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FAILING TO REALIZE *NICHOLSON'S* VISION: HOW NEW YORK'S CHILD WELFARE SYSTEM CONTINUES TO PUNISH BATTERED MOTHERS

*Jaime Perrone**

I. INTRODUCTION

In June 2010, Child Protective Services (“CPS”) initiated child neglect proceedings against an anonymous mother and father.¹ These proceedings were ostensibly based on two allegations: that the father had abused the mother in the presence of their three children, and that neither parent was ensuring the children’s regular school attendance.² CPS obtained a court order directing that the children be placed in the temporary custody of their grandmother, and the court issued a temporary order of protection against the father.³ In August 2010, the

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¹ *In re. David G.*, 909 N.Y.S.2d 891, 894 (Fam. Ct. 2010). The opinion refers to the local child protective agency as New York City Children’s Services, which is more commonly known as the Administration for Children’s Services (“ACS”). However, since this Note also examines child neglect cases outside of New York City, for the sake of consistency I will use the term CPS to refer to all child protective services agencies in New York State.

² *Id.*

³ *Id.*

mother requested a Family Court Act section 1028 hearing⁴ for the return of her son, David.⁵ The court ordered that David be immediately returned to his mother's custody on the condition that she was to cooperate with CPS supervision, enter a domestic violence shelter, enforce an order of protection against the father, and participate in domestic violence counseling.⁶

In compliance with the court's mandate, the mother moved into a domestic violence shelter with David.⁷ Unfortunately, David's father violated the order of protection by following them to the shelter, and they were forced to leave.⁸ During the tumultuous week that followed, the mother violated the court's order by missing one counseling session and by not informing CPS that she had left the shelter.⁹ Indifferent to the circumstances surrounding the mother's brief lapse in compliance, CPS placed David in foster care, this time without a court order.¹⁰

The next day, the court held a Family Court Act section 1027 hearing¹¹ to determine whether David was in "imminent risk" of danger such as to warrant removal.¹² CPS argued that David was at risk because "of the possibility that the mother might decide to return to the father."¹³ Yet, CPS did not offer any concrete evidence to support this allegation.¹⁴ CPS even admitted that before being forced to leave the shelter, the mother

⁴ See N.Y. JUD. CT. ACTS LAW § 1028(a) (McKinney 2009) ("Upon the application of the parent . . . the court shall hold a hearing to determine whether the child should be returned . . .").

⁵ *David G.*, 909 N.Y.S.2d at 894.

⁶ *Id.* at 894-95.

⁷ *Id.* at 895.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See N.Y. JUD. CT. ACTS LAW § 1027(b)(i) (McKinney 2009) (stating that for CPS to remove a child without a court order, such removal must be "necessary to avoid imminent risk to the child's life or health").

¹² *David G.*, 909 N.Y.S.2d at 895-96.

¹³ *Id.*

¹⁴ *Id.* at 896.

had been in total compliance with the court's command.¹⁵ Nevertheless, a CPS caseworker testified that the mother's breach cast doubt on her credibility and demonstrated that she could not be trusted to obey court orders.¹⁶

The court ultimately concluded that CPS had not met its burden of proof and had contravened the basic precepts of *Nicholson v. Scoppetta* by removing David from his mother's care.¹⁷ In *Nicholson*, the Court of Appeals of New York held that victims of domestic violence cannot be found guilty of neglect solely because their children have witnessed their mothers' abuse.¹⁸ While the *David G.* court immediately returned David to his mother, it did not dismiss the neglect proceeding.¹⁹ Moreover, David was only paroled to his mother on the condition that she was to cooperate with CPS supervision and referrals for domestic violence services while the neglect case was ongoing.²⁰

The case of *David G.* is troublesome for a number of reasons. First, CPS's primary basis for depriving the mother of custody appears to be her children's exposure to the abuse she

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 901; *see also* *Nicholson v. Scoppetta*, 820 N.E.2d 840, 853 (N.Y. 2004) (“[E]mergency removal is appropriate where the danger is so immediate, so urgent that the child’s life or safety will be at risk before an ex parte order can be obtained. The standard obviously is a stringent one.”); *see also infra* Part III (discussing the impact of *Nicholson* on child neglect proceedings against battered mothers in New York).

¹⁸ *Nicholson*, 820 N.E.2d at 844. Throughout this Note, I refer to domestic violence victims as women and batterers as men for the sake of consistency and to reflect the fact that the overwhelming majority of domestic violence victims are indeed women. *See Domestic Violence Facts*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE (July 2007), [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf) (stating that 85% of domestic violence victims are women); *Intimate Partner Violence in the U.S.*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/intimate/victims.cfm> (last modified Apr. 4, 2012) (stating that between 1976 and 2005, intimate partners committed 30% of homicides against females versus 5% of males).

¹⁹ *David G.*, 909 N.Y.S.2d at 901.

²⁰ *Id.*

suffered at the hands of their father.²¹ While CPS also accused the mother of failing to ensure that her children regularly attended school, the court opinion does not articulate any support for that allegation.²² Furthermore, the mother is only ordered to comply with domestic violence services.²³ Second, the father's violation of the order of protection was the impetus behind CPS placing David in foster care, despite the mother's best efforts to keep her and David safe.²⁴ The caseworker who testified focused narrowly on the mother's lapse in compliance, and did not consider that the mother fled the domestic violence shelter—which she had entered at the court's direction—in order to avoid further abuse.²⁵ Finally, it is unclear on what grounds the family court kept the neglect proceeding open, because it did not elaborate on its additional reasons for suspecting her of neglect, as required by *Nicholson*.²⁶ Thus, despite having admonished CPS for violating *Nicholson* by removing David, the court seemingly continued the neglect case against the mother primarily because she was a victim of domestic violence.²⁷

This Note argues that CPS agencies in New York contradict the policy goals of *Nicholson* when they remove children from their nonviolent parents chiefly due to the children's exposure to domestic violence, despite the presence of other, usually minor charges. In addition, this Note contends that, under *Nicholson*, family courts should dismiss these neglect proceedings if they cannot articulate a separate, credible ground for suspecting the mother of neglect. Part II of this Note describes the path of a CPS case in New York, exploring the various ways it can travel through the family court system. Part III discusses the landmark *Nicholson* case and why charging battered mothers with neglect is problematic. It also considers the role class and gender may play in the child welfare system and analyzes the current flaws

²¹ *Id.* at 894.

²² *See id.*

²³ *Id.* at 901.

²⁴ *Id.* at 895.

²⁵ *Id.* at 896.

²⁶ *See David G.*, 909 N.Y.S.2d. 891.

²⁷ *See id.*

in CPS practice. Part IV examines court decisions post-*Nicholson* which suggest that its vision has yet to be realized and argues that in order to more effectively further the goals of *Nicholson*, family courts must clearly delineate their consideration of the *Nicholson* factors in neglect proceedings against battered mothers. Finally, Part V proposes holistic solutions for change that will require the cooperation of CPS and New York family courts, as well as increased community support for families affected by domestic violence.

II. THE PATH OF CHILD ABUSE OR NEGLECT CASES IN NEW YORK STATE

CPS cases begin when someone calls a report of suspected child abuse or neglect to a hotline operated by the New York State Central Register of Child Abuse or Maltreatment ("SCR").²⁸ If the SCR finds sufficient cause to suspect abuse or neglect, they will send the report to the local child protection agency.²⁹ Next, a caseworker will have twenty-four hours to initiate and sixty days to complete an investigation to determine the accuracy of the report.³⁰ During the investigation, the caseworker will assess the condition of the child's home and interview the child's parents and any other person with potentially vital information concerning the child's well-being.³¹ At the end of the investigation the caseworker will either declare the report to be "unfounded" or "indicated" (i.e. accurate).³²

²⁸ N.Y. SOC. SERV. LAW §§ 422(1), 422-a (McKinney 2010); N.Y. COMP. CODES R. & REGS. tit. 18, § 432 (2012); *see also* INMOTION & BROOKLYN BAR ASS'N VOLUNTEER LAWYERS PROJECT, ABUSE AND NEGLECT CASES IN NEW YORK STATE 5 (2002) [hereinafter ABUSE AND NEGLECT CASES], *available at* http://www.inmotiononline.org/assets/pdfs/TheBasicsSeries_English/Abuse_and_Neglect.pdf.

²⁹ SOC. SERV. §§ 415, 422.2(b); COMP. CODES R. & REGS. tit. 18, § 432.2(b)(2); *see also* ABUSE AND NEGLECT CASES, *supra* note 28, at 5.

