

Denver Law Review

Volume 82
Issue 4 *Symposium - Children and the Courts: Is
Our System Truly Just?*

Article 5

December 2020

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Recommended Citation

Evan Stark, Nicholson v. Williams Revisited: When Good People Do Bad Things, 82 Denv. U. L. Rev. 691 (2005).

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NICHOLSON V. WILLIAMS REVISITED: WHEN GOOD PEOPLE DO BAD THINGS

EVAN STARK[†]

INTRODUCTION

My aim is to provide a broad framework for understanding and building on the *Nicholson* decision.¹ While I touch on some of the factual issues that arose in the case with respect to how domestic violence impacts children, my major concerns are with the conceptual, historical and political context in which the case was set. In particular, I want to address the case as a particular moment in the history of the relationship between the battered women's movement and the Child Protective Services (CPS) system, the flawed understanding of domestic violence that mediated this relationship and continues to shape how CPS responds to battered women, and the implications for improved practice of our growing appreciation of the power dynamics involved in woman battering. I also describe the dilemmas created for women like Ms. Nicholson, what I call "the battered mother's dilemma," because of the discrepancy between what battered women typically experience and how domestic violence is identified and managed.²

I. WHAT IS THE QUESTION?

I entered the *Nicholson* case with a Manichean view of the parties involved. Having been involved in the battered women's movement for over thirty years as an advocate, researcher and forensic social worker, I had learned not to idealize battered women or their behavior as mothers. Still, when you meet Ms. Nicholson, Ms. Tillet or the other plaintiff mothers, it is hard to avoid the impression that you're dealing with genuine pioneers, women with a courage to "talk truth to power" that is rare anywhere, let alone among the most vulnerable sectors of the population. By contrast, I viewed the CPS system as a disaster. For the last three years, as a member of the Nicholson Review Committee (NRC), I re-

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

2. For a review of my testimony that documents our factual claims in the case, see generally Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS. L. REP. 107, 107-131 (2002).

viewed complaints about Administration for Children's Services (ACS) and dozens of family court petitions, met regularly with ACS leadership and with other members of our panel trying to craft workable solutions that would bring ACS into compliance with Judge Weinstein's injunction.³ I have not substantially changed my overall assessment of the CPS system. But I have a far greater appreciation of the quality of commitment and intellect at CPS agencies like ACS. And this appreciation is the basis for one of the key questions raised by *Nicholson*: given such talent and commitment, why do CPS agencies behave so badly towards battered mothers?⁴

Lest my praise seem backhanded, let me state what I couldn't say publicly when I served as an advocate for the plaintiff mothers in the review process. I believe that ACS's work on domestic violence is state of the art and that its leadership in this area is exemplary. Before and during their attempts at compliance, ACS consulted regularly with a number of the nation's leading domestic violence experts, including Lonnie Davis, Richard Gelles, Susan Schecter, Jeffrey Edelson, and Kathryn Conroy. Elizabeth Roberts, the head of domestic violence policy at ACS, is a savvy and experienced practitioner with direct ties to the Massachusetts child welfare system widely considered to have a model domestic violence response. Before and after the trial, ACS maintained regular contact with the William Casey Foundation and a body of expertise through the foundation that is at the cutting edge of the issues raised by the case. William Bell, the agency head during much of our efforts to bring ACS into compliance, now works at Casey. Linda Spears from the National Child Welfare League, who represented ACS on the NRC and consulted with them throughout the compliance process, not only has a working knowledge of how the two systems operate, but a principled commitment to women's autonomy that is rare among persons so closely identified with the child welfare system. And John Mattingly, the current Commissioner of ACS, helped to fund the NRC and is one of the most progressive voices nationally in child welfare.

I emphasize these points because the actions ACS took against Ms. Nicholson and her co-litigants, charging them with neglect and removing their children solely because the mothers were victims of domestic violence, could easily be misinterpreted as the work of a backwater crowd of bureaucratic misogynists insensitive to the most basic principles of respect.⁵ Indeed, when I asked a close colleague in the field who has first-hand experience with ACS why she thought an agency with this quality of outside consultation could have produced such draconian policies, she drew on her South Jersey farm roots to quip, "You can't make a

3. *Nicholson*, 203 F. Supp. 2d at 258.

4. *See id.* at 219-20.

5. *Nicholson*, 203 F. Supp. 2d at 171.

silk purse from a sow's ear." My own view, however, is that a major lesson from *Nicholson* is that the peculiar biases to which child protection is predisposed by its mission, programmatic structure and peculiar role in our society allow and may even compel even its most progressive personnel to engage in morally and constitutionally indefensible practices with respect to mothers in general and in particular to the class of primarily disadvantaged and/or minority women who were the plaintiffs in *Nicholson*. Moreover, I also believe ACS's actions were the logical result of setting a view of domestic violence and how it harms children into a narrow mandate that effectively excludes from its purview the actions necessary to respond appropriately to cases of woman battering. A common view when we began the *Nicholson* case was that "they didn't get it," meaning that ACS leadership was stunningly naïve about the reality of battered women's experience. While this is true to a certain degree, in general the knowledge base from which CPS approaches battered women in its caseload is substantially the same as the knowledge base that guides the advocacy movement. Indeed, the domestic violence principles and guidelines ACS staff is asked to implement through their case practice emphasize support for non-offending parents and children and "accountability" for offending parents, the same tenets that guide the battered women's movement. If the practices and outcomes of ACS involvement for women and children are dramatically different than the practices and outcomes when shelters or other advocacy organizations are involved, this reflects the very different organizational and political contexts in which these responses are shaped. These contexts and the conceptual foundation on which they are built must be changed if we hope to improve the outcome of CPS intervention with battered women and their children.

Even a cursory review of ACS's organizational chart made it apparent that frontline service staff (e.g. child protection supervisors and caseworkers) were not accountable to the domestic violence expertise on board. Elizabeth Roberts, the titular head of domestic violence policies at ACS, had no line authority over casework practice whatsoever, a point I emphasized in my testimony.⁶ ACS continually reiterated during the trial that removal solely for domestic violence was not their "policy."⁷ But this defense was transparent. The written policies at ACS with respect to domestic violence were only marginally related to actual practice. In marked contrast to the principles enunciating the importance of "empowerment" for battered women, for example, was a standing directive from a previous commissioner that instructed caseworkers to resolve "any ambiguity regarding the safety of the child . . . in favor of removing the child from harm's way."⁸ With this directive in hand, no account-

6. Stark, *supra* note 2, at 128.

7. *Nicholson*, 203 F. Supp. 2d at 210-11.

8. Stark, *supra* note 2, at 128.

ability for punitive practices in domestic violence cases, no technical assistance on board to help resolve the ambiguities that are commonplace in these cases, and a legal staff whose burnout was matched by the ease with which their petitions were granted by family court judges, removal (with or without a court order) became the agencies effective policy. The problem here was not a lack of training. When *Nicholson* was decided, caseworkers at ACS had a domestic violence protocol and assessment tool in hand and received two full days of targeted domestic violence training. The training curriculum ACS used took an approach that emphasized psychological dimensions of abuse, including women's presumed ambivalence about separating from violent partners, that bore little relation to either the cutting edge definition of domestic violence as a pattern or coercive and controlling tactics ACS adopted from Massachusetts or to the criteria used in its protocol (also adopted from Massachusetts) to assess the emergent nature of the problem.⁹ Despite the lack of coherent guidance provided to child protection staff, the training fairly represented the existing state of knowledge in the field.

II. THE KNOWLEDGE BASE

The domestic violence field operates from what I term a "domestic violence paradigm." This paradigm is built around four elements. The first element is a definition of violence as a discrete act which causes or is likely to cause injury; the second is the equation of abuse with incidents of injurious or potentially injurious violence; and the third is an assessment of severity according to a "calculus of harms"—the more injury, the more serious the problem. The fourth element is a "victimization narrative" that links domestic violence to various deficits in the victim, including a condition known as "learned helplessness" and an ability to identify or utilize appropriate alternatives. The best known versions of the victimization narrative are the models of "battered woman syndrome" or "post-traumatic stress disorder" that make up the heart of a "battered woman's defense" widely used to represent women on trial for assaulting or killing abusive partners.¹⁰ Virtually every aspect of the helping response we've devised for battered women is built from these elements, including the definition of domestic violence as a crime, the understanding of protection orders, the importance placed on "safety" by our entire movement and the assessment tools we use to ration shelter,

9. For the CPS Model developed in Massachusetts, see Pamela Whitney & Lonna Davis, *Child Abuse and Domestic Violence in Massachusetts: Can Practice be Integrated in a Public Child Welfare Setting?*, 4 CHILD MALTREATMENT No. 2, 158-66 (1999).

10. This stereotype is based on the now discredited view that battered women suffer from "battered woman's syndrome" consisting of "learned helplessness" and a "cycle of violence" which causes victims to be ambivalent about leaving. See generally LENORE WALKER, *THE BATTERED WOMAN* 42-71 (1979); For a critique of this view, see generally DONALD DOWNS, *MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY AND THE LAW* 3-16 (1996). Mary Ann Dutton, *Understanding Women's Response to Domestic Violence: A Redefinition of Battered Women's Syndrome*, 21 HOFSTRA L. REV. 1191, 1197-1201 (1993).

medical care or police intervention. It was from this model that the ACS training curriculum built its sympathetic portrait of battered mothers. Put simply, it is generally assumed that battering consists of discrete, injurious assaults that can render victims incapable of acting effectively on their own or their children's behalf. This view diverges dramatically from what battered women actually experience in the vast majority of cases. As a result, interventions based on the paradigm are largely unsuccessful in ending abuse.

