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JUDGING *NICHOLSON*: AN ASSESSMENT OF *NICHOLSON V. SCOPPETTA*

JUSTINE A. DUNLAP[†]

INTRODUCTION

It was an unceremonious conclusion. After four years of bitterly contested litigation, extensive legal and popular press,[1] interplay between federal and state courts, and multiple judicial opinions, the class action lawsuit *Nicholson v. Scoppetta*[2] ended with a brief settlement order. On December 17, 2004, the court entered a four-page Stipulation & Order of Settlement. In it, the parties agreed that the New York Court of Appeals' decision accurately reflected the applicable law to be followed by New York City's child welfare agency, the Administration for Children's Services ("ACS").[3] This settlement averted further litigation to the United States Court of Appeals for the Second Circuit.[4]

The *Nicholson* case, taken in its entirety, creates significant law for battered women and their children, notwithstanding its short settlement

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† Associate Professor, Southern New England School of Law. Thanks to Lisa Carlson and Cathy O'Neill for their research assistance. Thanks, too, to Philip Cleary and Irene Scharf for their counsel. Finally, I appreciate the writing support provided by Southern New England School of Law.

1. Print, television, and legal media all covered the case. For instance, Dateline NBC featured a segment on *Nicholson*. *NBC News: Dateline* (NBC television broadcast, July 31, 2001). New York papers, including the New York Times, New York Post, and the New York Daily News also carried articles. Somini Sengupta, *Tough Justice: Taking a Child When One Parent is Battered*, NY TIMES, July 8, 2000, at A1; Kati Cornell Smith, *Court Boosts Custody for Abused Moms*, NEW YORK POST, Mar. 5, 2002, at 19; Mike Claffey, *Testimony by Mother Rips ACS*, NEW YORK DAILY NEWS, July 17, 2001, at 24. The popular press coverage reached beyond New York. The Washington Post reported on a similar practice in the District of Columbia. Karlyn Barker, *Policy Turns the Abused into Suspects: Mothers Find Seeking Help Can Backfire in the District*, WASHINGTON POST, Dec. 26, 2001, at B1. Legal Press such as the New York Law Journal printed more in-depth articles. Mark Hamblett, *Stayed Injunction May Encourage Negotiations, Judge Pushes Deal on Foster Care Suit*, N.Y.L.J., Aug. 20, 2001, at 1.

2. *See, e.g., In re* Nicholson, 181 F. Supp. 2d 182 (E.D.N.Y. 2001) (granting preliminary injunction), *supplemented sub nom.* Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) (finding state policy unconstitutional), *certifying questions sub nom.* Nicholson v. Scoppetta, 344 F.3d 154 (2d Cir. 2003). Certified question answered by *Nicholson v. Scoppetta*, 820 N.E.2d 840 (N.Y. 2004), *remanded by* Nicholson v. Scoppetta, 116 Fed.Appx. 313 (2d Cir. 2004). Stipulation & Order of Settlement, Nicholson v. Williams, No. 00 CV 2229 (E.D.N.Y. Dec. 17, 2004) (on file with author).

3. *Id.* at 2.

4. In an article published shortly after the New York Court of Appeals' decision was rendered, this author noted that the decision simplified the issues that would be revisited by the Second Circuit. She did not foretell the settlement of the case less than two months later. Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 597-98 (2004).

order.[5] The *Nicholson* "case" comprises at least three substantial opinions from the federal district and appellate courts as well as the New York Court of Appeals. That complexity notwithstanding, it can be fairly summarized as follows: mothers who are battered in front of their children are not guilty of neglecting them—on the sole ground that the children have witnessed the violence—under New York's child abuse and neglect laws.[6] At several points within the opinion, the New York high court explicitly rejected any notion that witnessing domestic violence is a presumptive ground for neglect or removal.[7]

This article will first examine the events that led to the filing of *Nicholson*. Next, it will look at the *Nicholson* opinions, most particularly the one issued by the New York Court of Appeals.[8] The article will conclude by assessing the impact of *Nicholson*, in New York and elsewhere.

I. BEFORE *NICHOLSON*

Nicholson, of course, locates its beginning long before the lawsuit was filed.[9] In 1995, lawyers from Sanctuary for Families, a multidisciplinary organization that assists women survivors of domestic violence, began noticing a disturbing development. Battered women were being charged with failing to protect their children if the children were present during episodes of domestic violence.[10]

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5. The settlement order was entered shortly before the trial of the case on the merits, which had been scheduled for Dec. 22, 2004. The order did not actually dismiss the case. Rather, the case was placed on the court's suspense calendar; it will be dismissed with prejudice on Sept. 1, 2005 unless the Plaintiffs restore the case to the court's active calendar. As of June 7, 2005, no action had been taken to restore the case and the Plaintiffs' attorney did not anticipate such an occurrence before September 1, 2005. Telephone Interview with Jill M. Zuccardy, Esq., Director, Child Protection Project, Sanctuary for Families (June 7, 2005).

6. That was essentially the conclusion of the New York Court of Appeals in response to the first question certified to it by the Second Circuit. Nicholson v. Scoppetta, 820 N.E.2d 840, 843-45 (N.Y. 2004).

7. *Id.* at 854.

8. See Dunlap, *supra* note 4, at 593-98 for an earlier discussion of these opinions. *See also* Maureen Collins, Nicholson v. Williams: *Who is Failing to Protect Whom? Collaborating the Agendas of Child Welfare Agencies and Domestic Violence Services to Better Protect and Support Battered Mothers and Their Children*, 38 NEW. ENG. L. REV. 725, 728-37 (2004).

9. Jill M. Zuccardy, Nicholson v. Williams: *The Case*, 82 DENV. U. L. REV. 655, 655-57 (2005) [hereinafter Zuccardy, *Transcript*]. For a discussion of the evolution of the lawsuit, *see also* Jill M. Zuccardy, *Child Protective Cases Involving Domestic Violence Issues, in* 189 PRACTICING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES CRIMINAL LAW AND URBAN PROBLEMS 165 (2002).

10. Zuccardy, *Transcript*, *supra* note 9; 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, 1487 (2001). Similar cases also occurred elsewhere. *See, e.g.*, *In re* A.D.R., 542 N.E.2d 487 (Ill. App. Ct. 1989). *See generally*, V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 238 (1996).

