held that ACS routinely and improperly prosecuted mothers for neglecting their children when they have done nothing but suffer abuse at the hands of a partner.<sup>181</sup> He stated that the government has “a responsibility to protect a victim of domestic violence from her partner, a responsibility not met by punishing *her* through forcible separation from her children.”<sup>182</sup>

Judge Weinstein also acknowledged that ACS has the primary responsibility and duty to protect the children.<sup>183</sup> Setting aside the fear that the child could itself be abused, arguments were also advanced that suggested that

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174. *Id.* at 165.

175. *Id.* at 192.

176. *Id.* at 218.

177. *Id.* at 220.

178. *Id.* at 250-51.

179. *Id.* at 163.

180. *Id.* at 250.

181. *Id.* at 228.

182. *Id.* at 252.

183. *Id.* at 167.

merely witnessing domestic violence could lead to long-term psychological damage.<sup>184</sup> Expert testimony showed that children exposed to domestic violence can display short-term effects of post-traumatic stress disorder, behavioral problems, depression, and other psychological problems.<sup>185</sup> It is clear that in the best circumstances, it is preferable for a child to never be a witness to domestic violence. However the issue here is whether the effects of separation of children from their mothers and placement in foster care can be significant enough to measure against the effects of witnessing domestic abuse. Evidence showed that removal can have very serious negative effects on children.<sup>186</sup> In addition, the foster care system itself is dangerous. Some scholars assert that children are actually more likely to be abused in foster care than in the general population:<sup>187</sup> “[T]aking a child whose greatest fear is separation from his or her mother and in the name of ‘protecting’ that child [by] forcing on them, what is in effect, their worst nightmare. . . is tantamount to pouring salt on an open wound.”<sup>188</sup>

The court ultimately determined that New York City could no longer “penalize a mother, not otherwise unfit, who is battered by her partner, by separating her from her children, nor may children be separated from the mother, in effect, visiting upon them the sins of their mother’s batterer.”<sup>189</sup> Judge Weinstein concluded that the best way to protect children in situations of domestic violence is to provide services and protection to the mothers, the actual victims. The court concluded that “The consistent policy applied by ACS is to remove children of abused mothers in violation of their procedural and substantive due process rights solely because the mother has been abused. No legislatively appropriate policy, no compelling state interest, justifies these removals.”<sup>190</sup>

The court required ACS to end the practice of charging domestic violence victims with neglect and to end removal of children without court orders. The court found that ACS caseworkers and managers lacked adequate training about domestic violence and that they routinely charged mothers with neglect and removed their children when the mothers had engaged in no violence themselves, but had been victims.<sup>191</sup> The court held that ACS did not conduct adequate investigation of the facts before removing children and failed to look at other alternatives to removal.<sup>192</sup>

Judge Weinstein also found that counsel representing abused mothers in court were incompetent and did not properly investigate matters or consult with their clients.<sup>193</sup> He called the system worse than ineffective, as it actually resulted

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184. *Id.* at 198.

185. *Id.* at 197.

186. *Id.* at 198-99.

187. Mandel, *supra* note 34, at 1145.

188. *Nicholson*, 203 F. Supp. 2d at 199 (quoting expert witness Dr. David Pelcovitz).

189. Andy Newman, *Children Removal Curbed for Battered Women*, N.Y. Times (Dec. 22, 2001), <http://www.nytimes.com/2001/12/22/nyregion/children-removal-curbed-for-battered-women.html>.

190. *Nicholson*, 203 F. Supp. 2d at 250.

191. *Id.* at 199.

192. *Id.* at 250-51.

193. *Id.* at 253.



in the delay of hearings and longer separation of mothers and children. The result is a “practice and policy by the State and City of New York violating the substantive and procedural constitutional rights of many abused mothers and their children.”<sup>194</sup>

The court concluded that ACS’s practices and policies violated both the substantive and due process rights of mothers and children not to be separated by the government unless the parent is unfit to care for the child.<sup>195</sup> In January 2002, the court granted a preliminary injunction, concluding that the City “may not penalize a mother, not otherwise unfit, who is battered by her partner, by separating her from her children, nor may children be separated from the mother, in effect visiting upon them the sins of their mother’s batterer.”<sup>196</sup>

