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I am an attorney at Sanctuary for Families, a multi-disciplinary agency in New York City. Sanctuary provides shelter, counseling, children's programs, job readiness counseling and legal services to domestic violence victims and their children. It was founded in 1985. At that time, Sanctuary did not include a legal services component. In 1989, University of Denver Sturm College of Law professor Kris Miccio founded Sanctuary's legal center, called the Center for Battered Women's Legal Services. Our legal center has grown to nineteen attorneys now and, to our knowledge, is the largest legal services provider in the country serving exclusively victims of domestic violence. We work collaboratively with the clinical side of the agency to provide families with holistic services.

I am the Director of Sanctuary's Child Protection Project, which focuses on issues related to domestic violence and child welfare. And, as mentioned, I was trial and appellate co-counsel in *Nicholson v. Williams*,[1] which challenged as unconstitutional the removal of children from and the prosecution of, battered mothers solely or primarily because the mothers had been victims of domestic violence in the presence of their children. Of course, there are so many things to be said and discussed about *Nicholson*, as evidenced by the mere fact of this Symposium, but I will focus my comments today on how the *Nicholson* case unfolded, our theories and our proofs.

In 1995, as mentioned, Professor Miccio was one of the first to identify a disturbing trend in child welfare cases involving domestic violence in New York State, a trend which was being repeated throughout the country. In an article published in the Albany Law Review, she highlighted that domestic violence victims were being charged with child neglect for failing to protect their children from exposure to domestic violence.[2] This burgeoning trend reached its tipping point in New York in 1998 with a state court case called *In re Lonell J.*[3] In *In re Lonell J.*, both mother and father, victim and abuser, were charged with child ne-

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

2. 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, 1088-90 (1995).

3. 673 N.Y.S.2d 116 (App. Div. 1998).

glect. Along with some vague and unsupported allegations of medical neglect, the neglect petition alleged that the respondent father had beaten the mother and that she had failed to separate from him, and that the respondent father was arrested for beating her.

After trial in *In re Lonell J.*, which included little testimony even to establish the facts of the domestic violence or the children's exposure to it, the family court reluctantly dismissed the petition.[4] The family court held that domestic violence between the parents was not sufficient to establish neglect of the children unless there was testimony from an *expert* that the children's witnessing of the violence had caused them emotional or mental impairment as defined by our child neglect statute.[5] However, while noting that it was constrained by New York law from finding neglect under the circumstances of this case, the family court used the decision to "beseech the legislature to amend the definition of neglect to include domestic violence which does not involve physical harm or the imminent risk of physical harm to children"[6] – i.e., to amend our child abuse statutes to make domestic violence in the presence of a child per se child neglect.

The child welfare agency, which in New York is called the Administration for Children's Services (ACS), appealed. The appellate court reversed, holding that expert testimony was *not* required to establish that the children had suffered harm and that nothing in the law required expert testimony "as opposed to other convincing evidence of neglect."[7]

What the court actually held in *In re Lonell J.* was that *expert* proof of emotional harm due to exposure to domestic violence is not required to establish neglect.[8] But ACS decided that the holding in *In re Lonell J.* meant that the element of harm, the requirement that there be *proof* that there was harm or imminent harm to a child, was done away with altogether in cases involving domestic violence; and, that a child's exposure to domestic violence was per se neglectful on the part of the abuser parent and on the part of the victim parent. ACS went even further, deciding that the potential for emotional harm to a child from witnessing domestic violence was so high that ACS could do away with the requirement of a court order before removing the child from the parent who was the victim of the violence. That is, ACS decided that it could do away with the requirement of due process. And that it could simply remove children from a home any time domestic violence was found and go to court later.

Shortly after *In re Lonell J.*, other appellate courts rendered decisions which, short on discussion of the facts or law, appeared to endorse

4. *Matter of Latisha J. and Lonell J.*, N.Y.L.J., Apr. 16, 1997, at 28, 28.
5. *See* N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2005).
6. *Id.*
7. *In re* Lonell J., 242 N.Y.S.2d at 117.
8. *Id.*

something close to a per se standard as well,[9] and we were off and running.