The New York state court case of *In re Lonell J.*[11] was the "tipping point," suggests Jill Zuccardy, Sanctuary's lawyer in *Nicholson.*[12] That 1998 case held that the government need not offer expert testimony to prove harm alleged to have been caused by witnessing domestic violence.[13] This, on its face, is a rather unexceptional declaration. Indeed, it was repeated by the New York Court of Appeals decision in *Nicholson* some six years later.[14] However, soon after it was handed down, *Lonell J.* began to be interpreted as adopting a per se standard that witnessing domestic violence constitutes neglect by the battered mother.[15]

Sanctuary helped many of these women battle against charges filed by ACS. After resolution of their cases in the family court, individual battered women filed civil rights lawsuits against the agency. These suits collectively formed the *Nicholson* class action.[16]

II. THE *NICHOLSON* DECISIONS

In January 2002, Judge Weinstein issued a preliminary injunction, after a lengthy trial held during the previous summer and fall.[17] The injunction precluded the agency from seeking removal of children from battered women on the sole ground that the children had witnessed domestic violence.[18] Judge Weinstein's extensive memorandum opinion

11. *In re* Lonell J., Jr., 673 N.Y.S.2d 116 (App. Div. 1998). *Lonell J.* is sometimes described as the first case holding battered mothers liable for failure to protect. *See, e.g.*, The "Failure to Protect" Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 852 (2000). However, the cases of *In re Melissa U*, 538 N.Y.S.2d 958 (App. Div. 1989), and *In re Theresa CC*, 576 N.Y.S.2d 937 (App. Div. 1991), reached similar conclusions several years earlier. *See* Dunlap, *supra* note 4, at 607-08, for a full discussion of these cases. Nonetheless, *Lonell J.* appears to be the case that started the trend of prosecuting battered mothers in New York.

12. Zuccardy, *Transcript*, *supra* note 9, at 655. Others have also suggested that *Lonell J.* was a critical case. *See* The "Failure to Protect" Working Group, *supra* note 11, at 852. Further, *Lonell J.* has been described as adopting a de facto strict liability standard. *Id. See infra* notes 30-35 and accompanying text for further discussion of strict liability.

13. In *Lonell J.*, the mother was "charged" with abuse and neglect in a family court proceeding. *In re Lonell J.*, 673 N.Y.S.2d at 116. There are also instances in which mothers have been charged criminally with failure to protect.

14. Nicholson v. Scoppetta, 820 N.E.2d 840, 855 (N.Y. 2004).

15. Zuccardy, *Transcript*, *supra* note 9, at 656-57. An unrelated event further contributed to the problem, according to Zuccardy. A child's death led the child protection agency to take a stance that encouraged the removal of children. *Id.* at 657. Thus women who were beaten were being charged with child neglect and their children were being taken from them, often without court order. These removals exacerbated the wrongs—legal and otherwise—perpetrated against these women and children; wrongs that the trial court judge termed "pitiless double abuse." Nicholson v. Williams, 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002).

16. A named plaintiff, Sharwline Nicholson, was represented by the public interest law firm of Lansner & Kubitschek. Nicholson filed suit in federal court in April 2000. Her case was later consolidated with other named plaintiffs. Zuccardy from Sanctuary joined as co-counsel. In August 2001, the classes were certified by Judge Weinstein. *Nicholson*, 820 N.E.2d at 843. News reports at the time hinted at a burgeoning class size that could top out at 30,000. Graham Rayman, *Conflict Over Size of Class-Action*, NEWSDAY, Mar. 28, 2001, at A16.

17. *In re* Nicholson, 181 F. Supp. 2d 182, 183 (E.D.N.Y. 2001).

18. *Id.* at 188-93.

followed in March.[19] The opinion was far-reaching in its finding of wrongs perpetrated by ACS.

In that awkward paradox of pending litigation, the city agreed to fix its practices even as it averred its innocence.[20] In this latter capacity, the city appealed Weinstein's order. However, the Second Circuit refused to stay the injunction pending appeal.[21]

The Second Circuit ruled in September 2003.[22] It determined that if the case could be resolved through the interpretation of state child abuse and neglect law, it might be unnecessary to reach the federal constitutional issues decided by Judge Weinstein. Therefore, the Second Circuit certified three questions to the New York Court of Appeals.

The New York Court of Appeals accepted the certification.[23] It heard oral argument in September 2004 and ruled the next month, answering the three questions certified to it by the Second Circuit. Those questions will be addressed in turn.

A. First Certified Question

The first question certified by the Second Circuit was: "Does the definition of a 'neglected child' under New York Family Court Act § 1012(f); (h)[24] include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker?"[25] The New York Court of Appeals simplified the issue: Does state law permit a finding of neglect predicated upon "two facts only": first, had the charged parent been abused and, second, had the child "been exposed" to that abuse?[26] In immediate response, the court said that "plainly" more is required to prove neglect.

The court then analyzed the two provisions of the statute cited in the certified question. Section 1012(f) of the statute sets forth the basic definition of neglect with a two-part causal standard. First, a "child's physical, mental or emotional condition" must either be impaired or be in

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

20. Indeed, the city's defense throughout the trial was that it did not remove children based solely on exposure to domestic violence. Zuccardy, *Transcript*, *supra* note 9, at 663.

21. Zuccardy, *Transcript*, *supra* note 9, at 668. Judge Weinstein initially stayed the injunction. *In re* Nicholson, 181 F. Supp at 193. The stay was later lifted.

22. Nicholson v. Scoppetta, 344 F.3d 154 (2d Cir. 2003).

23. *Id.* at 167-68.

24. N.Y. FAM. CT. ACT § 1012(f) (McKinney 2005) provides the core definition of neglected child; § 1012(h) defines emotional or mental neglect – the type of neglect at issue in *Nicholson.*

25. *Nicholson*, 820 N.E.2d at 844.

26. *Id.* The court did not analyze the potential difference between witnessing the abuse and being exposed to it. For an analysis of these differences *see* Dunlap, *supra* note 4, at 570-72.

"imminent danger" of becoming impaired.[27] If the impairment is established, the state must then prove that it is caused by the parent's failure to "exercise a minimum degree of care."[28] This requirement that parental failure be the source of the child's harm is significant in two ways.

First, it demonstrates that the legislature did not intend to make child neglect a strict liability proposition. There must be a nexus between the harm and the parent's failure to exercise the minimum standard.[29]

This clarification is significant. The *Lonell J.*[30] and *Glenn G.*[31] cases, among others, have been described as imposing strict liability in neglect actions. Indeed, the *Glenn G.* court stated that the neglect statute imposes "strict liability."[32] This conclusion is clearly contrary to the plain language of the statute, which requires a failure to meet a minimum standard of care.[33] The *Glenn G.* court appears to have conflated liability for unintentional actions with strict liability. Certainly neglect can be found absent a parent's intent to be neglectful. Strict liability, on the other hand, would apply in circumstances where harm occurred notwithstanding the exercise of due care.