I will have more to say about this model momentarily. But two points will help you anticipate where I am going. First, in contrast to the paradigm, battered women report that abuse is typically "ongoing" rather than comprised of discrete incidents and that in a majority of cases the most salient elements involve forms of isolation, intimidation and control rather than severe assault. Women's vulnerability to assault—and children's as well—may be largely a function of these nonviolent constraints. Importantly, the basic harms inflicted by these "nonviolent" forms of coercion and control are to women's basic liberties of movement, association, speech and the like, rather than to their physical integrity.¹¹ As a consequence and in contrast to the victimization narrative, although battered women evidence a greatly elevated risk compared to nonbattered women for a range of medical, behavioral and psychological problems, the vast majority of victims do not suffer from these problems. This issue was critical to *Nicholson* because it suggested that battered women were not like other women in the CPS caseload and required a specialized response. The second point is that the punitive and unconstitutional behaviors evidenced in *Nicholson* are the logical outcome when this model is superimposed on the current statutory aim of CPS, *even if no other contributing factors are brought into the picture*. In other words, we need to assume nothing else to generate the actions of ACS in *Nicholson* except that domestic violence creates an emergent situation that effectively disables the protective capacities of mothers. Not only does this view push certain actors (such as crisis managers, courts, shelters and police) and responses to the fore; it also makes other possible

11. On abuse as ongoing, see Page-Hall Smith et al., *Measuring Battering: Development of the Women's Experience of Battering (WEB) Scale*, WOMEN'S HEALTH, Winter 1995, at 273-88. On the importance of isolation, intimidation and control, see John W. McCormack Graduate School of Policy Studies Center for Social Policy, *In Harm's Way: Domestic Violence, AFDC Receipt, and Welfare Reform in Massachusetts*, (1997), at <http://www.mccormack.umb.edu/csp/publications/harms%20way.pdf>. Current controversies on defining nonlethal violence against women in intimate heterosexual relationships, see Walter S. DeKescredy, *Current Controversies of Defining Nonlethal Violence Against Women in Intimate Heterosexual Relationships: Empirical Implications*, 6 VIOLENCE AGAINST WOMEN No.7, 728-46 (2000); D.R. Follingstad et al., *Factors Moderating Physical and Psychological Symptoms of Battered Women*, 6 J. FAM. VIOLENCE No.1, 81-95 (1995); M. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283, 283-94 (1995). M. Kasian et al., *Frequency and Severity of Psychological Abuse in a Dating Population*, 7 J. INTERPERSONAL VIOLENCE No. 3, 350-64 (1992).

responses to the parties involved (such as a response based on partnering and emphasizing their strengths and resiliency) unlikely.

III. THE NEXUS OF RESEARCH AND POLITICS

Critical to *Nicholson* were three convergent processes: a growing body of literature that applied the domestic violence paradigm to children;¹² mounting political pressure for child protective services (CPS) to intervene in so-called “dual victim” families—where both a mother and child are put at risk by an abusive male; and a body of case law that applies the Failure to Protect Doctrine (under state neglect statutes) to non-offending parents in these families.¹³ Following the presumption that being “exposed” to domestic violence harms children, CPS and the courts in many states, with New York as the leader, instituted a policy of charging battered mothers with neglect and temporarily removing their

12. For a review of this literature, see PETER C. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 21 (1990), where it is estimated that 3.3 million American children are exposed to violent incidents between parents. See also Wanda K. Mohr, *Making the Invisible Victims of Domestic Violence Visible*, 2 DOMESTIC VIOLENCE REP. (Civil Research Institute, Kingston, N.J.), August/September 1997, No. 6, at 81; J.L. Edelson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE No. 8, 839-870 (1999); J.L. Edelson, *The Overlap Between Child Maltreatment and Woman Abuse*, 5 VIOLENCE AGAINST WOMEN 2, 1-6 (1999), available at http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_overlap.pdf. On-line resources summarizing the literature include: National Women's Resource Center, *Bibliography on Children Who Witness Violence: Research & Intervention by J.L. Edelson*, at <http://www.mincava.umn.edu/documents/bibs/bibkids/bibkids.html>. For estimates as high as ten million, see K. Kracke, *Children's Exposure to Violence: The Safe Start Initiative*, (U.S. Department of Justice), April 2000, No. 13, available at <http://www.ncjrs.org/pdffiles1/ojdp/fs200113.pdf>. For a summary of statutes, see Annelies Hagemester, *Overlap of Domestic Violence and Child Maltreatment in U.S.A. State Civil and Criminal Statutes*, at <http://www.mincava.umn.edu/link/documents/statutes/statutes.shtml>. This April 2000 table lists statutes alphabetically by state. On legal trends, see Nancy S. Erickson, *Battered Mothers of Battered Children: Using Our Knowledge of Battered Women to Defend Them Against Charges of Failure to Act*, 1A CURRENT PERSP. PSYCHOL. LEGAL & ETHICAL ISSUES: CHILDREN & FAM.: ABUSE & ENDANGERMENT 197, 216 (1992); Anne Johnson, *Criminal Liability for Parents Who Fail to Protect*, 5 L. & INEQUALITY 359, 362-81 (1987); See *State v. Walden*, 293 S.E.2d 780, 782 (N.C. 1982), *Smith v. State*, 408 N.E.2d 614, 616 (Ind. Ct. App. 1980), and *Fabritz v. Traurig*, 583 F.2d 697, 699 (1978) where women were charged because they failed to act to prevent children from being hurt or killed.

13. See Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the Protected Child in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1089 (1995); see also Evan Stark, *A Failure to Protect: Unraveling The Battered Mother's Dilemma*, 27 W. ST. U. L. REV. 29, 59 (2000); The Failure to Protect Working Group, *Charging Battered Mothers With Failure to Protect: Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 850 (2000). The best summary of this trend is Melissa A. Trepiccione, *At The Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child An Acceptable Solution When Her Child Witnesses Domestic Violence?* 69 FORDHAM L. REV. 1487, 1522 (2001). The critical case decisions in New York were *In the Matter of Glem G.*, 587 N.Y.S.2d 464 (Fam. Ct. 1992) (where a non-abusing battered mother was found neglectful for failing to protect her children from sexual abuse by the father, even though the court acknowledged that she suffered from battered woman's syndrome) and *In re Lonell J.*, 673 N.Y.S.2d 116 (App. Div. 1998) (where the court ruled that by staying in the abusive relationship the mother had failed to exercise a minimum degree of care). For examples of the argument that battered women's services should collaborate with CPS, see Susan Schechter & Jeffrey Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies*, at <http://www.mincava.umn.edu/documents/wingsp/wingsp.html>, and Janet Carter, *Domestic Violence, Child Abuse and Youth Violence: Strategies for Prevention and Early Intervention*, at <http://www.mincava.umn.edu/link/documents/fvpf2/fvpf2.shtml>.

children if it was alleged that the children witnessed the violence or were otherwise exposed to it.¹⁴ By re-victimizing battered women, these cases raised acute dilemmas for those of us who had publicized the harm domestic violence poses to children, urged CPS to provide safety enhancing services to victimized mothers as well as children, and helped to train CPS personnel.

The first piece of relevant background information is that, for at least a decade prior to *Nicholson*, domestic violence researchers promoted the idea that the connection between domestic violence and harms to children was not only significant, but compelled protective intervention.¹⁵

In one of the first studies of this connection, Dr. Anne Flitcraft and I reviewed all the cases “darted” for suspicion of child abuse at Yale-New Haven Hospital for a year.¹⁶ Remarkably, we found that the mother had also been abused in 45% of these cases.¹⁷ A replication of this work at Boston City Hospital’s Pediatric Department reported that the mother was battered in 60% of the child abuse cases.¹⁸ Data from CPS agencies is less reliable because the proportion of cases where domestic violence is identified depends on whether, and with what tools, screening for domestic violence occurs, whether organizational culture supports intervention, and whether the investigating agency is perceived as responsible for adult as well as child safety. Despite differing estimates, ranging from a low of 13% to 49%, evidence from CPS caseloads consistently highlights the importance of domestic violence as a contextual factor for child maltreatment.¹⁹ Although estimates appear to increase if a domestic violence protocol is in place and further still if questioning is routine, there is as yet no “gold standard” to use as a baseline for performance.²⁰ In part,

14. See V. Pualani Enos, *Prosecuting Battered Mothers: State Laws’ Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN’S L.J. 229, 245-48 (1996) (explaining that accusing battered mothers of neglect deprives them of control and further aggravates their problems).