³⁰ COMP. CODES R. & REGS. tit. 18, §§ 432.2(b)(3), 432.3(k); *see also* ABUSE AND NEGLECT CASES, *supra* note 28, at 6.

³¹ COMP. CODES R. & REGS. tit. 18, §§ 432.2(b)(3), 432.3(k); *see also* ABUSE AND NEGLECT CASES, *supra* note 28, at 6.

³² COMP. CODES R. & REGS. tit. 18, § 432.2(b)(3)(iv); *see also* ABUSE AND NEGLECT CASES, *supra* note 28, at 6.

When a report is indicated, CPS may bring child protective proceedings against the parents by filing a petition under Article 10 of the Family Court Act.³³ CPS may either commence such proceedings while the investigation is pending, or if the report is deemed indicated, after the investigation is complete.³⁴ Shortly thereafter, the court must hold a preliminary hearing to evaluate whether the child's interests should be protected while the final order of disposition is pending.³⁵ CPS has the burden of proving that removal is necessary "to avoid imminent risk to the child's life or health."³⁶ The court must consider whether CPS made reasonable efforts to prevent the need for removal and whether removing the offending parent from the child's home via an order of protection would lessen the risk to the child.³⁷

There are other avenues available to CPS and the family courts if there is not enough time to file a petition and hold a preliminary hearing.³⁸ For instance, the court may issue an order of removal at an expedited preliminary hearing.³⁹ However, if CPS determines that the child is in such immediate danger that there is not enough time for the expedited preliminary hearing, it may remove a child from its parents without a court order.⁴⁰ When CPS conducts an emergency removal without a court order, the child's parents may apply for a Family Court Act section 1028 hearing to secure their child's return.⁴¹ This hearing

³³ N.Y. JUD. CT. ACTS LAW § 1032(a) (McKinney 2011).

³⁴ See JUD. CT. ACTS § 1032(a); SOC. SERV. §§ 397(2)(b), 424(11); see also, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 167 (E.D.N.Y. 2002).

³⁵ JUD. CT. ACTS § 1027(a); see also, e.g., *Nicholson*, 203 F. Supp. 2d at 167.

³⁶ JUD. CT. ACTS § 1027(b)(i); see also, e.g., *Nicholson*, 203 F. Supp. 2d at 167.

³⁷ JUD. CT. ACTS § 1027(b); see also, e.g., *Nicholson*, 203 F. Supp. 2d at 167.

³⁸ JUD. CT. ACTS § 1022; see also, e.g., *Nicholson*, 203 F. Supp. 2d at 167.

³⁹ JUD. CT. ACTS § 1022; see also, e.g., *Nicholson*, 203 F. Supp. 2d at 167.

⁴⁰ JUD. CT. ACTS §§ 1022, 1024; N.Y. SOC. SERV. LAW § 417 (McKinney 2010); see also, e.g., *Nicholson*, 203 F. Supp. 2d at 167.

⁴¹ JUD. CT. ACTS § 1028; see also, e.g., *Nicholson*, 203 F. Supp. 2d at

must take place within three days of the parents' application.⁴² At this hearing, the court may decide to "parole" the child to his or her parents while the proceeding continues.⁴³ The child is then released into the temporary custody of his or her parents, although usually with broad oversight by CPS.⁴⁴

After the preliminary issues have been resolved, the next step in the court proceedings is the fact-finding stage.⁴⁵ This is generally a long and arduous process.⁴⁶ Nicholas Scopetta, the previous Commissioner of New York City's Administration for Children's Services has stated, "Once you are in the Family Court, you are in it very often for many months before you can get to the substance of the case"⁴⁷ Therefore, child protective caseworkers play a crucial gate-keeping role in ensuring that the only cases entering the family court system are the ones that belong there.

III. NICHOLSON'S ATTEMPT TO DECOUPLE DOMESTIC VIOLENCE AND NEGLECT

New York State's definition of neglect has undergone a significant evolution in recent years. Section 1012 of the Family Court Act defines a neglected child as one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care."⁴⁸ For years, courts could find battered mothers to be neglectful based on their perceived failure to protect their children from exposure to domestic violence.⁴⁹ In fact, CPS could remove children from

168.

⁴² JUD. CT. ACTS § 1028; *see also, e.g., Nicholson*, 203 F. Supp. 2d at 168.

⁴³ *Nicholson*, 203 F. Supp. 2d at 168.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ N.Y. JUD. CT. ACTS LAW § 1012(f)(i) (McKinney 2009).

⁴⁹ *See* The "Failure to Protect" Working Grp., *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM

their mother's custody in cases where the only allegation was that the mother herself had been abused.⁵⁰

The landmark *Nicholson* decision dramatically changed the definition of neglect in New York by holding that battered mothers could not be found neglectful solely because their children were exposed to domestic violence.⁵¹ The *Nicholson* court determined that removing children from their nonviolent parents unfairly punishes battered mothers⁵² and, when it comes to the child's welfare, may in fact do more harm than good.⁵³ This decision was an important first step for New York in moving away from a child welfare system that often blamed victims for their abuse instead of holding batterers accountable.

In order to comply with *Nicholson*, local CPS agencies must prove by a preponderance of the evidence that the child's "physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired" and that this is "clearly attributable" to the mother's failure to exercise a "minimum degree of care" toward the child.⁵⁴ The court emphasized that the statute merely required a "'baseline *minimal* degree of care'—not maximum, not best, not ideal—and the failure must be actual, not threatened."⁵⁵ It is important to note that this "minimal degree of care" is a very low bar.⁵⁶ Furthermore, in determining whether a parent has met this nominal standard of care, courts must objectively consider

URB. L.J. 849, 849–54 (2000); see also G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 107–08 (1999).

⁵⁰ See Miccio, *supra* note 49, at 92 (citing *In re Theresa*, 576 N.Y.S.2d 937 (App. Div. 1991)); see also *In re Glenn G.*, 587 N.Y.S.2d 464, 470 (Fam. Ct. 1992) (holding that neglect is a strict liability offense).

⁵¹ *Nicholson v. Scoppetta*, 820 N.E.2d 840, 853 (N.Y. 2004) ("Plainly, more is required for a showing of neglect under New York law than the fact that a child was exposed to domestic abuse against the caretaker.").

⁵² See *Nicholson v. Williams*, 203 F. Supp. 2d 153, 200 (E.D.N.Y. 2002).

⁵³ *Id.* at 204.

⁵⁴ *Nicholson*, 820 N.E.2d at 845–46.

⁵⁵ *Id.* at 846 (citing *In re Hofbauer*, 393 N.E.2d 1009 (N.Y. 1979)).

⁵⁶ *Id.*

whether “a reasonable and prudent parent would have so acted, or failed to act, under the circumstances then and there existing.”⁵⁷

When judging whether a battered mother has acted reasonably under the circumstances, courts must consider the risks attendant to leaving, if the batterer has threatened to kill her if she does; risks attendant to staying and suffering continued abuse; risks attendant to seeking assistance through government channels, potentially increasing the danger to herself and her children; risks attendant to criminal prosecution against the abuser; and risks attendant to relocation.⁵⁸

Furthermore, the determination of whether a battered mother has failed to exercise the requisite basic level of care “is necessarily dependent on facts such as the severity and frequency of the violence, and the resources and options available to her.”⁵⁹

Additionally, each case must be individually assessed to determine “whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. [The court] must balance that risk against the harm removal might bring”⁶⁰ In addition, the court must evaluate whether the need for removal could be eradicated by offering the mother and child preventive services.⁶¹ Thus, after *Nicholson*, CPS caseworkers may no longer charge battered mothers with neglect solely because their child was exposed to domestic violence.⁶²

⁵⁷ *Id.* (citing *In re Jessica YY.*, 685 N.Y.S.2d 489, 491 (App. Div. 1999)).

⁵⁸ *Id.*

⁵⁹ *Id.* (citing *In re Melissa U.*, 538 N.Y.S.2d 958 (App. Div. 1989)).

⁶⁰ *Id.* at 852.