We knew that battered mothers in other states and counties were facing the same problems, biases and judgments as battered mothers in New York. In other jurisdictions, and early on in New York, these cases were called "failure to protect" cases. Battered mothers were charged with failure to protect their children from the potential emotional harm of being exposed to domestic violence. ACS was also alleging "failure to protect," but it phrased its charge in a different way. ACS claimed that a battered mother was neglectful because she "engaged in domestic violence in the presence of her children." In choosing this language to describe the victim's role in her own assault, ACS said very clearly what other jurisdictions were saying more obliquely: the victim is equally responsible for any violence in the home. She fails to protect her children if she is unable to stop another person from being violent.

In New York City, there had been another development leading up to the almost hysterical atmosphere of removal in which we found ourselves in 1998 when *In re Lonell J.* came down. The highly-publicized death of a child had led to the creation of ACS, a new child welfare agency, in 1996. In New York City, whenever there's a death of a child, the government changes the name of the child welfare agency. I've been practicing law for fifteen years and I've been through four child welfare agencies -- BCW, SSC, CWA and, finally, ACS.

The new agency – ACS – issued a mission statement that said any ambiguities regarding safety of children shall be resolved in favor of removal. Now, this is an incredible policy statement and one which we believe to be unconstitutional, because it does away with the requirement of probable cause. We believe, on its face, that that policy statement is unconstitutional. And the frontline workers indeed took it as a license to search and seize children at will, and as an elimination of the need for any court order authorizing removal or, really, any justification for removal beyond an ambiguity. Of course, every domestic violence situation is fraught with ambiguity. So, the mission statement combined with the misread holding of *In re Lonell J.* and its progeny had a devastating impact on children who were exposed to domestic violence and their mothers who were the victims of it. It was this combination that led to a frenzy of removals in child welfare cases involving domestic violence.

That was the legal landscape when, in 1999, I met Sharwline Nicholson. Sharwline had been separated from her child's father for some time. He lived in South Carolina. Although he had not been a

9. *See, e.g., In re* Athena M., 678 N.Y.S.2d 11, 12 (App. Div. 1998); *In re* Deandre T., 676 N.Y.S.2d 666, 667 (App. Div. 1998).

model partner during the relationship, he was never physically abusive toward her or threatened physical abuse during the relationship.

From time to time after Sharwline and her child's father separated, he came to New York to visit his infant daughter. During one visit, he got into an argument with Sharwline and became enraged. He beat her very badly. She managed to call 911, and he took off. Her son was at school and her infant daughter was asleep in the other room.

Sharwline was very seriously injured. She had a broken arm; she had a concussion; she was bleeding from numerous wounds. Yet, even before the police arrived, her first thought was of her children. She called her neighbor, who was her regular child care provider, and had the neighbor come over, get the baby and pick up the son from school. Sharwline was removed by ambulance, thinking that her children were safely with the babysitter. She provided every piece of information she could think of so that the police could capture the abuser, although she believed that he immediately fled the state.

While Sharwline was in the hospital, the police—and to this day we don't know why—went to the neighbor's home with their guns drawn and took custody of the children. This all sounds incredible, but it's true. They called Sharwline at the hospital and said, "We have your children here at the precinct. We can't allow them to be in the custody of a stranger," which is not an accurate statement of New York law by any means. A fit parent has the right to make child care arrangements for his or her child. In any event, they said, "You have to call a relative to take care of the children."

So, Sharwline called her cousin in New Jersey. By now, it was ten or eleven o'clock at night. Sharwline's cousin went to the hospital, told Sharwline that she would go to the precinct and get the children and everything would be okay. However, when Sharwline's cousin went to the precinct, the police refused to release the children, saying the children could not be taken out of state to New Jersey. Again, this was not a proper statement of the law.

Sharwline received a telephone call early the next morning—and the person on the other end of the line said, "This is ACS. We have your children. If you want to see them, you'll need to go to court. We'll call you back and tell you the date." Sharwline immediately left the hospital against medical advice and went off in search of her children. ACS did not file in court until five days later. So, Sharwline had five days during which she did not know where her children were or whether they were being cared for.

When Sharwline finally had an opportunity to appear in court, she learned that she had been charged with child neglect for "engaging in domestic violence." Make no mistake. Sharwline was not accused of

perpetrating any violence. She was accused of being a victim and she was accused of being a neglectful mother because she was a victim.