15. Evan Stark & Anne Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT’L J. HEALTH SERVICES No.1, 97-98 (1988). For discussion of the service needs in families where woman battering and child abuse coincide, see Sandra K. Beeman et al., *Case Assessment And Service Receipt In Families Experiencing Both Child Maltreatment And Woman Battering*, 16 J. INTERPERSONAL VIOLENCE No. 5, 437-58 (2001). For examples of the argument that battered women’s services should collaborate with CPS, see Susan Schechter & Jeffrey Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies*, at <http://www.mincava.umn.edu/documents/wingsp/wingsp.html>, and Janet Carter, *Domestic Violence, Child Abuse and Youth Violence: Strategies for Prevention and Early Intervention*, at <http://www.mincava.umn.edu/link/documents/fvvpf2/fvvpf2.shtml>.

16. Stark & Flitcraft, *supra* note 15, at 104.

17. *Id.*

18. Linda McKibben et al., *Victimization of Mothers of Abused Children: A Controlled Study*, 84 PEDIATRICS No. 3, 531-34 (1989).

19. Stark, *supra* note 2, at 109-10.

20. SUSAN MITCHELL-HERZFELD, THE ADOPTION AND SAFE FAMILIES ACT (ASFA) STUDY (2000) (unpublished report, on file with the The Evaluation & Research Unit of New York State’s Office of Children and Family Studies).

this is because CPS workers are rarely accountable for identifying domestic violence and CPS clients often fear that revealing domestic violence will jeopardize their parenting status or lead to an escalation of abuse. One result is that a high proportion of the domestic violence cases identified as such by CPS involve levels of injury that make reporting unavoidable. Even the lowest incidence rates indicate that domestic violence is more often an issue in child protection cases than is substance abuse, homelessness, mental illness or other comparable problems to which considerably greater resources are devoted. Indeed, it is probably the single most common context for child maltreatment.

IV. METHODOLOGICAL WEAKNESSES

Several things are notable about this research. The first is that it is extremely weak methodologically. Most studies rely on small or unrepresentative samples, such as mothers in shelters, or on sources such as population surveys where secondhand reports with no confirming evidence are used to estimate prevalence rates. Substantial differences between the context, dynamics and consequences of child abuse and child neglect have been widely noted. The mothers in *Nicholson* were charged with neglect.²¹ But, the literature on how domestic violence harms children typically focuses either on child abuse or on psychological or behavioral outcomes attributed to domestic violence rather than on neglect. Conversely, there is virtually no data on "dosage" that would tell us "how much" or what types of abuse are likely to harm children. Few use comparison groups of children from nonviolent homes, differentiate violent families from high conflict or distressed families in which there is no violence, assess children's strengths or coping responses, link test profiles that indicate deficits to actual malfunctions or control for such confounding factors as the disruptive effects of going to a shelter, developmental age, exposure to community violence or other potentially traumatic life-experiences that may confound clinical measures of dysfunction. No attention has been paid to accompanying coercive or controlling factors within the family that may affect children's reactions independently of violence. Moreover, studies that identify witnessing as the cause of harm have rarely determined whether the children affected have also been abused.²² Finally, virtually no studies have compared the actual incidence of the behavioral problems that typically merit CPS intervention among exposed children to baseline rates of these problems in the general population or in foster care.

21. *Nicholson*, 203 F. Supp. 2d at 164.

22. *Stark*, *supra* note 2, at 114.

V. CONCEPTUAL FAILURE TO SHOW HOW DOMESTIC VIOLENCE HARMS CHILDREN

Perhaps an even more important issue for our current discussion is the consistent failure of researchers, including the range of advocates who consulted with ACS, to conceptualize the widely documented “overlap” between domestic violence and harms to children’s welfare. Of the several hundred published studies on this connection, fewer than a handful even address, let alone go into detail about, the dynamics that actually connect harms to mothers and children. A major explanation for the inappropriate ACS response is that, although there is widespread pressure for intervention in these cases, there are few conceptual maps to help professionals who are statutorily responsible for children’s safety unravel the chain of causation in these cases or shape the evidence before them into an intelligible and evidence based story to guide assessment, judgment or intervention. As a defensive adaptation to this situation, CPS agencies like ACS have relied heavily on blanket policies that include placement and accusations of “failure to protect” against abuse victims as first-line interventions.

One scenario presumably needs no elaboration, where children are directly injured during a partner assault. But we have no conclusive data on this circumstance. When I looked at Connecticut data gathered by the State Police, I found that children were considered “involved” in 17.6% of the cases where at least one partner was arrested.²³ Yet, the harm alleged to the child justified a charge of “risk of injury” in only 441 of 15,060 incidents, fewer than 3%.²⁴ An unpublished study of seventy-one domestic violence cases, the New York State Office of Families and Children reported that in three cases, children required outpatient medical treatment, slightly higher than the Connecticut figure.²⁵ To put these figures in perspective, consider this: even if we assume all of the children who required medical attention were “abused” and merited CPS intervention, this is just slightly higher than the proportion of abuse found in the general population (about 2.5%) and much less than the comparable risk in foster families (about 5%).²⁶ In other words, a generic policy of placement in domestic violence cases would almost double the risk that a child would be harmed.

We know some things about the dynamics when children are harmed. In our Yale research, we determined that the typical abuser of the children in these cases was the same man who was abusing their

23. 1999 CONN. DEP’T PUB. SAFETY ANN. REP. 4.

24. *Id.*

25. Mitchell-Herzfeld, *supra* note 20.

26. A report by the Public Advocate’s Office in New York City identifies the overall risk of child abuse in New York City as one in forty, about the same or only slightly less than the risk where domestic violence occurs, and the risk in foster care as one in twenty, almost half again as high as the risk posed by domestic violence. 2001 N.Y. PUB. ADVOC. OFF. REP. 15.

mother.²⁷ Indeed that the fathers in abusive relationships were three times more likely than fathers in non-abusive relationships to be responsible for the harms to the children.²⁸ But as a general rule, it has simply been assumed that knowing the two events occur in some proximity—that children are “exposed” and reveal possible problems on tests—is sufficient to posit an “if/then” connection.

VI. THE POLITICAL CONTEXT

One reason the “connection” was accepted so uncritically was because the women’s advocacy community had been trying unsuccessfully since the early 1970’s to get the child welfare system to acknowledge the importance of domestic violence for their clients. In 1985, when I presented the findings from our Yale studies and other evidence on the overlap at a national “Workshop on Violence as a Public Health Problem” convened by Dr. Koop, the United States Surgeon General, the leaders from the child welfare community in attendance responded with stone silence. They saw no need to share the wealth with the battered women’s advocacy community, relatively new kids on the block, and feared that identifying with an issue that smacked of “women’s lib” could open a political Pandora’s Box.

Everything changed when Congress passed and President Clinton signed the Violence Against Women Act (VAWA) in 1994.²⁹ Suddenly, with a little over 1.2 billion in funds committed to domestic violence and sexual assault, the battered women’s movement was no longer marginal. The phones started to ring. Funding for the Office of Maternal and Child Health had been flat for a decade, I was told. Could they garner a portion of VAWA if they recognized that “healthy” mothers also had to be safe? Health Resources and Services Administration (HRSA), National Clearinghouse on Child Abuse and Neglect (NCCAN) and other agencies that had shown little interest in women except in their roles as child-bearers and “mothers” were suddenly willing to hear about abuse. The Centers for Disease Control (CDC) has historically limited itself to research. Yet, because they had climbed on the domestic violence wagon early on, they got federal program dollars to dole out. The reauthorization bills for CPS included grants to research and break the connection between domestic violence and child maltreatment.

The lesson was clear. Our movement had changed the political context in which agencies for women and children met. In hundreds of communities, domestic violence services now sat at family violence council meetings with local representatives from CPS. We had always targeted CPS in our advocacy efforts, usually with little response. But

27. Stark & Flitcraft, *supra* note 15, at 105-07.

28. *Id.* at 86.

29. 42 U.S.C. § 13981 (2005).

now we were in the limelight and they needed to catch up. So they invited us to help train their workers, develop joint protocols, help explain some of their more difficult cases and, yes, to join them in attempts to get funds.

To understand the critical misstep that occurred next, put yourselves in the shoes of these parties. Try to imagine what the battered women's movement and CPS bring to the table or take away. The advocates came armed with research showing the overlap—our clients are also yours, they told CPS. From the advocacy standpoint, the more dramatic the claims, the more useful. Since virtually all children in homes where their mothers are being abused are likely to be “exposed” in some way, it did not seem like too much of a stretch to generalize from the increased risk for a number of problems associated with “witnessing” to the generic risk faced by all children in homes where domestic violence occurred. It is hard to fault the advocacy community for accepting on its face what the research community presented, particularly since it confirmed what we wanted to believe. So, we talked about harms and “witnessing” and “exposure” and left the rest to the imagination of a CPS workforce seasoned on the worst sort of family dysfunctions.

What is the CPS caseworker or a supervisor hearing? She is statutorily responsible for protecting children (not mothers). Now, she is told that when she sees domestic violence, there is high probability a child will suffer. Moreover, either for dramatic effect or because they don't know any better, the advocates are emphasizing injurious violence, as if this was the modal situation. This image rings true to CPS. Because they rarely ask about domestic violence routinely, have no mandate to protect women, lack the support needed to intervene appropriately and are widely distrusted by the mothers in their caseload, CPS rarely see cases until the violence becomes extreme, a situation that reinforces their mistaken belief that any real case of battering constitutes an “emergency.” This is the woman with the blackened eye that caseworkers see on Television and on the posters hung at Marshall's during Domestic Violence Month.