As a practical matter, however, courts may have been willing to conclude that the "conduct" of being a victim fell below the minimum standard of care. In *In re Theresa CC*, [34] the court cursorily concluded that there was a causal connection between the children's problems—e.g., the harm—and the parents' conduct. This conclusion is problematic, however, as the mother's only "conduct" was being the recipient of abuse.[35]

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27. *Nicholson*, 820 N.E.2d at 844-45. The imminent danger standard, the court said, demonstrates that neglect may be found short of actual harm but that the risk of harm had to be more than "merely possible." *Id.* at 845.

28. *Id.* at 844. The court noted that proof of this nexus is especially important in cases alleging emotional impairment, due to the "murky" nature of determining the source of such non-physical impairments. *Id.* at 845-46.

29. This failure, however, can be attributable to inability as well as unwillingness. *Id.* at 845-46. As one court stated, "Good faith, good intentions, and even best efforts" are not enough to defeat this objective test. *In re* Katherine C., 471 N.Y.S.2d 216, 218 (Fam. Ct. 1984). This same court later described the parental obligation to the child's welfare as "fundamental and absolute." *Id.* at 220.

30. Working Group, *supra* note 11, at 852. The *Lonell J.* court, in addition to finding that expert testimony was unnecessary to prove harm, stated that parental "spousal abuse" was an act that, under the statute, fell outside the minimum standard of care. *In re* Lonell J., 673 N.Y.S.2d 116, 118 (App. Div. 1998).

31. 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, 1092-96 (1995).

32. *In re* Glenn G., 587 N.Y.S.2d 464, 470 (Fam. Ct. 1992).

33. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2005).

34. 576 N.Y.S.2d 937, 938 (App. Div. 1991).

35. This conclusion is reminiscent of language used to charge the *Nicholson* plaintiffs. They were, as victims, said to be "engaged" in domestic violence. *Nicholson*, 203 F. Supp. 2d at 186. During the Nicholson trial, ACS's division of legal services wrote a memorandum clarifying the

Second, the New York Court of Appeals' holding in *Nicholson* fleshed out this minimum-level-of-care standard. Initially, the court noted that this is a baseline standard, applying to all parents.[36] Further, it is a standard of minimum care, not ideal parenting.[37] Finally, the court said that the failure to provide this minimal care must be actual, not threatened.[38]

The court then stated that the issue must be evaluated by reference to an objective person standard: how would a reasonably prudent parent have acted under the circumstances?[39] The court thus declined to adopt a reasonable battered mother standard.[40] But it did make clear that the circumstances and the special vulnerabilities of the child are part of the calculus.[41] In conclusion, the court set forth numerous factors that would be relevant in assessing whether the battered mother behaved reasonably. Those factors include: risks attendant to leaving as well as staying; risks attendant to seeking redress and protection via "government channels;" and risks attendant to both criminal prosecution of the batterer and of relocation.[42]

The court's articulation of these specific considerations gives meaning to the standard of a reasonable prudent person under the circumstances. First, the court explicitly discussed actions that are traditionally deemed to be the "appropriate" response for battered women. Indeed, women are often penalized for failing to follow one or more of these steps.[43] Second, the court acknowledged that such actions carry risks—to the children as well as to the mothers. Therefore, the court validated the notion that battered women may be acting reasonably if they choose not to take certain expected actions.

Of course, it remains to be seen if this principle will be correctly applied. How can a woman demonstrate that if she chooses not to leave,

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phrase "engaging in domestic violence," stating that its "usage misstates the nature of the victim's role . . . ." Memorandum from Joseph Cardieri and William Bell, to ACS Department of Legal Services and Department of Child Protection Staff (Aug. 14, 2001) (on file with author). The memorandum mandated that the phrase no longer be used. *Id.* Attorney compliance with the *Nicholson* mandates remains "uneven at best." *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).

36. *Nicholson,* 820 N.E.2d at 846.

37. *Id.* This is clearly a constitutional requirement. The state could not coercively interfere with the liberty interest that adheres to the parent-child relationship based on a parent's failure to provide perfect parenting.

38. *Id.*

39. *Id.* This standard was suggested by early writings on the topic. Professor Miccio urged such a standard over a decade ago. Miccio, *supra* note 31, at 1097-98, 1105. Professor Miccio has since argued for a more stringent reasonable battered mother's test. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings,* 22 HARV. WOMEN'S L.J. 89, 94-95 (1999). *See also* Enos, *supra* note 10, at 264.

40. Miccio, *supra* note 39, at 94-95.

41. *Nicholson,* 820 N.E.2d at 846-47.

42. *Id.* at 846. *See also* Miccio, *supra* note 31, at 1098-99.

43. Dunlap, *supra* note 4, at 573-74; Miccio, *supra* note 31, at 1092.

get a protective order, or pursue criminal prosecution, she has, in fact, reasonably calculated the various options and their attendant risks? Fortunately, the Court of Appeals' decision may help here as well. The court credited this dilemma by citing favorably to recent legislative mandates for social services personnel to receive special training regarding the dynamics of domestic violence in order to avoid punitive responses.[44]

Although concluding that an allegation of witnessing alone does not satisfy the statutory requirements for neglect, the court did not hold that a neglect case alleging witnessing could never be properly established against a battered mother. Witnessing, on its own, is insufficient. But witnessing, coupled with evidence of harm and a parental failure of minimal care, can constitute neglect.[45]

B. Second Certified Question

The New York Court of Appeals then proceeded to the second certified question: "Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or other caretaker constitute 'danger' or 'risk' to the child's 'life or health,' as those terms are defined in the New York Family Court Act §§ 1022, 1024, 1026-28?"[46]

This certified question is important because improper removal of the children from their battered mothers was alleged throughout *Nicholson*. Indeed, the trial court found these removals to be a pervasive and unconstitutional practice.[47]

Removals are statutorily authorized to occur in four different circumstances. The court phrased the overarching issue presented for review as follows: "[W]hether emotional harm suffered by a child exposed to domestic violence, where shown, can warrant the *trauma of removal* under *any* of these provisions."[48] Consistent with this explicit statement that removal causes trauma, the court stated, "removal may do more harm to the child than good."[49]

Courts have determined that removal itself is harmful and justified only after a balancing of the harms that will occur absent removal—as have legislatures, through statutes and legislative history, and agencies, through written policies. Yet removal - often on an *ex parte* emergency

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44. *Nicholson*, 820 N.E.2d at 847 n.6.
45. *Id.* at 846-47.
46. *Id.* at 847.
47. Nicholson v. Williams, 203 F. Supp. 2d 153, 215 (E.D.N.Y. 2002).
48. *Nicholson*, 820 N.E.2d at 849 (emphasis added).
49. *Id.* The court further stated that removals should not be treated as the "safer course" to be used "to mask a dearth of evidence or as a watered-down, impermissible presumption." *Id.* at 853.

basis - is the rule in practice.[50] The perennial battle between what is right and what actually happens—the law on the books versus the law as it looks—is often fought in child protection proceedings.[51] Moreover, these hasty and ill-considered removals are not wrongs that are easily rectified. Removals often set the course for the case, in both the casework and legal focus.[52] As a practical matter, the burden transfers to the parents, who now must prove that they deserve the child back.[53] More importantly, as explicitly found by Judge Weinstein, removals harm children.[54] Removals are not a neutral, let's-play-it-safe option.