⁶¹ *Id.*

⁶² *Id.* at 844. However, the court cautioned that a battered mother could still properly be charged with neglect where “a preponderance of the evidence establishes that the children were actually or imminently harmed by reason of her failure to exercise even minimal care in providing them with proper oversight.” *Id.* at 847. The court offers several examples where additional factors are present other than the children’s mere exposure to the domestic violence. *Id.*

A. Charging Battered Mothers with Neglect is Problematic

An overview of the complexities underlying domestic violence is helpful to understanding the importance of *Nicholson's* vision that battered mothers should not be blamed for the abuse they have endured.⁶³ Various theories have been propounded to explain the psychological effects of domestic violence on battered women.⁶⁴ The New York State Office for the Prevention of Domestic Violence (“OPDV”) defines domestic violence as a pattern of verbal, psychological, and/or physical abuse by one person in order to control the other person in an intimate relationship.⁶⁵ Abuse, therefore, need not be physical in order to have an impact.⁶⁶

Before the inception of the Battered Women’s Movement in the late 1960s and early 1970s, domestic violence was considered a private family matter and therefore “noncriminal.”⁶⁷ Police officers responding to domestic violence calls would often “tell the husband to ‘cool off’ by ‘taking a walk around the block.’”⁶⁸ The Battered Women’s Movement shed light on the severity of domestic violence and developed community resources to assist battered women.⁶⁹ Today, the Manhattan District Attorney’s Office describes domestic violence as “a public health crisis that affects us all.”⁷⁰ In 2010, New York City police responded to 249,440 domestic violence

⁶³ See generally *Nicholson*, 820 N.E.2d 840.

⁶⁴ See generally EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 117–20 (2007) [hereinafter STARK, COERCIVE CONTROL].

⁶⁵ See *Domestic Violence: Finding Safety and Support—Understanding the Problem*, N.Y.S. OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, <http://www.opdv.state.ny.us/help/fss/theproblem.html#whatisdv> (last visited Apr. 4, 2012).

⁶⁶ See *id.*

⁶⁷ Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1662.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1666.

⁷⁰ *Domestic Violence*, N.Y. CNTY. DIST. ATTORNEY’S OFFICE, <http://manhattanda.org/hot-topic> (last visited Apr. 4, 2012).

incidents, which translates to about 680 incidents per day.⁷¹ Moreover, New York State's OPDV estimates that intimate partner violence accounts for 3% of all violence against males and 23% of all violence against females in the United States.⁷²

Dr. Lenore Walker, a clinical and forensic psychologist, developed the "Cycle Theory of Violence" in an effort to explain the complex interpersonal dynamics of an abusive relationship.⁷³ According to this theory, a recurring battering cycle is composed of three phases.⁷⁴ The first phase is characterized by "a gradual escalation of tension" through the batterer's verbal or physical abuse of his partner.⁷⁵ During this phase, the woman learns to walk on eggshells to avoid angering her abuser.⁷⁶ She tries her best to pacify him, but her inability to predict his responses leads to the creation of "learned helplessness."⁷⁷ Dr. Walker defines "learned helplessness" as "having lost the ability to predict that what you do will make a particular outcome occur," and argues that because such coping behavior is learned, it can also be unlearned.⁷⁸ The second phase occurs after the batterer has created such an atmosphere of tension that an explosion of physical violence is inescapable without intervention.⁷⁹ Finally, in the third phase, the batterer may express remorse for his physical violence and promise to never do it again.⁸⁰ He may be loving and attentive, reminding

⁷¹ *Domestic Violence Annual Fact Sheet 2010*, N.Y.C. MAYOR'S OFFICE TO COMBAT DOMESTIC VIOLENCE, http://www.nyc.gov/html/ocdv/downloads/pdf/2010_annual_DVFactSheet.pdf (2010). The City's Domestic Violence Hotline also took 119,177 calls, an average daily total of more than 320. *Id.*

⁷² *National Intimate Partner Violence Statistics*, N.Y.S. OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, <http://www.opdv.state.ny.us/statistics/nationaldvdata/natlipvstats.html> (last visited Apr. 4, 2012).

⁷³ See generally LENORE E.A. WALKER, *THE BATTERED WOMAN SYNDROME* 126-38 (2d ed. 2000).

⁷⁴ *Id.* at 126.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 116.

⁷⁹ *Id.* at 126-27.

⁸⁰ *Id.* at 127.

the woman of why she fell in love with him.⁸¹ Even if the batterer does not express any remorse, the absence of violence and tension alone may reinforce the battered woman's belief that her partner's violent behavior was an aberration.⁸²

The theory of "traumatic bonding," developed by sociologists Donald Dutton and Susan Painter, provides additional insight into the dynamics of an abusive relationship.⁸³ It refers to "the development and course of strong emotional ties between two persons where one person intermittently harasses, beats, threatens, abuses or intimidates the other."⁸⁴ According to traumatic bonding theory, abusive relationships are characterized by a mutually dependent power imbalance and intermittent abusive episodes.⁸⁵ The woman views the first violent incident as an aberration; she does not believe her partner will hurt her again.⁸⁶ As the abuse become more frequent and severe, the woman comes to believe that it is her fault and that it is within her power to prevent it from happening again.⁸⁷ By the time the woman realizes that she cannot control the abuse, the relationship's power imbalance has intensified; she feels dependent on her batterer, and her batterer in turn needs her to maintain his sense of dominance.⁸⁸

Furthermore, many actions taken by a battered mother may be the result of rational, reasoned choices as to what will best protect her and her children.⁸⁹ For example, an abused woman

⁸¹ *Id.*

⁸² *Id.* at 126.

⁸³ Don Dutton & Susan Lee Painter, *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*, 6 VICTIMOLOGY: AN INT'L J. 139, 139 (1983).

⁸⁴ *Id.* at 146-47.

⁸⁵ *Id.* at 147-48.

⁸⁶ *Id.* at 151.

⁸⁷ *Id.*

⁸⁸ Donald G. Dutton & Susan Painter, *Emotional Attachments in Abusive Relationships: A Test of Traumatic Bonding Theory*, 8 VIOLENCE & VICTIMS 105, 106-07 (1993).

⁸⁹ Amy R. Melner, *Rights of Abused Mothers vs. Best Interest of Abused Children: Courts' Termination of Battered Women's Parental Rights Due to Failure to Protect Their Children From Abuse*, 7 S. CAL. REV. L. & WOMEN'S STUD. 299, 309 (1998).

may reasonably believe that she will be in more danger if she leaves the relationship than if she stays.⁹⁰ Indeed, this is often accurate, as a battered woman is at a higher risk of severe or fatal injury after leaving her abuser.⁹¹ In addition, lack of financial resources, social support, an inadequate number of domestic violence shelters, and fear of losing her children may cause a battered woman to rationally decide that it will be better for her and her children if she stays in the relationship.⁹²

Moreover, in order to properly ascertain the impact domestic violence has on a battered woman, the abuse should be viewed as an ongoing, continuous event.⁹³ Even when there is a lull in the physical violence, an abused woman lives with the fear and certainty that such violence could erupt at any moment.⁹⁴ Her fear is derived not just from the immediate threat her batterer is presenting, but also from what she knows he is capable of.⁹⁵

While courts and caseworkers may assume that the psychological manifestations of abuse are fundamental to the character of battered mothers, such symptoms generally disappear after the abusive relationship is over.⁹⁶ While some battered women may continue to enter into violent relationships, the reality is that many do not.⁹⁷ In fact, Dr. Walker's research into the behavior of domestic violence victims discovered that when beginning new relationships, "[battered women] were extremely careful not to choose another violent [man]."⁹⁸

While she is in the grip of an abusive relationship, however, a battered woman may feel as though she cannot escape.⁹⁹ This psychological response should be attributed to "the nature of the relationship, not the nature of the woman."¹⁰⁰ Behavior that may

⁹⁰ *Id.* at 309–10.

⁹¹ STARK, COERCIVE CONTROL, *supra* note 64, at 115.

⁹² Melner, *supra* note 89, at 308–15.

⁹³ *Id.* at 305.

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ *Id.* at 309.

⁹⁷ *Id.*

⁹⁸ *Id.* (quoting LENORE E. WALKER, THE BATTERED WOMAN 28 (1979)).

⁹⁹ *Id.* at 308.

