NICHOLSON v. SCOPPETTA: PROVIDING A CONCEPTUAL FRAMEWORK FOR NON-CRIMINALIZATION OF BATTERED MOTHERS AND ALTERNATIVES TO REMOVAL OF THEIR CHILDREN FROM THE HOME

I. INTRODUCTION

The welfare and protection of our children is a significant and crucial concern of society today. One such concern that has been increasing in recent decades is the possible harm inflicted upon children that are exposed to domestic violence. In fact, research suggests that as many as ten million children are exposed to domestic violence each year.[1] Therefore, in response to this growing problem, the legal system has attempted to develop policies and practices, typically implemented through various government agencies and the court system, by which to intervene in domestic violence situations that may affect the welfare of children in the home.

Unfortunately, however, these practices and policies have often had a tendency to harm another particular group of victims of domestic violence—*battered mothers*. Battered mothers are frequently charged with neglect and have their children removed from the home, and they sometimes even have their parental rights ultimately terminated for exposing their children to domestic violence, even when neither the mother nor the batterer has actually physically abused the children.[2] The legal system has attempted to address this problematic issue through state and federal legislation and case law, but has not yet been able to create an equitable and consistent policy that is able to both protect children in domestic violence situations from harm as well as uphold the parental rights of battered mothers.

However, the United States Court of Appeals for the Second Circuit is currently considering this issue in *Nicholson v. Scoppetta*,[3] as it has been asked to review the United Stated District Court for the Eastern District New York's ruling preventing New York's Administration for Children's Services (ACS) from prosecuting battered mothers for neglect for exposing their children to domestic violence and removing their children from the

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[1] Lucy Salcido Carter et al., *Domestic Violence and Children: Analysis and Recommendations*, *in* 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN, at 4, 4 (Winter 1999).

[2] Nancy K.D. Lemon, *The Legal System's Response to Children Exposed to Domestic Violence*, *in* 9 THE FUTURE OF CHILDREN; DOMESTIC VIOLENCE AND CHILDREN, at 68, 71 (Winter 1999).

[3] 344 F.3d 154 (2d Cir. 2003).

home.[4] Importantly, although its decision will only directly affect families within the Second Circuit, specifically in New York, Connecticut, and Vermont, the decision will still have significant and far-reaching consequences for victims of domestic violence and perhaps also affect the future legislative law, court decisions, and public policy created in other states.[5]

This Note advocates upholding the district court's decision and proposes a conceptual framework that should be provided by the Second Circuit to address the issues of whether battered women should be prosecuted for neglect for exposing their children to domestic violence and whether these children should be removed from the home and care of their mothers merely because domestic violence occurred in the home. Specifically, this Note asserts that holding battered mothers responsible for domestic violence and removing their children from the home is a poor legal and public policy. Battered mothers should not be considered neglectful and unfit to parent merely because they have been abused by their significant others in the presence of their children. Rather, the perpetrators of domestic violence should be the ones found neglectful and held criminally responsible for their acts of abuse that both psychologically and physically endangered the mother *and* the child. Furthermore, this Note advocates that better policies and methods exist that should be developed and implemented to protect children in domestic violence situations from harm before having to resort to violating the rights of battered mothers through prosecution and removal of their children.

Therefore, this Note will begin by analyzing the connection between domestic violence and child welfare. Part II of this Note will give a thorough background of the history of domestic violence in the United States and how abused women have been socially, legally, and psychologically affected by domestic abuse. This part will then explore how such abuse affects children when the woman being battered is also their mother by outlining the development of public concern for child welfare and exploring how this concern affects the concept of the constitutional right to custody of one's children. Finally, this part will examine how the legal system currently addresses the issues of liability of mothers and removal of children from homes where domestic violence has occurred, specifically focusing on current statutes and case law from New York.

Part III of this Note will thoroughly discuss the facts of *Nicholson* as well as the ruling of the United States District Court for the Eastern

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[4] *Id*. at 158.

[5] *See* Ginger Adams Otis, *Court May Rule on Battered Women Losing Custody*, Women's e News, *at* http://www.womensenews.com/article.cfm/dyn/aid/1553/context/-archive (Oct. 7, 2003).

District of New York,[6] the Second Circuit's first review of the case,[7] and the New York Court of Appeals' answers to the three certified questions of state domestic law.[8] This part will then outline the major concerns that are being considered by legislatures, courts, and advocates in determining whether a mother should be held responsible for allowing her children to witness domestic violence in her home as well as whether the best interests of a child who has been a witness to domestic violence are served by removing that child from the home or by permitting the child to remain with the mother.

Finally, Part IV of this Note will discuss how the Second Circuit should address these critical issues. This part will provide a conceptual framework through which legislatures, courts, and child protection agencies should criminalize domestic violence in the presence of children as well as handle removal of children from homes in which they have witnessed their mother being abused by her significant other. In particular, this part will recommend various alternatives to removal of children from homes in which domestic violence has occurred.

II. BACKGROUND

A. *The History of Domestic Violence in the United States*

Wife battering used to be an act that was not only accepted in society, but also permitted under the law.[9] English common law considered a married man and woman to be legally one entity, and that *one* was the husband.[10] The husband was responsible for the acts of his wife and could, therefore, control her acts by any means necessary to keep her in line, even through violence.[11] It was not until 1853 that the English Parliament finally passed a law against assaults upon women and children, and, eventually, the United States followed this example.[12] By 1880, laws against assault existed in many states, but because they were so rarely enforced, the lives of battered women changed very little.[13]

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

7 *Nicholson*, 344 F.3d at 154.

8 Nicholson v. Scoppetta, 820 N.E.2d 840 (N.Y. 2004).

9 *See* ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 19-20 (rev. ed. 2000).

10 *Id*. at 19.

11 *Id*. at 19-20.

12 *Id*. at 20-21.

13 *Id*. at 21.

Eventually, society and the legal system began to recognize domestic violence against women as a major problem.[14] In fact, feminist leaders of the suffrage and temperance movements singled out wife abuse as a major societal scourge in the 19th and early 20th centuries.[15] However, it was not until the anti-rape movement of the 1970s that the widespread nature of domestic violence was revealed in the public sphere, and a societal effort to protect battered women was initiated through the creation of telephone hotlines, support groups, and shelters for battered women.[16]

However, domestic violence was still not treated as a serious crime by the police, which significantly affected abused women's ability to receive protection from abuse through the legal system.[17] Typically, a police officer would not arrest an abuser unless the officer actually saw the abuse take place.[18] However, in 1984, when Tracey Thurman, an abused woman from Connecticut, won a landmark lawsuit against police for violating her Fourteenth Amendment rights, police agencies began treating domestic violence as a more serious crime due to the risk of being held accountable for violating the abused woman's rights, even when the majority of the abuse was not actually witnessed by the police officer.[19] Thurman had made numerous reports to the local police between October of 1982 and June 1983 regarding repeated threats against her and her son's life by her estranged husband.[20] However, these reports, the restraining order against her husband, and her requests for police protection were disregarded by police officers.[21] Ultimately, Thurman was beaten and stabbed by her husband on June 10, 1983.[22] She sued the city police department, and the court held that the department was responsible for the attack, as it was their duty to acknowledge her reports and requests and provide protection.[23] Thus, by the mid 1980s, fifteen states and the District of Columbia had passed mandatory arrest laws that required a police officer to make an arrest when called to the scene of a domestic violence complaint.[24] Also importantly, by this time, Congress had passed legislation that provided

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14 *See* Sarah Glazer, *Violence Against Women*, 3 THE CQ RESEARCHER 171, 178-79 (1993).

15 *Id.* at 178.

16 *Id*.

17 *See* JONES, *supra* note 9, at 22-23.

18 Glazer, *supra* note 14, at 174.

19 *See* JONES, *supra* note 9, at 23, 49, 51.

20 Thurman v. City of Torrington, 595 F. Supp. 1521, 1524 (D. Conn. 1984).

21 *See id*. at 1524-25.

22 *Id*. at 1525-26.

23 *See id*. at 1528-29.

24 Glazer, *supra* note 14, at 174.

federal money to domestic violence programs and shelters, and the surgeon general officially declared domestic violence a major health problem.[25]

Nevertheless, despite this recognition of domestic violence as a societal problem and the increased effort by the legal system to protect battered women, women who were abused still continued to be abandoned in various ways. First, when an abuser was arrested by a police officer, he was typically only put in jail overnight.[26] Thus, mandatory arrest was only a short-term solution to stopping the abuse and, as statistics showed, actually caused the abuser to be more violent after being released.[27] In addition, some states required officers to make dual arrests when called to a domestic violence complaint, which led to women, the victims of the incident, also being placed in jail and their children being placed in foster care.[28] Furthermore, women had difficulty winning cases against their abusers, as the burden of proof was typically laid upon the victim who often had difficulty "overcom[ing] centuries of male bias to convince a prosecutor of the seriousness of her charge."[29]

In addition, there was also a lack of social services available to abused women. This problem primarily stemmed from the fact that social services were just not well-coordinated or easily accessible to battered women at this time.[30] Also, because "different people and professions perceive[d] the problem of battered women differently," just one agency alone could not provide adequate help.[31] As a result, a battered woman in need of several different services, such as finding housing, employment, and healthcare, had to spend a great deal of time traveling from one agency to another.[32] In addition, women often had difficulty finding emergency housing as rarely any nighttime or weekend services were available.[33] Likewise, there were not nearly as many shelters open to women and children as there were to men.[34] Furthermore, public assistance was often not available to women because most social workers believed that women seeking assistance could easily return home, where their husbands could support them and their children.[35] In fact, most of the time, women would

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25 *Id*. at 179.

26 *Id*. at 175.

27 *Id*. at 174.

28 *Id*. at 176.

29 DEL MARTIN, BATTERED WIVES 111 (1976).

30 *See id*. at 120-23.

31 *Id*. at 123.

32 *Id*. at 122.

33 *Id*. at 126.

34 *Id*.

35 *Id*. at 130.

not even be considered for aid programs for victims because not all authorities recognized battering as a true social problem.[36]

Abused women also had difficulty accessing adequate medical care. First, mental health services were not always available to battered women and their children.[37] Also, when women sought emergency treatment for abusive injuries, many treating physicians did not have the time or were reluctant to discuss possible domestic abuse in an examination room.[38] Statistics showed that only one in four battered women actually informed their physicians that they were being abused.[39] Therefore, because the actual cause of injury was never determined, physicians were often documenting improbable stories from battered women of "accidental" injuries and only treating those individual injuries, rather than helping to prevent further injuries as well.[40] Ultimately, physicians were documenting that only one out of thirty-five patients that they saw was being abused when, in actuality, one in three patients was actually suffering injuries from abuse.[41] Thus, what physicians were portraying as a rare occurrence was actually the leading cause of injury to women at this time, and no additional medical help was being made available to treat this growing problem.[42]

Fortunately, increased efforts to treat and prevent violence against women emerged in the 1990s. Legislation encouraging a federal response to violence against women was first proposed in 1990.[43] By 1994, Congress had passed the first Violence Against Women Act, which advocated for women civil right remedies, equal justice in courts, and reduction of domestic and stalker violence.[44] This entire statute remained in effect until 2000, at which time portions of it were found unconstitutional by the United States Supreme Court due to Congress' lack of authority under the Commerce Clause to create civil remedies for victims of domestic violence.[45] Later that year, however, President Clinton signed into law the Victims of Trafficking and Violence Protection Act, of

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36 *Id*. at 131.

37 *See id*. at 141.

38 Glazer, *supra* note 14, at 172.

39 *Id*. at 173.

40 *See id*.

41 EVAN STARK & ANNE FLITCRAFT, WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN'S HEALTH 10 (1996).

42 *See id*.

43 ALISON SISKIN, CONG. RESEARCH SERV., VIOLENCE AGAINST WOMEN ACT: HISTORY, FEDERAL FUNDING, AND REAUTHORIZING LEGISLATION 1 (2001).

44 *See id*. at 3-4.