#### B. *Nicholson v. Scoppetta*<sup>197</sup>

The City of New York appealed the decision. In 2003, the United States Court of Appeals for the Second Circuit upheld the preliminary injunction but, before reaching the constitutional issues in the case, certified three questions to the New York State Court of Appeals.<sup>198</sup>

The first question was whether the definition of a “neglected child” under Family Court Act § 1012 allowed a court to find a parent responsible for neglect based on evidence of only two facts: that the parent has been a victim of domestic violence, and that the child was exposed to that violence.<sup>199</sup> The “more” that is required of the petitioner is a showing, by a preponderance of the evidence, that “(1) the child’s physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) the actual or threatened impairment is clearly attributable to the mother’s failure to exercise a minimum degree of care toward the child.”<sup>200</sup> Only when both elements are satisfied can the child be considered “neglected”; when the only facts are that the mother was abused and the child witnessed the abuse, the requirements have not been met.

The New York Court of Appeals held that a domestic violence victim could be defined *per se* as neglectful, but only due to her failure to exercise a minimum degree of care, not because she was a victim of domestic violence or because her children were exposed to it.<sup>201</sup> The mother could be charged with neglect only if a “preponderance of the evidence establishes that the children were actually or imminently harmed by reason of her failure to exercise even minimal care in providing them with proper oversight.”<sup>202</sup> The standard for evaluating whether a battered mother has acted reasonably under the circumstances is for the courts to consider the “risks attendant to leaving, if the batterer has threatened to kill

194. *Id.* at 254.

195. See Kathleen A. Copps, Note, *The Good, The Bad and The Future of Nicholson v. Scoppetta: An Analysis of the Effects and Suggestions for Further Improvements*, 72 ALB. L. REV. 497, 498 (2009).

196. *Nicholson v. Scoppetta*, 820 N.E. 2d. 840, 843 (N.Y. 2004).

197. *Id.*

198. *Id.* at 844.

199. *Id.* at 844.

200. *Id.* at 845.

201. *Id.* at 847.

202. *Id.*

her...risks attendant to staying and suffering continued abuse, risks attendant to seeking assistance through government channels, potentially increasing the danger to herself and her children, risks attendant to criminal prosecution against the abuser; and risks attendant to relocation."<sup>203</sup> A battered mother could now be charged with neglect, but not because she was a victim of domestic violence or because her children witnessed the abuse, but "rather because a preponderance of the evidence establishes that the children were actually or imminently harmed by reason of her failure to exercise even minimal care in providing them with proper oversight."<sup>204</sup>

The second question certified to the New York State Court of Appeals was whether the damage to the child resulting from witnessing domestic violence could be considered a danger or risk to the child's life or health.<sup>205</sup> The court emphasized that the legislature had clearly expressed its emphasis on preventive services to maintain family relationships rather than removing children as a response to problems within the family. The court recognized that two fundamental principles were in conflict: the objective of keeping families together and the understanding that the overriding concern is the health and safety of the child.<sup>206</sup> The court found that there could be no blanket presumption in favor of removal because not every child is harmed by exposure to domestic violence and removal may do more harm than good: "*A fortiori*, exposure of a child to violence is not presumptively ground for removal, and in many instances removal may do more harm to the child than good."<sup>207</sup>

The final question certified to the court was whether a child protective agency must offer evidence more than merely witnessing abuse to justify removal of a child.<sup>208</sup> The court strongly confirmed that there was no support for the presumption that if a child has witnessed domestic violence the child has been harmed and removal is appropriate.<sup>209</sup> They concluded that particularized evidence must exist to justify a court order to remove a child, including evidence of efforts made to prevent the need for removal.<sup>210</sup>

This decision had a dramatic impact on ACS practices. For several years after the decision, the removal of children declined dramatically. The number of instances where a mother was cited for neglect because of domestic violence also sharply declined.<sup>211</sup> ACS revised its program and instructions about domestic violence to reflect the decision and made expertise on domestic violence available to staff.<sup>212</sup>

The two *Nicholson* cases have come to represent the way the courts interpret the standard for neglect. The question remains, however, as to whether the institutional biases inherent in the child protective field prevent effective

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203. *Id.* at 846.

204. *Id.* at 847.

205. *Id.*

206. *Id.* at 849.