The myth linking woman battering to physical injury was one of the hardest to dispel during the *Nicholson* case. Again, my own research is relevant here. In the Yale Trauma Studies, Dr. Flitcraft and I found that battered women were at a much higher risk for injury than non-battered women: if a woman presents with an injury to the hospital, it is more likely to have been caused by a partner than by any other cause, including auto accidents, widely believed to be the most common cause of injury to women under sixty-five.³⁰ But even in the ER, only a tiny pro-

30. Shirley A. Wiegand, *Deception and Artifice: Thelma, Louise, and the Legal Hermeneutic*, 22 OKLA. CITY U. L. REV. 25, 43 (1997). On injury, homicide, suicidality and other health and

portion of victims require hospitalization. In fact, depending on whether we look at emergency medical data, police data, or general population surveys, no significant injury occurs in an estimated 98% of all domestic violence incidents.³¹

Enter Ms. Nicholson. In the target incident, the father of her daughter arrived at the apartment in a jealous rage, threw objects throughout the house, then kicked and severely beat Sharwline, breaking her arm.³² Ms. Tillet, another plaintiff, was also badly beaten by her estranged husband.³³ Both women had separated from their abusive partners.³⁴ Ms. Tillet had been assaulted before, but this was the first domestic violence incident against Ms. Nicholson.³⁵ None of their children witnessed the abuse.³⁶ But this information made little difference to ACS largely because all the caseworkers saw was the "emergency" created by the violence and the mother's incapacity to take the steps needed to protect herself or her children. In many instances, the caseworkers were insensitive as well as over-worked and underpaid; the lawyers involved were ill-trained and often as dismissive of the caseworkers as of the mothers whom they charged. Supervisors were often conspicuously negligent. In this, the employees at ACS were no different than employees at any comparable public agency or private service. To reiterate: to understand ACS's response we need to know little more than how they understood abuse and in what policy context this understanding took shape.

mental health problems, see EVAN STARK & ANNE FLITCRAFT, *WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN'S HEALTH* 99-150 (1996).

31. For police data on injury, see 1999 CONN. DEP'T PUB. SAFETY ANN. REP. 7, showing that adult victims require treatment in about 3% of the cases. Medical data is summarized in CLAIRE M. RENZETTI ET AL., *SOURCEBOOK ON VIOLENCE AGAINST WOMEN* 345-71 (2000). For general population data showing approximately 2% of domestic violence incidents cause injury, see Warren H. Pearse et al., *The Commonwealth Fund Survey of Women's Health*, 10 *WOMEN'S HEALTH ISSUES* No.1, 35-38 (2000).

32. *Nicholson*, 203 F. Supp. 2d at 169. Ms. Nicholson first became a victim of domestic violence one winter afternoon while her infant daughter was asleep and her son was in school. *Id.* Claude Barnett, the father of her daughter Destinee, arrived at her apartment in a jealous rage. *Id.* While throwing objects throughout the house, he kicked, beat and severely assaulted Sharwline, injuring her head with his gun and leaving her with a broken arm. *Id.* Sharwline remained overnight in the hospital while her cousin cared for the children. *Id.* Though separated from Claude, and never before a victim of domestic violence, child welfare workers had police removed six-year-old Kendall and baby Destinee from Sharwline's cousin. *Id.* at 170. Sharwline was charged with neglect, even though her children had not witnessed domestic violence prior to or during the incident. *Id.* at 171.

33. *Id.* at 180. Sharlene Tillet was not a first time victim of domestic violence. *Id.* While pregnant with her second child, she separated from her baby's father and purchased a plane ticket to relocate to California to protect herself from further abuse. *Id.* Before she left, however, he beat her one night in her apartment. *Id.* After Sharlene gave birth to her son Uganda, a hospital social worker routinely questioned her about any history of domestic violence. *Id.* Sharlene honestly responded, the case was reported to ACS and the supervisor instructed the caseworker to remove the baby "if the boyfriend is still in the picture." *Id.* at 180-81. When Ms. Tillet agreed to let the boyfriend drive her home from the hospital, hoping not to make a scene, child welfare caseworkers and police officers removed her newborn from her custody. *Id.*

34. Trepiccione, *supra* note 3, at 1487.

35. *Id.*

36. *Id.* at 1488.

VII. WHY PUNISH MOTHERS?

If this framework explains why ACS defined the cases in *Nicholson* as requiring an emergency response and why they felt it was not possible to work with the battered mothers, we have yet to explain an important aspect of the case, the decision to respond by charging the mothers with neglect rather than, for instance, removing or charging the fathers, the alternative we preferred.

A significant facet of the explanation for the punitive response by ACS is the legendary gender bias that drives CPS. The role of bias will become clearer momentarily, when we look at how the view of women has changed over the last century in the child welfare system. Child welfare services have the propensity to treat women almost exclusively through their maternal role; to offer services which heavily emphasize helping women to become better mothers rather than to find jobs or secure housing; and the treatment of fathers or father-surrogates as if they were invisible. For example, in New York, Connecticut and many other states, child welfare cases are classified in the mother's name even if she is dead. Moreover, even though men commit a higher proportion of serious and fatal child abuse than women, I am unaware of a single program in the United States that specifically provides parenting skills for abusive dads. Racial bias was another contributing factor. The proportion of African-Americans in the CPS caseload is vastly disproportionate to their proportion in the population as a whole.³⁷ CPS workers routinely intrude in the lives of poor and minority women, and then demand that they jump through hoops to prove their worthiness as persons, in ways that they, let alone their middle-class neighbors, would not tolerate for a moment. All of these factors played a role in *Nicholson*.

Given its historical tendency to define mothers as its clients, but not fathers, once CPS determined to treat exposure to domestic violence as an emergent situation requiring removal, the third background factor followed—the application of the failure to protect and neglect doctrines to non-offending parents. We are aware of how damaging these practices could be, in part, because your own Professor Miccio had fought so hard to call our attention to them.

A personal note may be relevant here. My interest in the *Nicholson* case was the direct outgrowth of the sense of disappointment and responsibility I felt because the work we had done as researcher/advocates was being used against the very people that we had hoped it would help. We had naïvely assumed that once the information about domestic violence and children was presented to the child welfare system, it would be automatically translated into the sorts of practice we favored, enhanced

37. Ana M. Novoa, *Count the Brown Faces: Where is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 8-9 (1999).

advocacy for battered mothers, accountability for abusive men and greater safety and support for all victimized parties. That the opposite occurred made us appreciate that any information we provided on the misfortunes of women would be downsized and inverted to fit within a very narrow purview of the child protection mission. One obvious conclusion from this realization is that the child protection mission must change.

A final point before we move on is how deeply divided the advocacy community remains about where the responsibility of the abusive partner ends and the responsibility of the victimized mothers for harms suffered by children begins. Since both Ms. Nicholson³⁸ and Ms. Tillet³⁹ were taken by surprise, they can hardly be held accountable for the supposed "exposure" of their children. In any case, their children did not directly witness the violence and there was no evidence they were harmed.⁴⁰

But what if Ms. Nicholson or Ms. Tillet had refused to separate from their abusive partners or had returned to an abusive relationship as Ms. Tillet was falsely suspected of doing? Should they then be held accountable? Given its long-term commitment to the belief that domestic violence automatically harms children, even when the facts of the *Nicholson* case became clear, there were still some leading advocates who hesitated to condemn ACS' behavior. In part this was because so many leaders in the advocacy movement are deeply invested in the belief that CPS can be turned around if only the proper training is provided or the proper formula developed to mix domestic violence and child protection services. In part, a deep ambivalence remains about whether even being physically abused—particularly if the injuries are not life-threatening—can reduce the enormous responsibility we place on women as default caretakers.

This was illustrated by the response among some feminists to the tragic murder of Lisa Steinberg by Joel Steinberg. Despite the fact that Mr. Steinberg had so brutalized his live-in partner, Hedda Nussbaum, she had to literally crawl out of the apartment to get help with a ruptured spleen, the ambivalence towards Hedda felt by many in the women's movement was illustrated in *Waverly Place*, a semi-fictionalized account of Lisa's murder by Susan Brownmiller, a feminist pioneer in the anti-rape movement, that sharply condemned the character based on Ms. Nussbaum.⁴¹ Whatever else may motivate such attitudes, they are rooted to a large extent in a misconception of what actually goes on in abusive

38. *Nicholson*, 203 F. Supp. 2d at 168-73.

39. *Id.* at 180-81.

40. Trepiccione, *supra* note 13, at 1488.

41. SUSAN BROWNMILLER, *WAVERLY PLACE* (Grove Press 1st ed. 1989).

relationships. This is the issue to which I want to turn now in more detail.