45 *See* United States v. Morrison, 529 U.S. 598, 598 (2000).

which part was the revised Violence Against Women Act.[46] This new Act reauthorized many of the programs that had been in effect under the first Act as well as approved numerous grants to assist victims of dating violence, provide housing for victims of violence, create programs to protect children from abusers, and protect elderly and disabled women from violence.[47]

However, despite the aid that has been afforded to battered women by society and the legal system, there are still challenges that abused women continue to face today. Foremost is the inability of society to understand the psychological effect that abuse has on women and their ability to leave an abusive home. Importantly, this ignorance has always seemed to bias society against battered women and significantly affect battered women's ability to receive adequate help.

In the early 1980s, Dr. Lenore E. A. Walker first attempted to explain and define this negative tendency through a theory she coined battered woman syndrome (BWS).[48] The theory explains that battered women who have repeatedly been exposed to violence suffer from a psychological condition called learned helplessness, which causes them to feel incapable of stopping the abuse in their relationships.[49] Essentially, battered women feel powerless to stop the abuse through means that are typically used by individuals that have been assaulted, such as leaving the abusive situation.[50] Often, "avenues of help and escape are both literally and psychologically closed and women become entrapped."[51] Therefore, women who are abused act in ways that are reactive to the battering.[52] Their behavior is affected by what they perceive will be most effective in minimizing the abuse and staying alive, and often they believe that is not angering the abuser by leaving the home.[53]

The fact that many women do not leave abusive homes due to these psychological barriers presents another significant and unique challenge to a battered woman when she is also a mother. Though society and the law recognize that a mother generally has the right to custody of her own children, it is also both legally and morally expected that a mother be able to protect and care for her children. However, her ability to adequately

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46 SISKIN, *supra* note 43, at 5.

47 *Id*.

48 *See* LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME ix (2d ed. 2000).

49 *See id*. at 10-11.

50 *See id*. Walker claims that "[t]hose who have developed learned helplessness have a reduced ability to predict that their actions will produce a result that can protect them from adversity." *Id*. at 10.

51 STARK & FLITCRAFT, *supra* note 41, at 167.

52 *See* WALKER, *supra* note 48, at 10, 40-41.

53 *See id*.

protect and provide for those children is often questioned when she and her children live in a home in which she is continually abused by her significant other and her children are witness to this abuse. Therefore, in some cases in which domestic violence against the mother is present in the home, her parental rights may be limited and possibly even terminated.[54] As a result of such concern for child welfare, legislation, case law, and public policy has been developed to protect children, sometimes even despite custodial rights.

B. *Child Welfare and the Constitutional Right to Custody*

Some of the first efforts by society to protect children from parental abuse and neglect began as early as the mid-nineteenth century during the anticruelty movement.[55] Many American cities began forming private agencies to seek out and rescue children that were being abused or neglected.[56] Then, in 1885, the American Humane Association, which had been founded only a few years earlier as the national federation of animal rescue agencies, also formed the national federation of child rescue agencies.[57] However, child rescue agents had little time to investigate individual complaints and advocated placing abused and neglected children in institutions rather than in foster family care.[58] Oftentimes, these institutionalized children would then be placed with a surrogate family that would use them as laborers.[59]

The courts then began addressing the issue of parental rights in regards to child welfare by examining whether parents have a fundamental right to custody of their children. In 1903, a Tennessee court upheld the common law parental immunity doctrine and held that a parent, though specifically referring to the father at this time in history, had the right to custody and control of his children based upon his duty to maintain, protect, and educate his children.[60] The court further claimed that the only way these rights could be forfeited was through gross misconduct by the parent.[61] Then, in the 1920s, the United States Supreme Court ruled that parents

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54 *See* Lemon, *supra* note 2, at 71.

55 *See* Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionalizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 3 (1995); Paul Gerard Anderson, *The Origin, Emergence, and Professional Recognition of Child Protection*, 63 SOC. SERV. REV. 222, 223 (1989).

56 Anderson, *supra* note 55, at 223.

57 *Id*.

58 *Id*.

59 Levesque, *supra* note 55, at 4.

60 *See* McKelvey v. McKelvey, 77 S.W. 664, 664 (Tenn. 1903), *overruled by* Broadwell v. Holmes, 871 S.W.2d 471 (Tenn. 1994).

61 *Id*.

have the right, based upon the Fourteenth Amendment, to raise and educate their children as they see fit.[62]

Additional significant and positive advances were made in the area of public policy toward child welfare during the early twentieth century in an attempt to aid abused and neglected children. The first juvenile court was established in Illinois in 1899, and many northern states passed regulatory legislation to protect children from exploitive labor.[63] Then, in 1909, President Theodore Roosevelt sponsored the Conference on the Care of Dependent Children, which attempted to lay the groundwork for reform in the area of child welfare by encouraging greater care and more scientific investigation before decisions were made to terminate parental rights.[64]

However, as the anticruelty movement lost its momentum and the United States struggled through the Great Depression in the early 1930s, the issue of child welfare began to lose its prominence as a major social issue for the next few decades.[65] Although the issue continued to be discussed and debated amongst legislators, advocates, and social workers, a dormancy of intervention into child abuse resulted due to conflicting goals and attitudes.[66] Such conflicts included blurred definitions of categories of children, dissatisfaction with the juvenile court, artificial distinctions between "child" welfare and "family" welfare agencies, and the conflicting goals of family privacy and child protection, which all were compounded by the critical influences of economic and social conditions at that time in history.[67]

Finally, in the early 1960s, the Kennedy Administration passed the 1961 Act, which provided further aid to families with dependent children,

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[62] *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding that a statute that required all children ages eight to sixteen years old to attend public schools was unconstitutional because it unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a statute prohibiting the teaching of foreign languages to children that had not passed the eighth grade was unconstitutional because it materially interfered with the power of parents to control the education of their own children).

[63] Lela B. Costin, *Cruelty to Children: A Dormant Issue and Its Rediscovery, 1920-1960*, 66 SOC. SERV. REV. 177, 178 (1992).

[64] *Id*.

[65] *See id*. at 177; Levesque, *supra* note 55, at 4 (discussing the change in the child welfare system as a result of the increase in the number of families that were unable to care for children).

[66] *See* Costin, *supra* note 63, at 184-193.

[67] *Id*.

in an attempt to improve the welfare system in the United States.[68] The Act provided funding to state agencies to care for abused and neglected children thus allowing those children to be placed in foster care homes.[69] However, the Act failed to design a mechanism for moving children out of foster care, which resulted in nearly 400,000 children drifting from one foster home to another throughout most of their adolescence, without ever being placed in permanent homes.[70]

Thus, by the 1970s, the problem of foster care placement became the most prominent issue in the area of child welfare.[71] Children were being removed from their families oftentimes, it was argued, devoid of professional judgment or concern for the family, and then shuffled from one foster care home to another.[72] The system at this time was not only failing to monitor children in foster care, but also failing to reunite the child with his or her family.[73]

Because of this, Congress enacted the Adoption Assistance and Child Welfare Act of 1980.[74] This law was based upon the premise that the purpose of foster care was only to provide abused and neglected children with temporary security and, therefore, every effort should be made to find children permanent homes, either with their birth parents or through adoption.[75] Thus, the Act de-emphasized the use of the foster care system and instead supported the use of greater efforts to place children in permanent homes by reuniting them with their families.[76] The Act encouraged permanency planning for abused and neglected children and family preservation whenever possible by requiring that states make "reasonable efforts" to maintain families.[77] This requirement was mandated in an attempt "to protect abused and neglected children while

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[68] Deborah L. Sanders, Article, *Toward Creating a Policy of Permanence for America's Disposable Children: The Evolution of Federal Foster Care Funding Statutes from 1961 to Present*, 29 J. LEGIS. 51, 55 (2002).

[69] *Id*. at 51.

[70] *Id*. at 51-52.

[71] Jill Sheldon, Note, *50,000 Children Are Waiting: Permanency, Planning, and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. THIRD WORLD L.J. 73, 76 (1997).

[72] *Id*.

[73] *Id*.

[74] *Id*. at 77.

[75] *Id*.

[76] *Id*.

[77] *Id*. at 78.

remaining sensitive to parents' fundamental rights."[78] The federal government forced states to follow these guidelines by only making federal funds available to those states that agreed to comply with the Act.[79]

The courts then eventually began to analyze the proper procedure for removing a child from a parent's custody if the parent may, in fact, possibly be unfit. The United States Supreme Court had previously ruled during the early 1970s that a parent, even when unmarried, is entitled to a hearing regarding his or her fitness, which must be challenged by individualized proof, before his or her parental rights can be terminated.[80] By 1982, however, the Supreme Court had set up stricter requirements in *Santosky v. Kramer*[81] by holding that, because the severing of family ties implicates serious constitutional concerns, the state must provide fundamentally fair procedures when attempting to terminate parental rights.[82] A mere preponderance of evidence is not enough[83]; rather, the state must show through "clear and convincing evidence" that parental rights should be terminated.[84] Various state courts and legislatures also followed suit, demanding that parental unfitness be shown through clear and convincing evidence before parental rights could be suspended or terminated.[85] In addition, the Supreme Court once again reiterated its position in 1983 in *Lehr v. Robertson*[86] that parents have a constitutionally protected liberty interest in the custody, care, and management of their children.[87]

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78 Rachel Venier, Article, *Parental Rights and the Best Interests of the Child: Implications of the Adoption and Safe Families Act of 1997 on Domestic Violence Victims' Rights*, 8 AM. U. J. GENDER SOC. POL'Y & L. 517, 524 (2000).

79 Sheldon, *supra* note 71, at 79.

80 Stanley v. Illinois, 405 U.S. 645, 656-58 (1972).

81 455 U.S. 745 (1982).

82 *Id*. at 753-54. The Court held that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Id*. at 747-48.

83 *Id*. at 766.

84 *See id*. at 769-70.

85 *See* Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1222 n.72 (1994). Overall, at least thirty-five states required a standard of proof higher than a mere "preponderance of evidence" as determined by statute or judicial decision. *Id*.

86 463 U.S. 248 (1983).

87 *See id*. at 257-58. To clarify, though the Court did recognize a parent's constitutional right to custody of his or her child, in this particular case it chose not to grant custody to the biological putative father because he never had any significant personal or financial relationship with the child. *See id*. at 266-68.

However, there has once again been a recent shift in attitudes toward child welfare as both Congress and the courts have begun placing more definite limits on parental rights to custody, despite its recognition as a constitutionally protected right, in favor of protecting children from further abuse and neglect. For instance, in the mid-1990s, a Tennessee court officially overruled the parental immunity doctrine that had been acknowledged in the early 1900s and held that, although parents do have a right to custody and control of the upbringing of their children under the United States Constitution as well as state constitutions, some conduct, such as that which causes injury, is outside the scope of the parent-child relationship.[88] In these types of situations, the court concluded that immunity would not be granted to parents on the basis of right to custody.[89]

Then, in 1997, Congress passed the Adoption and Safe Families Act (AFSA) in response to the growing number of children still in foster care for long periods of time under the previous Act of 1980.[90] ASFA purported to change the law by focusing on the safety and health of abused and neglected children rather than on the rights of the biological parents.[91] To achieve this goal, AFSA shortened the permanency planning time that states must follow for children in foster care, encouraged adoption by removing the geographic barriers that had previously existed, and provided financial incentives to states that increased their adoption rates.[92] It mandated that states focus on the "best interests of the child" rather than on parental rights to custody.[93] Thus, for instance, in a home in which a child is removed because of domestic violence between his or her parents, a state may move to terminate parental rights without even having made an attempt to reunite the child with the nonabusive parent if it believes that removal is necessary to provide safety and is in "the best interests of the child."[94]

Since the passage of AFSA, the concept of the "best interests of the child" standard has continually been used by the courts as a means of limiting or terminating, under certain circumstances, the custody rights of parents. Numerous state courts first began applying this standard.[95] Then,

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88 Broadwell v. Holmes, 871 S.W.2d 471, 475-76 (Tenn. 1994).

89 *See id*. at 476.

90 *See* Venier, *supra* note 78, at 525.

91 *Id*. at 517-18.

92 *Id*. at 518.

93 *Id*. at 525.

94 *See* Terry Lyons, *When Reasonable Efforts Hurt Victims of Abuse: Five Years of the Adoption and Safe Families Act of 1997*, 26 SETON HALL LEGIS. J. 391, 400-01 (2002).