207. *Id.*

208. *Id.* at 854.

209. *Id.* at 855.

210. *Id.* at 854.

211. Stark, *supra* note 2, at 718.

212. *Id.*

implementation of the holdings of the Court of Appeals. Has the influence of the *Nicholson* decision continued to permeate ACS practices, or is there still a residual refusal to consider all of the factors involved in situations of domestic violence to enable fair evaluations of whether removal is appropriate? The number of children placed in foster care has declined in the ten years since the decision. However, it is unclear whether ACS has continued to follow the policy requirements of *Nicholson* or whether “the peculiar biases to which child protection is predisposed by its mission, programmatic structure and peculiar role in our society allow and may even compel even its most progressive personnel to engage in morally and constitutionally indefensible practices with respect to mothers in general?”<sup>213</sup> In the next section, I review several recent cases that illustrate the continued victimization of mothers who have experienced domestic violence and conclude that further efforts need to be made to change ACS policies.

#### IV. POST-NICHOLSON: PROMISE UNFULFILLED

“Despite current plans for reform, this situation is likely to persist unless and until ACS broadens its mission to include the safety of all victimized household members, shifts the emphasis in safety planning from placement to support and preservation, and reflects this broadened mission by fully incorporating domestic violence expertise into line authority to which field and supervisory staff are accountable.”<sup>214</sup>

In light of the changes in ACS stated policies and practices, one can question why there continue to be cases where victims are improperly treated by ACS employees. I have selected several cases, one published and two based on interviews with attorneys at the Brooklyn Defenders Office,<sup>215</sup> to illustrate the difficulty of changing established patterns of behavior. I do not intend these cases to be a comprehensive review of all instances of removal, nor do I mean to imply that ACS employees have not introduced some modification of their practices since the *Nicholson* decisions. These cases illustrate instances where *Nicholson* has not had the desired impact on treatment of victims and are evidence that progress must still be made.

##### A. *In re David G.*<sup>216</sup>

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213. *Id.*

214. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 221 at (quoting plaintiff’s expert Dr. Evan Stark).

215. I would like to thank Megan S. Brown and Gabriel Freiman, staff attorneys at Brooklyn Defender Services, for sharing these stories. Brooklyn Defender Services is located in Brooklyn, New York. The mission of Brooklyn Defender Services is to provide high quality legal representation and related services to people who cannot afford to retain an attorney. Brooklyn Defender Services represents 45,000 people each year. Their staff consists of specialized attorneys, social workers, investigators, paralegals and administrative staff who are experts in their individual fields. Their staff is highly qualified and specially trained to provide legal representation to people charged with a crime or facing child welfare proceedings. Every client receives the services needed to defend his or her case, including an investigator to track down witnesses or recover evidence, a social worker to improve the life circumstances of the client and a qualified attorney who will analyze the legal issues in the case, try to negotiate a fair resolution of the matter and represent the client at trial.

216. *In re David G.* (Blossom B.), 909 N.Y.S.2d 891 (N.Y. Fam. Ct. 2010).

In June 2010, New York City Children's Services (a division of ACS; hereinafter "NYCCS") filed neglect proceedings in Family Court against the G. family based on allegations that the father had abused the mother in the presence of the three children and that neither parent was ensuring the children's regular school attendance.<sup>217</sup> Once the petition was filed, the court permitted removal of the children, placed them with the grandmother and entered a temporary order of protection against the father.<sup>218</sup> Two months later, the mother requested a hearing for return of her son, David (the two other children remained with relatives in Pennsylvania), which was granted on several conditions, including that she enter a domestic violence shelter, attend therapy and enforce the order of protection against the father. The mother complied with the court order and moved to a shelter, but the father violated the order of protection and followed her there. She was afraid for her well-being, and left the shelter without informing NYCCS. She then missed one therapy session during the following week. NYCCS made no efforts to find her.<sup>219</sup>