VIII. FROM DOMESTIC VIOLENCE TO COERCIVE CONTROL

I have already suggested that the dominant paradigm provides an inadequate frame for understanding the battered women experience and provided some factual data to contradict the equation of abuse with incidents of severe violence. To reiterate, the vast majority of abusive incidents involve pushes, shoves, slaps, hair-pulling and numerous other acts that are unlikely to cause injury and are relatively trivial from a medical or criminal justice standpoint. Some critics of the battered women's movement, and most notably NYU Law and Social Work Professor Linda Mills, take evidence that most domestic violence is minor to mean we have exaggerated the seriousness of the problem and that it should be decriminalized.⁴² This is not my position. What I am suggesting is that our understanding of why domestic violence is serious is flawed. While violent incidents can create a life-threatening emergency, the greatest danger to all involved is a function of the *frequency* of abusive episodes and their cumulative effect on women's safety and decision-making. About 40% of all battering cases involve "serial" abuse, for instance, where violence occurs several times a week and it is by no means unusual in my caseload for women to report hundreds, even thousands of assaultive incidents over many years.⁴³

One implication of this is that if we wait for an injury before we ask about or identify domestic violence, we will miss more than ninety percent of all incidents and probably enter a case when a victim's options are already severely constrained. Another implication of taking the history of abusive violence seriously is that the fear or psychological problems we see are the *cumulative outcome* of multiple episodes, not of the immediate effect of a particular incident. This is important because it is easy to think that a victim is exaggerating the danger she is in or the degree of oppression she faces when we measure her reaction by the level of harm caused by a particular incident. Conversely, if there is *no* previous history of abuse and there is no other reason to believe the assailant continues to pose a danger, there may be no emergency risk to the woman, let alone to her child, even if the presenting incident is severe. This was the situation with Ms. Nicholson.⁴⁴ Without an historical understanding and belief violence itself constitutes the emergency, CPS both *underestimates* what is needed in cases where violence is ongoing but not currently severe and *exaggerates* the risk posed to Ms. Nichol-

42. See generally Linda Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 551-613 (1999).

43. 1984 U.S. DEP'T OF JUST. REP. 1.

44. *Nicholson*, 203 F. Supp. 2d at 209.

son, where the serious assault is not part of a pattern.⁴⁵ At present, agencies like ACS take the worst possible approach to these cases, failing to identify the first as requiring supportive services and considering the latter an "emergency" in which there is insufficient time to conduct a careful assessment of needs, partner with victims to devise a safety-plan or to provide enhanced advocacy with the criminal justice system.

There is another unfortunate consequence of the violence-based, incident-specific definition of abuse that bears mentioning now, because it profoundly affects the calculations women make about how to protect themselves. Like CPS, the criminal law views domestic violence as incident specific. So do the courts. In most jurisdictions today, domestic violence incidents are treated alongside traffic offenses, most cases are dismissed or nollied—80% or more in my own state of Connecticut, for instance and almost no one goes to jail for any significant length of time.⁴⁶ I estimate that, even with mandatory and pro-arrest policies in place nationwide, the chance that a man will go to jail for any given domestic violence incident is about four in ten thousand or just a little better than the chance of winning the lottery. Again, this has less to do with police or court bias than with the law's failure to grasp the cumulative significance of what is typically an ongoing course of assaultive conduct, much like harassment or stalking.

So consider what it means when the same court system that threatens to remove a woman's children because she has exposed them to an abusive partner also tells her, if only by example, that they will not punish a man who has assaulted her dozens, perhaps hundreds of times. This discrepancy between what batterers do and what the CPS, justice and court system define as the domestic violence crime explains the tortured machinations through which battered women strive to end or minimize or manage the abuse. When Ms. Tillet bought a plane ticket to California to protect herself from further abuse or agreed to let her boyfriend drive her home from the hospital rather than make a scene, she was selecting ways to minimize future abuse that were likely to be more effective than *any other option currently available to her*.⁴⁷ In several cases that came before the NRC, ACS charged mothers with neglect for not getting or not personally serving protection orders. The expectation that women will follow certain steps—even if there is no evidence these steps are likely to be more effective than other steps—is a common foundation for punitive responses to battered mothers.

45. See *id.* at 169.

46. 1991 CONN. ST. POLICE ANN. REP. 4.

47. *Nicholson*, 203 F. Supp. 2d at 180-81.

IX. A TYPOLOGY OF ABUSE

A second piece of “new” knowledge is that not all battering is the same.

For many years, domestic violence researchers puzzled over the fact that the portrait of domestic violence that emerged from population surveys differed markedly from the portrait we got from crime surveys or from the points-of-service where women sought help. For example, more than 100 population-based studies now show women and men are equally prone to use force to settle their differences in relationships and that the use of force is “mutual” in almost half of these situations.⁴⁸ By contrast, both crime surveys and research conducted in hospitals, court settings or shelters show that battering is overwhelmingly a male crime committed against female partners.⁴⁹ One explanation was that men and women were equally violent, but that the greater severity of male violence explained why women (but not men) showed up in the ER, called police and considered their partner’s use of force a “crime.” This account was not satisfying, however, since, as I’ve indicated, the vast majority of incidents reported to helping services do not involve injury. Another response was for the researchers on different sides of this debate to attack one another as biased or to fault the methods used in various studies. The discrepancies in the data were serious because, among other things, they made it impossible to agree on incidence or prevalence figures and so made it impossible to determine the need for services or whether interventions were working.

A sociologist, Michael Johnson, helped resolve the dispute by making a point that should have been obvious—that the surveys were picking up a very different population than the battered women who came for help.⁵⁰ What is increasingly clear is that force is used in at least three distinctive ways by partners, in “fights,” in “assaults” and as part of a pattern that includes tactics to intimidate, isolate and control a partner, the pattern I term “coercive control.” Each of these situations poses different types and levels of risk to children and a nuanced assessment that hopes to provide appropriate interventions should take this into account.

X. COMMON COUPLE VIOLENCE

The most common use of force in couples is what Johnson terms “common couple violence.”⁵¹ In these situations, which are basically

48. An overview of this work is provided by Murray Sraus, *Physical Assault by Women: A Major Social Problem*, (1997), at <http://pubpages.unh.edu/~mas2/VB33.pdf>.

49. This work is summarized in DEMI KURZ, *Physical Assault by Husbands: A Major Social Problem*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 88-103 (Richard Gelles & Donileen Loescke eds., 1991).

50. M. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, J. MARRIAGE & FAM. 57, 290 (1995).

51. *Id.*

akin to what most people would call "fights," one or both partners use force to address a situational issue or difference of opinion or to express feelings of frustration or anger. Women appear as likely to use force in this context as men. But typically, neither party considers the use of force illegitimate, injury is rare and outside help is rarely called for or required. Interestingly, unlike the classic domestic violence situation, the use of force appears to decline in these relationships over time and some studies even suggest that couples that engage in this sort of fighting may be more stable and more "satisfied" with their relationship than couples where force is not used.

Of course, wherever children are present when force is used, they can be harmed. Whatever our moral views about the use of violence, however, it is important to understand that in inner-city communities where there may be fewer resources than elsewhere that allow people to settle their differences without violence, the use of force is commonly understood as a conflict resolution strategy, i.e., a way to *reduce* serious violence. In my son's high school, if you didn't fight when you were called out, whether you were a boy or a girl, you ate your lunch in the bathroom. And if you did fight, even if you were beaten up, there was far less chance that you would be picked on afterwards than if you did not. Many of the women I see take this attitude into their relationships and believe, rightly or wrongly, that fighting for what they want is the only way to get even a semblance of equality. Children also learn this value on the street and in school as well as in their homes. But there is no evidence whatsoever that these situations threaten children to any substantial degree. I am not defending this particular use of force among partners. But I hope that even those of you who believe that any exposure of children to fighting can harm them will recognize that institutional intervention to "protect" children in these circumstances is intrusive to the extreme, not to say an unconstitutional violation of privacy rights.

XI. DOMESTIC ASSAULT

The second context in which force is used by partners involves "domestic violence." This situation involves the unilateral use of force to hurt a partner or their children, often in response to jealousy, in the context of drug or alcohol use, and/or as part of a broad pattern of criminal activity. Domestic assault may extend to child abuse, inadvertently hurt children, or be psychologically traumatic. Since this form of domestic violence is rarely accompanied by strategies designed to subordinate the partner, however, victims who are assaulted in this context typically retain their psychological integrity, primarily require criminal justice intervention, and are ready allies in safety planning for children. Women frequently commit domestic assaults as well as men and with much the

same motive, though they are significantly more likely to be injured than male partners.⁵²

Unlike fights, these assaults rarely grow out of conflicts or disagreements and are often designed to suppress conflict rather than to resolve it. Moreover, these assaults appear to increase in frequency and severity over time and victims are far more likely to define them as illegitimate or as crimes and to seek outside assistance. Domestic assaults where violence is the sole or principal element of abuse probably constitute somewhere around 50-60% of the cases in which women primarily (but not exclusively) seek help.⁵³ Emotional abuse is a common element in these cases, but rarely are victims kept from key activities in their lives, such as working, caring for their children, going to school or socializing with friends or family. Although we may not fully empathize with women who do so, some women in my practice “accept” assault in their relationships, usually because they believe that the alternative, leaving the partner permanently or making the violence the focus of their lives, will do more to disrupt their life-plans or their parenting, than simply trying to minimize the harms caused. Such women should be fully apprised of the risks their decisions pose to children.