95 *See, e.g.*, Russo v. Gardner, 956 P.2d 98 (Nev. 1998) (holding that the presence of domestic violence in the home should be considered when determining the best interests of

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in 2000, the United States Supreme Court finally officially recognized this standard in *Troxel v. Granville*.[96] The Court stated that, because parents have a fundamental right to make decisions concerning the care and control of their children, any state interference with that right must be closely scrutinized by the courts.[97] Therefore, courts must take into account the "best interests of the child" standard when determining if a parent is unfit and should have his or her children removed from the home.[98]

C. *How the Legal System Currently Addresses the Issues of Criminal Liability of Mothers and Removal of Children from the Home in Domestic Violence Situations*

Nevertheless, although most courts do require that the "best interests of the child" standard be applied in custody cases, there is unclear and inconsistent case law that specifically states whether and when the presence of domestic violence in a home should be considered a factor in this analysis, specifically as it pertains to the parental rights of battered mothers.[99] As of today, practically all fifty states and the District of Columbia have passed statutes requiring that domestic violence be considered when courts make decisions regarding custody and visitation.[100] Typically, there is a presumption under these statutes that fathers who commit acts of domestic violence should have their custodial and visitation rights temporarily limited or terminated.[101] However, very few of these statutes specifically address whether a mother should be criminally charged and also have her custodial rights limited or terminated for

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the child); Kasprowicz v. Kasprowicz, 575 N.W.2d 921 (N.D. 1998) (holding that courts must consider the best interests of the child in awarding custody when domestic violence is present in the home); Clapper v. Harvey, 716 A.2d 1271 (Pa. Super. Ct. 1998) (holding that consideration of the best interests of the child is paramount).

96 530 U.S. 57 (2000).

97 *See id*. at 65-67.

98 *See id*. at 68-69.

99 Lemon, *supra* note 2, at 69.

100 *Id*.

101 *See id*. at 69. Several states have also passed statutes that criminalize and enhance punishment for batterers that commit abuse in front of children. Sheila M. Murphy, *Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L.J. 281, 297 (1999). For instance, in Oregon, statutory law bumps up the crime of committing domestic abuse in front of a child from a misdemeanor to a felony, which increases the penalty from one year in prison to five. *Id*.

exposing her children to the domestic violence perpetrated against her.[102] Essentially, such statutes provide very few "rules of thumb" that judges should abide by in weighing the relevance of domestic violence in custody cases.[103] Nevertheless, some courts have ultimately decided to consider domestic violence a factor when deciding to remove a child from the home and limit or even terminate the mother's parental rights.[104]

New York is a state that has statutorily interpreted domestic violence in the home to be a factor in determining whether a child should be removed from the home and whether parental custody of the mother limited or terminated.[105] New York Domestic Relations Law section 240(1), which went into effect in 1962, states:

> Where either party to an action concerning custody of or a right to visitation with a child alleges . . . that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party . . . and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant . . . .[106]

Likewise, in 1970, New York passed the Family Court Act for the purpose of addressing child welfare, of which section 1012 defines a neglected child as one "whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired" by his or her parent's failure to exercise minimal care.[107] Examples of neglectful behavior under this statute include failure to provide food or medical

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[102] *See* Amy B. Levin, Comment, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 816-17 (2000).

[103] *Id*. at 817.

[104] *See* Lemon, *supra* note 2, at 69-72. In 1996, the Massachusetts courts developed the nation's first judicially-created requirement to consider family violence and provide specific findings about its impact on the children in the home in all custody cases. *See* Custody of Vaughn, 664 N.E.2d 434, 439-40 (Mass. 1996); Philip C. Crosby, Case Comment, Custody of Vaughn*: Emphasizing the Importance of Domestic Violence in Child Custody Cases*, 77 B. U. L. REV. 483 (1997) (discussing the impact of domestic violence on children and how it has typically been ignored by the courts until the decision in Vaughn).

[105] N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2003).

[106] *Id*.

[107] N.Y. FAM. CT. ACT § 1012 (McKinney 2003).

treatment, parental drug abuse, and "*any other acts of a similarly serious nature requiring the aid of the court*."[108]

The courts in New York have applied these statutes in custody cases involving episodes of domestic violence.[109] For instance, in *In re Peters v. Blue*, the Family Court of New York stated:

> A custody proceeding between a parent and non-parent is governed by the firmly established principle that the natural parent's right to the custody of his or her child is superior to that of any other person, unless the parent is unfit or the parent has surrendered, abandoned, or persistently neglected the child.[110]

Thus, because the New York legislature had directed the courts to consider domestic violence as a factor in determining whether neglect is present in the home through Domestic Relations Law section 240(1), the court here found that the parents were neglectful of their child due to the presence of domestic violence in the home, which the child had witnessed, and remanded for a best interest of the child hearing to determine if termination of paternal rights was warranted.[111]

Likewise, a New York Appellate Division Court also followed the statutory custody laws in *In re Lonell J., Jr.*[112] when it reversed the trial court's determination that the parents of two young children were not neglectful based on the numerous instances of domestic violence in the home.[113] The court held that, under section 1012 of the New York Family Court Act, the catchall provision defining neglect as "any other acts of similarly serious nature requiring the aid of the court" included the witnessing of domestic violence.[114] Thus, the court found that the parents were neglectful, even without expert testimony that the parents' strife had caused specific harm to the children.[115] Also, the court recognized in *In re Deandre T.*[116] that, since section 1012 was drafted in sufficiently broad terms, the presence of domestic violence in the home was a permissible basis upon which to make a finding of neglect, absent expert advice.[117]

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108 *Id*. (emphasis added).

109 *See*, *e.g.*, *In re* Peters v. Blue, 661 N.Y.S.2d 722 (N.Y. Fam. Ct. 1997).

110 *Id*. at 724.

111 *See id*. at 725-26.

112 673 N.Y.S.2d 116 (N.Y. App. Div. 1998).

113 *Id*. at 118.

114 *See id*. at 117 (citing N.Y. FAM. CT. ACT § 1012 (McKinney 2003)).

115 *See id*. at 117-18.

116 676 N.Y.S.2d 666 (N.Y. App. Div. 1998).

117 *Id*. at 666-67.

In addition, many New York court decisions have imposed liability on both the perpetrator and victim when domestic violence occurs in the presence of the children, also finding the mother guilty of neglect, even though she is merely a victim of the abuse.[118] Furthermore, some courts have even held that a lack of actual injury to the child does not preclude a ruling of neglect against one or both of the parents.[119]

Recently, however, there appears to be the possibility of a shift in the law in New York regarding the consideration of domestic violence in the presence of children as a factor in custody cases. First, there does appear to be some indication from the New York state courts in the recent past that the mere presence and witnessing of domestic violence by children should not be considered a factor in neglect cases against mothers or used against her in an attempt to terminate her parental rights. For instance, there have been some cases decided recently by state courts in New York that have indicated that domestic violence in the presence of children is inadequate, in and of itself, to support a finding of neglect against one or both parents.[120] In addition, courts have occasionally found in some cases

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[118] *See, e.g.*, *In re* Francis S., 745 N.Y.S.2d 486 (N.Y. App. Div 2002) (finding a mother guilty of neglect because she had exposed her children to acts of domestic violence); James MM v. June 00, 740 N.Y.S.2d 730 (N.Y. App. Div. 2002) (finding a mother to be neglectful due to the ongoing domestic violence in the home and establishing that a child's exposure to domestic violence may form the basis for a finding of neglect); *In re* Maxwell B., 703 N.Y.S.2d 210 (N.Y. App. Div. 2000) (finding both parents to be neglectful because of the father's assaultive behavior toward the child and mother and the mother's inability to protect the child); Scott M., Jr., v. Janna C., 655 N.Y.S.2d 600 (N.Y. App. Div. 1997) (finding that both parents were neglectful due to the fact that the father physically and verbally abused the mother in the presence of the child and, as a result, the mother did not consistently exercise the minimum degree of care necessary to protect the child); *In re* Billy Jean II, 640 N.Y.S.2d 326 (N.Y. App. Div. 1996) (finding that both the mother and father were neglectful due to, among other things, a history of domestic violence in the home); *In re* Tami G., 619 N.Y.S.2d 222 (N.Y. App. Div. 1994) (finding both parents to be neglectful when a mother and father engaged in acts of domestic violence in the presence of their children and one of the children intervened in an attempt to protect the mother).

[119] *See In re* Billy Jean II, 640 N.Y.S.2d at 328; *In re* Tami G., 619 N.Y.S.2d at 223.

[120] *See, e.g.*, *In re* Emily PP., 710 N.Y.S.2d 476 (N.Y. App. Div. 2000) (dismissing a neglect petition against a mother and father that were involved in a domestic dispute that became physical); *In re* Kayla B., 690 N.Y.S.2d 444 (N.Y. App. Div. 1999) (finding that a domestic incident between a mother and her boyfriend was itself insufficient to sustain a neglect petition); *In re* Uniqua M., 692 N.Y.S.2d 389 (N.Y. App. Div. 1999) (finding that there was insufficient evidence to support a finding of neglect against both parents on the basis of domestic violence).

only the perpetrator of domestic violence, typically the father or mother's significant other, guilty of neglect and not the mother.[121]

III. DISCUSSION & ANALYSIS

The decision of the Second Circuit in *Nicholson* may actually be the final necessary push toward a shift in New York law as well as implement a change in other states in the Second Circuit. The decision has the potential to create a more consistent and just approach to determining whether battered mothers should be found neglectful for the domestic violence that occurs in the presence of their children as well as whether their children should be removed from their homes and their parental rights limited and eventually terminated.

A. *The Facts*

In January of 1999, Sharwline Nicholson, a single mother in New York, was viciously beaten for the first time by Barnett, the father of one of her children.[122] The attack occurred during one of his visits to her home when she was attempting to break off her relationship with him.[123] At the time, her three-year-old daughter was in a crib in another room, and her eight-year-old son was at school.[124] She called 911 and placed her children with her next-door neighbor, a woman who had babysat the children in the past, to be cared for while she was at the hospital receiving treatment.[125]

Upon arriving at the hospital for emergency treatment, tests revealed that Nicholson had suffered a broken arm, fractured ribs, and head injuries as a result of the attack.[126] Police officers visited Nicholson soon after she had arrived at the hospital and asked her for the names and phone numbers of family members that could care for her children, telling her that it would be better for her children to stay with family members than the babysitter

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[121] *See, e.g.*, *In re* Jeremiah M., 738 N.Y.S.2d 585 (N.Y. App. Div. 2002) (finding that the father neglected the child by engaging in acts of violence against the mother in the child's presence); *In re* Cybill V., 719 N.Y.S.2d 286 (N.Y. App. Div. 2001) (finding that the father neglected the child by engaging in acts of domestic violence against the mother in the child's presence, thereby creating an imminent danger that the child's physical, mental, and emotional health would be harmed); *In re* Andrew MM., 719 N.Y.S.2d 317 (N.Y. App. Div. 2001) (finding a mother's boyfriend guilty of neglect for subjecting her children to physical harm and instances of domestic violence); *In re* Deandre T., 676 N.Y.S.2d at 666 (holding that the pattern of domestic violence perpetrated by the father against the mother, which was witnessed by the child, was sufficient to find the father guilty of neglect).

[122] Nicholson v. Williams, 203 F. Supp. 2d 153, 168-69 (E.D.N.Y. 2002).

[123] *Id*. at 169.

[124] *Id*. at 168-69.

[125] *Id*. at 169.