Now, at that time, I had just started working at Sanctuary. In the early 1990's, I previously had worked in the field of child welfare. And I found it so draining and so frustrating, because the system was so biased in favor of the child welfare agency that, after a particularly difficult case, I quit. And I went off and worked as a secretary for six months, as a temp, to try to figure out what I could do, because I did not think I could go back to child welfare. And for the next several years, I steered clear of it, returning to legal services but as a housing attorney and, later, supervising pro bono attorneys in family court.

When I got Sharwline's case, I was blown away. I read the transcript of the first court appearance in family court when I represented her. I'm sputtering, "Your Honor, this is outrageous! I—I can't believe this." And having been away from the field for a while, you know, I was very naïve about what was going on. I knew the child welfare system was crazy, but I couldn't believe it was that crazy.

So, I thought the case was some sort of aberration, some sort of a mistake. But as Sharwline's story unfolded over the next nine months that it took to get the charges against her dismissed, so did the stories of many other survivors. I am not going to go over all of them, because they're in the opinion, if you want to read them. But there are a few worth mentioning.

Ekaete Udoh, a Nigerian woman, had five daughters and was married to a very strict and punitive Nigerian man, who believed he had a right to take a second wife because his wife had only produced daughters for him. He was very free in admitting that this was the reason that he would beat her, because she wouldn't consent to his taking of a second wife. We had been representing Mrs. Udoh at the legal center for a year or so. She had been to court approximately twenty-three times to try to get him excluded from the home, to try to get child support, and to try to get visitation limited. And, even with excellent legal advocacy, she was unsuccessful in getting any meaningful relief from the court system. After she was evicted, she had to return to the marital home with her five daughters.

There was another incident of abuse—and in this incident, he hit the child. Mrs. Udoh reported the incident to the police but her husband was not arrested. However, a teacher reported the incident to ACS. ACS came to the home and, with no investigation, removed all four of her minor children. Mrs. Udoh was charged with child neglect for "engaging in domestic violence" for twenty-five years.

Sharlene Tillett was another one of our class members in the *Nicholson* case. She was hit while she was pregnant. After she gave birth, she was charged with engaging in domestic violence in the pres-

ence of her unborn child. That child was placed in foster care and mom and child missed the first several months of the child's life – several months of bonding and breast feeding gone forever.

Bizarrely, we also encountered women who were charged with engaging in domestic violence in the presence of their children but, after the women left, ACS placed their children in the abuser's custody. The theory was that once the parents were separated, there were no more problems. So, we even had cases like that; and so on, and so on, and so on.

In the class action which ultimately came to pass, we never ran out of plaintiffs. The City is fond of saying that there were only ten class members in the *Nicholson* case because the judge chose to only tell the stories of ten women. But there were not ten class members. There were probably hundreds. There were at least close to a hundred that we knew of. Now, the theory in all of these cases was that the children were suffering, or in danger of suffering, emotional harm from exposure to domestic violence against their mothers and, therefore, should be removed from their mothers. These were not cases in which the City alleged that the children were in danger of physical harm, or that the mother had failed to protect the child from physical harm. Rather, they all focused on the presumption that exposure to domestic violence, per se, constituted impairment rising to the level of imminent harm and neglect under our child welfare statutes.

After the neglect charges against Sharwline Nicholson were dismissed in state court, she retained the public interest law firm Lansner & Kubitschek in New York City to represent her in a civil rights damages action. Lansner & Kubitschek is well known in New York City for its success in civil rights actions involving children, including not only unlawful removals, but also abuse in foster care. I had worked with them before. They are a true public interest law firm dedicated to social justice in so many ways, and they were outraged by what was going on with Sharwline and the other mothers. After the charges against Mrs. Udoh were dismissed, she and her children also retained Lansner & Kubitschek and filed a lawsuit, and then Ms. Tillett and her children did the same.

Our clients had the extremely good fortune to be assigned Judge Jack B. Weinstein in the Eastern District of New York to hear the case. This was a random assignment, but someone must have been looking out for us. Judge Weinstein is a prominent jurist with a distinguished career which included creative, bold and, occasionally unpopular, rulings. Judge Weinstein was once called the quintessential activist judge by the New York Times. If anyone would listen, he would.