Applying a calculus of harms to the means and consequences of domestic assault is a good way to judge its severity and its potential to harm children. Rarely do these situations present an emergency requiring removal, let alone removal without a court order. At the same time, if violence is severe, as it was against Ms. Nicholson, children can be deprived of significant caretaking by their mother for varying lengths of time and so require alternative care-taking arrangements (as Ms. Nicholson recognized) and, in extreme cases where alternatives within the family or kin network are unavailable, even temporary placement outside this network. Because the psychological and physical risks to children in placement can be as great, or greater, than allowing them to remain in situations where protections are unsure, the balance of harms is a critical piece to be worked out jointly with the non-offending parent.

The appropriate steps in such cases are to have the father or father surrogate removed from the home if the victim so desires, provide the enhanced advocacy with criminal justice needed to protect the family and offer the family appropriate resources (such as shelter or alternative housing if needed) to support them. Because the autonomy and parenting capacities of primary caretakers is unlikely to be seriously compromised by domestic assault, CPS is obligated to develop safety or other

52. See Kurtz, *supra* note 49, at 88-103.

53. Among men arrested for domestic violence crimes in Quincy, Mass., 38.1% admitted they had prevented their partners from freely coming and going in their daily routine, 58.5% said they denied their partners access to money and other resources and almost half reported restricting their partners in three or more additional ways. E. Buzawa et al., *Response to Domestic Violence in a Pro-Active Court Setting: Final Report*, (1999), at <http://www.ncjrs.org/pdffiles1/nij/grants/181428.pdf>.

plans for the children in these situations with the full partnership of the non-offending parent. This strategy differs markedly from the approach we saw so often in *Nicholson* and which is commonplace in the rest of the country, namely where mothers are mandated into services, charged with "neglect" if they refuse a service option (such as going to a shelter or securing a protection order) provided by the caseworker or a pressured into "voluntary" placement agreements by the threat of removal. Importantly, women may also be pressured in these ways by battered women's shelters. Partnering is particularly important in the present context, where there is only a small likelihood that protection orders or even criminal charges on their own will result in more than a temporary cessation of abuse.

XII. CAN CASE WORKERS PARTNER WITH ABUSED WOMEN?

Before turning to the third context in which force is used, I would like to briefly address another misconception widely made about battered women in the CPS caseload, that even if they are not disabled by the violence, their parenting capacities are nonetheless compromised by the secondary or indirect affects of abuse on their psychological functioning. As we've seen, this too is a basic tenet of the paradigm.

In *Nicholson*, we assessed this issue from two vantage points. First, we asked whether violence impaired women's parenting capacity as such. Second, we compared rates of problems often linked to impairment among battered and non-battered mothers within the CPS caseload. Despite evidence that some proportion of battered women experience moderate to severe symptoms of depression, post-traumatic stress disorders or other mental health or behavioral problems, there is no evidence that their capacity to parent is compromised as a result. To the contrary, even among the most severely abused, only a small minority of abused women require shelter, and the vast majority exhibit unimpaired capacities to parent. Evidence of this comes from a recent study, authored by Chris Sullivan, of battered women in shelters.⁵⁴

Utilizing multi-variant techniques, Sullivan and her colleagues concluded "a mother's experience of physical and emotional abuse had no direct impact on their level of parenting stress or use of discipline with their children."⁵⁵ Both by their own and their children's reports, the vast majority of mothers in this study were emotionally available to their children (ninety-eight percent), continued to value parenting (ninety-one percent), and provided appropriate supervision and discipline (ninety-one percent), typically using timeouts, grounding and taking away privi-

54. Chris M. Sullivan et al., *Beyond Searching for Deficits: Evidence that Physically and Emotionally Abused Women are Nurturing Parents*, 2 J. EMOTIONAL ABUSE, 61-62 (2000).

55. *Id.*

leges.⁵⁶ Seventy-three percent of the battered mothers reported spanking or slapping their children, though only fifty-eight percent of the children reported ever being spanked or slapped.⁵⁷ Whatever one may think about the proportion of battered mothers who employ corporal punishment, however, it is actually smaller than the comparable proportion among American parents generally.⁵⁸ Perhaps the most telling findings are that children of battered mothers in battered women shelters reported relatively high and stable scores on their self-concept across time, and exhibited overall adjustment that fell within the range of what is considered normal.⁵⁹

Even if Sullivan and her colleagues are correct in concluding that battered women retain their capacity to parent, a more critical problem is whether they are hindered—and their children put at risk—because they develop a range of problems commonly associated with neglect in the CPS population such as substance abuse or mental illness. In the Yale Trauma Studies, for instance, Dr. Flitcraft and I found that battered women in the hospital population had significantly higher rates of a range of behavioral and mental health problems than non-battered women.⁶⁰ Indeed, they were nine times more likely to abuse drugs, fifteen times more likely to abuse alcohol and far more likely to have a “psychotic break,” report depression, and to have attempted suicide.⁶¹ Since these problems only became disproportionate after the onset of abuse, they had clearly developed in the context and as a response to battering and could not be its cause.

Even in the trauma sample, battered women were statistically much more likely to present these problems than non-battered women, however, the vast majority of battered women did not, in fact, develop these problems.⁶² Still, we expected that the multi-problem profile we found among battered women in the emergency room would be replicated among the battered mothers we identified in the study of children “darted” for abuse. To our surprise, however, we found that the battered mothers of abused or neglected children were much *less* likely than non-victimized mothers to have histories that included disproportionate rates of alcohol or drug abuse, mental illness, sexual abuse or violence in childhood.⁶³ In fact, we found that the population of “darted” children could be basically divided into two subgroups, “neglected” children with

56. *Id.* at 65-66.

57. *Id.*

58. Over 90% of American parents report spanking their children, and the overwhelming majority support the practice. M.A. Straus, *Discipline and Deviance: Physical Punishment of Children and Violence and Other Crime in Adulthood*, 38 SOC. PROBS. 133, 136 (1991).

59. Sullivan, *supra* note 54, at 51-71.

60. *Id.*

61. Stark & Flitcraft, *supra* note 30, at 12.

62. *Id.*

63. *See id.* at 30.

multi-problem mothers (there was little data on fathers) who often came from multi-problem families-of-origin and children who were being “abused,” usually by the same man who was assaulting their mothers.⁶⁴ The results of our work at Yale were supported by the AFSA study of CPS cases in New York City cited earlier. This study found that caretakers who were not victims of domestic violence were almost one hundred percent more likely to be identified with abusing drugs (19.4% - 11.3%) or both alcohol and drugs (2.0% vs. 1.4%).⁶⁵ By contrast, fully eighty-four and one half percent of the domestic violence victims had no mental health problems.⁶⁶

How should we explain these seemingly contradictory findings, that battering causes a range of problems among victims and yet, within the CPS population, these victims look considerably better from a psychological or behavioral standpoint than other clients? The explanation is that battered mothers comprise a distinct population within the CPS caseload *because they enter the caseload almost exclusively because of what their partner has done to them, not because of psychological or behavioral problems that place their children at risk.* Within the multi-problem CPS caseload, they typically present as high functioning and capable parents who are relatively problem free.

This information is particularly important in understanding the wrongs committed by ACS in *Nicholson*. ACS charged the *Nicholson* mothers with “neglect” despite the fact that there was no evidence of “neglect” in the classic sense and this was a population that did not resemble the typical population of neglectful mothers in any sense.⁶⁷ The battered mothers in *Nicholson* present a need for help in the CPS population that flows directly from their victimization *and from no other source.* Though emergent psychiatric care or mental health counseling for symptoms related to trauma may be occasionally required by these women, typical needs include economic resources, shelter and other housing options, as well as enhanced advocacy—particularly with the criminal justice and court systems. As importantly, given the evidence that their parenting skills are typically unimpaired by battering, parenting classes are rarely required or appropriate and may send the unintended message that the woman, not her abuser, is responsible for her victimization. Yet these are precisely the “services” to which battered mothers were referred or mandated. Finally, the fact that the vast majority of the battered mothers in the CPS caseload are psychologically and behaviorally “normal,” at least in a statistical sense, eliminates the usual rationale given by CPS for not treating clients as equals and making them full

64. Stark & Flitcraft, *supra* note 15, at 105.

65. See Mitchell-Herzfeld, *supra* note 20.

66. See *id.*

67. *Nicholson*, 203 F. Supp. 2d at 171.

partners in service planning. Clearly too, based on this data, there is no rationale whatsoever for considering placement as a first-line option.

XIII. COERCIVE CONTROL

The third context in which force is used by partners involves coercive control, where physical assault is complemented by a pattern of intimidation, isolation and control.

When we opened the first shelters in the 1970's, women told us repeatedly "the violence isn't the worst part." Because we had learned in working with rape victims that violence is hard to talk about, we redirected those who said this to "talk about the violence." Now, almost thirty years later, we have come to realize that the most devastating context for battering is when minor physical abuse is embedded in a pattern that deprives women of basic rights and resources, exploits them sexually and often monetarily, isolates them from friends, family, professionals and other potential sources of support, and implements a regime of regulation over everyday affairs. In study after study, we are now finding—because we are asking for the first time—that varying majorities of abusers are taking their partners money, denying them food, monitoring their going and coming, prohibiting their use of the phone, forcing them to check in or out, limiting their access to work, school or church, monitoring their time and relationships and so forth. I don't have time to document these findings here but only to introduce you to the phenomenon.