[126] *Id*.

for the night.[127] She complied and gave the officers the names of two of her cousins and her daughter's godmother.[128]

That evening, New York's Administration for Children's Services (ACS) removed the children from the babysitter's home and took them to spend the night at one of their nurseries.[129] An ACS worker called Nicholson the following day and informed her that ACS had possession of her children, but refused to tell her where they were.[130] She was also informed that if she wanted to see her children, she would have to appear in court the following week.[131] Nicholson immediately demanded to be released from the hospital, to which the hospital agreed.[132] However, she was unable to go home because police had told her that she could not return to her apartment; therefore, she had to stay with her cousin.[133]

Though the policy of ACS was to place children removed from domestic violence homes with family or friends of their choice, Williams, the ACS worker assigned to the Nicholson case, did not do this and, as a result, Nicholson's children were placed in foster care.[134] Williams stated that he was aware that the children were in ACS's custody without legal authorization, but that he was hoping that Nicholson would comply with his demands to avoid going to court.[135] Williams also admitted that, though he knew that ACS was required to go to court the following business day after placing a child in foster care, he had learned in his training that it was common to wait a few more days in domestic violence cases as most mothers will comply with ACS's demands to avoid going to court.[136]

Five days after the children were placed in foster care, a neglect petition was finally filed with the New York Family Court against both Nicholson and Barnett.[137] The petition included three allegations of neglect.[138] The first allegation was against Barnett for excessive corporal punishment.[139] The second allegation was against both Nicholson and Barnett and alleged that they engaged in domestic violence in the presence

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127 *Id*.
128 *Id*.
129 *Id*.
130 *Id*.
131 *Id*.
132 *Id*.
133 *Id*. at 169-70.
134 *Id*. at 170.
135 *Id*.
136 *Id*.
137 *Id*. at 171.
138 *Id*.
139 *Id*.

of their daughter.[140] However, the claim made no distinction between abuser and victim.[141] The third allegation was directed at Nicholson and alleged that she failed to cooperate with the services offered to insure the safety of her children, though it did not specifically state what services she had failed to utilize.[142]

Williams justified the neglect charges against Nicholson by stating that, though he did not find Nicholson to be a neglectful parent, he did believe that she was an inadequate guardian because she was not properly handling the dangerousness of the domestic violence situation in her home.[143] However, Williams made these observations without first inquiring as to the actual situation in the Nicholson home.[144] Had he done this, he would have discovered that Barnett had never lived in the Nicholson home, did not have a key to the apartment, and, in fact, actually resided in South Carolina.[145] Williams further justified the neglect charge based upon the fact that Nicholson had failed to obtain a protection order against Barrett.[146] However, Nicholson had attempted to obtain an order, but was unable to do so because she did not know Barnett's out-of-state address.[147]

Nicholson appeared in family court on February 2, 1999, as ACS had instructed her.[148] However, she did not have nor was she offered legal representation.[149] The court remanded the children back into the custody of ACS to be placed in foster care pending an order of final disposition.[150] Nicholson claimed, however, that she was not even aware that such an order was issued.[151] She was not contacted by her appointed attorney until after the hearing and the order had been issued.[152]

Two days later, after being separated from her children for an entire week, Nicholson returned to court with her appointed attorney.[153] The court ordered that her children be placed back in her custody on the

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140 *Id*.
141 *Id*.
142 *Id*.
143 *Id*.
144 *Id*.
145 *Id*.
146 *Id*.
147 *Id*.
148 *Id*.
149 *Id*.
150 *Id*.
151 *Id*.
152 *Id*.
153 *Id*.

condition that she not return to her apartment, but instead live with the cousin she had be staying with.[154]

The following day, Nicholson was allowed for the first time since being attacked to visit and speak with her children at an ASC foster agency.[155] Unfortunately, however, it had appeared that her children had not been cared for well.[156] Her daughter had a rash, a runny nose, and some scratches, and her son had a swollen eye and claimed that it because his foster mother had slapped him.[157] Nicholson filed a report with the police on her son's behalf, and her children were placed in a new foster home.[158] Sadly, a few days later, her son had his sixth birthday, but Nicholson was not allowed to see or speak with him on that day.[159]

Finally, twenty-one days after separation and fourteen days after the family court had paroled her children to her, Nicholson's children were returned to her.[160] ACS claimed that this delay occurred because it did not believe that there was proper bedding for the children at the home of Nicholson's cousin.[161] However, ACS did not assist her in moving the bedding from Nicholson's apartment, which she was prohibited from entering because ACS believed the home was possibly dangerous for her to enter.[162]

After the children were returned to Nicholson, ACS alleged that its caseworkers had difficulty visiting her and the children.[163] ACS claimed to have attempted to visit the home of Nicholson's cousin on six or seven occasions and that Nicholson had called the ACS offices on several occasions from mid-February to April.[164] However, Nicholson maintained that ACS only made one unannounced attempt to visit her home when she and the children were not there.[165] She then called ACS to setup an appointment, but had to later cancel that appointment because of a snowstorm.[166] ACS filed a warrant stating that caseworkers had attempted

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154 *Id*. at 171-72.
155 *Id*. at 172.
156 *Id*.
157 *Id*.
158 *Id*.
159 *Id*.
160 *Id*.
161 *Id*.
162 *Id*.
163 *Id*.
164 *Id*.
165 *Id*.
166 *Id*.

several times to visit Nicholson at her cousin's home and previous apartment and that she had not returned any messages.[167]

The warrant was subsequently granted, and Nicholson, afraid that ACS would take her children from her again, sent them to live temporarily with her father in Jamaica.[168] She had tried several times to reach her court-appointed attorney, but her messages were not returned.[169]

Nicholson was then arrested on April 7, 2000, and charged with neglect.[170] When she appeared before the family court, a different court-appointed attorney represented her.[171] She informed the court that her children were in Jamaica.[172] She was then ordered to return to court later that month and, at that time, the court granted her permission to return to her apartment with her children.[173] However, she remained on record as a neglecting parent due to the petition filed against her and Barnett, though she appealed the ruling and was informed that it would be administratively reviewed.[174]

B. *The Suit*

In April of 2000, Nicholson filed a complaint in the United States District Court for the Eastern District of New York against ACS and the City of New York on behalf of herself and her two children.[175] In the following months, numerous other women also began filing similar complaints.[176] Therefore, early in 2001, Nicholson and these other plaintiffs moved the court for class certification.[177] In June of 2001, the plaintiffs moved for a preliminary injunction against the City soon after to prohibit ACS from continuing to remove children from the home and care

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167 *Id*.

168 *Id*.

169 *Id*.

170 *Id*. at 173.

171 *Id*.

172 *Id*.

173 *Id*.

174 *Id*.

175 *Id*. at 164-65. The State of New York was dismissed as a defendant to the action by consent of all the parties in February of 2002. Nicholson v. Williams, No. CV00-2229, 2002 U.S. Dist. LEXIS 4828, at *2-3 (E.D.N.Y. Feb. 5, 2002).

176 *Nicholson*, 203 F. Supp. 2d at 165.

177 Nicholson v. Giuliani, No. CV00-2229, 2001 U.S. Dist. LEXIS 2624, at *2-3 (E.D.N.Y. Feb. 28, 2001). The individual facts and claims of the cases of other plaintiffs to the class action were also considered by the district court and outlined in its opinion. *Nicholson*, 203 F. Supp. 2d at 173-93.

of their mother solely based on the presence of domestic violence in the home.[178]

A trial commenced in July of 2001 as to whether class certification and then the preliminary injunction should be granted.[179] In August, the court granted class certification.[180] However, the court required that, in order to avoid a conflict in interest, the plaintiffs divide into three subclasses: children, battered mothers, and alleged batterers, though no alleged batterers actually came forward.[181]

Then, a few months later, in January of 2002, a preliminary injunction was issued against ACS stating that their practices and policies violated the constitutional rights of both mothers and children.[182] The court held that "the government 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."[183] The court then ordered that ACS follow specific guidelines through which it was required to immediately return a battered mother's children to her home after determining that any risk of imminent danger had passed in situations in which the children had been taken from the home solely because the mother was a victim of domestic violence, and she had not otherwise abused or neglected the child.[184]

C. *The District Court's Ruling*

The district court upheld the issuance of the injunction in March of 2002, as it concluded that the need for the preliminary injunction had been established by clear and convincing evidence.[185] In its opinion, the court first addressed modern perspectives on domestic violence and child welfare by providing historical background on the problem of domestic violence[186] and efforts at protecting child welfare.[187] The court then went on to describe the views of experts that had testified as to the effects on

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178 *Nicholson*, 203 F. Supp. 2d at 165.

179 *Id*.

180 Nicholson v. Williams, 205 F.R.D. 92, 94 (E.D.N.Y. 2001).

181 *Id*. at 95; *see also Nicholson*, 203 F. Supp. 2d at 165.

182 *In re* Nicholson, 181 F. Supp. 2d 182, 185 (E.D.N.Y. 2002).

183 *Id*. at 188.

184 *See id*. at 189-92.

185 *Nicholson*, 203 F. Supp. 2d at 260.

186 *See id*. at 193-94.

187 *See id*. at 194-97.

children who experience domestic violence,[188] as well as the effects of children who are removed from the home.[189]

1. *The Best Practices*

From its historical analysis and consideration of expert opinions, the court identified a series of best practices for dealing with the intersection of child maltreatment and domestic violence.[190] The first practice identified was that mothers should not be accused of neglect for being victims of domestic violence.[191] The court recognized that when a battered mother fails to protect herself and her children from her abuser, it is usually due to a lack of viable options, not her lack of desire to provide protection.[192] Therefore, charging battered mothers with neglect does nothing more than aggravate the problem by blaming the mother for failing to control a situation that is actually controlled by the abuser.[193] In fact, the court acknowledged that charging the battered mother with neglect just further victimizes her.[194]

The second practice the court identified was that batterers should be held accountable for the abuse they have perpetrated.[195] The court explained that there is an overriding principle that violent perpetrators must be held accountable for their abusive behavior.[196] In addition, the court stated that child welfare services should be responsible for holding batterers accountable because victims are not in a position to do this.[197]

The next practice identified was that children should be protected from harm by offering battered mothers appropriate services and protection.[198]

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188 *See id*. at 197-98. The court agreed with the consensus of the experts that children can be, but are not necessarily, negatively affected by witnessing domestic violence. *Id*. at 197.

189 *See id*. at 198-99. Many experts testified that, due to the primacy of the parent-child bond, a child is negatively affected when he or she is separated from the parent. *Id*.

190 *Id*. at 200. The court acknowledged that these practices were strongly based upon a 1999 report entitled *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice*, which was published by the National Council of Juvenile & Family Court Judges Family Violence Department, an advisory committee composed of professionals from child welfare and domestic violence services, members of the academic community, judges, and federal agency representatives. *Id*.

191 *See id*. at 200-01.

192 *Id*. at 200.

193 *Id*. at 201.

194 *Id*.

195 *Id*. at 201-02.

196 *Id*. at 201.

197 *Id*. at 201-02.

198 *Id*. at 202-03.

The court held that, in order to ensure the safety of battered mothers and their children, there needs to be stronger community support structures and more adequate responses for providing services to victims of abuse.[199] The court also noted that service planning for domestic violence cases needs to be different than the approach taken in general maltreatment cases, as mothers and victims of domestic violence require different services in order to keep them safe from the abuser.[200]

Another practice identified by the court was that separation of battered mothers and children should be the alternative of last resort.[201] The court acknowledged that removing a child from his or her mother could be very traumatic and cause severe psychological and emotional injuries.[202] Thus, the court stated that a child should only be removed from his or her mother as a last resort when there is a very real risk to the safety of the child.[203] The best policy, they argued, was to remove and sanction the batterer.[204] The court also acknowledged that, when agencies remove a child from a battered mother, the mother is less likely to report acts of abuse in the early stages due to the fear of losing her child, which may actually further endanger the child.[205]

The last two practices that the court advocated involved the policies and practices of child welfare agencies.[206] The court stated that child welfare employees need to be adequately trained to deal with domestic violence through high quality, on-going training.[207] Also, agency policy needs to provide clear guidelines to caseworkers regarding the specific criteria under which children can remain safely with the non-abusive parent.[208]

2. *Problems with the Current Policies and Practices of ACS*

After identifying what it believed to be the best practices, the court went on to describe and analyze the current policies and practices of ACS in the City of New York. The court first described the historical

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199 *Id*. at 202.

200 *Id*.

201 *Id*. at 203-05.

202 *Id*. at 203.

203 *Id*.

204 *Id*. at 204.

205 *Id*.

206 *Id*. at 205.

207 *Id*.