After acknowledging the trauma caused by removal, the New York Court of Appeals analyzed each type of removal.[55] It did so with reference to the Second Circuit's speculation that, depending upon how the state court interpreted the neglect statute, the removals were likely to be constitutionally infirm in any number of ways.[56] Further, the court noted that its analysis included balancing potentially conflicting child welfare policies such as keeping families together versus the need to protect children in cases of domestic violence.[57]

The court stated that since exposure to domestic violence is not presumptively neglectful, then exposure cannot be a presumptive ground for removal.[58] Moreover, identifying a risk of serious harm is not enough.[59] Instead, a court must balance the risk of staying against the risk of removal.[60] In addition, it must assess whether any risk that might flow from non-removal can be otherwise ameliorated.[61] To illustrate this latter point, the Court of Appeals cited with approval the possibility of removing the batterer rather than the child.[62]

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50. *Nicholson*, 203 F. Supp. 2d at 237. *See* Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 FAM. CT. REV. 540, 541 (2004).

51. The New York Court of Appeals acknowledged that extant practice might be contrary to statute. *Nicholson*, 820 N.E.2d at 853.

52. Chill, *supra* note 50, at 542.

53. *Id.* at 542-45. Battered mothers are immediately suspect for their perceived lack of parenting skills or even maternal instinct. Thus, this burden may prove to be insurmountable. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 157-68 (2000); Enos, *supra* note 10, at 267.

54. *Nicholson*, 203 F. Supp. 2d at 251; Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS. L. REP. 107, 118-19 (2002). Advocates of removal often appear to be unaware of or simply unwilling to acknowledge the well-documented cost of removal. *See, e.g.*, Melanie Margarida Nowling, *Protecting Children Who Witness Domestic Violence: Is Nicholson v. Williams an Adequate Response?*, 41 FAM. & CONCILIATION CTS. REV. 517, 520 (2003).

55. *Nicholson*, 820 N.E.2d at 849-54.

56. *Id.* at 847-48.

57. *Id.* at 848-49.

58. *Id.* at 849.

59. *Id.* at 851-52.

60. *Id.* at 852.

61. *Id.*

62. *Id.* at 851-52.

Two of the four possible avenues for removal create the greatest concern. Both of these are removals that can occur before the filing of a petition. The *ex parte* removal is pursuant to a pre-petition court order.[63] The other—an emergency removal—occurs via the agency's unilateral determination of risk of harm; a neglect petition and court review of the removal follow.[64] Describing the circumstances under which an emergency removal would be legitimate as "urgent" and "very grave,"[65] the court gave a very cautious assessment of when such removals would be appropriate.[66] The court was unwilling to say never, but nonetheless stated that it would be a "rare circumstance" in which emotional injury, or the risk thereof, would be sufficient to justify these emergency removals.[67]

C. Third Certified Question

The third question certified by the Second Circuit to the New York Court of Appeals was: "Does the fact that the child witnessed such abuse suffice to demonstrate that 'removal is necessary,' or that 'removal was in the child's best interests,' or must the child protective agency offer additional, particularized evidence to justify removal?"[68] Reiterating its prior conclusion that witnessing domestic violence does not trigger a presumption of removal, the court quickly determined that particularized evidence is needed.[69] However, it rejected the idea that such particularized evidence must include expert testimony.[70]

The reference to expert testimony carries *Nicholson* full circle back to *Lonell J.*[71] In *Lonell J.*, the trial court had refused to make a finding of neglect in the absence of expert testimony showing emotional harm as a consequence of witnessing domestic violence.[72] The appellate court, however, determined that such expert testimony was not required. The Court of Appeals, in *Nicholson*, declined to read *Lonell J.* as holding that witnessing was presumptively neglect. In so stating, it noted that the case had involved more than an assertion of witnessing; there were, the court said, "multiple factors" supporting a neglect finding.[73] Thus, although *Lonell J.* has been blamed[74] for starting the rush towards holding battered women liable for failure to protect,[75] the New York Court of Appeals'

63. *Id.* at 852.
64. *Id.* at 853-54.
65. *Id.*
66. *Id.* at 853-54.
67. *Id.* at 854.
68. *Id.* at 854 (internal citations omitted).
69. *Id.* at 382-83.
70. *Id.* at 855.
71. *Lonell J.*, 673 N.Y.S.2d at 116.
72. *Id.* at 117.
73. *Nicholson*, 820 N.E.2d at 855.
74. Or credited, depending on one's point of view.
75. *See* Zuccardy, *Transcript*, *supra* note 9, at 656-57.

conclusions support the notion that it was, in fact, misread and misapplied.

III. JUDGING *NICHOLSON*

In the final analysis, *Nicholson* offers a little something for everyone. It clearly provides that women who are beaten in front of their children are neither presumptively guilty of neglect nor presumptively subject to having their children removed. To some, however, that is a patently obvious reading of the statute. With its two-part, casually connected definition of neglect, its valid interpretation could not be otherwise. And, if it were, then federal constitutional provisions would require either that the statute be interpreted consistent with constitutional mandates or that it be struck down.[76]

Of course, this "obvious" conclusion eluded trial and appellate courts, as well as New York City's child welfare agency, for nearly a decade. So this clear enunciation of the statute by the Court of Appeals is welcomed relief to countless mothers and children who will, one hopes, no longer be subjected to agency "pique"[77] or "pitiless double abuse."[78] Further, the court's unequivocal assertion that the state must prove harm to children that is the result of a parent's failure to exercise a minimum degree of care may lessen the divide between the law as it reads and as it is applied. *Nicholson* was a lengthy and publicized case that cannot be overlooked; perhaps judges, lawyers, and child welfare professionals will now hew more closely to the law.