To some extent, this regime of control resembles the situation of hostages, victims of kidnapping or indentured servants. But there are three critical differences that define what legal scholar Elizabeth Schneider calls the "particularity" of abuse.⁶⁸ First, because of the presumption of intimacy, the abusive partner has access not only to the victim, but to knowledge about her personal life and her children's lives that allows him to manipulate her in ways that are particularly threatening to her. He knows her illegal activity, whether she uses illicit drugs or is stealing from work or is occasionally leaving her nine year old home alone with a twelve year old. He knows that she was sexually abused by an uncle who hid from her in a family closet. So he plays this game when he wants to teach her a lesson. This combination of intimate knowledge and continued access is the most serious facet of battering in terms of women's decision-making.

Secondly, these forms of control operate across social space. I mean this literally. A common element in coercive control is the use of means to track and regulate victim behavior when the couple is sepa-

68. Elizabeth M. Schneider, *Particularity and Generality: Challenges Of Feminist Theory And Practice In Work On Woman-Abuse*, 67 N.Y.U. L. REV. 520, 527-28 (1992).

rated, through beepers, tracking devices or other forms of surveillance for instance, when she is at work or shopping or in the car. This aspect of coercive control makes separation largely ineffective as a means of freeing herself from abuse.

The third particular element of coercive control is the extent to which regulatory tactics target women's everyday behavior and particularly those behaviors associated with stereotypic gender roles. We are talking here about how they dress, clean, cook, drive, care for the children and so forth. Nor is coercive control only a problem in the most extreme cases of abuse. Instead, there is growing evidence that at least some of these restrictions are present in a majority of the instances where women seek help with abuse. Coercive control currently has no legal standing.

We are only beginning to get a handle on coercive control and what its presence implies for children's welfare or CPS practice. The major risks to children involve attempts to deprive the primary caretaker of support and resources needed for basic survival, including food, money or access to transportation. It is already apparent that coercive control has several important implications for how we intervene in battering.

First, the presence of coercive control shifts the focus of understanding from the psychological effects of abuse to the objective parameters of exploitation and deprivation. While mothers subjected to coercive control may experience a range of medical, behavioral or psychological problems, the risk of neglect in these cases is typically a direct result of the constraints under which she is living, not an incapacity or inability to provide or protect. In the presence of coercive control, there is no need to posit a psychological dependence or even an investment in maintaining the relationship to understand why it is so difficult for victims to affect a permanent separation. This also shifts attention from "why women stay?" to how to effectively limit the access of a controlling partner to his partner and her children. Conversely, the range of interventions that focus on self-esteem or parenting issues would seem to be largely irrelevant if the major problem in the household is that the woman's decision-making has been usurped by being denied money and regulated in her everyday behaviors. Until the law clearly recognizes coercive control as a course of conduct and liberty crime, however, it is not clear how intervention should proceed.

At the same time, secondly, coercive control is often hard to see, largely because it builds so heavily on the constraints on women's behavior they inherit with their role as default homemakers, caretakers and sex objects. For example, if women are expected to clean and cook, it is hard to discern what difference it makes that there are "rules" in the household for how high the bedspread must be above the rug or how and when dinner is to be served. We assume that "men" make the major financial decisions in a household. So the fact that a man takes the

woman's paycheck, freely uses her money card or goes through her pocket for spare change to support his gambling or drug habit may not seem like anything more than a "bad" luck extension of business as usual, not behavior we would encourage certainly, but also not behavior we would automatically link to abuse. Victims too are often confused about what label to place on coercive control. Subtle steps often link what feel like expressions of "love" such as being told he likes her hair a certain way or that she shouldn't go to a certain club or to hang out with certain friends to buying her clothes, not letting her shop by herself, or drive, or talk on the phone, or see these friends. Although these prohibitions are almost always backed up by the implication "or else..." violence may be minimal in these relationships or may become so routine it appears, or even feels normal. The fact that coercive control relies so heavily on enforcing traditional gender roles—what I term "sexism with a vengeance"—contributes to its invisibility. So does the fact that coercive control is so alien to the experience of the vast majority of men.

In addition to the direct risks children face in cases involving simple domestic violence or coercive control, they are also endangered by two common patterns, "the battered mother's dilemma" and when child abuse occurs as "tangential spouse abuse."

XIV. THE BATTERED MOTHER'S DILEMMA

The battered mother's dilemma refers to the choices the offender forces the victim to make between their own safety and the safety of their children. A particular incident may bring this dilemma into sharp focus, as when a woman realizes that she may be hurt or killed if she attempts to protect her child from an offender's abuse. In a case in which I testified, for example, a woman whose life had been threatened returned to her house and was killed when her husband took their eighteen month old child "hostage."⁶⁹

Typically, however, the battered mother's dilemma describes an ongoing facet of abusive relationships where the offending partner repeatedly forces a victimized caretaker to choose between taking some action she believes is wrong (such as physically disciplining her child), being hurt herself, or standing by while he hurts the child. Threatening to hurt the primary caretaker if she reports domestic violence or child abuse is a classic instance of the battered mother's dilemma. Confronted with these dilemmas, victims attempt to preserve their rationality and humanity by selecting the least dangerous option, a decision-making process I term "control in the context of no control." It is the responsibility of CPS or the police to redress the imbalance in power from which this dilemma arises, thereby increasing the choices available to the victim. Ignorance of the external constraints to which a caretaker is re-

69. State v. Traficonda, 612 A.2d 45, 47 (Conn. 1992).

sponding, however, often leads agencies to mistakenly hold her culpable and respond punitively, thereby aggravating rather than relieving the dilemma.

XV. CHILD ABUSE AS TANGENTIAL SPOUSE ABUSE

A related but separate dynamic occurs when child abuse appears as “tangential spouse abuse.” Here, the offender treats the child as an extension of the mother, and threatens or harms the child to increase the mother’s dependence, compliance and/or fear. Child abuse as tangential spouse abuse is particularly common during separation and divorce, when the offender’s access to his partner, but not to the children, may be limited. The frequency of this dynamic is an important reason why a mother’s hesitation to separate, or seek a protection order should be taken seriously during safety planning. Examples of this dynamic in intact couples include threats to report the mother to CPS, using children to spy on their mother, punishing a mother by denying her access to the children, hurting the children whenever the mother does something that makes him jealous, or being passive-aggressive by consenting to care for the children so the mother can work and then neglecting them. Mothers caught in this dynamic are particularly susceptible to guilt, whether induced by the offender’s accusations or by institutional victim blaming.

The child’s risk in these scenarios is a function of the type of abuse employed (common couple violence, domestic assault or coercive control) and the extent to which children are implicated in the pattern (e.g. by “tangential spouse abuse”). In all of these cases, the abusive partner is the immediate source of threat to the child and therefore the only appropriate target for removal or punitive intervention. At the same time, the child’s vulnerability may condition the mothers, as when the mother is held hostage by her partner’s threats to the children (child abuse as tangential spouse abuse). The reverse may also be true, namely that the child may be vulnerable because the offending partner has effectively disabled the mother’s capacity to protect (e.g. by denying her money or refusing to let her leave the house for food). In these instances, the safety of either requires a global assessment of the overall levels of violence and entrapment in the relationship regardless of whether actual child abuse or neglect has occurred. Child maltreatment in these situations can be prevented only when it is addressed in tandem with interventions that remove the offending partner and protect and empower the victimized caretaker. To devise such interventions requires frank sharing of information, a realistic picture of the constraints on the victim’s choices, mutual and independent planning for safety of mother and child based on the child’s developmental age and the victim’s experience with the offender, and a reliance on the victim to make protective decisions if

given the resources and opportunity to do so safely.⁷⁰ The data on battered mothers in the CPS caseload suggest that such a response is not only required, but that it is also feasible given the relative strengths of this population and the resiliency typically demonstrated by the children involved.

Current policies and practices by CPS agencies like ACS aggravate “the battered mother’s dilemma” and the probability that child abuse, as tangential spouse abuse, will occur. While the offending partner is the principal source of the mother’s dilemmas, these are often exacerbated by the agencies to which the victim turns for help, particularly those agencies responsible for child protection, CPS and the courts. In the Yale Trauma Studies, for example, we found that children darted for child abuse or neglect were more likely to be placed if their mother was battered than if she was not, even when we controlled for the level of injury alleged to the child, a frankly punitive response.⁷¹ Current CPS policy and practice aggravate the battered mother’s dilemma in a number of ways. For instance, the increasing propensity for CPS agencies and courts to equate domestic violence with abuse or neglect means that if a mother reports domestic violence to ACS she risks losing her child, an example of the battered mother’s dilemma. If she does not report, however, she risks further harm to herself or her child. Moreover, because the mother cannot talk forthrightly with the case-worker, given the policy implications, she may misrepresent her situation, further increasing her vulnerability to punitive interventions (because she is perceived as untrustworthy and reinforcing the mistaken perception that she is ambivalent about the violent partner or resisting services).