208 *Id*.

background of ACS as well as its previous domestic violence initiatives.[209] It then went on to explain the problems with ACS's present policies and practices concerning removing children from homes with domestic violence.[210]

The first policy and practice the court acknowledged was that ACS regularly alleged and charged battered mothers with neglect.[211] The court cited to the results of a statistical study conducted by the New York State Office of Children and Family Services, which indicated that battered women in New York City had been accused of neglect and separated from their children in numerous cases and that, in many of the cases, the mother's only fault was that she had been abused.[212] Furthermore, the court noted that many of the neglect petitions filed against battered mothers alleged that they "engaged in domestic violence," but rarely named the mother as the victim of the violence.[213]

Second, the court recognized that ACS rarely held abusers accountable for the violence they perpetrated.[214] Although ACS contended they were initiating a new domestic protocol, which emphasized holding batterers accountable, the court noted that ACS had not yet established guidelines on how to implement the program, coordinate with police, or provide future training to caseworkers.[215] The court further stated that there was no indication that ACS pursued the removal of the abuser from the home before removing the child, even though they had the power to do so.[216]

The next practice and policy the court identified was that ACS failed to offer adequate services to mothers before prosecuting them or removing their children.[217] The court did acknowledge that ACS had made significant strides in improving the availability of preventative services, but stated that these services were not being properly provided because ACS expected and required mothers to accept the services offered.[218] Often, when a woman refused a service, perhaps because the plan or an element of the plan was unnecessary or actually increased the danger to her and her children, ACS interpreted this refusal as the mother's refusal to

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209 *Id*. at 205-07. The court found that many of the policies applied by ACS in regard to child abuse, specifically pertaining to domestic violence homes, were inadequate and driven moreso by "institutional self-protection" than the best interests of the child. *Id*.

210 *Id*. at 207-21.

211 *Id*. at 207-10.

212 *Id*. at 208.

213 *Id*. at 209-10.

214 *Id*. at 210-11.

215 *Id*. at 210.

216 *Id*. at 211.

217 *Id*. at 211-12.

218 *Id*. at 212.

protect her children.[219] In addition, the court stated that more preventative services needed to be provided to abused women and their children as this would most likely lead to fewer removals.[220]

The court also noted that ACS regularly separated battered mothers and their children unnecessarily.[221] Statistics showed that ACS made many more separations of abused mothers and their children than was necessary to protect the children.[222] In fact, removal of the children of abused mothers seemed to have occurred in every case.[223] Likewise, the court also found that ACS unnecessarily delayed returning children to battered mothers, sometimes due to administrative inefficiency, but other times just to punish mother and child until the mother agreed to comply with ACS's orders.[224]

Furthermore, the court found that ACS failed to adequately train its employees regarding domestic violence.[225] Newly hired ACS caseworkers were only receiving two days of training on how to handle domestic violence situations.[226] It was not until 2001 that caseworkers were required to receive training on the dangers and trauma involved in separating children from their parents; however, this training did not include a comprehensive discussion of what constitutes risk to children who witness domestic violence.[227] Basically, ACS caseworkers' training just did not adequately equip them to handle the dynamics of domestic violence situations.[228]

Finally, the court found that ACS's written policies provided insufficient and inappropriate guidance to employees.[229] ACS policy stated that every case must be assessed for domestic violence and that caseworkers must follow the new domestic violence protocol, which focused on safety planning for the victims and holding the abuser accountable.[230] However, the loophole in the protocol and the practice generally followed by the caseworker was that a separation order could still be ordered if the caseworker believed that the mother was not ready or able to accept services and lack of these services would place the child in

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219 *Id*.

220 *See id*.

221 *Id*. at 212-16.

222 *Id*. at 212.

223 *Id*. at 212-13.

224 *Id*. at 216.

225 *Id*. at 216-18.

226 *Id*. at 216.

227 *Id*.

228 *Id*. at 217.

229 *Id*. at 218-21.

230 *Id*. at 219-20.

immediate danger.[231] Essentially, ACS failed to adhere to the principles advocating unity of the battered mother and her children that it claimed to believe.[232] The court did acknowledge, however, that ACS has numerous future projects planned to improve the handling of domestic violence cases, but still believed that these changes would not be effectuated unless a preliminary injunction was issued.[233]

3. *Problems Resulting from Court Procedure*

In addition, the court claimed that there had been judicial oversight by the New York Family Court of ACS's wrongful actions toward battered women and through a lack of representation for battered women.[234] The court acknowledged that this oversight by the courts was often the result of heavy caseloads and lack of time to adequately hear and decide a case.[235] The urgency of child safety demands that judges make quick decisions; however, they often do not have the time to discover the critical information needed to make such decisions immediately.[236] Therefore, they tended to give ACS much latitude, trusting that its information was accurate, even though cases showed that it often was not.[237] Furthermore, attorney representation was not assigned to indigent mothers until after they arrived for their court date; thus, hearings also had to be postponed so that these attorneys could prepare for the case.[238] Also importantly, most lawyers that were assigned to such cases could not afford to make a full-time commitment or pay the necessary overhead costs.[239]

Therefore, the court, claiming to have jurisdiction to hear and decide this claim[240] under both 42 U.S.C. section 1983[241] and the Fourteenth

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231 *Id*. at 220.

232 *Id*.

233 *Id*. at 221.

234 *Id*. at 221-28.

235 *Id*. at 222.

236 *Id*.

237 *Id*.

238 *Id*.

239 *Id*. at 225.

240 *Id*. at 229-32. The court refused to abstain from hearing and deciding the case, finding that the plaintiffs' claims implicated fundamental constitutional rights as well as alleged that serious substantive and procedural due process violations had occurred by ACS and New York City. *Id*. at 229-30.

241 *Id*. at 232-33. This statute provides a cause of action "against any person who, acting under color of state law, deprives another of a right, privilege, or immunity secured by the Constitution or other laws of the United States." *Id*. at 232 (quoting Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993); 42 U.S.C. § 1983 (2000)).

Amendment,[242] found that there was clear and convincing evidence of repeated misconduct by ACS of the City of New York.[243] The court held that there were unnecessary removals of children from their mothers,[244] improper prosecution of battered mothers,[245] and a lack of adequate representation for battered mothers.[246] Thus, the court determined that the issuance of the preliminary injunction was appropriate.[247]

D. *The Appellate Court's Ruling*

ACS and the City of New York then appealed the judgment of the district court to the United States Court of Appeals for the Second Circuit, seeking to reverse the issuance of the injunction.[248] ACS and the City argued that the way they chose to carry out the task of removing an alleged abused or neglected child from the home did not violate the United States Constitution.[249]

The Second Circuit believed, however, that, though some of the circumstances surrounding the removal of children from the home did raise serious issues regarding federal constitutional law, there were unclear and inconsistent issues of New York state domestic law that needed to be

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[242] *Nicholson*, 203 F. Supp. 2d at 233-46. The Fourteenth Amendment to the U.S. Constitution states that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[243] *Nicholson*, 203 F. Supp. 2d at 249.

[244] *Id*. at 250-51. The court held that these unnecessary removals were due to a lack of adequate investigations into whether or not a child should be removed from the home and, thus, resulted in a violation of battered mothers' substantive due process rights. *Id*.

[245] *Id*. at 252-53. The court stated that ACS incorrectly and unjustly "presume[d] that [a battered mother was] not a fit parent and that she [was] not capable of raising her children in a safe and appropriate manner because of actions which [were] not her own." *Id*. at 252.

[246] *Id*. at 253-57. The court noted that representation of battered mothers is merely a "sham" as the court typically supplies these women with attorneys that cannot and do not properly represent her. *Id*. at 253. The court held that, as a result, a battered mother's due process right to effective assigned counsel is violated. *Id*. at 253-56.

[247] *Id*. at 257-60. The court stated,

> A preliminary injunction has been granted for the purpose of ensuring that 1) battered mothers who are fit to retain custody of their children do not face prosecution or removal of their children solely because the mothers are battered, and 2) the child's right to live with such a mother is protected.

Id. at 257.

[248] Nicholson v. Scoppetta, 344 F.3d 154, 158 (2d Cir. 2003).

[249] *Id*.

determined before it could make its own constitutional inquiry.[250] It stated, "Few matters are closer to the core of a State's essential function than the protection of its children against those who would, intentionally or not, do them harm."[251] Further, the court also recognized that areas of traditional state concern, such as those involving family law, should be deferred to the state courts to determine, as they are "far more expert than [federal courts] are . . . at understanding the implications of each decision in its practiced field."[252] The court then acknowledged that New York had created a "detailed administrative scheme" to protect its children, in which the New York courts themselves also played a significant role, and was, therefore, hesitant to interfere in and possibly disrupt New York's process for investigating child abuse claims.[253]

Therefore, the court certified the following three questions to the New York Court of Appeals that it believed must be answered before it could dispose of the appeal:

> 1. Does the definition of a "neglected child" under N.Y. Family Ct. Act § 1012(f), (h) include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker?
> 2. Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or other caretaker constitute "danger" or "risk" to the child's "life or health," as those terms are defined in the N.Y. Family Ct. Act §§ 1022, 1024, 1026-1028?
> 3. Does the fact that the child witnessed such abuse suffice to demonstrate that "removal is necessary" [(N.Y. Family Ct. Act §§ 1022, 1024, 1027)], or that "removal was in the child's best interests" [(N.Y. Family Ct. Act §§ 1028, 1052(b)(i)(A))], or must the child protective agency offer additional, particularized evidence to justify removal?[254]

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250 *Id*.

251 *Id*.

252 *Id*. at 168.

253 *Id*. at 176.

254 *Id*. at 176-77. It should also be noted, however, that one of the three justices for the Second Circuit Court of Appeals did dissent from this ruling, arguing that the injunction should be vacated. *Id*. at 177 (Walker, C. J., dissenting). Chief Judge Walker claimed that the preliminary injunction should be lifted because the evidence was not sufficient to

(*continued*)

E. *New York Court of Appeals' Answers*

In October of 2004, the New York Court of Appeals finally issued its answers to the three certified questions.[255] As to the first certified question, the court answered that the definition of a "neglected child" under New York Family Court Act section 1012(f) and (h) does not include an instance in which the only allegation is that the parent has been a victim of domestic violence, and the child has been exposed to that violence.[256] More is required under New York law for a showing of neglect.[257] The court explained that the party seeking to establish neglect must show by a preponderance of evidence that the child's physical or mental condition has been impaired or is at least in imminent danger of being impaired.[258] Such impairment must actually be near and impending and not just possible.[259] Furthermore, there must be a causal connection between the basis for the neglect petition and the circumstances that caused the impairment or imminent impairment.[260] For instance, in order for the mother of a newborn who tested positive for cocaine at birth to be found neglectful, the baby's positive drug test must be linked to additional evidence, such as the mother's history of drug use and testimony from witnesses who saw her use drugs while pregnant.[261]

Furthermore, the court held that the party must also establish by a preponderance of evidence that the actual or potential harm to the child is a result of the battered parent's failure to provide a minimum degree of care for the child.[262] This must be evaluated objectively, "[t]hus, when the inquiry is whether a mother—and domestic violence victim—failed to

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support a finding that ACS had a policy or practice that violated either the Fourth or Fourteenth Amendments with respect to the removal of abused and neglected children from homes with domestic violence. *Id*. He contended that ACS upheld its principal of removing children from homes only when it found that domestic violence created an immediate danger of possible serious physical or emotional harm, which did not constitute a policy of "regularly separating battered mothers and children unnecessarily" as the district court alleged, though some cases did appear to be unnecessary in hindsight. *Id*. at 177-79. Walker stated, "Exposure to domestic violence poses enough risk of harm to a child that the Constitution does not bar a state from carrying out a removal to protect against that harm." *Id*. at 184.

255 Nicholson v. Scoppetta, 820 N.E.2d 840 (N.Y. 2004).

256 *Id*. at 844.

257 *Id*.

258 *Id*. at 845.

259 *Id*. at *10.

260 *Id*.

261 *Id*.