¹⁰⁰ *Id.*

seem irrational to an outsider could instead be “a terrified human being’s normal response to an abnormal and dangerous situation.”¹⁰¹ A batterer creates a “generalized feeling of powerlessness” in his victim.¹⁰² He may force her to choose between her own safety and the safety of her children, or threaten to hurt her if she reports his violence to the authorities.¹⁰³ Thus, courts should not assume that the actions a battered woman takes while she is in an abusive relationship are evidence of her true character.¹⁰⁴

In addition, it is important to view domestic violence within the broader framework of societal gender inequality.¹⁰⁵ Narrowly focusing on the individual correlates of intimate partner violence ignores the fact that partner abuse does not occur in a vacuum; rather, it is “a chosen behavior occurring in a larger structural context.”¹⁰⁶ Susan Schechter, a leading feminist scholar, argues that domestic violence should be viewed as a collective problem caused by women’s oppression, rather than as one of individual victimization.¹⁰⁷ Similarly, Dr. Stark, a nationally recognized expert on domestic violence and an expert witness for the plaintiffs in *Nicholson*, argues that while trauma theory is helpful to explain why many battered women fail to effectively utilize support services, it is also dangerous because it shifts the focus from the batterer’s actions to the victim’s response, which may reinforce the stereotype that victims of domestic violence are at least partially to blame for their abuse.¹⁰⁸

¹⁰¹ *Id.* (quoting LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 180 (1990)).

¹⁰² Geneva Brown, *When the Bough Breaks: Traumatic Paralysis—An Affirmative Defense for Battered Mothers*, 32 WM. MITCHELL L. REV. 189, 214 (2005).

¹⁰³ Evan Stark, *Nicholson v. Williams Revisited: When Good People Do Bad Things*, 82 DENV. U. L. REV. 691, 715 (2005) [hereinafter, Stark, *Good People*].

¹⁰⁴ *See generally id.* at 713–16.

¹⁰⁵ LARRY L. TIFFT, *BATTERING OF WOMEN: THE FAILURE OF INTERVENTION AND THE CASE FOR PREVENTION* 16 (1993).

¹⁰⁶ *Id.* at 13.

¹⁰⁷ *See* SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* 252 (1982).

¹⁰⁸ STARK, *COERCIVE CONTROL*, *supra* note 64, at 116–17.

This shift in accountability is amplified by the fact that child protective workers are often encouraged, and indeed may find it easier, to deal with the nonviolent parent.¹⁰⁹ Professor Leigh Goodmark, of the University of Baltimore School of Law, suggests that “this reluctance may stem from fear of the perpetrator, the difficulty of tracking the perpetrator down, lack of appropriate services to offer batterers, or the absence of a familial relationship between the perpetrator and the child.”¹¹⁰ However, basing a neglect charge against a battered woman on her abusive partner's actions only furthers the power imbalance of the relationship; the court sends her the message that she is a “bad mother” and that she is at least partly to blame for what has transpired.¹¹¹ Yet, in families affected by domestic violence, both mother and child are victims at the offender's hands.¹¹² Therefore, it is imperative that CPS and family courts do not punish battered mothers for being abused. Family courts in particular must take care to ensure that CPS has an alternative basis for any neglect charges it may bring against battered women.

B. Role of Class and Gender in the System's Treatment of Battered Mothers

Some suggest that there are two separate child welfare systems: one for families that are poor, and one for families that are not.¹¹³ Whereas the custody battles of upper-class families are

¹⁰⁹ Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613, 620 (2004) (citing NAT'L ASS'N OF PUB. CHILD WELFARE ADM'RS, GUIDELINES FOR PUBLIC CHILD WELFARE AGENCIES SERVING CHILDREN AND FAMILIES EXPERIENCING DOMESTIC VIOLENCE 10 (2001)).

¹¹⁰ *Id.* at 620.

¹¹¹ See Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 588 (2004) (“The system and the batterer have the same refrain towards the mother: it—whatever ‘it’ is—is her fault.”).

¹¹² See Stark, *Good People*, *supra* note 103, at 715–16.

¹¹³ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 26 (2002).

largely dealt with in private divorce actions, the problems of low-income families are usually relegated to public child protective agencies, such as CPS.¹¹⁴ This is illustrated by the disparity in treatment of private custody and visitation disputes in Supreme Court, where access is largely limited to families who can afford private counsel, and actions brought in family courts, which are overwhelmingly against or on behalf of low-income persons.¹¹⁵ The stark contrast between the legal system's treatment of affluent and indigent children has existed in America since the inception of the child welfare movement, and continues today.¹¹⁶

Domestic violence cases that would ordinarily result in a report of neglect if handled by CPS may not have the same result when they arise in the context of a private civil action. For instance, in *J.R. v. N.R.*, a father filed a petition in Richmond County Supreme Court seeking visitation with his seventeen-year-old daughter, Nicole.¹¹⁷ The mother alleged that she had been physically, sexually, and emotionally abused by her husband throughout their marriage.¹¹⁸ She also testified that her husband had physically abused Nicole on more than one occasion.¹¹⁹ In one such incident the father kicked Nicole and broke her finger.¹²⁰ When the mother took Nicole to the doctor, however, she lied about the source of Nicole's injuries and directed Nicole to do the same because she was scared that Nicole would be placed in foster care if she told the truth.¹²¹ The

¹¹⁴ *Id.*

¹¹⁵ Irene Jay Liu, *Report: Family Courts in Crisis*, TIMES UNION (Oct. 25, 2009), <http://www.timesunion.com/local/article/Report-family-courts-in-crisis-557888.php#page-2> (quoting Caroline Kearney, Family Law Coordinator at Legal Services NYC, stating "[T]he family courts are by and large poor people's courts[:] . . . the litigants . . . are disproportionately poor people of color.").

¹¹⁶ See ROBERTS, *supra* note 113, at 26–27.

¹¹⁷ *J.R. v. N.R.*, No. V-00064/08-08A, 2011 N.Y. Misc. LEXIS 2383, at *1, *6 (Sup. Ct. May 18, 2011).

¹¹⁸ *Id.* at *8–9.

¹¹⁹ *Id.* at *10–13, *16.

¹²⁰ *Id.* at *12–13.

¹²¹ *Id.*

court stated that, while it “obviously does not condone Mother’s failure to tell the truth about how Nicole’s finger was injured, [it] does credit Mother’s testimony that Father told her that her children might well be removed if another incident was reported.”¹²² In 2003, the father was excluded from the home via an order of protection after the mother came home from work to find that her husband had beat Nicole “black and blue” for “telling on him.”¹²³ Yet, the *J.R.* court does not mention the mother ever being investigated for neglect, despite her testimony that her husband had been physically abusive towards her and the children throughout their approximately sixteen year marriage.¹²⁴

On the contrary, parties in family court do not seem to receive such sympathetic treatment. For example, in *David G.*, the family court did not dismiss a neglect proceeding against a mother whose only potentially viable offense was not ensuring her children’s regular school attendance.¹²⁵ Moreover, in *In re Christopher B.*, the family court found a battered mother guilty of neglect for not being cognizant of the impact her batterer’s substance abuse had on her children.¹²⁶ These cases serve as examples of the disparate treatment that may occur when neglect allegations arise in the context of neglect proceedings initiated by CPS versus those that arise in private divorce actions.¹²⁷

In addition, fathers may be pardoned for situations that would ordinarily result in neglect proceedings against mothers. Professor Jane Murphy, of the University Of Baltimore School Of Law, argues that because mothers are more likely to be the primary caretakers of children, they are more likely than fathers to be indicated in child neglect reports.¹²⁸ This is partly due to

¹²² *Id.* at *13.

¹²³ *Id.* at *11.

¹²⁴ See generally *J.R. v. N.R.*, No. V-00064/08-08A, 2011 N.Y. Misc. LEXIS 2383 (Sup. Ct. May 18, 2011).

¹²⁵ *In re David G.*, 909 N.Y.S.2d 891, 894, 901 (App. Div. 2010); see *supra* Introduction.

¹²⁶ *In re Christopher B.*, 809 N.Y.S.2d 202, 202 (App. Div. 2006); see *infra* Part IV.

¹²⁷ See ROBERTS, *supra* note 113, at 26–27.

¹²⁸ Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions*

mothers' increased visibility to schools, doctors, and others likely to report abuse, and the expectation that even if the father is the perpetrator, the mother should have done something to protect her child.¹²⁹ Fathers, on the other hand, are not expected to be the primary caretakers of their children, and thus the quality of their parenting does not face as much scrutiny.¹³⁰

For example, in *C.S. v. J.S.*, the husband brought a private divorce action against his wife in the Nassau County Supreme Court, on the grounds of cruel and inhuman treatment.¹³¹ He alleged that when his wife became pregnant for the second time, she began to engage in a pattern of physical, verbal, and psychological abuse against him, which caused him to feel frightened and humiliated.¹³² In addition, he alleged that his wife grabbed their oldest child by the neck, pinning her against the wall, and slapped their youngest child in the face, in his presence, causing him to feel "helpless [and] afraid."¹³³ After petitioning for an order of protection, child protective services filed neglect petitions on behalf of the children against their mother.¹³⁴

Although the husband in *C.S.* admitted that he had witnessed his wife use physical violence against their children and that he had felt powerless to intervene, he does not appear to have been indicated for neglect.¹³⁵ By contrast, in *Green v. Mattingly*, the United States District Court for the Eastern District of New York largely dismissed the claims brought by a battered mother that her and her son's constitutional rights were violated when

From Welfare "Reform," Family, and Criminal Law, 83 CORNELL L. REV. 688, 708 (1998).