But the Plaintiffs' victory is not without limits. First and foremost, *Nicholson* makes clear that battered women whose children suffer emotional harm as a result of witnessing domestic abuse may still be neglectful parents.[79] It is now plain that the state must prove that such harm is the result of the mother failing to meet a minimum standard of care. It is equally plain, however, that such evidence is readily adducible. Indeed, *Nicholson* cites rather commonplace examples as to when a battered woman might be held culpable for letting her child witness her battery.[80] For instance, the court said there might be neglect if: a) the mother knew that her children were aware of the domestic violence; b) the children were afraid of the batterer; c) the mother allowed the batterer to return;

76. *Nicholson*, 820 N.E.2d at 847.
77. *Nicholson*, 203 F. Supp. 2d at 216.
78. *Id.* at 163. Judge Weinstein found that children were not returned home simply based upon the power of the agency to refuse to do so. *Id.* at 216. He also termed the ordeal of the battered mothers to be pitiless double abuse. *Id.* at 163.
79. Imminent risk of such harm would also satisfy the statutory requirement.
80. Nicholson, 820 N.E.2d at 846-47.

and d) the mother lacked awareness of the impact of the violence on the children.[81]

Thus, *Nicholson* makes it harder for the government to prove its case. Or, more bluntly, *Nicholson* holds that the government can no longer rely on baseless presumptions in lieu of offering evidence of harm.[82] But *Nicholson* most assuredly does not take away the cause of action. Thus, those critical of ACS's policy of alleging neglect based upon exposure may yet be critical of this result.[83]

The flaws inherent in the policy—and found by Judge Weinstein—are arguably still present. Battered women can still be held accountable for the wrongs of their batterers. Based on their status as abused women, they—and their children—are being subjected to the child welfare system, which itself may cause harm.[84] Further, they are not receiving the support they need from institutional actors in order to extricate themselves—and their children—from a violent setting.[85]

IV. *NICHOLSON'S* PRECEDENTIAL AND PERSUASIVE IMPACT

It is difficult to accurately gauge *Nicholson's* impact. First, the final outcome is still fresh.[86] Second, there is more than one *Nicholson* opinion. Although the state Court of Appeals opinion is binding state law, it may also be fairly argued that, in light of the way the case was resolved, there is no single definitive opinion.[87] Each of the three primary deci-

81. *Id.* (citing *In re* James MM, 740 N.Y.S.2d 730 (App. Div. 2002)). The court favorably cited cases in which exposure had been shown to meet the requirements of the neglect statute. *Id.*

82. *Nicholson,* 820 N.E.2d at 852-53.

83. This author has suggested that women never be charged with neglect on the sole ground that their children have witnessed domestic violence. Dunlap, *supra* note 4, *passim; See also* Collins, *supra* note 8, at 727-54. At least one state, Montana, appears to have done that. Dunlap, *supra* note 4, at 605-06.

84. Richard Wexler, *Take The Child and Run: Tales From the Age of ASFA,* 36 NEW ENG. L. REV. 129, 136-37 (2001).

85. Illustrating this point is the fact that the social worker in *Lonell J.* ceased working with the family because the father—the abuser—objected to her involvement. So it was legitimate for the professional to be scared off by the father but not for the mother to be so intimidated. *In re* Lonell J., Jr., 673 N.Y.S.2d 116 (App. Div. 1998). In many ways, *Lonell J.* is a textbook circumstance of domestic violence and all that it can represent. First, and at the risk of essentializing, the mother was a classic victim. She told the social worker that she deserved to be hit and, once the violence came to light, she minimized it. Second, the chaos of a family living in domestic violence was exacerbated as this family also lived a shelter. Finally, the shelter raises several points to consider. How was the violence occurring in such a public setting? That query, coupled with the fact that the social worker stopped her work with the family due to the father's objection, demonstrates graphically the sway exerted by batterers. Yet only the mothers are held accountable. *See also* Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women,* 23 ST. LOUIS U. PUB. L. REV. 7 (2004).

86. Indeed, the outcome will not be absolutely final until the case is removed from the suspense docket on Sept. 1, 2005. *See supra* note 5.

87. The *Nicholson* lawsuit itself has settled and is on the verge of dismissal; none of the judicial opinions that flow from this suit were reversed and thus are, at least, persuasive authority. The New York Court of Appeals opinion is, of course, binding law in the jurisdiction.

sions has value in its own way.[88] As one might expect, each has been cited in support of different propositions.[89]

The *Nicholson* opinions have been cited most frequently, of course, by New York courts. The New York Court of Appeals decision has been cited several times for its clear articulation of what the government must prove in a neglect case. In that capacity, it has been used by New York's intermediate-tier appellate courts to reverse lower court neglect findings against battered mothers. For instance, in *In re: Eryck N.*, two years after the *Nicholson* trial, a mother was charged with exposing her five children to domestic violence. They were removed from her care.[90] The appeals court reversed, citing the "landmark decision" of *Nicholson* in the New York Court of Appeals.[91] The court found that the "dearth" of evidence adduced concerning the effect of the domestic violence on the children did not meet the standard set forth in *Nicholson*.[92]

Nicholson has also been cited in cases in which the lower appellate courts have found the newly articulated burden to have been met. However, none of these cases yet involve the traditional failure-to-protect scenario of *Nicholson*.[93] But some come close. In *In re Taisha R.*,[94] the harm requirement was deemed to be met based on the "fear and distress" that one of the children experienced after the mother told the child not to tell anyone about the domestic violence.[95] This one-page appellate opinion raises several points of concern. First, there was another ground on

88. Those decisions are defined here as Judge Weinstein's memorandum opinion in support of the preliminary injunction, the Second Circuit's opinion, and the New York Court of Appeals' decision. There were, of course, other orders throughout the case. Judge Weinstein's Jan. 2001 order issuing the preliminary injunction, while the engine that ran the case, has not been cited as frequently as his memorandum in support of that injunction.

89. Often the various opinions are cited for reasons not particularly relevant for this analysis. For instance, Judge Weinstein's opinion has been cited for principles related to ineffective assistance of counsel. People v. Toms, 743 N.Y.S.2d 690, 699 (N.Y. Co. Ct. 2002). The *Nicholson* Second Circuit opinion has been cited, *e.g.*, for principles related to injunctive relief. Stauber v. City of New York, No. 03 Civ. 9162(RWS), 2004 WL 1593870, at *22 (S.D.N.Y. July 16, 2004).

90. *In re* Eryck N., 791 N.Y.S.2d 857, 857 (App. Div. 2005). The mother had initially gone with her children to a shelter and had secured a protection order. *Id.* However, she left the shelter in order to "facilitate visitation between her husband and the children due to a modification of the order of protection." *Id.*

91. *Id.* at 858.

92. *Id. See also In re* Ravern H., 789 N.Y.S.2d 563 (App. Div. 2005). Relying on *Nicholson*, the *Ravern* court reversed a neglect finding because the government had merely proven that the mother was a victim of domestic violence and the children had been exposed to it. *Id.* at 565.