262 *Id*.

exercise a minimum degree of care, the focus must be on whether she has met the standard of the reasonable and prudent person in similar circumstances."[263] Factors that should be considered include the severity and frequency of the violence, the resources and options available to the battered mother, and whether she repeatedly allowed the abuser to return to the home even though the child knew of the abuse and was afraid of the abuser.[264]

Regarding the second certified question, the court answered that injury or possible injury to a child who has witnessed domestic violence against his or her parent does not necessarily constitute danger or risk as defined in New York Family Court Act sections 1022, 1024, and 1026-1028.[265] The court acknowledged that "[n]ot every child exposed to domestic violence is at risk of impairment."[266] Thus, mere exposure of a child to domestic violence is not an automatic ground for removal under any of the four permissible types of removal.[267] In addition, the court specifically pointed out that, if such a removal does occur, it may in fact end up doing more harm than good to the child.[268]

Finally, in response to the third certified question, the court answered that the fact that a child witnessed domestic violence does not alone demonstrate that removal is necessary; rather, the child protective agency must offer additional evidence demonstrating that removal is necessary.[269] The court explained that there is no "blanket presumption" requiring removal when a child witnesses domestic violence as each case is fact-specific.[270] Thus, "when a court orders removal, particularized evidence must exist to justify that determination, including, where appropriate, evidence of efforts made to prevent or eliminate the need for removal and the impact of removal on the child."[271]

F. *Analyzing the Issues*

The Second Circuit has two opposing interests that it must recognize and address in its decision. First, issues pertaining to the protection of

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263 *Id*. at 846.

264 *Id*. at 846-47.

265 *Id*. at 849.

266 *Id*.

267 *See id*. The four ways a child can be removed from the home based on neglect include: "(1) temporary removal with consent; (2) preliminary orders after a petition is filed; (3) preliminary orders before a petition is filed; and (4) emergency removal without a court order." *Id*.

268 *Id*.

269 *Id*. at 854.

270 *Id*.

271 *Id*.

children in homes with domestic violence, which tend to advocate removal, must be analyzed. Then, issues pertaining to the rights of battered mothers must be explored, as they tend to support nonremoval and custody remaining with the mother. Arguments for both sides are significant and persuasive.

1. *Issues Concerning the Protection of Children*

The primary reason that some advocate prosecuting battered women and removing children from homes in which domestic violence has occurred is that the witnessing of domestic violence is believed to cause children to suffer from a number of severe psychological problems. Specifically, at least 50% of children exposed to the trauma of domestic violence before the age of ten are likely to develop psychiatric problems later in life.[272] Research has shown that the impact of exposure to domestic violence on children may cause anywhere from minimal to severe limitations on personality development and cognition.[273] These types of psychological injuries are often considered "emotional abuse" and have been found to lead to cognitive, emotive, behavioral, and sociological deficits that disrupt both a child's short-term and long-term functioning.[274] Such maltreatment may cause language delays, regressive tendencies, lack of motivation, and inability to concentrate, all which affect a child's ability to function and learn in school.[275] Maltreated children also have difficulty interacting socially, as their behavior may be unusually withdrawn, aggressive, fearful of others, anxious and compulsive, or socially

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[272] Crosby, *supra* note 104, at 502.

[273] WALKER, *supra* note 48, at 75. Many parents tend to think that their children did not know that the abuse was occurring because, for instance, they were sleeping or in the next room. Crosby, *supra* note 104, at 499-500. In addition, parents also tend to believe that children will not remember or not understand the violence that they did witness. *Id*. at 500. However, interviews with children illustrate that almost all can remember and provide detailed accounts of the violence. *Id*. In fact, research shows that children are able to recall traumatic events in their life as early as eighteen months of age. *Id*.

[274] *See* G. Steven Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress*, 27 N. KY. L. REV. 689, 690-94 (2000). This abuse has also been referred to by the courts as "secondary abuse," which suggests that children who witness occurrences of abuse in their environment are psychologically affected, though the abuse may not be specifically directed at them. *See also* Heather A. v. Harold A., 52 Cal. App. 4th 183, 195-96 & n.11 (1996); Jon N. v. Fred N., 179 Cal. App. 3d 156, 161 (1986). In fact, some courts have sometimes even gone as far as to acknowledge this emotional abuse by allowing a child to recover in tort later in life against his or her abusive parent for the emotional distress inflicted upon him or her because of witnessing the domestic violence. *See* Murphy, *supra* note 101, at 297-98.

[275] Neeley, *supra* note 274, at 694-95.

inappropriate.[276] Most importantly, this emotional abuse may also cause much more severe psychological disorders lasting throughout life such a depression, low self-esteem, dissociative reaction, addiction, and suicide attempts.[277] In addition, research has shown that anxiety disorders and post-traumatic stress disorder are also quite common in children that have witnessed domestic violence.[278]

Another reason for removal is the risk of possible physical injury to the child if the batterer remains in or returns to the home. Research has shown that in homes in which the mother is abused, the children are likely to have been abused or to be abused in the future.[279] Specifically, statistics show that 53% to 70% of batterers also abuse their children.[280] In addition, battered women are at least twice as likely to abuse their children than women who are not abused, and almost 30% of these women abuse their children while living in a home with domestic violence.[281] Moreover, even if the child has not directly been abused, there is always a risk that the child may be physically injured during a violent encounter between the mother and her partner.[282] Often, children are at risk of being inadvertently injured by furniture or other objects being thrown or when they attempt to intervene.[283]

In addition, evidence shows that domestic violence tends to flow from generation to generation, further endangering future children as well as others.[284] Research indicates that "children who are exposed to violence

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[276] *Id*. at 695-96.

[277] *Id*. at 696.

[278] WALKER, *supra* note 48, at 74-75.

[279] STARK & FLITCRAFT, *supra* note 41, at 76-77.

[280] Crosby, *supra* note 104, at 503.

[281] Gary J. Maxwell, *Women and Children First . . . Why not Build Enough Lifeboats? News from the Front: A Report on the Honolulu Conference "Two Systems—One Family, Bringing the Child Abuse and Domestic Violence Communities Together" (March 23-24, 2000)*, 10 COLUM. J. GENDER & L. 33, 38-39 (2000). There is also a greater likelihood that a battered mother may neglect her children because she needs to give her full attention to her abusive partner in an effort to control his violence. *Id*. at 36. She may also neglect her children by being unresponsive to their needs due to the fact that she is so focused on her own fears of violence. *Id*.

[282] *See* STARK & FLITCRAFT, *supra* note 41, at 77; WALKER, *supra* note 48, at 77-78.

[283] Janice A. Drye, *The Silent Victims of Domestic Violence: Children Forgotten by the Judicial System*, 34 GONZ. L. REV. 229, 231 (1998). The youngest children tend to suffer the most serious injuries such as concussions or broken bones. *Id*. Also, in one study involving 146 children of battered women, statistics showed that all sons over the age of fourteen had attempted to protect their mothers from the perpetrator during beatings and were injured 62% of the time. *Id*.

[284] Neeley, *supra* note 274, at 690.

have a significant risk of using violence themselves" in their current behavior as well as their future interactions as adults.[285] Females tend to exhibit symptoms such as withdrawal, passivity, clinging behavior, anxiety, depression, and dependence,[286] which may make them more prone to becoming victims in future violent relationships.[287] Males tend to demonstrate symptoms of alcoholism and portray violent behavior through disobedience, defiance, and aggressiveness.[288] In fact, statistics show that a boy who witnesses his father batter his mother is 700 times more likely than a child who did not witness domestic violence to be abusive to others during his lifetime.[289]

Finally, another reason that some advocate removing the child is simply based upon the belief that society possesses a moral obligation to protect abused and neglected children.[290] This belief may stem from the fact that children, especially those that are abused, are not likely to have ready access to the legal system[291] or perhaps even access to any other means of aid. Because of this, children are viewed as "the most vulnerable members of society and the state has an interest in ensuring their emotional well-being."[292] Also, many believe that children are entitled to a reasonable expectation of safety within the home,[293] and, if this does not exist in a home in which domestic violence is present, then a child should be removed from that home and placed in a home in which he or she can feel safe.

2. *Issues Concerning the Rights of Battered Mothers*

Other evidence has shown, however, that children are generally more stable and less emotionally distressed following the witnessing of a domestic encounter when they are left in the care of their mother rather than removed from the home and placed in foster care.[294] The district court pointed out in *Nicholson* that research has shown that children only *may* be negatively affected by the presence of domestic violence in the home as

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285 WALKER, *supra* note 48, at 74.

286 Murphy, *supra* note 101, at 285; *see also* Drye, *supra* note 283, at 232.

287 *See* Drye, *supra* note 283, at 236.

288 Murphy, *supra* note 101, at 285 & n.29; *see also* Drye, *supra* note 283, at 232.

289 Lenore E. Walker, *Domestic Violence*, *in* CLINICAL HANDBOOK OF ADULT EXPLOITATION AND ABUSE 77, 81 (Thomas W. Miller & Lane J. Veltkamp eds., 1998).

290 *See* Neeley, *supra* note 274, at 711.

291 *Id*. at 712.

292 *Id*. at 710.

293 Mary Kate Kearney, *Child Witnesses of Domestic Violence: Third Party Recovery for Intentional Infliction of Emotional Distress*, 47 LOY. L. REV. 283, 301 (2001).

294 *See* Nicholson v. Williams, 203 F. Supp. 2d 153, 199 (E.D.N.Y. 2002).

there is a wide range of psychological responses that children may experience, and these responses may not necessarily be severe.[295]

Furthermore, research has actually shown that a disruption in the parent-child relationship may also cause psychological problems.[296] Psychologists have found that separation from the primary caregiver and frequent replacements with different caregivers during infancy and early childhood may result in reactive attachment disorder (RAD).[297] According to explanations of RAD, a child's primary caregiver, typically the mother, calms a child's fears and makes the child feel secure as well as teaches the child how to regulate these fears.[298] Therefore, if the child is separated from the primary caregiver, the child will begin viewing the world as a threat because he or she never developed the necessary ability to calm this fear early in life.[299] As a result, the child may suffer from a lack of ability to give and receive love, engage in chronic lying, develop poor peer relationships, and engage in self-injurious behavior and cruelty to animals or other children.[300]

In fact, there may even be a greater psychological and physical risk of injury to a child when that child is in foster care. Psychologists have found that children removed from their homes and placed in a series of foster homes are much more prone to suffering long-term psychological problems than children who remained with their mothers.[301] Furthermore, the district court acknowledged in *Nicholson* that removal places children in the foster care system, which may also put the child at risk if, for instance, abuse also occurs in that home, there is a lack of adequate medical care, or the child responds negatively as a result of his or her disruption in contact with his or her siblings and previous school and community.[302]

In addition, research has also shown that children raised in violent homes are not necessarily more prone to becoming violent adults than

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295 *Id.* at 197-98.

296 *See id*. at 199.

297 *See* Heal the Hearts, *What is RAD (Reactive Attachment Disorder)*, *at* http://www.healtheheart.org/rad.html (last visited May 19, 2005).

298 *Id*.

299 *Id*.

300 *Id*.

301 Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS. L. REP. 107, 119 (2002).

302 *See* Nicholson v. Williams, 203 F. Supp. 2d 153, 199 (E.D.N.Y. 2002). For instance, when Nicholson saw her children for the first time after her attack, her daughter was suffering from a cold and had not been properly cared for, and her son had a swollen eye where he had been slapped by his foster mother. *Id.* at 172.

those not raised in violent homes.[303] One study showed that 90% of men who grew up in violent homes did not abuse their female partners.[304] In fact, Walker stated, in regards to the statistic that a child witnessing abuse was 700 times more likely to abuse others, that "these data are very difficult and very complex from which to make predictions[, thus,] we can't support the statement that a little boy who watches his father batter his mother is going to grow up to be a batterer with any great predictive numbers because we just don't know."[305]

Finally, there are also very important constitutional concerns when attempting to limit or terminate a mother's right to custody. The United States Supreme Court held that a parent has a fundamental right to raise his or her child.[306] In addition, a child has the right to be raised and nurtured by his or her parents.[307] Therefore, a battered woman's fundamental right to custody of her children through the Fourteenth Amendment is violated when the state removes her children from her home and attempts to terminate her custodial rights without a compelling state interest.[308] Likewise, her procedural due process rights are also violated when her children are removed from the home as a result of unfair procedures.[309]

IV. SIGNIFICANCE

Obviously, the Second Circuit is faced with a very difficult yet fundamentally significant responsibility, as it must somehow balance these opposing interests and provide a solution. First, the court should uphold the injunction issued by the district court and comply with the response of the New York Court of Appeals because better legal and public policies exist that should be implemented by ASC before neglect petitions are filed against battered mothers and their children are removed from their homes. Then, the court must provide some sort of a solution that attempts to both protect children in homes with domestic violence from harm and uphold the rights of battered mothers. A solution that will adequately recognize the significance of both interests as well as then balance these interests is a conceptual framework that ACS as well as other child protection agencies in New York and other states should implement regarding criminalization

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303 *See* STARK & FLITCRAFT, *supra* note 41, at 79.