The ACS practices documented in *Nicholson* also lend credibility to the batterer’s threat that if the victim disobeys him, she will lose her children—another example of child abuse as tangential spouse abuse.⁷² Through the review process, the NRC found that caseworkers routinely delivered so-called “safety” plans (e.g. going to a shelter, leaving the abuser, or moving) as what, given the punitive consequences of noncompliance, amounted to a mandated service, and without consultation with the client or domestic violence expertise. In one case brought to the NRC by plaintiff attorneys, for instance, the victimized caretaker was cited for neglect because she had failed to personally serve her abusive partner with a protection order. The devil’s choice in this instance is either to put herself and the child at further risk or lose the child.

70. Susan Schechter & Jeffrey Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies*, at <http://www.mincava.umn.edu/documents/wingsp/wingsp.html>.

71. Stark & Flitcraft, *supra* note 15, at 103-05.

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

Mothers frequently were placed in similar dilemmas involving losing their children of losing their low-rent housing, employment or support network (by entering a shelter, for instance). ACS training materials emphasized that battered mothers might be “ambivalent” about separating from offending partners because of their psychological investment in the relationship, not because of the risks involved. This emphasis reinforced the view that non-offending mothers had to be pressured or threatened into doing the right thing for their children, an approach which almost always backfired. Again, the CPS response is self-fulfilling: against the intimidating context within which safety concerns are addressed, women are reluctant to report domestic violence until it escalates to a point where children face imminent danger. In sum, in addition to being insensitive to victim needs and leaving them at even greater risk, typical CPS policies and practices also aggravate the possibility that children will be harmed in families where domestic violence occurs. During the review process, ACS introduced multidisciplinary teams that included domestic violence expertise. Although caseworkers were encouraged to utilize such expertise, there were no consequences when they did not and they sometimes proceeded with victim-blaming and punitive interventions despite the contrary advice of the domestic violence expertise at their disposal.

CONCLUSION: LESSONS LEARNED

The *Nicholson* decision with the Nicholson Review Committee (NRC) as the monitor of compliance aimed at stopping the ACS practice of removing children from mothers and charging the mothers with neglect solely because they were victims of domestic violence or because they had refused services mandated because of domestic violence. In response to the injunction ACS sharply curtailed its removal of children solely because their mother is abused; dramatically reduced the number of mothers cited for neglect because of domestic violence; informed staff and clients about the requirements of *Nicholson*; revised its domestic violence curriculum to reflect *Nicholson*; made domestic violence expertise available to frontline staff through Consultation Teams; developed a training program for staff on emergency removal that is consistent with *Nicholson*; devised a system to monitor cases involving domestic violence and to selectively review practice in these cases; and implemented a process to ensure that attorneys draft petitions that are consistent with the principles enunciated in *Nicholson*.

Only time will tell whether the practices found unconstitutional will be resumed without the temporary injunction in place and without the surveillance of the NRC. The decision by the New York Court of Appeals upholding the principles enunciated in *Nicholson* make it possible for plaintiffs to go to state courts if the behaviors found unconstitutional

in *Nicholson* are continued.⁷³ By the time the NRC disbanded, the only petitions primarily concerning domestic violence were filed against the offending father. There were still petitions being filed against women who had been abused, but the primary allegation in these cases usually involved another issue, like substance abuse or leaving a child on their own. The NRC was concerned that pre-textual allegations are being used to conceal the prosecution or indication of mothers primarily due to domestic violence. In one case we reviewed, for instance, the allegation that the battered mother had left her children alone was based solely on the report of a neighbor that was never verified and the pertinent issue for ACS seemed to be that she had failed to personally serve her partner with the court order she had secured. Caseworkers could consult domestic violence experts on newly installed Consultation Teams. But they were under no obligation to follow their recommendations. So, the caseworker in the example above continued to pressure the mother to enforce the court order, although the domestic violence expert from the ACS multidisciplinary team she had consulted strongly advised against this approach.

Apart from reviewing departmental statistics on removals and reviewing the petitions to assess the basis for going to court, the NRC had no way to tell whether frontline practices with respect to battered mothers and their children have changed. To get at case practice, we proposed to conduct a "quality service review" of several cases involving domestic violence. These reviews look at every aspect of the agency-family interaction, relying on direct interviews with family members, caseworkers, supervisors and any other professional or related persons involved in the case. This initiative was frustrated by ACS, although they were to select the target families. Several issues were also not addressed by ACS. There was no more evidence that frontline staff were being held accountable to the agency's domestic violence policies after the two year review process than before, for example, let alone to the recommendations of the multidisciplinary teams. Nor was there any substantial shift in the resources allocated to domestic violence within the agency. Although anywhere between twenty and fifty percent of the CPS caseload involves domestic violence, only a tiny proportion of the agency's funds were being devoted to this problem. An outstanding issue was the ease with which "indicated" parties are placed on New York State's "black list" (and so cannot get positions in child care) and the difficulty of getting off the list, even after a case is withdrawn.

In its concluding report, the NRC articulated its assessment of what had been accomplished. We wrote:

73. *Id.* at 260.

Nicholson not only enunciated the law. As is now widely acknowledged throughout the country, *Nicholson* also identified grievous harms to battered women and their children and outlined a set of principles to redress this harm. Even after months of testimony by plaintiff mothers, significant findings of constitutional violations by a federal court and two years of operating under a temporary injunction enforced by the NRC, ACS remains equivocal in its acceptance of responsibility for these harms.⁷⁴

Operating under the terms of the temporary injunction, the nation's largest child welfare agency has come to the brink of implementing a model of what it means to protect children exposed to domestic violence and preserve their families in ways that are supportive, just and respectful.⁷⁵ It would indeed be tragic if, out of the public limelight afforded by *Nicholson* and without the scrutiny provided by the NRC, ACS reverted to the punitive, unfair and unconstitutional practices it has done so much to undo. Our hope that this will not be the case is based on the competence, commitment and judgment of the ACS leadership.⁷⁶

I do not share even the limited optimism expressed by this assessment. Far from being the actions of a an agency that is out of the mainstream, I believe that the responses of ACS to battered mothers are the culmination of two processes, the constraints on effective intervention in family problems imposed by the narrow mission of child saving and the long history of child welfare in this country. Both reflect a core dilemma in child services, how to protect children without confronting the environmental and political contexts from which harms to children arise. These contexts are reflected in woman battering, where individual men exploit persistent sexual inequalities to coerce and control individual women who, in many cases, are also mothers. By all accounts, woman battering is the single most important context from which children enter the child protection system, whether rightly or wrongly. The idea that we discharge our responsibility to the victims in these situations by removing the children from possible threats is wrong in both its substance—because the risks to children almost certainly increase with placement in foster care—and in form, because, as Judge Weinstein put so clearly, it is so patently unjust to punish those who are already being victimized.⁷⁷

In its construction, the NRC reflected the lawsuit itself. Each member, with the marked exception of our Chair, retired North Carolina family court Judge William Jones, was appointed to represent a different party in the dispute. With very few and very limited exceptions, we were

74. *Nicholson* Review Committee Report, to Judge Jack B. Weinstein, United States District Judge, Eastern District of New York, 10 (Dec. 17, 2004) (on file with author).

75. *Nicholson*, 203 F. Supp. 2d at 258.

76. *Supra* note 74.

77. *Nicholson*, 203 F. Supp. 2d at 253.

able to do what the parties could not: we reached consensus on every complaint that we heard. Although some of us thought there were other ways to approach our charge, we agreed to operate as a complaint-driven process, pursuing the complaints as a window to understand how the agency was complying with the injunction and what remedies were necessary. The sense that changed policy might not be reflected in reformed treatment of battered women and their children was also shared. It may be going too far to say that we also agreed that the capacity for CPS to treat battered mothers as women with needs in their own right was undermined by a mission-driven accountability structure that directs intervention away from appropriate practice and towards victim-blaming strategies, including placement. Even within that context, however, we shared a faith that caseworkers might better learn how to “walk in the shoes” of their abused clients, to recognize their commitment to what was best for their children and, from this vantage, to reframe their choices in ways that afforded women the autonomy they needed to escape the dilemmas in which they had been put by their abusive partner. In Ms. Nicholson’s case, this would have meant trusting her confidence that her husband was no longer a threat. In Ms. Tillet’s, it would have meant asking “what is the context?” before assuming that letting her abusive partner drive her home meant she was “ambivalent” about protecting herself or her child from violence. Partner, don’t patronize, became one of our watchwords.

Everyone involved on the NRC concurred that ACS’s practices with respect to battered women were unconstitutional and needed to stop. But throughout our preparation for *Nicholson* and the review process, we continued to debate what we saw as the ultimate solution. Should ACS identify battered women and immediately refer them to the advocacy system for assessment and support? Could we reform ACS from within, by bringing domestic violence expertise on board for instance, the way they’ve done in Massachusetts? Should we work to expand the responsibility of CPS to include the safety of *all* family members? Or, should we return the detection and response of child abuse to the police, dismantle the current CPS system and find a more effective way to help families brought low by the range of problems currently identified with “neglect?” Obviously, resolving this debate goes far beyond the scope of our discussion today.