Although the mother and her son had been repeatedly displaced and forced to relocate as a result of the father's abuse, NYCCS showed no indication of understanding the circumstances or the holdings of *Nicholson*. They took no action against the abuser, and instead removed David from his mother's care and placed him in foster care.<sup>220</sup> A caseworker testified that the mother's error "cast doubt on her credibility and demonstrated that she could not be trusted to obey court orders."<sup>221</sup> NYCCS argued that David was at risk because the mother was likely to return to the father, but offered no concrete evidence to support this allegation.<sup>222</sup> NYCCS also removed the children from their relatives in Pennsylvania and placed them in foster care in New York. In September 2010, the mother requested a hearing for all three children. At the hearing, the NYCCS caseworker testified that the removal of all three children was necessary due to the possibility that the mother would return to the father. No evidence was presented that indicated that the mother was considering returning to the father or had even spoken to him.<sup>223</sup> The agency described their concern that the mother had failed to keep the agency apprised of her whereabouts and had missed one therapy session.<sup>224</sup> According to the NYCCS worker, "these acts of non-compliance established that the mother could not always be trusted to comply with court orders and raised doubts about the reliability of her statements, including her assertion that she and the father were no longer together."<sup>225</sup>

The court ultimately held that both the emergency removal and continued removal of the children from their mother's care were unnecessary.<sup>226</sup> Quoting

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217. *Id.* at 894; *see also* Perrone, *supra* note 84, at 641.

218. *In re David G.*, 909 N.Y.S.2d. at 894.

219. *Id.* at 895.

220. *Id.*

221. Perrone *supra* note 84, at 643.

222. *In re David G.*, 909 N.Y.S.2d. at 896.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 898.

extensively from *Nicholson v. Scoppetta*, it noted that “the public policy in this State is to keep families together whenever possible [and to] spare children the trauma of removal and placement in foster care.”<sup>227</sup> The court held that NYCCS had not met its burden of proof and had contravened the conclusions of *Nicholson*. The court stated that NYCCS relied on exactly the same assumptions that the Court of Appeals had clearly rejected as an acceptable rationale for removals. The removal of David was based on “assumptions, guesswork and unsupported predictions of future behavior.”<sup>228</sup>

The court emphasized that the legislature never intended to have a presumption favoring removal in the Family Court Act. On the contrary, the policy objective was to keep families together whenever possible: “[W]here one parent is abusive but the child may safely reside at home with the other parent, the abuser should be removed.”<sup>229</sup>

### B. *In Re Joy*<sup>230</sup>

Sharon D. was a twenty-five-year old African American unmarried woman, living in Brooklyn. She was raised in Virginia and had attended high school and two years of college before coming to New York. She had met Michael in 2003 and had a relationship with him for four years before having her first child, Melody. Michael began to be physically abusive, and Sharon moved to a domestic violence shelter. Michael was subsequently incarcerated for other offenses, and Sharon returned to her neighborhood and lived with her brother in public housing receiving public assistance.

Sharon met Carter in 2011 in her neighborhood. In 2012, she and Melody moved in with Carter because Sharon’s brother was smoking marijuana in the home and she did not want Melody exposed to it. Carter had been in and out of jail for drug convictions, and had eight arrests, including two felonies and five misdemeanors, but was working full-time. Sharon and Carter were together for one year before her second child, Joy, was born.

In April 2012, when Sharon was eight months pregnant with Joy, she began to feel sad and depressed about her ability to handle another child. She sought help at Brookdale hospital and was assessed and released with a diagnosis of depression and a recommendation for outpatient services. According to hospital records, she was not in need of medication or hospitalization.<sup>231</sup> Joy was born in May 2012. Although Carter had been physically abusive in the past, he was supportive once the baby was born and contributed to the infant’s needs until he was laid off from his job. After he was unemployed, he began to be abusive to Sharon, and she attempted to end their relationship. In retaliation, Carter called the child abuse hotline, accusing her of inadequate guardianship and lack of providing adequate medical care, based on the allegation that she refused to take Joy to the doctor. The hotline call triggered an ACS investigation. An ACS

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227. *Id.* at 897 (quoting *Nicholson v. Scoppetta*, 820 N.E. 2d 840, 852 (N.Y. 2004)).

228. *Id.*

229. *Id.* at 897 (quoting *Nicholson v. Williams*, 203 F. Supp. 2d 153, 379 (E.D.N.Y. 2002)).

230. Interview with Megan Brown, Staff Attorney, Brooklyn Defender Services (unpublished documents on file with Brooklyn Defender Services).