304 *Id*.

305 Walker, *supra* note 289, at 81.

306 *See* cases cited *supra* notes 62, 80-84, 86-87, 96-98 and accompanying text.

307 Shima Baradaran-Robison, *Tipping the Balance in Favor of Justice: Due Process and the Thirteenth and Nineteenth Amendments in Child Removal from Battered Mothers*, 2003 BYU L. REV. 227, 235 (2003).

308 *See id*. at 235-36.

309 Nicholson v. Williams, 203 F. Supp. 2d 153, 237-41 (E.D.N.Y. 2002).

of acts of domestic violence and removal of children from homes with domestic violence.

A. *Conceptual Response to Criminalization*

Foremost, the act of exposing children to violence must be expressly and consistently criminalized through both legislation and case law due to the overwhelming amount of research and evidence illustrating the detrimental effects that the witnessing of domestic violence may have on children.[310] These negative effects on children clearly constitute not only neglect, but also the crime of child endangerment[311] by the perpetrator of the domestic violence because his acts endanger both the physical and psychological welfare of the child.

However, it should be the batterer and not the mother who should be found neglectful and be held criminally liable for endangering the welfare of the children in the home. Too often, mothers are found "neglectful" for allowing their children to witness the domestic violence being perpetrated upon them by their batterers.[312] However, in actuality, it is the batterer in these situations and not the mother, the victim of the domestic violence, that is actually the person directly responsible for placing the children in a psychologically and physically dangerous situation.

Specifically, failure-to-protect laws that result in allegations of neglect should no longer be used against mothers. These laws are based upon the premise that parents have a duty to keep their children safe, and particular omissions in a parent's behavior, such as not stopping the domestic violence in the home that the child is witnessing, can cause children harm.[313] Such allegations against battered women merely perpetuate stereotypical beliefs about woman abuse by holding the battered woman, the victim, responsible for the abuse and assuming that she can stop the violence.[314] In addition, such allegations also deny the fact that many battered women actually make calculated decisions to remain with their

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[310] Crosby, *supra* note 104, at 511-12; Maxwell, *supra* note 281, at 42; *see also* WALKER, *supra* note 48, at 75.

[311] Most states' child endangerment statutes only specifically focus on prosecuting batterers when a child has been directly physically harmed. Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse,* 20 HARV. WOMEN'S L.J. 205, 213-14 (1997). However, some state's criminal laws have begun to be used to prosecute batterers for endangering children who witness their violence. *Id*. at 219. For instance, New York finds a batterer "guilty of endangering the welfare of the child when: 1. [h]e knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child." N.Y. PENAL LAW § 260.10 (McKinny 2000).

[312] *See* cases cited *supra* note 118.

[313] Carter et al., *supra* note 1, at 13.

[314] *Id*.

batterers as a means of protecting themselves and their children because leaving could result in homelessness, lack of income, or even injury or death at the hands of their batterers.[315]

Furthermore, in these situations, the mother is just as much a victim of the batterer's violence as her children, and she, as an incapacitated victim, should not be further victimized by the legal system by being accused of neglect for failing to stop the abuse from occurring in the presence of her children.[316] When both the mother and the batterer are charged with neglect, not only is the batterer not held sufficiently accountable for his violent actions, but the abused mother suffers the same legal consequences for the actions solely perpetrated by the batterer.[317] As a result, both the victim and society are left with the sense that the victim, the mother, did something wrong, and "[t]he violence perpetrated against the mother is obscured, and the root cause of harm to the child remains unchallenged and unchanged."[318] Thus, the legal system must criminalize such acts by the batterer and take the position that the "parent who attacks the other parent in total disregard for the safety and welfare of the children should be [the one] held responsible for the individual damage and the far-reaching social implications of [his] violent behavior."[319]

Criminalizing such acts of violence by the batterer in the presence of children is necessary for a variety of reasons. Foremost, as discussed previously, criminalizing such acts places the focus on the batterer and holds him accountable for the acts of abuse rather than the mother, who has typically and unjustly been accused of allowing the abuse to occur.[320] Such policies also encourage women to report acts of domestic violence without having to accept the risk of having their children removed from their care.[321] In addition, aggressive arrest and prosecution policies for abusers may serve as a deterrent for committing such acts, which may then result in lower domestic violence rates.[322] Furthermore, criminal sanctions for committing acts of domestic violence sends a message to child victims that the acts of violence they witness are illegal and should not serve as a model for their future relationships.[323] Finally, criminalizing acts of domestic violence that occur in the presence of children gives the legal

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315 *Id*.

316 *See* Maxwell, *supra* note 281, at 42.

317 *See* Brief of Amici Curiae New York Legal Assistance Group at 19, Nicholson v. Scoppetta, 344 F.3d 154 (2d Cir. 2003) (No. 02-7079).

318 *Id*. at 19-20.

319 Drye, *supra* note 283, at 238.

320 Murphy, *supra* note 101, at 295; Stone & Fialk, *supra* note 311, at 210.

321 *See* Stone & Fialk, *supra* note 311, at 210-11.

322 Murphy, *supra* note 101, at 296.

323 *Id*.; Stone & Fialk, *supra* note 311, at 210.

system another tool for combating domestic violence.[324] For example, where there may be insufficient evidence to prosecute a batterer for abusing his significant other, there may still be a viable case against him for engaging in domestic violence in the presence of the children.[325]

B. *Conceptual Response to Removal*

Removal of a child from a home in which he or she has witnessed domestic violence is not always necessary or in the best interests of the child, even when an assessment of harm shows possible negative effects. The safety of children is a priority, but better child protection strategies do exist that should be further developed and implemented before first resorting to automatic removal of the child from the home and the care of his or her mother. Importantly, "Child safety can often be improved by helping the mother to become safe and by supporting the mother's efforts to achieve safety."[326] Thus, permitting the child to remain in the home in the care of his or her mother can actually be in the best interests of the child when other alternative solutions to dealing with the domestic violence situation in the home are employed.

1. *Treatment of Batterers*

Foremost, it is, of course, necessary that batterers be required to remove themselves from the home. It is obviously unsafe for a child to live in a home in which acts of domestic violence continue to occur due to evidence of the psychological damages that may result[327] and the risk of physical harm to the child.[328] Then, once the batterer is no longer residing in the home, his right to custody of his children should be suspended. A batterer should be considered an unfit parent firstly because he has already shown a tendency toward ignoring the child's interests by abusing the child's other parent.[329] He should also be considered unfit because a batterer's pattern of control through abuse commonly continues after physical separation from his victim and, therefore, acts of violence could then be inflicted upon the child.[330] Also, batterers are highly likely to use custody of their children as a means of continuing to control their victim.[331]

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[324] Murphy, *supra* note 101, at 297; Stone & Fialk, *supra* note 311, at 213.

[325] Stone & Fialk, *supra* note 311, at 213.

[326] Linda Spears, *Building Bridges Between Domestic Violence Organizations and Child Protective Services*, Violence Against Women Online Resources, *at* http://www.vaw.umn.edu/documents/dvcps/dvcps.html (last revised Feb. 2000).

[327] *See* discussion *supra* pp. 32-33.

[328] *See* discussion *supra* pp. 33.

[329] *See* STARK & FLITCRAFT, *supra* note 41, at 76-77.

[330] *See id*.

[331] Levin, *supra* note 102, at 852.

Furthermore, even if it is believed to be in the best interests of the child for him or her to continue to see an abusive father, those visits should then be supervised, at least until the batterer has completed a treatment program and parenting classes.[332]

The courts should also more consistently mandate by court order that perpetrators of domestic violence not only attend, but also complete, batterer intervention programs. These programs focus on ending domestic violence in the home by confronting the batterer about his violent behavior and offering alternative behaviors with which to replace those acts.[333] Simply ordering or encouraging a batterer to attend anger management classes is not effective because battering is a control issue and not just an anger issue.[334] Though research as to whether or not batterer intervention programs are effective is inconclusive, the ordering of psychological treatment for batterers through these programs is at least an effort to end domestic violence in the home.[335] In fact, such psychological treatment may be beneficial to some men who batter, as "not all batterers need to remain locked into [a] pattern of abuse for the rest of their lives."[336] Research has shown that battering is a problem within the individual due to their own internalized belief system that allows him to batter, which could be based on a number of factors including historical and societal cues, personal experience, drugs and alcohol, poverty, and negative feelings about oneself.[337] Thus, psychological treatment offered through batterer intervention programs, which shows batterers how these factors influence their behavior and how to deal with these issues in another way besides battering, may actually stop batterers from continuing to abuse.

2. *Provide Better Social Services*

The social services available to women and children also need to be greatly improved and expanded. Without such services as shelter, emotional support, crisis intervention, physical and mental health care, and legal aid, many women and their children are not able to leave their abusers. Therefore, foremost, shelter-based services need to be enhanced. Not only do most cities in the United States not even have battered women's shelters, but there are also not nearly enough beds to service the

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[332] *Id*. at 851-55; Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 30-31 (2002).

[333] Brief of Amici Curiae New York Legal Assistance Group at 21, Nicholson v. Scoppetta, 344 F.3d 154 (2d Cir. 2003) (No. 02-7079).

[334] *Id*. at 21-22.

[335] *Id*. at 22.

[336] Maxwell, *supra* note 281, at 40.

[337] *Id*.

number of women and children seeking shelter in those cities that do have them.[338] In addition, many shelters have reported having to turn away women and children due to a lack of beds.[339] For instance, in 2002 in Arizona, 17,000 women and children trying to find a place to escape from their abusers were turned away due to a lack of beds.[340] In addition, statistics show that approximately 50% of the residents in battered women's shelters are typically children, and almost 80% of women in shelters are accompanied by at least one child.[341] However, many shelters unfortunately do not offer children's programs.[342]

In addition, more legal aid clinics need to be available to women who are trying to leave abusive homes and retain custody of their children prior to even entering into any court proceedings. Though protective orders are available to battered women, they are only effective if battered women know they are available and are actually able to obtain them.[343] And, as research indicates, battered women are only likely to succeed in obtaining such orders if they are represented by legal counsel.[344] Furthermore, as the district court pointed out in *Nicholson*, there are also serious inadequacies in the system when attempting to provide indigent battered women with appointed representation once court proceedings begin as, most of the time, these appointed attorneys cannot and do not always properly handle their case.[345] In addition, even those court-appointed attorneys who are well prepared are not sufficiently compensated for their work by enough to even cover office overhead expenses.[346] Thus, an increase in legal aid that is easily accessible to battered women could significantly benefit women and their children.

Furthermore, more domestic violence prevention programs need to be available to educate women and children as well as the public. Prevention programs are critical to reducing the impact of violence on children and setting societal norms that condone domestic violence.[347] School-based prevention programs tend to be beneficial because they have the ability to

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[338] Amy J. Saathoff & Elizabeth Ann Stoffel, *Community-Based Domestic Violence Services*, *in* 9 THE FUTURE OF OUR CHILDREN: DOMESTIC VIOLENCE AND CHILDREN, at 97, 100 (Winter 1999).

[339] *Id*.

[340] *See* Susie Steckner, *Stopping Domestic Violence; Call for New State Plan Aims to Provide Aid, Fund Shelters*, THE ARIZ. REPUBLIC, Oct. 2, 2003, at Final Chaser Edition.

[341] Saathoff & Stoffel, *supra* note 338, at 99.

[342] *Id*. at 100.

[343] Carter et al., *supra* note 1, at 12.

[344] *Id*.

[345] Nicholson v. Williams, 203 F. Supp. 2d 153, 223-28 (E.D.N.Y. 2002).