93. *See, e.g., In re* Richard T., 785 N.Y.S.2d 169, 170 (App. Div. 2004), wherein the mother's instigation of an altercation with her own mother in the presence of the children was found to meet the standard set forth in *Nicholson*. *But cf. In re* Daniel GG, 792 N.Y.S.2d 710, 711-12 (App. Div. 2005), in which the court reversed a neglect finding based on a single incident of shoving where harm to the child was not demonstrated. In *In re* Paul U., 785 N.Y.S.2d 767, 769 (App. Div. 2004), the court determined that a neglect finding based upon a mother's attempt to place her son permanently with the father who was subject to a stay-away order from both mother and child was consistent with the just-announced *Nicholson* standard. The child, although not yet harmed, was in imminent danger of impairment and the mother's actions, in light of her knowledge of the father's past violence, were not within the necessary minimum degree of care. *Id.*

94. 788 N.Y.S.2d 357 (App. Div. 2005).

95. *Id.* at 358.

which to establish neglect, so it can be argued that the court unnecessarily found harm on the domestic violence allegation.[96] Further, this mother may have reasonably believed that her actions—telling the child not to tell anyone about the abuse—were protective.[97] Thus, even if the harm prong was proven, perhaps the failure to meet a minimum standard of care was not.[98]

Neglect was found in each of the preceding cases at the trial level, even if subsequently reversed by an appellate court. And each of these cases was initiated in 2003, over a year after the *Nicholson* injunction was issued. But none of the trial level courts appear to have been influenced by the case.

What can explain the initial reticence to follow *Nicholson*?[99] There is little doubt that these judges were aware of the *Nicholson* case, as it received significant publicity.[100] One explanation is that natural, indeed constitutional, tension between state and federal courts. This tension may approach animosity when state courts perceive that the federal courts are intruding upon state court jurisdiction.[101] The Second Circuit mentioned this as grounds for its decision to certify the three questions of state law to the New York Court of Appeals.[102] Further, *Nicholson* lawyers have suggested that, in general, courts were unhappy with the litigation.[103] It is also possible that, on a substantive level, the courts disagreed with Judge Weinstein's decision, which was not binding on the state courts.[104] Therefore, they simply chose not to follow it.

96. The second ground was marijuana usage. *Id.*

97. *Id.* This case also flags the domestic-violence sensitive lawyering that will be required under *Nicholson*. In order to demonstrate that certain actions are protective and reasonable, lawyers representing these mothers will themselves need to be aware of the issues in a way that permits them to bring relevant evidence before the court. *See* Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L. J. 217, 305 (2003).

98. The *Nicholson* Court of Appeals decision listed factors that a court must weigh in assessing whether the minimum standard of care has been met. *Nicholson*, 820 N.E.2d at 846. One can easily imagine that a parent who has been threatened with further harm should she reveal the abuse might reasonably caution her child against such disclosure.

99. Of course, no court has articulated this reticence. And in what are typically very brief appellate opinions, rationale is often unstated and hard to discern. But in each of the referenced cases, battered women were prosecuted for exposure notwithstanding the *Nicholson* case.

100. *Supra* note 1.

101. *See, e.g.*, Nora Meltzer, *Dismissing the Foster Children: The Eleventh Circuit's Misapplication and Improper Expansion of the Younger Abstention Doctrine in* Bonnie L. v. Bush, 70 BROOK. L. REV. 635, 636 (2005).

102. Nicholson v. Scoppetta, 344 F.3d 154, 176 (2d Cir. 2002).

103. Zuccardy, *Transcript*, *supra* note 9, at 670. The author's own practice experience in Washington, D.C. corroborates this tension. The District of Columbia child welfare system was placed under receivership by a federal court. LaShawn A. v. Dixon, 762 F. Supp. 959, 988-89 (D.D.C. 1991). Following that action, there was general confusion over the jurisdictional boundaries between the federal court, the receiver, and "state" court judges hearing individual neglect cases. Zuccardy also discusses the state-federal court tension. Zuccardy, *Transcript*, *supra* note 9, at 669.

104. The injunction was issued against ACS. *In re* Nicholson, 181 F. Supp. 2d 182, 183 (E.D.N.Y. 2002).

Whether one agrees with it or not, the trial court's opinion is compelling reading. Onc easily can come away appalled by the practices and policies that the court found proved by the evidence.[105] However, the decision, even with its extensive findings and conclusions, has been cited relatively infrequently. Paradoxically, it has been cited for the proposition that witnessing domestic violence can cause harm.[106] While the *Nicholson* opinion does say that,[107] its legally salient point is that witnessing is not presumptively harmful.[108]

In addition, the *Nicholson* trial court opinion addressed more than the three issues certified to the New York Court of Appeals. For instance, Judge Weinstein found that the system of court-appointed counsel for the "abused mothers is largely a sham."[109] Much of the problem, Weinstein opined, was the result of the inadequate system of compensation for court-appointed counsel.[110] The Second Circuit, however, deferred resolution of this issue, pending a decision by the New York Court of Appeals.[111] That issue has been resolved subsequently by increased compensation to court-appointed counsel.[112]

The trial court also discussed the impact of a report of neglect upon a battered women's employability. The issue, in short, is the lingering consequences of a substantiated report of neglect. In New York, the State Central Register for Child Abuse and Maltreatment receives, screens, and investigates reports of child abuse.[113] If a report is "indicated,"[114] all information concerning the allegation and its investigation is maintained in the register until the youngest child in the subject family turns twenty-eight.[115] Persons on that register as subjects of "indicated"

105. Zuccardy describes testimony that caused everyone in the courtroom, including the judge, to be teary-eyed. Zuccardy, *Transcript*, *supra* note 9, at 667.

106. McEvoy v. Brewer, No. M2001-02054-COA-R3-CV, 2003 WL 22794521, at *4 n.4 (Tenn. Ct. App. Nov. 25, 2003).

107. As summarized by Judge Weinstein, the experts agreed that exposure to domestic violence *could* result in harm (emphasis added). Nicholson v. Williams, 203 F. Supp. 2d 153, 197 (E.D.N.Y. 2002).

108. *Id.*

109. *Id.* at 253. Judge Weinstein has written about this issue. Jack B. Weinstein, *Hamlet in the District Court: Facing Personal Ethical Dilemmas*, 32 HOFSTRA L. REV. 1173, 1175 (2004). His findings on the issue of lawyer compensation have been cited several times. *See, e.g.*, Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1362 (N.D. Ga. 2005). *See also* Buel, *supra* note 97, at 290.

110. *Nicholson*, 203 F. Supp. 2d at 257.