231. *Id.*

investigator came to Sharon's home and advised her to take Joy to the doctor. This investigator reported that there were no marks or bruises on Joy and there was food in the home. The investigator did have some concerns which she shared with Sharon based on the conditions of her public housing, the presence of a pit bull, possible marijuana use, the claim that she suffered from depression, and her failure to ensure that Joy was fully immunized or to prevent a severe diaper rash. Nevertheless, the investigator found both children happy and generally healthy, with no marks or bruises on either child. Both children appeared to be well cared for. Melody had a good school attendance record (which is typically a red flag in child protective situations) and was reported to be a bright child.<sup>232</sup>

Four days later, ACS workers visited again, and at this time the home was reported to be cleaner than it had been and Sharon had taken Joy to the doctor. Sharon had also clearly attempted to remedy the concerns expressed by the investigator: she had contacted the housing authority to arrange for carbon monoxide and smoke detectors to be installed in the home, and had attempted to arrange for further repairs. Over the course of the next few weeks, ACS made several home visits to Sharon. Sharon was responsive to their requests and complied with their suggestions. They asked her to give away her dog, and she did. She agreed to engage with family protective services, and thereafter was visited once a week by a worker who testified that each time the children were observed to be well, with no marks or bruises. There was plenty of food in the home, the bedrooms were neat and clean and Joy was on target with her developmental milestones. Sharon was communicative with the ACS worker and returned his phone calls and stayed in touch. On December 11, he made another visit; both children were happy and healthy and well cared for and Carter was no longer living in the home. On December 20, he visited again, and Sharon informed him that she was leaving for Virginia for the holidays. She called him several times to keep him updated while she was away.

On January 11, the worker began to close the case. He observed that the children were happy and healthy. On January 16, he wrote a report stating that the family was stable and that there were no safety concerns regarding welfare of the children. He noted that Sharon had demonstrated throughout the intervention that "she [had] the ability to provide care, medical care and supervision for her two daughters" and that she put the children's needs ahead of her own.<sup>233</sup>

On January 22, 2013, Carter unexpectedly came into the home and assaulted Sharon, slamming her shoulder into a large television. He became enraged and left the room. When he returned, he had a knife in his hand. He tried to stab her and threatened to kill her, all in the presence of Joy. Following the assault, Sharon called the police and was taken to the hospital to have her injuries treated. She obtained an Order of Protection on January 25. However, the previous day, ACS had convened a Child Safety Conference about the family. Despite the fact that she had just been assaulted and had cooperated fully with ACS during the prior three months, she was abruptly informed at this conference

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232. *Id.*

233. *Id.*

that ACS would be filing a neglect petition against her. When she reacted in despair and anger and stormed out of the conference, ACS decided to remove Joy from her home.

The only aspect of the situation that changed between January 15, when ACS was closing the case, and the removal of Joy on January 24, was that Sharon was assaulted by Carter on January 22, and that she became distraught and abruptly left the conference after learning that ACS would be charging her with neglect. ACS testimony reflects that the only reason ACS decided to remove Joy was because of the statements Sharon made when she left the child safety conference, which were clearly outbursts made in frustration and out of fear that her children would be taken away.<sup>234</sup> They wanted to penalize Sharon for her behavior, rather than support her as a victim. Prior to being removed from Sharon, Joy had been in her mother's care for her entire life. Once she was removed, she was placed in foster care and her contact with her mother was limited to supervised visits.

When ACS filed a neglect petition against Sharon on January 24, she was not present in court and was not represented by counsel. The court granted removal of Joy and ACS removed her that evening. On January 29, Sharon appeared in court, was assigned counsel and requested a § 1028 hearing.<sup>235</sup>

The hearing began on January 31, 2013. The Family Court judge, Judge Gruebel, decided to immediately return Joy to Sharon, stating:

ACS has failed to establish imminent risk of harm, and that continued services can minimize the risk of harm to the child in the care of her mother. Further the Court finds that the risk of harm due to the removal of this child from her mother and placement in non-kinship foster care, with a visitation schedule, outweighs the risk of being with the parent.<sup>236</sup>