[346] *Id*. at 225

[347] Carter et al., *supra* note 1, at 14.

reach a large number of children, reduce misunderstandings regarding domestic violence, give safety information and planning, and offer alternatives to conflict resolution.[348] Also, public-awareness campaigns promoted through public service announcements and advertisements may be a beneficial approach to reaching and educating adults.[349] Other promising programs include those that target families and couples directly through home visiting programs or therapy for new couples at risk for violence.[350] For example, Hawaii has created a Healthy Start Program in which it screens for families at risk for domestic violence and then sends home visitors to respond to early warning signs by assisting wives and mothers in developing safety plans and helping abusers register for specific treatment programs.[351]

In addition, treatment programs for children that have been exposed to domestic violence are also imperative to manage mental health problems that a child may be suffering from as well as to aid in overcoming academic difficulties caused by these problems.[352] Small group and individual intervention counseling that deals with such topics as identifying feelings, communication and conflict resolution skills, anger management, and safety planning can be very beneficial to children who have lived in domestic violence homes.[353] Also, participation in appropriate school programs, such as additional tutoring or placement in special educational classrooms, can help children keep up with their studies and overcome academic difficulties.[354]

3. *Acknowledge the Rights of Children*

Child protective services as well as the courts need to develop a policy of acknowledging and considering the rights and wishes of children who have witnessed domestic violence when determining if removal is necessary. Children's wishes and suggestions need to be considered, as they should have the right to express where they feel safe and what they believe is in their best interest.[355] Also, in some cases, interviewing

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348 *Id*.

349 David A. Wolfe & Peter G. Jaffe, *Emerging Strategies in the Prevention of Domestic Violence*, *in* 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN, at 133, 140 (Winter 1999).

350 Carter et al., *supra* note 1, at 14.

351 Wolfe & Jaffe, *supra* note 349, at 139.

352 Saathoff & Stoffel, *supra* note 338, at 101-02.

353 Brief of Amici Curiae New York Legal Assistance Group at 17, Nicholson v. Scoppetta, 344 F.3d 154 (2d Cir. 2003) (No. 02-7079).

354 Saathoff & Stoffel, *supra* note 338, at 102.

355 Brief of Amici Curiae New York Legal Assistance Group at 12, *Nicholson* (No. 02-7079).

children may also be useful as they can aid in brainstorming strategies and solutions to the domestic violence situation in the home based upon what they feel capable of being able to handle.[356] Furthermore, children should be interviewed about the domestic violence situation in their home as they often serve as a valuable source of information regarding the extent of danger and the strengths and weaknesses of their parents and other family members.[357]

Also, courts should appoint guardians ad litem to represent the best interests of children in all domestic violence cases. Because children generally do not have standing in court due to the fact that they are not considered the direct victims of domestic violence, guardians ad litem need to be appointed to represent the rights of children for matters concerning removal and custody.[358] In addition, guardians ad litem can bring the issue of domestic violence before the judge and argue for nonremoval of the child from the home when it is believed to be in the child's best interest to remain in the home with the mother.[359] Importantly, pilot programs appointing guardians ad litem for children in domestic violence cases, in which guardians ad litem have advocated children's interests and explained how their interests could and should be considered in addition to the mother's interests, have been deemed a huge success by children, families, attorneys, and the courts.[360]

4. *Resolve the Problems with the Adoption and Safe Families Act*

The current mandates required under AFSA are a problem that needs to be addressed by state legislatures and the courts, as AFSA fails in many ways to consider the custody rights of mothers. First, AFSA is very inflexible as it automatically assumes that removal, and sometimes even eventual termination, is always in the best interests of the child regardless of the parental abilities of the mother and the circumstances surrounding the domestic violence in the home.[361] Furthermore, many critics argue that AFSA goes too far in a direction away from family preservation by mandating termination of parental rights and overemphasizing adoption, thus, cutting short efforts at sustaining viable families.[362] Specifically, ASFA does this by providing fiscal incentives to agencies that place foster children into adoptive homes.[363] Also, ASFA shortens the time lines

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356 *Id*.

357 *Id*.

358 *See* Murphy, *supra* note 101, at 298-99.

359 *Id*. at 287.

360 *Id*. at 300.

361 *See* Venier, *supra* note 78, at 525-29.

362 *E.g.*, Sanders, *supra* note 68, at 75.

363 Carter et al., *supra* note 1, at 11.

within which agencies must develop permanent placements for children, which in turn limits the ability of battered women to regain custody of their children after removal.[364] For example, "[b]attered women leaving abusive situations may need more time than the law allows to ensure safety for themselves and their children, recover from the trauma of being battered, find a new home and job, and enhance their parenting skills."[365] However, under AFSA's mandated timeline, a mother's parental rights could be terminated when it would actually be in the best interests of the child to remain in foster care a while longer before returning to the home and the care of his or her mother.[366]

Therefore, state legislatures need to expand on the requirements of AFSA when incorporating it into their state statutes.[367] AFSA just has not been able to adequately address the problems with the child welfare system.[368] Thus, states need to further develop the requirements set out in AFSA by setting up their own specific standards as to how domestic violence should be considered in regards to removal and termination of custody while also taking into consideration the parental rights of battered mothers.[369]

5. *Initiate a Collaborative Response*

A collaborative effort needs to be made by agents of both social and legal systems to protect the best interests of the entire family. Evidence shows that "[i]n many jurisdictions, communication between the various courts and social agencies dealing with a particular family is poor or non-existent."[370] Therefore, judges, attorneys, guardians ad litem, law enforcement officers, caseworkers, health care professionals, and advocates need to make a greater effort to work together as a team to provide the best possible outcome for children as well as mothers in domestic violence situations.

Also, importantly, better training programs need to be made available and required in order to educate those involved in domestic violence cases. In particular, child protection workers need to be properly trained to screen for domestic violence in the home and to provide the most appropriate services to these families.[371] In addition, judges also need to be educated

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364 *Id*.

365 *Id*.

366 *Id*.

367 Venier, *supra* note 78, at 552.

368 *Id*.

369 *See id.*

370 *Id*. at 530.

371 Lyons, *supra* note 94, at 404.

regarding issues involving domestic violence in order to be able to better evaluate the best interests of the child.[372]

Specifically, child protective agencies and domestic violence service programs need to work together to create safe, appropriate, and effective responses to family violence. Right now, child protection workers and women's advocates often play very polarized roles in domestic violence situations.[373] Therefore, in order to bring these two agencies together to work for the best interests of the family, child protection workers need to realize that they will only be able to protect victimized children from harm when they truly understand and consider the dynamics of the domestic violence and that "if [they] can end the abuse, rather than punish the mother, [they can] help the children as well."[374] In addition, advocates for battered women must also recognize that children have the right to be free from harm and that in some domestic violence cases, mothers are actually another direct cause of harm to their children, perhaps because they are physically abusing the children or have a substance abuse problem, and should not be allowed to retain custody when these factors also exist.[375] If these concepts are not recognized, neither agency will be effective.[376] Therefore, new strategies for collaborative work need to be utilized by both agencies such as violence training programs for child protection workers, training in child protection laws, policies, and court and agency practices for domestic violence program staff, and the participation of domestic violence specialists in child protections agencies' and on their citizen review boards.[377]

Another way collaborative efforts can occur within the legal system is through the creation of a unified family court that provides both dispute resolution and therapeutic justice. A typical unified family court would have comprehensive jurisdiction over a wide range of family law matters, including divorce, domestic violence, child welfare, juvenile justice and criminal sanctions stemming from abuse, juvenile justice, and child

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372 Levin, *supra* note 102, at 846-49.

373 Maxwell, *supra* note 281, at 43.

374 *Id*.

375 *See id*.

376 *Id*. In fact, it should also be noted that many workers in both agencies are actually concerned about the safety needs of both the children and the battered mothers. Janet E. Findlater & Susan Kelly, *Child Protective Services and Domestic Violence*, *in* 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN, at 84, 87 (Winter 1999).

377 Findlater & Kelly, *supra* note 376, at 88-93. Examples of communities that have built collaborations that address both domestic violence and child maltreatment include the AWAKE Program in Boston, Massachusetts, the Massachusetts Department of Social Services, and Michigan's Families First Domestic Collaboration Project. Spears, *supra* note 326.

welfare cases.[378] As of now, very few jurisdictions currently address all family law matters within one family court or before one judge, and typically separate the issue of abuse and neglect from domestic violence.[379] Therefore, domestic violence in the home is not always accurately or fairly considered by the court system, which may result in removal of children and termination of a mother's custody rights when such a result is not in the best interests of the child.[380] Proponents of the unified family court claim that this shortcoming could be remedied by bringing all matters regarding family issues before one court and one judge that would not only investigate and resolve the dispute, but also attempt to remedy all other family problems related to the dispute.[381] Combining these matters to be heard in front of one judge in one court may increase efficiency in the court system by reducing the need for families and children to appear in duplicative hearings and preventing the possibility of conflicting orders and decision from the courts.[382] Most importantly, however, a decision by a unified family court ensures that all relevant issues are brought forth to be considered before the same judge and court and that, as a result, the best interests of the entire family are accurately and justly determined.[383]

V. CONCLUSION

Obviously, the current policies and practices implemented by ASC and the courts in New York City are more harmful than helpful to both mothers and children and, as found by the United States District Court for the Eastern District of New York in *Nicholson*, are also illegal. Both children and battered mothers continue to suffer and to be further victimized under the current policies mandated by the State of New York as well as federal law. Essentially, holding battered mothers responsible for domestic violence and removing their children from the home is a poor legal and

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[378] Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 436 (2002).

[379] Venier, *supra* note 78, at 530-31.

[380] *Id*. at 531.

[381] Geraghty & Mlyniec, *supra* note 378, at 435.

[382] *Id*.

[383] A valid criticism that many policy makers have of the unified family court is the amount of public money it will cost to fund a new court. *Id*. at 444. Some claim, "Money that is available to build more courtrooms, appoint new judges and clerks, and hire more experts might be better spent creating better lives for disadvantaged people, or at least delivering better services to those who get caught up in our current family court systems." *Id*. However, once unified family courts have been created, the efficiency and preventive service they provide may in fact end up costing less then what is being spent now to run the current family law system.

public policy. Battered mothers should not be considered neglectful and unfit parents merely because they have been abused by their partners in the presence of their children. Likewise, in many cases, their children should not be automatically removed from the home based only upon exposure to domestic violence because it is often not in the best interests of the child and it violates the mothers' constitutional right to custody.

Therefore, the United States Court of Appeals for the Second Circuit should acknowledge the response of the New York Court of Appeals and uphold the preliminary injunction issued by the United States District Court for the Eastern District of New York in order to continue to stop ACS's policy toward battered mothers and their children from negatively affecting more families. However, just stopping ACS, one child protection agency in New York, from implementing its poor policies is not enough. The court needs to provide a solution that balances the necessity of protecting children in domestic violence situations from harm and the importance of upholding the rights of battered mothers. Thus, the court should provide a conceptual framework for ACS and other child protection agencies in New York and the rest of the Second Circuit to follow that addresses how domestic violence should be criminalized and offers alternatives to removal.

The court needs to stress that the perpetrators of domestic violence and *not* battered mothers, the victims, should be found neglectful and held criminally responsible for psychologically and physically endangering the welfare of the children in the home. Batterers need to be held accountable for their acts of violence that affect both the women they directly injure and the children they indirectly harm. Furthermore, children should not be immediately removed from the home and the care of their mothers merely because acts of domestic violence have occurred in the home. Other possible alternatives, including treatment for batterers, improved social services, acknowledgement of children's rights, revision of AFSA, and initiation of a collaborative response, should be further developed and implemented before resorting to removal.

Therefore, the decision of the Second Circuit will be significant in the area of family law, as it will potentially create new law and policy directed at protecting the welfare of the child while at the same time upholding the constitutional parental rights of battered mothers. If the Second Circuit is able to develop such a policy in its opinion, the lives of victims of domestic violence, both women and children, could be significantly improved. In addition, such a policy, if created, will hopefully stretch

beyond the borders of just New York and the Second Circuit to affect the law and policies created in other states as well.

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