As we identified more and more of these mothers and children who had been separated after domestic violence in the home, we considered that Judge Weinstein might be receptive to a motion for class certifica-

tion. Ultimately, on January 19, 2001, we filed the motion on behalf of all battered mothers and their children, who had been separated or were in danger of being separated solely or primarily because of domestic violence in the home. Sanctuary signed on officially as co-counsel with Lansner & Kubitschek for the lawsuit. Lansner & Kubitschek brought the child welfare expertise to the table, and Sanctuary brought the domestic violence expertise.

Our contentions were, in sum, that ACS was employing a policy and a practice of removing children from battered mothers solely or primarily because the mothers had been abused; of making those removals without court order; of charging those mothers with child neglect for engaging in domestic violence; and of marking cases "indicated" against the mothers in the state register of child abuse and maltreatment.

This final element of the case related to the marking of cases against mothers in the state central register is one that gets lost in the shuffle sometimes. These moms, upon investigation, were being blacklisted—we call it a blacklist—by the State Central Register of Child Abuse and Maltreatment. The cases are marked as having some credible evidence that the subject of the report is neglectful or abusive. And this impacts the mother's ability to ever get a job working with children which, for many of our clients who work in jobs related to child care, is a real problem.

We sought injunctive relief on behalf of the class. Many of the mothers also had individual damages actions. The damages claims were separated out. This was not a class action about money; it was a class action about an injunction.

Now, if anyone is familiar with Judge Weinstein you will not be surprised to hear what happened when we appeared in April of 2001 on our class certification motion.

The court fast-tracked the case and announced that on July 9, 2001 we would start a trial on the issues of whether class certification should be granted, and whether a preliminary injunction should be granted. We had very little time, three months, to conduct discovery, develop our theory, locate our experts, and find more class members. The case was tried primarily by me and by David Lansner, Carolyn Kubitschek and others in their firm. We were in court by day and in depositions by night. Now, you all aren't out practicing in the field yet, so you might not yet appreciate this. You'll remember this when you're working your twelve-hour days what it would be like to be on trial by day, go have some dinner, meet for a deposition at six o'clock, deposition's over at ten, wait for the transcript till two in the morning, prepare your cross-examination and then go to court the next morning and, you know, conduct a trial. It was quite a wild ride.

We used some very unique methods of witness preparation, such as holding a Fourth of July barbeque for class members and their children,

who then met, one by one, with David Lansner, me and other attorneys in separate rooms to be prepared for trial. As a practical matter, this was important because it allowed us to prepare the moms without concern about child care issues and scheduling conflicts, but it was also important that the moms could see the faces of other mothers and draw strength from one another.

The trial lasted for nearly two months and encompassed forty-four witnesses, including twelve experts, and hundreds of documents. As one of our first witnesses, we called a former family court judge, Philip Segal, who had presided over nearly ten thousand child welfare cases during his time on the bench. We called him to familiarize the court with the realities of family court and to provide evidence as to the number of cases that had come before him during his time on the bench in which a battered mother was charged with engaging in domestic violence.

However, as Judge Segal described the experience in family court of a battered mother who had her children removed, often illegally, Judge Weinstein became very disturbed. It was clear that battered mothers in New York were not receiving adequate representation from assigned counsel. In New York, indigent litigants in family court have a right, a statutory right, to assigned counsel. New York State, however, paid assigned counsel only twenty-five dollars an hour for out-of-court work, and forty dollars an hour for in-court work. A state court case which was challenging these rates had been languishing for years, and legislative action seemed very unlikely.

Previously, we had considered including the issue of inadequate representation in our complaint. Many of the women would appear in court but because the rates were so low, there was a dearth of assigned counsel. So a case would be adjourned, adjourned, adjourned—with no substantive inquiry whatsoever into the facts of the case, while the court officers would literally run around the courthouse trying to find an attorney who was willing to take on the case for that little money. We had rejected including this claim in the suit as potentially complicating the issues.