The court cited *Nicholson* in the decision, noting that the court must balance the risk of harm from being in the parent's care against the risk of harm that their removal might cause.<sup>237</sup> The court determined that the concerns about Sharon relating to the conditions of her apartment, her psychological condition, and the failure to obtain immunizations for Joy had all been addressed or could be addressed with better services from ACS. The court further noted that when ACS originally filed its petition, they had decided to "have the child remain with the mother with 'Court ordered supervision.'" They changed their view and sought removal of the child because at the Child's Safety Conference the mother

234. *Id.*

235. Section 1028 of the New York Family Court Act provides that when a child has been removed from the home of his or her parent, the parent may request a hearing at any time to determine whether the child should be returned home. At this hearing, the burden is on the child protective agency to demonstrate that the child should not be returned to the home. The statute provides that the court shall return the child to the parent unless it finds "imminent risk" to the child's life or health needs. N.Y. FAM. CT. ACT. § 1028 (McKinney 2014). In *Nicholson v. Scopetta*, 820 N.E. 2d. 840, 845 (N.Y. 2004), the court held that imminent danger "must be near or impending, not merely possible," and the court must weigh whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal and must balance the risk the removal might bring.

236. Interview with Megan Brown, Staff Attorney, Brooklyn Defender Services (unpublished documents on file with Brooklyn Defender Services).

237. *Nicholson v. Scopetta*, 820 N.E. 2d. 840, 852 (N.Y. 2004).

stormed out stating that she was 'going to kill the respondent father' (the alleged source of the anonymous call to the hotline that precipitated the investigation and conference)."<sup>238</sup> These remarks, uttered in frustration and fear, were the basis for ACS's decision to revisit the case, arguing that there was imminent risk based on prior incidents. However, "[ACS] used those remarks to review what had previously not been [*sic*] viewed as substantially concerning, to argue that this is imminent risk." The court found that Sharon needed ongoing support and services, but that the risk of harm from removal would be greater than the risk of harm keeping Joy with her mother.

This case illustrates the difficulty of implementing the *Nicholson* approach in the field. Caseworkers appear more concerned with controlling the behavior of a victim by using removal of children as a weapon to assert control.

### C. *In the B. Children*<sup>239</sup>

Adawna was a twenty-eight-year old Latina woman living in Brooklyn. She had three children: nine-year old twins and an infant. She was separated from the children's father, and was on the verge of being evicted from her home when she became involved with James, who was also twenty-eight years old. Although Adawna had a supportive family and was planning to go to live with her grandmother, James was persuasive and convinced her to live with him. Adawna had been experiencing difficulties ensuring that her older children attended school on a regular basis, which led to ACS becoming involved with the family. James encouraged her to send the twins to live with their father, and she moved into his home with her youngest child, Janisse.

Once Adawna moved in with James, he began to isolate her; he prevented her from communicating with her family and friends. At the same time, the children's father was not properly caring for their children. In particular, he was ineffective at ensuring that the twins attended school. After Adawna's family did not hear for her for several months, they became concerned and begged ACS to try to locate her.

ACS did attempt to find her, and an ACS worker was able to make contact with Adawna and arranged to meet with her. James would only allow the ACS employee to meet with Adawna in public and in his presence, and he made sure he was sitting right next to Adawna on a bench. He was clearly controlling her speech and movements. Following this encounter, Adawna disappeared for two more months, and no one heard from her during that time.

The neighbors in her building began to complain of unusual noises coming from James' apartment. On May 29, 2012, the police responded to a call from the landlord and reportedly found the baby and Adawna tied and bound with duct tape. James was in the room when they arrived, and they arrested him. The police found wounds over both of Janisse's and Adawna's bodies, and they found Janisse emaciated and malnourished. James had held them captive in a

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238. Interview with Megan Brown, Staff Attorney, Brooklyn Defender Services (unpublished documents on file with Brooklyn Defender Services).

239. Interview with Gabriel Freiman, Staff Attorney, Brooklyn Defender Services (unpublished documents on file with Brooklyn Defender Services).



room for three months; they had not been allowed to leave the room for any reason.