¹²⁹ *Id.* at 718; see also Jeanne A. Fugate, Note, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 285-97 (discussing this phenomenon and the gender stereotypes which perpetuate it).

¹³⁰ See Murphy, *supra* note 128 at 708; see also Fugate, *supra* note 129 at 287-300.

¹³¹ *C.S. v. J.S.*, 2009 N.Y. Misc. LEXIS 2697, at *1 (Sup. Ct. June 4, 2009).

¹³² *Id.* at *2-3.

¹³³ *Id.* at *5-6.

¹³⁴ *Id.* at *6-7.

¹³⁵ See *id.* at *1, *7.

her son was placed in foster care for four days without her consent.¹³⁶ In chronicling the family court case that served as the basis for the lawsuit, the court detailed how Ms. Green was charged with neglect because her husband had slapped their seven-month-old child in the face.¹³⁷ Ms. Green was living in a homeless shelter at the time of the incident, and immediately notified the authorities upon learning of her husband's actions.¹³⁸ Despite the fact that her son was returned to her care after four days, Ms. Green remained under CPS supervision for more than one year while the neglect case against her remained open.¹³⁹

There are many reasons why cases like *J.R.* and *C.S.* are distinguishable from a CPS case, but if the previously mentioned cases are any indication, the mother in *J.R.* and the father in *C.S.* may very well have had their children removed from their care if they had entered the family court through a CPS investigation. In both cases, the nonviolent parents were victims of domestic violence who knew that their partners were physically abusing their children and yet did not immediately contact the authorities.¹⁴⁰ These cases are examples of situations in which more affluent parents were not charged with neglect, although neglect charges may have been filed against lower-income families.

C. Persistent Issues in CPS Treatment of Domestic Violence Cases

Nicholson was an important first step for New York family courts and child welfare agencies to move away from a system

¹³⁶ *Green v. Mattingly*, No. 07-CV-1790 (ENV) (CLP), 2010 U.S. Dist. LEXIS 99864 (E.D.N.Y. Sept. 22, 2010); *see also infra* Part IV.

¹³⁷ *Mattingly*, 2010 U.S. Dist. LEXIS 99864, at *8; *see also infra* Part IV.

¹³⁸ *Mattingly*, 2010 U.S. Dist. LEXIS 99864, at *8; *see also infra* Part IV.

¹³⁹ *Mattingly*, 2010 U.S. Dist. LEXIS 99864, at *14–15; *see also* Part IV.

¹⁴⁰ *See generally J.R. v. N.R.*, No. V-00064/08-08A, 2011 N.Y. Misc. LEXIS 2383 (Sup. Ct. May 18, 2011); *see also generally C.S. v. J.S.*, 2009 N.Y. Misc. LEXIS 2697 (Sup. Ct. Jun. 4, 2009).

that labeled victims of domestic violence neglectful simply because they were abused in front of their children.¹⁴¹ Yet, the same problems of hasty removal by overburdened caseworkers that existed before *Nicholson* continue to be at issue today. These problems are particularly apparent in cases where failure to protect is a primary focus of a neglect case against a battered mother.

1. The Crucial Role Played by CPS Caseworkers and the Need for More Stringent Qualifications

Caseworkers have vast discretion in determining whether a child should be removed from his or her primary caretaker for neglect.¹⁴² Unlike child abuse, which can be substantiated by physical evidence, the perceived *potential* for harm is enough to commence neglect proceedings.¹⁴³ Initially, it is entirely up to the investigating caseworker to determine whether such potential for harm exists.¹⁴⁴ In certain situations, the caseworker can even remove the child from his or her home prior to obtaining a court order.¹⁴⁵ Under these conditions, there is a very real danger that caseworkers will impose their subjective values of appropriate child rearing on the families they investigate.¹⁴⁶

Yet, many caseworkers are not particularly qualified to make these sensitive judgment calls.¹⁴⁷ For example, in New York City, a CPS caseworker need only have a bachelor's degree with twenty-

¹⁴¹ See *supra* Part II.

¹⁴² See ROBERTS, *supra* note 113, at 55; see also N.Y. COMP. CODES R. & REGS. tit. 18, § 432 (2012); see also *supra* Part II (detailing the path of child abuse and neglect cases in New York).

¹⁴³ See N.Y. JUD. CT. ACTS LAW § 1012(f)(i) (McKinney 2009) (defining a neglected child as one “whose physical, mental, or emotional condition has been impaired *or is in imminent danger of becoming impaired . . .*” (emphasis added)); see also ROBERTS, *supra* note 113, at 55.

¹⁴⁴ ROBERTS, *supra* note 113, at 55.

¹⁴⁵ JUD. CT. ACTS § 1022; see also, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 167 (E.D.N.Y. 2002); ROBERTS, *supra* note 113, at 55 (suggesting that this exception is widely abused by caseworkers).

¹⁴⁶ ROBERTS, *supra* note 113, at 56.

¹⁴⁷ *Id.*

four credits in “any combination of . . . social work, psychology, sociology, human services, criminal justice, education . . . nursing, or cultural anthropology.”¹⁴⁸ Worker burnout and high turnover rates are commonplace in child welfare agencies, and as such many caseworkers are inexperienced recent college graduates.¹⁴⁹

Moreover, overburdened caseworkers are incentivized to place children in foster care to avoid being held responsible for abuse that occurs after they have taken action to “protect” the child.¹⁵⁰ Dorothy Roberts, a renowned expert on issues of race, gender, and the law, argues that “[r]isk-averse authorities are more afraid of making the wrong decision to return a child to an abusive home than of making the wrong decision to keep a child in state custody.”¹⁵¹ For example, while a caseworker that does not remove a child may be vulnerable to disciplinary sanction if the child is later discovered to be abused, caseworkers are rarely blamed for harm inflicted on children in foster care.¹⁵²

2. *The Detrimental Effects of Removing Children Exposed to Domestic Violence*

Foster care is not necessarily a better alternative for children deemed to be abused or neglected.¹⁵³ The act of removal in and of itself is particularly traumatic, even under the best of circumstances.¹⁵⁴ Dorothy Roberts argues that removing a child from his or her parents is not only one of the most severe governmental intrusions into a parent's life, but is also an

¹⁴⁸ N.Y.C. ADMIN. FOR CHILDREN'S SERVS., BECOME A CHILD PROTECTIVE SPECIALIST (2011), available at http://www.nyc.gov/html/acs/html/about/work_cps.shtml.

¹⁴⁹ ROBERTS, *supra* note 113, at 56.

¹⁵⁰ *Id.* at 122–23.

¹⁵¹ *Id.* at 122.

¹⁵² *Id.* at 123.

¹⁵³ *See id.* at 223 (detailing how the foster care system is in a current state of crisis).

¹⁵⁴ Evan Stark, *The Battered Mother in the Child Protective Services Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS. L. REP. 107, 118 (2002) [hereinafter Stark, *Battered Mother*].

extremely frightening experience for a child.¹⁵⁵ Children in foster care are often moved to multiple homes, which can negatively impact their sense of security, independence, and self-esteem.¹⁵⁶ Common reactions to removal include feelings of abandonment and helplessness.¹⁵⁷ To compensate for this lack of control, children may blame themselves for the separation in an effort to feel that they are still an important part of their parents' lives or to avoid feeling angry with their parents.¹⁵⁸ In addition, separated children are often fearful that they will be retaliated against, because they believe that removal is their fault and that they must be punished for it.¹⁵⁹

For children exposed to domestic violence, "where the bond to the primary caretaker has already been made fragile by abuse, the trauma of placement can be particularly harsh, evoking powerful feelings of guilt and self-loathing that can leave lasting scars."¹⁶⁰ Children that have been exposed to domestic violence "often experience their immediate universe as unpredictable and unstable."¹⁶¹ Children may also perceive their removal as a punishment.¹⁶² They may experience anxiety concerning the battered parent's safety and guilt that their absence has left them unprotected.¹⁶³ Thus, the negative effects removal has on a child must be considered along with the dangers of child maltreatment.¹⁶⁴ Removing these children from their nonviolent parents often re-victimizes them; in addition to the trauma inflicted on them by

¹⁵⁵ ROBERTS, *supra* note 113, at 17.