But, after the family court judge's testimony, and Judge Weinstein's reaction to it, we moved to amend the complaint and join the state as a defendant on the grounds that, in addition to the city's misdeeds, the state was providing unconstitutionally inadequate representation.

Why was this issue important? Because Judge Weinstein, as a federal court judge, could only affect ACS behavior before the agency reached the state courthouse door. Once the government passed the threshold of the state court door, the state court took over, and the issue of whether the rights of battered mothers would be protected once they were in state court was imperative. And not insignificant was the fact that the inclusion of this issue in the lawsuit made the legal community

sit up and take notice. A most cynical view of that is that once attorneys' fees were involved, we started to get more publicity in the legal press.

During *Nicholson*, the city put forth one defense only, "We don't do this. We don't remove children solely or primarily because of domestic violence, period." The city said, "We employ best practices. Look at our written policies." And, in fact, except for the mission statement that I referred to earlier, the ACS domestic violence policies and guiding principles looked really good on paper. Thus, it made the case simpler for us that ACS actually agreed with us as to what constituted best practices in child welfare cases involving domestic violence. They claimed they already employed them; we claimed that they didn't.

Judge Weinstein early on expressed his skepticism about our ability to prove our case without statistics. Unfortunately, there were few statistics to speak of. ACS did not keep reliable records on how many cases involved domestic violence; how many times they removed children from battered mothers; or, how many moms were charged with engaging in domestic violence. In claiming that there was no municipal policy, ACS relied almost exclusively upon a state study of domestic violence cases which had been languishing for about a year. This state study had been mandated as an afterthought by the legislature on another piece of legislation years earlier. It was not a serious study. It consisted of untrained college students on a three-week winter break one January reviewing seventy-one cases involving domestic violence. The study had not been completed or published. The study concluded that in only one instance out of seventy-one cases was a child removed because of domestic violence.

The City defendants repeated the words "state study" like a mantra throughout the entire litigation. In fact, they continued to do so throughout the appeals. Even after the Second Circuit confirmed Judge Weinstein's findings that they had a pattern and practice of removing children from their mothers solely or primarily because the mothers had been victims of domestic violence, they continued to talk about this state study. They talked about it to the media; they talked about it in the appellate courts. It was the one-note song that they had.

During the trial it was my job to debunk the study. With the help of a statistics expert, we challenged shoddy methodology. But, we also demanded that the seventy-one case files which formed the basis for the study be produced to us and, nearly on the eve of trial, they arrived. We divvied them up among paralegals, law students and attorneys and read them very carefully.

We found that the state's definition of when removal occurred solely or primarily because of domestic violence was very generous to the city. For example, in one case the father beat up the mother while he was drunk. The state study concluded this was not a removal because of

domestic violence; it was a removal because of domestic violence and alcohol abuse. So, we had a social worker who was qualified as an expert and who was a former child protective worker review the files, especially the ones that were problematic, and she testified about those particular cases and helped us undermine the validity of the state study's substantive findings.

Now, we, of course, were seeking to prove that there was a broad enough constitutional violation to warrant certification of the class. If I was asked once, I was asked a million times, "How big is the class? How many women are affected?" We couldn't answer that question. We didn't have the statistics. However, again, those of you familiar with Judge Weinstein will not be surprised to learn what happened at trial.

Judge Weinstein, in his brilliance, turned this piece of statistical evidence on its head. He accepted the state study on its face as the city urged. In the middle of testimony, he then extrapolated from the city's numbers and he came up with eighty families a year that, by the City's own data, were affected by this policy.

I was in the middle of my brilliant cross-examination, having had a crash course in statistics over the course of a few days, and I had about ten pages of cross-examination left where I was going to use words like "inter-rater reliability study," and things like that. After the judge's comments, I took the notes, and I folded them up and I said, "Nothing further,"—and a short time later, we became a class action. Ultimately, the judge said, "That's a lot of mothers. It doesn't need to be hundreds and thousands of mothers. That's enough. It's probably bigger than that and, you know, the plaintiffs have made some good points, but I think that's fine."