Adawna stated that James physically and verbally abused her in the presence of her child and refused to allow her to eat or leave the home. She was fearful that he would kill her and Janisse because he had previously threatened to do so if she left him. This is the exact quandary that victims of domestic violence encounter when they become trapped in a cycle of power, violence and control by their abusers.<sup>240</sup>

Following her rescue, Adawna more than adequately met her children's needs. She had her older children return to her house. She arranged for medical appointments, took Janisse for evaluations and signed her up for school. She found supportive services for herself and her family without the assistance of ACS. Nevertheless, ACS brought a neglect proceeding against Adawna. This proceeding placed further trauma and strain on Adawna and her young daughter as they tried to heal from their traumatic experience.<sup>241</sup> ACS included the older children in the neglect petition and subsequently released them to the care of their father, who had been inadequately caring for them. This was not a rational response to the situation and appears to be punishment of Adawna merely for being a victim of abuse.

When Adawna appeared in Family Court for the first time, she was by herself, without counsel, and ACS informed her that she would be seeing her abuser in the courtroom. Her caseworker's only advice was "not to look at him."<sup>242</sup> When her assigned counsel met her, she was in a state of total panic about seeing her abuser for the first time since she was rescued. This shows a lack of training and sensitivity on the part of caseworkers at ACS in dealing with a victim who has experienced such a traumatic event.

In addition, despite the fact that the father had *eleven* domestic violence incident reports against him, ACS then advised the father of the children to file for sole custody and to call the police against Adawna if she gave him any problems. Although ACS stated that they were in the process of attempting to work out a visitation plan, their objective was clearly to separate Adawna from her children. ACS's approach seems illogical since they had complete access to previous reports and knew that the father had a long history of violence. In addition, the father actually had no interest in having custody of the children and had stated that he wanted them to return to living with their mother.

In a meeting with Adawna to review her situation, ACS discovered that she was taking her children to therapy to help them process the events they had experienced. ACS reacted as though this was a negative, rather than a helpful, effort by a concerned mother. ACS immediately threatened to hold a child safety conference to discuss removal. The mother was properly taking advantage of available social services to help her family, and as a consequence ACS was attempting to remove her children. The approach ACS took was traumatic for the family and shows a lack of understanding of the dynamics of domestic violence.

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240. Letter from Brooklyn Family Defense Project to Family Court Legal Services, July 13, 2012 (on file with author) (discussing *Nicholson v. Scopetta*, 820 N.E. 2d. 840 (N.Y. 2004).

241. *Id.*

242. *Id.*

Instead of using their abilities to support her as a survivor of abuse, ACS appeared to blame Adawna for the violence, and attempted to undermine her efforts to create a better life for her family.

#### CONCLUSION AND IMPLICATIONS

“Because the psychological and physical risks to children in placement can be as great, or greater, than allowing them to remain in situations where protections are unsure, the balance of harms is a critical piece to be worked out jointly with the non-offending parent.”<sup>243</sup>

A review of neglect proceedings brought by ACS against victims of domestic violence over the past ten years suggests that the family courts are attempting to comply with *Nicholson*. The number of children entering the foster care system decreased by 22% between 2003 and 2012 from 13,598 to 10,594.<sup>244</sup> It is now rare that the Court upholds the removal of children from a battered mother solely because she is a victim of domestic violence. However, ACS practices appear to still fall short of fully implementing the tenets of *Nicholson*.

ACS has made improvements in holding abusers accountable, but still regularly alleges neglect against battered mothers, who are much easier targets. As evidenced by the situations described above, there are still instances where the implementation of *Nicholson* has fallen short of its directives. ACS still fails to consistently offer adequate services to victims of domestic violence before prosecuting them or removing their children. There are a variety of preventive services that ACS should offer to families experiencing domestic violence. These include offering adequate shelters, family and individual therapy, legal advocacy, medical advocacy, social service referrals and advocacy, parenting skills classes, employment referrals and housing assistance.<sup>245</sup> While ACS has improved the general availability of these programs, they are still not in adequate supply. According to the information provided on the ACS website, it is the caseworker’s responsibility to identify the services necessary to protect the child and help the family.<sup>246</sup> Nevertheless, as evidenced by *In Re David G.*, *In Re Joy*, and *In the Matter of B. Children*, it seems too tempting to take the easiest solution of removing a child, rather than following the time-intensive path of focusing more intently on service provision and attacking the underlying problems. ACS employees are often too ready to judge victims and may not be properly trained to make sensitive decisions and balance outcomes.