¹⁵⁶ *Id.* at 239.

¹⁵⁷ NER LITTNER, CHILD WELFARE LEAGUE OF AMERICA, SOME TRAUMATIC EFFECTS OF SEPARATION AND PLACEMENT 8 (1973).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 9.

¹⁶⁰ Stark, *Battered Mother*, *supra* note 154, at 118.

¹⁶¹ *Id.*

¹⁶² Beth A. Mandel, Comment, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholson v. Williams*, 73 U. CIN. L. REV. 1131, 1145 (2005).

¹⁶³ *Id.*

¹⁶⁴ ROBERTS, *supra* note 113, at 18; *see also* Zandra D'Ambrosio, Note, *Advocating for Comprehensive Assessments in Domestic Violence Cases*, 46 FAM. CT. REV. 654, 660 (2008).

their abusive parent, they are now thrust against their will into an unfamiliar situation that may not even be a safer alternative.¹⁶⁵

IV. COURT DECISIONS AFTER *NICHOLSON* SUGGEST THAT ITS VISION HAS YET TO BE REALIZED

A review of neglect proceedings brought by CPS against battered mothers suggests that while CPS and New York family courts may technically be complying with the mandate of *Nicholson*, they have not fully embraced its underlying spirit.¹⁶⁶ Although CPS may no longer bring neglect proceedings against a battered mother solely because she is a victim of domestic violence, there have been a number of post-*Nicholson* cases in which, despite the inclusion of various relatively minor allegations, the mother's victimization appears to have been the primary charge.¹⁶⁷ In addition, family courts continue neglect proceedings against battered mothers in cases where CPS fails to either meet the requisite "imminent risk" standard necessary for removal, or to provide an alternative ground for suspecting the mother of neglect.¹⁶⁸ Usually, the mother is ordered to participate in domestic violence services, pending a final order of disposition, which may not happen for a significant amount of time.¹⁶⁹ The following court decisions suggest that *Nicholson's* vision has yet to fully be realized in New York family courts.¹⁷⁰

David G. is an example of this phenomenon. In that case, the judge admonished CPS for violating *Nicholson* by conducting a removal from a victim of domestic violence.¹⁷¹ The court found that neither mere speculation that the mother might return to her batterer, nor the father's violation of the order of protection were sufficient to establish that imminent risk was present,

¹⁶⁵ The "Failure to Protect" Working Grp., *supra* note 49, at 856; *see also* D'Ambrosio, *supra* note 164, at 660.

¹⁶⁶ *See infra* Part IV.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See, e.g., In re David G.*, 909 N.Y.S.2d 891, 901 (Fam. Ct. 2010); *see also* Mandel, *supra* note 162, at 1145; *supra* Part IV.

¹⁷⁰ *See infra* Part IV.

¹⁷¹ *David G.*, 909 N.Y.S.2d at 901.

warranting removal.¹⁷² Yet, the court did not articulate its reasoning for keeping the neglect proceeding open and conditioning the mother's parental custody on her compliance with domestic violence services.¹⁷³ While the court could have relied on the allegation that the children were not consistently attending school, the court did not articulate this.¹⁷⁴ Moreover, every condition that the mother was ordered to comply with related to her victimization, despite the court having found that CPS violated *Nicholson* by removing the child solely because he was exposed to domestic violence.¹⁷⁵ For example, the mother was not ordered to attend any parenting classes to teach her about the importance of sending her children to school.¹⁷⁶ Thus, the primary focus of the neglect proceeding appears to have been the children's exposure to domestic violence: the exact scenario prohibited by *Nicholson*.¹⁷⁷

Similarly, in *In re Aiden L.* a battered mother was found to have neglected her child by "allowing him to be exposed to an incident involving domestic violence" where the father ransacked the mother's home looking for money he believed she had stolen from him.¹⁷⁸ As additional evidence of the mother's alleged neglect, CPS also blamed the mother for the unclean condition of her apartment.¹⁷⁹ The court did not find the mother's testimony that the apartment's condition was temporary and due to the father's rampage to be credible.¹⁸⁰ While the unsanitary condition of the apartment may certainly have been a valid ground on which to find the mother neglectful, the court

¹⁷² *Id.* at 898–99.

¹⁷³ *Id.* at 898–900.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 901.

¹⁷⁶ *See id.* (enumerating a number of domestic violence related conditions for return of the children, but none addressing the mother's parenting).

¹⁷⁷ *Nicholson v. Scoppetta*, 820 N.E.2d 840, 844 (N.Y. 2004).

¹⁷⁸ *In re Aiden L.*, 850 N.Y.S.2d 671 (App. Div. 2008); *see also* Kathleen A. Copps, Comment, *The Good, the Bad, and the Future of Nicholson v. Scoppetta: An Analysis of the Effects and Suggestions for Further Improvements*, 72 ALB. L. REV. 497, 511–12 (2009).

¹⁷⁹ *Aiden L.*, 850 N.Y.S.2d at 671.

¹⁸⁰ *Id.* at 673.

fails to articulate any understanding of the possible connection between the domestic violence and the dirty apartment.¹⁸¹ For example, there is no mention in the opinion of whether the mother was unable to clean the apartment because her primary focus was on keeping her child and herself safe from the father's abuse.¹⁸² Moreover, while the court faults the mother for allowing the father to have contact with the child, its opinion does not include any analysis of whether the mother reasonably could have concluded that this was a safer course of action for her child than refusing to allow the father into their home.¹⁸³ Of course, it is entirely plausible that even after conducting this more detailed analysis the mother may still have been found neglectful. Yet, in order to further *Nicholson's* goal of protecting battered mothers from being blamed for their abuse, it is crucial that the court articulate its consideration of the *Nicholson* factors when determining whether a battered mother has acted reasonably under the circumstances.¹⁸⁴

In re Aiden L. shows that the New York courts have not yet embraced the full vision of *Nicholson*.¹⁸⁵ *In re Christopher B.* is another case that indicates that the underlying spirit of *Nicholson* has yet to be realized. In *Christopher B.*, the court found a battered mother guilty of neglect because "the child was exposed to regular domestic violence and regular drug use by the father."¹⁸⁶ In addition, the court determined that the mother had no awareness of the impact of the father's actions on her child.¹⁸⁷ Yet, the court did not elaborate on the mother's lack of "awareness"¹⁸⁸ and did not consider the possibility that the father's drug use may have either contributed to

¹⁸¹ *Id.*

¹⁸² See generally *Aiden L.*, 850 N.Y.S.2d 671; see also Copps, *supra* note 178, at 515.

¹⁸³ See generally *Aiden L.*, 850 N.Y.S.2d 671.

¹⁸⁴ See Copps, *supra* note 178, at 515 ("[C]ourts are failing to consider, or at least to articulate their consideration of, the 'clearly attributable' causation requirement and the 'risk' factors necessary to determine whether a domestic violence victim has provided a minimum degree of care to her children.").

¹⁸⁵ See *supra* Part IV.

¹⁸⁶ *In re Christopher B.*, 809 N.Y.S.2d 202, 202 (App. Div. 2006).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

or have been an integral part of his physical abuse.¹⁸⁹ The court may very well have been correct in its conclusion that the mother was ignorant of the impact of the father's substance abuse on the child and that this made her a neglectful parent. However, the opinion was too conclusory, ignoring the analysis that *Nicholson* requires. *Nicholson* demands that the court specifically identify why it found the mother's alleged lack of awareness to be enough to qualify as neglect, in order to ensure that she is not being charged with neglect solely based on her batterer's actions.¹⁹⁰

Green v. Mattingly offers further evidence that New York courts fail to realize *Nicholson*'s vision by continuing neglect proceedings against battered mothers.¹⁹¹ In this case, a battered mother's seven-month-old son, T.C., was removed from her care because her husband had slapped him in the face, despite the fact that the mother immediately reported his actions to the authorities.¹⁹² CPS initiated child neglect proceedings against both Ms. Green and her husband, alleging that Ms. Green was aware that her husband had hit their child in the past and that she had willfully not complied with an existing order of protection by living with her husband.¹⁹³ Based on these claims, T.C. was removed from his mother's home and placed in foster care.¹⁹⁴ Ms. Green filed an application pursuant to Family Court Act section 1028 for an order returning T.C. to her custody.¹⁹⁵ After four days in foster care, Family Court ordered that T.C. be returned to his mother immediately, but the neglect proceedings against her remained open for over one year.¹⁹⁶

Since the facts in *Green* are distinguishable from those in *Nicholson*, the *Green* court was able to avoid *Nicholson*'s important precedent. In *Nicholson*, the children had merely been

¹⁸⁹ See WALKER, *supra* note 73, at 53 ("Alcohol and drug abuse are other high risk factors for potential lethality.").