The city also waved its written policies like a banner throughout the case. And, as I mentioned, their written policies were actually pretty good. The problem was the disconnection between the written policies and the actual policies and practices. We illustrated this disconnection in three ways. First, of course, our class members testified about their experiences. Second, we had our experts. And, even one of their experts testified that the practices in the class members' cases were not consistent with the written policies. But, third, to prove the broader constitutional violation, we focused our case on, and as calling as our witnesses, child protective managers at ACS who were involved in some of the cases of the class members. The child protective managers are third level supervisors who sign off on all removals.

Deposing them and questioning them at trial might have been fun, if it wasn't so sad. They were naïvely honest, believing that their actions were righteous. Some had not seen the agency's written domestic violence policies or, if they had, were only vaguely familiar with them. The child protective managers' description of the agency's practices with

regard to domestic violence supported our contentions, and since each child protective manager was responsible for twenty-five case workers, each with a caseload of some fifteen to twenty cases, the child protective managers' understanding and implementation of policy in domestic violence cases took us a long way to the finish line. Ultimately, we had five of them testify at the trial.

Another striking moment for me as an attorney in the trial was as I was cross-examining a child protective manager who said that sometimes he removed children from battered mothers without ever going to court, because if you remove their children, battered mothers tend to do what you want them to do. That was another instance of restraint as a lawyer where I had to say, "Nothing further." You're standing there listening to this fellow and you think, "He did *not* just say that," but, alas, he did.

Incredibly, the city never disavowed or explained the actions of their staff in the cases brought before the court. Not a single witness called by ACS, not a single deputy commissioner, not a single director or policy maker, not a single expert had looked at any of the case files of any of the class members. The Commissioner of ACS testified that he had not even directed anyone to look at the cases. So, de facto, the city endorsed the policies.

In addition to calling class members, experts and ACS staff as witnesses, we also called advocates who had worked in the field for many years to discuss their anecdotal experiences, which were so plentiful that they supported the conclusion of a practice. The advocates also served another important purpose for us in proving our case. They established that the practices complained of had been brought to the city's attention time and time again. Suddenly, the advocates' coffee-stained, handwritten notes of meetings with various Commissioners, and I thank God that they were all meticulous enough to save them, were evidence in the federal class action lawsuit.

I think *Nicholson* was a unique case for systemic reform: we believed that due to the nature of the lawsuit, because the safety of children was involved, the case could not just be about proving that the city's practices were unconstitutional or that they violated the civil rights of battered mothers and their children. We firmly believed that in order to prevail, we must educate, and challenge head-on some of society's most deeply-held biases and judgments regarding domestic violence and child welfare. And we had to show that what the city was doing was hurting children. It was not a necessary component of our legal case, but we felt that we needed to prove that.

The media was becoming interested in the case as well, and we saw this as an opportunity to educate them and, through the media, the public. The most prevalent judgment was, of course, "Why doesn't she leave?" And the corollary in this context was that the mother who does not sepa-

rate is a mother who is not protecting her children. This refrain that we hear when members of general society are talking about battered mothers always puzzles me, because we know that domestic violence homicides frequently occur around issues of separation. I always ask people, you know, we read articles in newspapers that talk about the death of battered mothers and sometimes their children, but we never read an article that says, "He killed her and the children because she told him she was staying." So, staying is many times protection. We felt at the trial that we needed to make that point very clear. Fortunately, the people working at ACS on domestic violence issues—there were three of them in this 2.3 billion dollar child welfare agency—were professionally sophisticated. And, we were able to extract a lot of this evidence from them as well.

Very quickly, here are some other judgments that we had to challenge, "She didn't prosecute him when she had the chance." I don't know what it's like here and the rest of the country, but in New York City he gets out. He gets out pretty quickly. So, society judges her for not going forward but if she does, for what? In all of the cases of our class members, the abuser was set free and suffered no criminal consequences for his behavior, not even the man who so brutally assaulted Sharwline.

Another one of the judgments, "She didn't go into shelter." Now first, there's the question of whether she even had access to shelter. Originally in our complaint, we included the city's failure to provide adequate shelter as a cause of action. The judge, for whatever reason, didn't want any part of that. So, he didn't bite and we didn't get to go forward on that. But, second, even if she had access to shelter, there's the question of whether shelter is in the best interests of the child. Shelter is relocating, removing a child from his or her community, changing schools and every other familiar thing that may have contributed to the child's resiliency.