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

112. Zuccardy, *Transcript*, *supra* note 9, at 669; N.Y. COUNTY LAW § 722-b (McKinney 2005).

113. *Nicholson*, 203 F. Supp. 2d at 166. The investigation function is generally delegated to local agencies. *Id.*

114. An "indicated" report is one that the agency, after investigation, determines is supported by credible evidence. *Nicholson*, 203 F. Supp. 2d at 166-67; N.Y. SOC. SERV. LAW § 412(12) (McKinney 2005).

115. *Nicholson*, 203 F. Supp. 2d at 166-67; N.Y. SOC. SERV. LAW § 422(6) (McKinney 2005).

reports are generally prevented from obtaining jobs in which they will be working with children.[116]

For battered women, the resultant damage is obvious and cruel. They are beaten up in the presence of their children. They are charged with neglect. Their children are removed from their care and custody. Their name is placed on the register. They are debarred from occupations involving children, *e.g.*, as childcare workers, teachers, or teacher's aides. They thereafter lose or are prevented from procuring employment. Thus, they are deprived of the economic resources required to leave the batterer. And the cycle starts over.

Of course, *Nicholson* has had an impact beyond what can be gleaned from case citations. Most obviously, ACS has reformed its practices.[117] Attorney compensation has been increased.[118] Further, the state legislature has enacted a law requiring all child protection caseworkers to be trained in the principles set forth in *Nicholson.*[119]

Of what import is *Nicholson* beyond the state boundaries of New York? Its ultimate resolution on state law rather than federal constitutional grounds is likely to limit its national reach. Child abuse and neglect law flows from both state law and federal constitutional law. But the legal provisions for holding mothers liable for witnessing are primarily state-law based.[120] Since the case was settled on the strength of the New York Court of Appeals' interpretation of state neglect law, its legal relevance for other state's statutory and decisional law is persuasive at best.

There are often similarities, however, among state neglect laws. Therefore, to the extent a state has laws identical or even similar to *Nicholson*, its impact may extend beyond the boundaries of New York. By way of example, New Jersey's definition of neglect is remarkably similar to New York's. It has the same, causally connected, two elements: 1) harm—or its imminent risk; that 2) results from the parent's failure to exercise minimum care.[121] Accordingly, a New Jersey court

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116. There are ways around this barrier, but they involve the submission by the employer of written rationale for hiring a person who is the subject of an indicated report. *Nicholson*, 203 F. Supp. 2d at 166-67. One can easily imagine that employers may not choose to do this extra work, especially if there are other potential employees.

117. *Nicholson* Review Committee Report, *supra* note 35, at *passim*. The *Nicholson* Review Committee ("NRC") was established as part of the preliminary injunction. *In re Nicholson*, 181 F. Supp. 2d at 192-93. It met monthly to assess compliance with the injunction. The NRC reports to Judge Weinstein indicate that the reform of ACS practices was not always quickly or smoothly accomplished. *Nicholson* Review Committee Report, *supra* note 35, at *passim*.

118. *See* Zuccardy, *Transcript*, *supra* note 9, at 668-69.

119. Zuccardy, *Transcript*, *supra* note 9, at 669-70.

120. *See, e.g.*, Dunlap *supra* note 4, at 599-607. *See* Mundorff *infra* note 128, at 148-55 for a description of some of the training for ACS workers prior to *Nicholson*.

121. N.J. STAT. ANN. § 9:6-8.21(c)(4) (West 2005).

could find New York's highest court's interpretation of an identical statute to be compelling.

Indeed, a New Jersey appellate court, in *New Jersey Division of Youth and Family Services v. S.S.*,[122] cited to Judge Weinstein's findings when it held that witnessing domestic violence does not necessarily harm children.[123] In reversing a neglect finding against a battered mother, the court wrote that the agency officials and the court below improperly assumed that witnessing domestic violence harmed children.[124] It thus reached the same conclusion that the New York Court of Appeals in *Nicholson* later reached: a battered mother may be held liable for neglect for permitting her child to be exposed to domestic violence if and only if the state proves harm that was the result of her failure to exercise a minimum degree of care.[125]

The several *Nicholson* opinions have been cited in numerous law review articles, both favorably[126] and otherwise.[127] Two articles have recently examined the slavery and involuntary servitude parallels flowing from Judge Weinstein's conclusion that there were possible violations of the Thirteenth and Nineteenth Amendments.[128] Likewise, legal commentary has cited *Nicholson*.[129]

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122. 855 A.2d 8 (N.J. Super. Ct. App. Div. 2004).

123. New Jersey Div. of Youth & Family Servs., 855 A.2d at 15-16.

124. *Id.* at 16. In *S.S.*, the mother was attacked by her husband while their 21-month old boy was in her arms. *Id.* at 10. The child was removed on an emergency basis without a court order. *Id.* at 11-12. The mother was not allowed to be with the child unsupervised. *Id.* at 11. In its reversal, the appellate court noted that there was no evidence that the child was harmed. *Id.* at 14. According to the caseworker, he was "a cute little guy who was friendly, happy and healthy." *Id.* at 12. Other testimony "confirmed" that the mother was a good parent. *Id.* Nor was any other testimony presented regarding the impact of witnessing domestic violence. *Id.* at 13-14.

125. *Id.* at 15. The *S.S.* court made clear, as did the *Nicholson* court, that the harm may be unintentional, *i.e.*, a parent who acts in reckless disregard of known risks to the child. *Id.*

126. *See, e.g.*, Heidi A. White, *Refusing To Blame The Victim For The Aftermath of Domestic Violence:* Nicholson v. Williams *Is A Step In The Right Direction*, 41 FAM. CT. REV. 527, 531 (2003); Buel, *supra* note 97, at 288-95; Collins, *supra* note 8, at 726-37; Trepiccione, *supra* note 10, at 1522. Trepiccione's article was written while *Nicholson* was pending and predates even the trial decision; however, she predicted it well. She criticized the rush to assume that witnessing causes harm. *Id.* at 1501-06.

127. *See, e.g.*, Nowling, *supra* note 54, at 523-24. In her negative assessment of *Nicholson*, Nowling makes a series of challengeable assertions. Further, she urges courts not to be hasty in deciding the "health and welfare" of children. *Id.* at 520. Of all the possible critiques of *Nicholson*, that it was decided hastily seems ill-founded.

128. Nicholson v. Williams, 203 F. Supp. 2d 153, 247-48 (E.D.N.Y. 2002); Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 131, 136-47 (2003). Mundorff writes chillingly of his experiences as a Child Protective Specialist for ACS. His conclusions about race and racism, improper removals, monetary incentives, and the harms caused by foster care are sobering, to say the least. *Id.* at 148-63. Moreover, they speak volumes about the folly of removing children unnecessarily. "When in doubt, take 'em out" was one trainer's refrain. *Id.* at 152. *See also* Shima Baradaran-Robison, *Tipping the Balance in Favor of Justice: Due Process and the Thirteenth and Nineteenth Amendments in Child Removal from Battered Women*, 2003 B.Y.U. L. REV. 227, 239-63 (2003).