¹⁹⁰ *Nicholson v. Scoppetta*, 820 N.E.2d 840, 845-46 (N.Y. 2004).

¹⁹¹ See generally *Green v. Mattingly*, No. 07-CV-1790 (ENV) (CLP), 2010 U.S. Dist. LEXIS 99864 (E.D.N.Y. Sept. 22, 2010).

¹⁹² *Id.* at *8.

¹⁹³ *Id.* at *10-11.

¹⁹⁴ *Id.* at *11-13.

¹⁹⁵ *Id.* at *13.

¹⁹⁶ *Id.* at *14-15.

exposed to domestic violence but had not been physically abused themselves.¹⁹⁷ In contrast, the husband in *Green* had slapped the child in the face, and there was evidence that he had spanked him in the past.¹⁹⁸ Clearly, there is a difference between a child who has only been exposed to domestic violence and one who has actually been physically abused. Yet, in a case such as this, where the abusive partner is the only parent accused of violence and the mother immediately notified the authorities upon learning of her husband's actions, an analysis of the *Nicholson* factors would help to shed light on why the family court found that the mother had failed to act as "a reasonable and prudent parent" would under the circumstances.¹⁹⁹ For example, it is possible that Ms. Green thought it would be safer for her and T.C. if she allowed her husband to live with them than if she reported him to the police, which might only enrage him.²⁰⁰ It is vital that New York courts clearly delineate their consideration of the *Nicholson* factors in order to further *Nicholson*'s policy of not blaming victims of domestic violence for their abuse.

Similarly, while a battered mother's reluctance to leave an abusive relationship may be legitimate grounds for finding her neglectful, compliance with *Nicholson* requires that courts delve beneath the surface in analyzing the mother's reasons for not wanting her batterer to leave her home. In *In re Angelique L.*, a battered mother was found guilty of neglect after a CPS caseworker discovered that her live-in boyfriend hit her in front of her children.²⁰¹ The caseworker filed a neglect petition against the mother based on her alleged failure to protect her children from exposure to repeated incidents of domestic violence, and the children's report to the caseworker that their mother's

¹⁹⁷ *Nicholson v. Scoppetta*, 820 N.E.2d 840, 842–44 (N.Y. 2004); *see also supra* Part III.

¹⁹⁸ *Green*, 2010 U.S. Dist. LEXIS 99864, at *11.

¹⁹⁹ *Nicholson*, 820 N.E.2d at 846 (citing *In re Jessica YY.*, 685 N.Y.S.2d 489, 491 (App. Div. 1999)).

²⁰⁰ *See supra* Part III.A (discussing how a domestic violence victim may be behaving quite rationally, despite how illogical her actions may appear from the outside).

²⁰¹ *See generally In re Angelique L.*, 840 N.Y.S.2d 811 (App. Div. 2007).

boyfriend had hit them in the past.²⁰² The court distinguished this case from *Nicholson* because here the boyfriend had also hit the children, and the children were considered to be “extremely vulnerable.”²⁰³

While *Nicholson* dictates that the children’s “special vulnerabilities” are a proper consideration for courts in determining neglect cases, *Nicholson* also requires the court to consider additional factors in determining the imminent risk to the child of remaining in the home versus the potential harm of removal.²⁰⁴ For example, in *Angelique L.*, while the court briefly mentions that the mother did not wish to press criminal charges against her boyfriend and did not want him to leave the home because she depended on him for financial support, it does not integrate this into its analysis of whether the mother failed to exercise a minimal level of care towards her child.²⁰⁵ However, *Nicholson* demands that courts undertake this type of analysis in determining whether the mother’s psychological state has been so negatively impacted by the abuse that she cannot be trusted to properly care for her child, or whether providing her with practical services to help her become self-sufficient could alleviate the problem.²⁰⁶

These cases serve as examples of the ways in which CPS continues to punish battered mothers for being victims of domestic violence, while technically staying within the parameters of *Nicholson*. Therefore, when exposure to domestic violence is the primary charge levied against a battered mother in a neglect proceeding, it is imperative that the family courts carefully examine the basis for the supplemental allegation, so as to avoid unfairly blaming victims of domestic violence for their batterers’ actions.

²⁰² *Id.* at 813–15.

²⁰³ *Id.* at 815.

²⁰⁴ *See supra* Part III.

²⁰⁵ *Angelique L.*, 840 N.Y.S.2d at 813–15.

²⁰⁶ *See supra* Part III.

V. SUGGESTIONS FOR CHANGE

The *Nicholson* case was a significant beginning in the evolution of the child welfare system's response to families affected by domestic violence; CPS may no longer charge battered mothers with neglect solely because they were abused in front of their children.²⁰⁷ However, more than mere compliance with the literal command of *Nicholson* is required to bring about real change. To fully achieve the policy vision of *Nicholson*, both CPS and the family courts must fully embrace its goal of ensuring that the system does not blame battered mothers merely for being victims. In addition, more funding must be dedicated to providing emergency housing to domestic violence victims so that every abused woman who makes the life changing decision to leave an abusive relationship has somewhere safe she can go.²⁰⁸

When the primary reason for keeping a neglect proceeding against a nonviolent parent open is that her children have been exposed to domestic violence, CPS must prove that the child's life or health is at imminent risk warranting removal from the battered mother's care.²⁰⁹ Absent this showing, CPS must articulate a separate, credible ground for suspecting impairment or risk of impairment to the child.²¹⁰ If CPS fails to meet this burden, family courts should not hesitate to dismiss these neglect proceedings in their entirety.²¹¹ Ordering battered women to comply with domestic violence services within the punitive context of neglect proceedings and to enforce orders of protection against their batterers under threat of losing their children is not the proper way to address the needs of domestic violence victims.²¹²

²⁰⁷ *Id.*

²⁰⁸ *See infra* Part V.

²⁰⁹ *See supra* Part II.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Maureen K. Collins, Comment, *Nicholson v. Williams: Who is Failing to Protect Whom? Collaborating the Agendas of Child Welfare Agencies and Domestic Violence Services to Better Protect and Support Battered Mothers and Their Children*, 38 NEW ENG. L. REV. 725, 755

A. CPS- and Family Court-Based Solutions

Family courts fail battered women when they continue, post-*Nicholson*, to hold them responsible for domestic violence. In cases where CPS does not meet its burden of proving imminent risk to the child, courts may still keep proceedings open although they cannot articulate a separate ground for suspecting neglect.²¹³ This practice furthers CPS's misguided response to the *Nicholson* holding.²¹⁴ For example, family courts typically order battered mothers charged with neglect to comply with CPS referrals for domestic violence shelters, leave their abusers, and obtain domestic violence counseling.²¹⁵ While such orders may be intended to ensure the safety of the mother and her child, Professor Justine Dunlap argues that charging battered women with neglect "re-victimizes the mother by removing her children and premising their return on her conformity with governmental edict."²¹⁶ In reality, these orders are more punishing than supportive because the battered mother is at risk of losing her children if she does not comply.²¹⁷

In addition, maintaining a neglect proceeding against a battered mother may reinforce the power and control dynamic which is typical in abusive relationships.²¹⁸ Despite having left her batterer, the family court steps in and reinforces the batterer's control over the mother.²¹⁹ The judge generally orders her to comply with CPS supervision, including referrals for domestic violence shelters, as well as announced and unannounced visits to her home.²²⁰ In addition, she will usually be ordered to enforce an order of protection against her abuser, who may prevent her from calling the police or threaten to hurt

(2004).

²¹³ See *supra* Part IV.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Dunlap, *supra* note 111, at 588.

²¹⁷ Stark, *Battered Mother*, *supra* note 154, at 125.

²¹⁸ Collins, *supra* note 212, at 755.