We also had to challenge the notion that every child is irreparably emotionally damaged and each in the same way by exposure to domestic violence. Is witnessing domestic violence good for children? -- of course not. But, as Dr. Stark I think will discuss a little later, if I'm not putting him on the spot, even the research we have available now shows that children are very resilient and the type and manner of any intervention will affect that resiliency. So, we had our experts address that point.

I always think about this. You know, some children are devastated, but some children grow up to live very productive lives. Some of you in this room may even have been exposed to domestic violence as children. There are 3.3 to 10 million children every year exposed to domestic violence and, clearly, not all of them suffer the level of dysfunction which would require them to be taken from their parents.

We also felt that we had to challenge the notion that removing children from their parents is erring on the side of safety. You hear that a lot. There is a notion that foster care provides safety for children. This is simply not true. It's not just me who says so with my anecdotal experience. I won't go through all of the data but it's out there. There are reports from the Department of Health and Human Services that the rate of child maltreatment is more than seventy-five percent higher in foster care than in the general population; that a child is twice as likely to die of abuse in foster care as in the general population; that the rate of substantiated cases of sexual abuse in foster care is more than four times higher than the rate in the general population, and so on and so forth.

Many of our clients' children suffered in foster care, ranging from the physical abuse of Sharwline's son, to various incidents of medical neglect and emotional harm. The mothers' testimony about their children's experience in foster care was very powerful. But we did not only use the mothers, the literature and the experts to help us establish the trauma and danger of foster care.

We called the older children as witnesses. Listening to one fourteen year-old describe her experience, Judge Weinstein and everyone in the courtroom, including the city's attorneys, became teary-eyed and Judge Weinstein had to call a ten-minute recess. Listening to her describe her trauma of being taken from her mother and being placed in foster care was one of the most wrenching moments in the trial.

Finally, we felt that we couldn't simply say the government is doing it wrong, we believed that we had to say there's a way to do it right. And, that there are ways to protect children without separating them from their mothers. ACS provided us with some fodder for this argument.

From time to time in the 1990s, ACS had recognized systemic problems in handling of child welfare cases involving domestic violence. In 1999, they had a pilot project in which they placed a domestic violence specialist in a local office, and this specialist looked at every case that came in, and she helped the caseworker with the case. Out of seventy-seven cases in the six-month period, there were only three removals. There was a comparison study done of a Brooklyn site that had no domestic violence specialist. Removals were twenty-four percent in the site that did not have a specialist.

Although the advocates who pressed ACS to conduct the pilot project will tell you that it was far from a perfect project, it was something for us to show the court there's a way to do it right and ACS has chosen not to do it right, because they refused to renew the pilot project when it expired.

I think most compelling to the court was the fact that the federally-funded National Council of Juvenile and Family Court Judges and other well-respected professionals decried the use of removal of children as an

intervention in child welfare cases involving domestic violence. No one from the National Council of Juvenile and Family Court Judges ever testified for us. As a group representing judges, they didn't feel that they could. But we put their treatise into evidence and got every expert to recognize its principles.

Ultimately, Judge Weinstein said in his decision, in which he gave the treatise a lot of weight, that ACS was not bound to follow best practices, it was only bound to follow the Constitution. However, he ruled its failure to follow best practices bore on its justification for its behavior. In other words, ACS was behaving punitively and couldn't really justify it as being best for the child when there was this whole body of research about what constituted best practices.

So here was our theory of the case: the city's behavior was wrong, the way they are doing it harms children, and there is a way to do it right. We boiled it down to what is technically part of the theory of the case but what I sort of think of as the "bumper stickers"—this came about because, when we started getting media attention, to try to explain the complexity of these issues to reporters was really a challenge, so, we came up with these simple concepts: remove the batterer, not the child; protect the child by protecting the mother; witnessing domestic violence is bad, removing children is worse.