129. *See, e.g.*, Janice Inman, *Supreme Court Limits Removing Children From Homes Due to Partner Abuse*, N.Y. FAM. L. MONTHLY, Dec. 6, 2004, at 3; 3 AM. JUR. 2D *Proof of Facts* § 17.3

It is somewhat surprising that the *Nicholson* opinions have not been more widely cited.[130] The implications are open to interpretation. For instance, does the low number of citations simply indicate that interested persons were waiting for the litigation to play out? If so, then it is fair to expect *Nicholson* to be cited more now that the case has concluded. Or, is it that the number of different *Nicholson* opinions makes reference to it more difficult? The exact holding of *Nicholson* is, in some ways, difficult to pinpoint. Finally, perhaps the lack of extensive citation reveals a disagreement with the decision itself.

CONCLUSION: LOOKING AHEAD

Will the conclusions of *Nicholson* ultimately take hold, both among the relevant professional cohort and in the world of public opinion? Will those groups endorse the notion that witnessing domestic violence, standing alone, is insufficient to sustain neglect charges against battered mothers?

Even those who think *Nicholson* was rightly decided must acknowledge the challenge of this proposition. For years, advocates against domestic violence have urged that courts consider the impact that exposure to domestic violence has upon children.[131] Finally, legislatures, courts, researchers, and relevant agencies started to take notice. The assertion that children are harmed by exposure then became engraved as sacred truth. So to now urge that the impact of exposure has been oversold may strike many as either self-serving or contrary to the evidence.

The evidence, however, does indeed show that the assumptions about the universality of harm were not well-founded. The experts in *Nicholson* agreed that harm was possible, not inevitable.[132] There is, of course, a range of "possibles" and some experts may find harm more likely than others.[133] The problem now lies with how to present the evidence that witnessing is not necessarily harmful.

It is here that critical thinking about the purpose, effects, and legal bases for the child abuse and neglect system is so important. Such critical analysis leads one to reject the sloppy logic that transforms the obvious assertion that it would be better if children did not witness domestic violence into the conclusion that witnessing always harms children and

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(2005); RONALD B. ADRINE & ALEXANDRIA M. RUDEN, BALDWIN'S OHIO HANDBOOK SERIES §§ 8:6, 14:24 (2004).

130. Whether a case has been widely cited is, to some degree, a matter of opinion.

131. *See* Dunlap *supra* note 4, at 583-84.

132. The evidence proffered at the *Nicholson* trial is a valid starting point. Competing experts testified and Judge Weinstein made conclusions about areas of agreement. Nicholson v. Williams, 203 F. Supp. 2d 153, 197-99 (E.D.N.Y. 2002).

133. Evan Stark, an expert for the Plaintiffs, suggests that in 60-75% of families in which domestic violence is occurring, there are no mental health effects for the children. Stark, *supra* note 54, at 116-17.

that battered women should be held liable if their children witness the violence.

Jill Zuccardy, one of the *Nicholson* lawyers, is sanguine about the long-term impact of *Nicholson.*[134] Calling it a "unique case for systemic reform," she believes *Nicholson* provides the basis for changing societal biases on domestic violence and mothering.[135] Her optimism may be well-founded.[136] She has spoken widely about the case in this country and she, along with her *Nicholson* co-counsel, have traveled to Australia to speak to local government officials in the hope of preventing whole-sale wrongful removals similar those that helped precipitate the *Nicholson* litigation.[137]

Those who are persuaded by the findings of the *Nicholson* trial court can only hope that Zuccardy is right. There can be two opposite reactions to the facts highlighted in *Nicholson.* First, the horrified, disbelieving one. This reaction reveals disbelief and outrage that women are being blamed.[138] The second reaction offers the requisite sympathy to the battered adult, but firmly asserts that the children's interest must prevail.[139] Perhaps both reactions need tempering. The first absolves the mother of responsibility for protection that is inherent in parenting.[140] The second is ostrich-like in its assertion that removal benefits children.

Sweeping conclusions about *Nicholson* are yet premature. While in their midst, cultural and legal change mimic a glacial pace. Fortunately, hindsight can offer some perspective. As Professor Miccio pointed out a decade ago, women were being charged with failing to protect their children from witnessing acts that, a few short years earlier, were "socially permissible."[141] Within a relatively short period, wife abuse moved from

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134. Zuccardy, *Transcript, supra* note 9, at 665-70. Zuccardy's optimism is shared by others. Inman, *supra* note 129, at 3; Buel *supra* note 97, at 291-92.

135. Zuccardy, *Transcript, supra* note 9, at 665-70. *See also* ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 148-78 (2000).

136. It is most important, of course, that *Nicholson* be successful within New York and, especially, New York City. Class actions and other reform litigation have had a mixed history of success – if success is defined by systems change, not just a technical legal "win." Professor Elizabeth Cooper, who teaches a class at Fordham University Law School entitled Institutional Reform Through the Courts, suggests that the *Nicholson* class action may have a greater chance of success since it focused on changing a narrow, discrete wrong. Conversation with Elizabeth Cooper, Associate Professor of Law, Fordham University School of Law (June 18, 2005).

137. E-mail from Jill Zuccardy, Director, Child Projection Project, Sanctuary for Families, to Justine Dunlap, Associate Professor of Law, Southern New England School of Law, May 31, 2005 (on file with author).

138. Buel, *supra* note 97, at 224.

139. *In re* Jane Doe, 57 P.3d 447, 464 (Haw. 2002). *See also* Brooke Kintner, *The "Other" Victim: Can We Hold Parents Liable for Failing to Protect Their Children from Harms of Domestic Violence?*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 271, 282-95 (2005).

140. Although it is axiomatic that protecting children is inherent in parenting, the author does not mean to suggest that the inherent protective nature of parenting legitimizes charging battered women with failing to protect their children from witnessing domestic abuse. It is important not to wrongly extend appropriate responsibility into strict liability.

141. Miccio, *supra* note 31, at 1090.

being legal to being subject to criminal and civil laws. To then move rather quickly to charging battered women with failing to protect their child from witnessing that abuse seemed regressive. Progress, however, comes in fits and starts. *Nicholson* is surely a step forward. Perhaps it will lead, as Zuccardy suggests, to a positive change in social attitudes to towards battered women and their mothering capabilities.[142]

142. The *Nicholson* Review Committee Report offers some cause for concern here. It concludes that ACS "remains equivocal" about acknowledging or accepting responsibility for the constitutional violations found by the district court. *Nicholson* Review Committee Report, *supra* note 35, at 10.