ACS continues to inadequately train its employees regarding domestic violence and fails to incorporate domestic violence expertise into the standards against which case workers and supervisors are held. Although the requirements to become an ACS caseworker include a college degree with “twenty-four credits in any combination of social work, psychology, sociology,

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243. Stark, *supra* note 2, at 709.

244. U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, FOSTER CARE FY2003-FY2011 ENTRIES, EXITS, AND NUMBERS OF CHILDREN IN CARE ON THE LAST DAY OF EACH FEDERAL FISCAL YEAR, *available at* <http://www.acf.hhs.gov/programs/cb>.

245. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 211 (E.D.N.Y. 2002).

246. *Preventative Services*, N.Y.C. ADMIN. FOR CHILD. SERVS., [http://www.nyc.gov/html/acs/html/support\\_families/preventive\\_services.shtml](http://www.nyc.gov/html/acs/html/support_families/preventive_services.shtml) (last visited Feb. 11, 2015).

human services, criminal justice, education, nursing, or cultural anthropology,”<sup>247</sup> there is no requirement to be trained in domestic violence prevention or counseling. Caseworkers have tremendous discretion to remove children, unbridled by adequate supervision.<sup>248</sup> Without sufficient understanding of the complications surrounding domestic violence, there cannot be a complete assessment of the family situation. In fact, “[d]espite evidence that some proportion of battered women experience moderate to severe symptoms of depression, post-traumatic stress disorders or other mental health or behavioral problems, there is no evidence that their capacity to parent is compromised as a result.”<sup>249</sup>

The manner in which caseworkers treat female victims of violence has implications for their recovery and the well-being of their families. Treating victims with respect, offering positive support, and giving them a sense of control increases the odds of positive outcomes.<sup>250</sup> Coordinated efforts by city agencies, and the *perception* by victims that there are coordinated approaches, improves the recovery of victims.<sup>251</sup> A more coordinated approach to assisting victims of domestic violence would require community agencies to work together. These agencies should represent law enforcement, prosecution, nonprofit victim service agencies and the medical and legal communities. The New York City Mayor’s Office to Combat Domestic Violence, created under Mayor Michael Bloomberg, is a vital but insufficient step towards creating this coordination. This Office has opened Family Justice Centers in several boroughs in New York, where victims of domestic violence can receive criminal justice, civil legal and social services in one location. The Mayor’s Office needs to coordinate these centers with ACS to create adequate assistance and equal treatment for all victims of domestic violence.

There is hope that we will see progress in the practices and policies of ACS. In December 2013, Mayor-elect Bill de Blasio named Gladys Carrión as his child welfare commissioner for ACS. In May 2014, Commissioner Carrión announced a number of improvements at ACS, including adding staff members and improving collaboration with other city agencies. She has also hired an internal monitor to oversee the implementation of the improvements. ACS now has an opportunity to rectify the injustices perpetrated by ACS and to change the approach of the agency towards victims of domestic violence and their children.<sup>252</sup>

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247. *Become A Child Protective Specialist*, N.Y.C. ADMIN. FOR CHILDREN’S SERVS., [http://www.nyc.gov/html/acs/html/about/work\\_cps.shtml](http://www.nyc.gov/html/acs/html/about/work_cps.shtml) (last visited Feb. 11, 2015).

248. Perrone, *supra* note 84, at 660.

249. Stark, *supra* note 2, at 710.

250. Janine M. Zweig & Martha R. Burt, *The Effects on Victims of Victim Service Programs Funded By the STOP Formula Grants Program*, URBAN INSTITUTE (Feb. 2003), [http://www.urban.org/uploadedPDF/410645\\_VictimServicePrograms.pdf](http://www.urban.org/uploadedPDF/410645_VictimServicePrograms.pdf).

251. *Id.* “Coordinated effort improves reported outcomes whether it is between victim service and legal system agencies, victim service and non-legal system agencies, or legal system agencies and non-victim service agencies.”

252. Gladys Carrión, Commissioner, New York City Administration for Children’s Services, Testimony to the New York City Council Committee on General Welfare (May 8, 2014)(transcript available at [http://www.nyc.gov/html/acs/downloads/pdf/Child\\_Welfare\\_5\\_8\\_14\\_FINAL.pdf](http://www.nyc.gov/html/acs/downloads/pdf/Child_Welfare_5_8_14_FINAL.pdf)).