Of course, by now you all know that we won and we got a preliminary injunction. The injunction was very simple. It was only fourteen paragraphs, but it was very powerful in its message. For example, the federal court ordered that ACS could not remove a child when it could, instead, remove the batterer. ACS could remove children without a court order in only the rarest of circumstances. The city sought a stay of the injunction and we defeated their motion by meticulously addressing each paragraph of the injunction, looking at the trial record and saying, "Look, Second Circuit. They say they already do that. So where is the irreparable harm to them of being held accountable for doing it?" We were very pleased and excited that the Second Circuit declined to grant the stay. We worked very hard on that particular brief, and Carolyn Kubitschek withstood a particularly grueling oral argument.

An essential provision of the decision in the injunction was that Judge Weinstein carved out a right to counsel for our clients and found that they were being deprived of it. Now, in the case of *Lassiter v. Department of Social Services*,[10] which is a Supreme Court case, the Supreme Court had rejected the general right to counsel for parents in cases in which their parental rights were at stake, but had left the door open for the right to counsel for certain sub-groups of parents.[11] And, as far as I

10. 452 U.S. 18 (1981).
11. *Lassiter*, 452 U.S. at 31-32.

know, Judge Weinstein is the only judge in the country who has walked through that door and found a federal right to counsel for a certain group of parents involved in a case in which their parental rights are at stake. And he ordered that attorneys for class members be paid ninety dollars an hour.

Ultimately, as a result of *Nicholson*, there was a domino effect. The state court case addressing the issue of rates for assigned counsel was revived; the state courts issued opinions which mirrored Judge Weinstein's; and, the New York State Legislature amended state laws to provide that effective January 1st of 2004, attorneys in all cases for all indigent litigants, including children, in family and criminal court, are paid seventy-five dollars an hour.

In its appellate travels, the *Nicholson* case made its way to the New York State Court of Appeals, which is our highest court, when the Second Circuit certified questions of state law. So, at the end, it all came back to *In re Lonell J.* and some of its predecessor cases. The New York Court of Appeals last October issued a sweeping decision clarifying the law on removals without court order in all types of child welfare cases, on what is necessary for a finding of child neglect, and, for our purposes most importantly, ruled that a domestic violence victim is not presumptively a neglectful parent.[12] The New York Court of Appeals said that there may be instances in which a domestic violence victim can be found neglectful, but the circumstances must be very egregious.[13]

My favorite part of that decision is where the court lists the factors that must be considered when looking at the mother's conduct: risks of leaving; risks of staying; risks of seeking assistance through government channels; risks of criminally prosecuting the abuser; risks attendant to relocation (going to shelter); the severity and frequency of the violence; and, most importantly, the resources and options available to the mother. The mother's conduct, ruled the court, must be judged in the context of circumstances then and there existing. And that had not been done before. Now we have the highest court in the state saying to the state court judges, "Listen! This is what you have to look at. You can't presume she should have left. You can't presume she should have prosecuted. You can't presume she should have gone to shelter."

The *Nicholson* decision had a domino effect locally and nationwide. ACS stopped removing children from battered mothers, and the case spurred them to make vast improvements in their child welfare practice, some of which I hope will be institutionalized. Shortly after the *Nicholson* ruling, the New York State Legislature passed a law requiring specialized training for all child welfare workers throughout the state on

12. Nicholson v. Scoppetta, 820 N.E.2d 840, 847 (N.Y. 2004).
13. *Id.*

the *Nicholson* principles. Advocates had pursued that legislation, unsuccessfully, for many years. I'm told that Congress gave renewed funding to the National Council of Juvenile and Family Court Judges to explore best practices in child welfare cases involving domestic violence in part because of *Nicholson*. We have heard reports from domestic violence and child welfare agencies throughout the country about the effect of *Nicholson*, how it led to new programs and new state funding.

In December we settled the case after Judge Weinstein indicated that he thought enough had been done. This was after we won in the New York State Court of Appeals. ACS also has a new commissioner who did not take the lawsuit personally and was willing to agree to abide by the principles set forth in the decision—both the letter of the principles *and* their spirit. If the city behaves itself, the case will finally be dismissed in September 2005.

Ultimately, it's hard to say what the day-to-day effect of the lawsuit on New York's family courts will be. Ever the skeptic, I await a backlash or unintended consequences. Some judges in New York appear to be unhappy with the case, and I'll talk about that a little more later, believing that it places too many restrictions on them. However, there can be no dispute that the case has had wide-reaching implications.