²¹⁹ *Id.*

²²⁰ See *supra* Part IV.

her children if she reports his violation.²²¹ She may even be charged with neglect if her batterer's violation of the order of protection is the cause of her noncompliance with the court order.²²²

While family courts may have the best of intentions in issuing these orders, they are nonetheless determined on the basis of the woman's status as a victim of domestic violence.²²³ If the woman does not comply with these orders, she may lose custody of her children.²²⁴

In this way, survivors of domestic violence are blamed for the abuse they have suffered.²²⁵ Instead, CPS caseworkers should be responsible for obtaining and enforcing orders of protection, rather than battered women.²²⁶ Batterers would presumably be more obedient to orders of protection likely to be enforced by CPS, as opposed to orders obtained by women who may be too frightened to report their abusers' violations to the police.²²⁷ Furthermore, this practice would send a strong message to batterers that they are solely responsible for their actions and that domestic violence will not be tolerated.²²⁸

In addition, collaboration between domestic violence advocates and CPS is crucial to adequately training CPS caseworkers to respond to families affected by domestic violence.²²⁹ Children's welfare does not exist separate and apart

²²¹ See *supra* Part III.A.

²²² See, e.g., *In re David G.*, 909 N.Y.S.2d 891, 899 (Fam. Ct. 2010).

²²³ See *supra* Part IV.

²²⁴ *Id.*

²²⁵ Collins, *supra* note 212, at 754–55.

²²⁶ The “Failure to Protect” Working Grp., *supra* note 49, at 865 (“[W]here ‘imminent risk’ would be eliminated, ACS should request and the family court should issue an order of protection excluding the batterer from the home.”).

²²⁷ See Goodmark, *supra* note 109, at 630 (“Caseworkers should inform batterers that violations of these orders will be taken seriously and could subject them to criminal liability, even imprisonment. . . . [C]hild protection workers and probation officers can collaborate to ensure that batterers comply with the orders and that they face serious consequences when they do not.”).

²²⁸ The “Failure to Protect Working Grp.,” *supra* note 49, at 865.

²²⁹ Amanda J. Jackson, Note, *Nicholson v. Scoppetta: Providing a Conceptual Framework for Non-Criminalization of Battered Mothers and*

from the welfare of their parents.²³⁰ The child's welfare is linked to the safety of his or her mother, just as in many ways, the mother's well being depends on the safety of her child.²³¹ Therefore, fostering improved communication between domestic violence advocates and child protection workers is a crucial step towards decreasing the number of child neglect cases that are unnecessarily brought against battered mothers, while ensuring the holistic support of the entire family.²³²

B. Increased Emergency Housing Options

In addition, the availability of domestic violence shelters is indispensable in helping victims of domestic violence successfully escape their abusive relationships.²³³ Not only do these shelters provide battered women with safe and confidential housing, but they offer vital services such as counseling, legal advocacy, and job training to their residents.²³⁴ Instead of simply providing temporary housing to battered women, domestic violence shelters are intended to provide them with the tools they need to achieve independence.²³⁵ This is critical because battered women often face a catch-22 problem due to their common economic dependence and social isolation.²³⁶ If they leave, they will have nowhere to go and no way to support their children.²³⁷ If they stay, they will be subject to continued

Alternatives to Removal of Their Children From the Home, 33 CAP. U. L. REV. 821, 865 (2005); see also Collins, *supra* note 212, at 755.

²³⁰ See Collins, *supra* note 212, at 755.

²³¹ *Id.*

²³² Jackson, *supra* note 229, at 265.

²³³ See, e.g., *From the Street*, SAFE HORIZON, <http://www.safehorizon.org/index/get-help-8/domestic-violence-and-abusive-relationships-35/tour-from-the-street-34.html> (last visited Apr. 4, 2012).

²³⁴ *Domestic Violence and Housing*, S. BROOKLYN LEGAL SERVS. (Jan. 9, 2008), <http://www.sbls.org/index.php?id=41>.

²³⁵ See *id.*

²³⁶ STARK, COERCIVE CONTROL, *supra* note 64, at 262; Stark, *Good People*, *supra* note 103, at 713.

²³⁷ Mandel, *supra* note 162, at 1157.

abuse.²³⁸ Thus, emergency housing is significant in helping domestic violence victims leave abusive relationships.²³⁹

Unfortunately, there is a dire lack of emergency housing options in New York. Many women are turned away from domestic violence shelters that are at their maximum resident capacity.²⁴⁰ In New York City, if there is no space at domestic violence shelters, victims are referred to the Prevention Assistance and Temporary Housing ("PATH") office, which will assign them to a regular homeless shelter.²⁴¹ Prior to December 2009, the New York City Housing Authority's ("NYCHA") Section 8 program enabled victims of domestic violence to obtain rental assistance vouchers.²⁴² However, due to federal budget cuts, NYCHA has stopped accepting new applications to this program.²⁴³ Furthermore, over 3,000 previously issued vouchers were revoked.²⁴⁴ Thus, even if a woman enters a domestic violence shelter, she will likely face an uphill battle when she must eventually secure permanent housing.²⁴⁵

If the child welfare system expects battered mothers to successfully leave their abusive partners, it is imperative that the

²³⁸ *Id.*

²³⁹ *Id.* at 1146.

²⁴⁰ The "Failure to Protect" Working Grp., *supra* note 49, at 858.

²⁴¹ *Domestic Violence and Housing*, *supra* note 234.

²⁴² *Victim Services: Housing*, MAYOR'S OFFICE TO COMBAT DOMESTIC VIOLENCE, <http://www.nyc.gov/html/ocdv/html/services/housing.shtml> (last visited Apr. 4, 2012).

²⁴³ See Manny Fernandez, *Thousands Lose Rent Vouchers in Cutback*, N.Y. TIMES (Dec. 17, 2009), <http://www.nytimes.com/2009/12/18/nyregion/18vouchers.html>; see also *Applying for Section 8*, N.Y.C. HOUS. AUTH., <http://www.nyc.gov/html/nycha/html/section8/applicant-info.shtml> (last visited Apr. 4, 2012).

²⁴⁴ Jen Chung, *Due to Funding Issues, City Cancels 3,000 Section 8 Vouchers*, GOTHAMIST (Dec. 18, 2009, 9:10 AM), http://gothamist.com/2009/12/18/due_to_funding_issues_city_slashes.php; see also *NYCHA Revokes More Than 3,000 Section 8 Vouchers*, NY1 NEWS (Dec. 18, 2009, 8:51 AM), http://www.ny1.com/content/top_stories/110655/nycha-revokes-more-than-3-000-section-8-vouchers.

²⁴⁵ Cindy Rodriguez, *As Subsidies Dry Up, Homeless Families Struggle to Find Housing*, WNYC NEWS (Nov. 1, 2011), <http://www.wnyc.org/articles/wnyc-news/2011/nov/01/subsidies-dry-homeless-families-struggle-make-ends-meet/>.

resources necessary to accomplish this are available to them. Victims of domestic violence should not have to choose between staying with their batterers and becoming homeless.²⁴⁶ Therefore, more government funding must be directed to providing emergency housing to survivors of domestic violence in order to facilitate their safe transition into self-sufficiency.

VI. CONCLUSION

Nicholson was an important first step in the child welfare system's recognition that nonviolent battered mothers should not be charged with neglect solely because their children have been exposed to domestic violence.²⁴⁷ True change, however, requires more than technical compliance with *Nicholson's* holding. To fully embrace the underlying spirit of *Nicholson*, family courts must consistently reinforce the *Nicholson* holding by undergoing a comprehensive analysis of battered mothers' behavior in determining whether they should be deemed neglectful.²⁴⁸

In addition, CPS caseworkers must receive proper training in how to skillfully respond to families affected by domestic violence.²⁴⁹ In order to be effective, this training should encompass the complex interpersonal dynamics of an abusive relationship and emphasize that the psychological effects of domestic violence are often temporary and may be rectified in many cases by removing batterers from the home via an order of protection.²⁵⁰ Furthermore, there must be sufficient community support for domestic violence survivors who make the difficult decision to leave an abusive relationship.²⁵¹ Increased funding to organizations and government resources providing domestic violence shelters and permanent housing to survivors is crucial in ensuring the safety of battered mothers and their children.²⁵²

²⁴⁶ *Id.*

²⁴⁷ *See supra* Part III.

²⁴⁸ *See supra* Part V.A.

²⁴⁹ *See supra* Part V.A.

²⁵⁰ *Id.*

²⁵¹ *See supra* Part V.B.

²⁵² *Id.*

In this way, New York child welfare agencies and family courts will be able to truly hold batterers accountable for their actions and support families affected by domestic violence in their quest towards safety and independence.