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THE "PITILESS DOUBLE ABUSE" OF BATTERED MOTHERS⁺

JUSTINE A. DUNLAP*

Mothers are expected to do and be all for their children, and those who fall short are criticized. Elizabeth Schneider makes this unassailable assertion in her book *Battered Women and Feminist Lawmaking*.¹ In the chapter entitled *Motherhood and Battering*, Schneider argues that society reserves its greatest opprobrium for mothers who harm their children or who are perceived to stand idly by while others harm their children.² As Schneider demonstrates, women who fail to protect their children, even if they attempt to do so, can be legally liable and soundly condemned.³ This ill-conceived accountability is most likely to occur when the mother is herself a victim of violence. Thus the dangerous confluence of two powerful archetypes—being a mother and being battered—inflicts double injury on women who wear both mantles. They not only bear the scars of their abuser, but they also shoulder the blame for the harms others cause to their children.⁴

⁺ *Nicholson v. Williams*, 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002).

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1. See ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 150 (2000) (noting the general cultural attitude that mothers can and should sacrifice anything for their children).

2. See *id.* at 148 ("Battered women who are mothers are reviled.").

3. See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 168 (E.D.N.Y. 2002) (pointing out that plaintiff Nicholson makes sure her children are cared for while she is in school or working, by either taking them with her, taking them to daycare, or providing for a babysitter). Despite her efforts, the city removed her children from her care after an incident of battering by her partner and later charged her with neglect. See *id.* at 169-71. On April 4, 2003, the Second Circuit Court of Appeals heard arguments in the appeal of the district court's decision in *Nicholson*. See *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002), *appeal docketed*, No. 02-7079 (2d Cir. Jan. 23, 2002).

4. The "other" involved here is the known "other," most likely the intimate "other," as it would be exceedingly unlikely that a woman would be blamed for harm to a child caused by a stranger unless, of course, the mother had left the child

A battered woman is stereotyped as weak, helpless, incapable or unwilling to redress the situation in which she finds herself.⁵ This stereotype faults the battered woman for her batterer's actions. For battered mothers, this notion is compounded. As Schneider points out, the battered mother is stereotyped as possessing weaknesses that prevent her from caring for her children or, worse yet, encourage her to choose her abuser over her children.⁶

Children living in homes where their mothers are battered can suffer physical harm in many ways. Of course, a batterer might intentionally abuse a child as well as an intimate.⁷ A battered woman herself is more likely to abuse her child than is a woman who is not abused.⁸ Children can also be caught in the crossfire and suffer accidental injury. Children, particularly adolescents and especially adolescent boys, are often injured while attempting to protect their mothers.⁹ In addition to physical harm, children who are exposed to domestic violence can be harmed in non-physical ways. Recent data has shown that children who witness domestic violence are subject to various emotional and psychological harms.¹⁰ This data has been used to limit a batterer's right to custody.¹¹ It has also been used to

inappropriately in the care of such a stranger; then she might be called to account for that choice.

5. See Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 628 (2000) (noting the many "theories" attached to battered women, among them battered women's syndrome and survivor theory). In an article that takes the learned helplessness explicit in battered women's syndrome to an extreme, Ruth Jones suggests that some women are "coercively controlled battered women" who lack the ability to act on their own behalf and for whom there should be state intervention in the form of guardianship. *Id.*

6. See SCHNEIDER, *supra* note 1, at 154 (noting that battered women are often forced to choose between their children and their battering partner).

7. See *id.* at 152 (citing studies that show a high correlation between child and "intimate other" abuse).

8. The data on this is mixed. While one expert in *Nicholson* testified that the "man hits wife, wife hits child" scenario is rare, 203 F. Supp. 2d at 197, others show it to be more common. See, e.g., Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 359 (1995) (noting that some parents who are victims of domestic violence are also the perpetrators of child abuse).

9. See generally Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 83 (2001) (describing incidents in which children were injured while attempting to protect their mothers from her abusive partner).

10. Although all children who witness domestic violence may be subject to increased risk, the evidence shows that not all such children actually suffer harm. See, e.g., *Nicholson*, 203 F. Supp. 2d at 197 (finding that children's responses to witnessing domestic violence can vary from little or none to serious, depending on a wide variety of factors, such as the child's age and the extent of the violence).

11. See, e.g., *In re Vaughn*, 664 N.E.2d 434, 437 (Mass. 1996) (stating that abuse,

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penalize battered women by charging them with failing to protect their children.

Schneider opines that the hallowed status of motherhood¹² should render it shocking that much woman abuse commences during pregnancy.¹³ Likewise, it should be similarly shocking that authorities remove a battered woman's child from her care because the child has seen his or her mother battered. But exactly this scenario forms the basis of a class action lawsuit in New York City against, *inter alia*, the Administration for Children's Services ("ACS").¹⁴ This Essay examines that lawsuit in light of Schneider's chapter on *Motherhood and Battering in Women and Feminist Lawmaking*.

"SUFFERING AND TRAUMA"¹⁵ BEYOND MEASURE

In January 2001, battered women and their children filed a class action¹⁶ against ACS for its removal of children from battered mothers because the mothers had "engaged in" domestic violence by being battered.¹⁷ On January 3, 2002, United States District Court Judge Jack Weinstein issued a preliminary injunction barring ACS from separating children from their mother based on the fact that the mother was considered to engage in domestic violence by being a victim.¹⁸ That injunction was followed by an extensive supplemental memorandum on March 18, 2002.¹⁹ He began his strongly worded

by and of any family member, must be accounted for when determining the best interests of the child, specifically when a custody decree is at issue).

12. See SCHNEIDER, *supra* note 1, at 149 (discussing motherhood as the "greatest joy" in some women's lives). Paradoxically, motherhood also has another, subordinating function. See *id.* (identifying as "a principal way that women are shackled to an inferior status . . .").

13. See *id.* at 150 (noting that "[f]orty percent of assaults by male partners begin during a woman's first pregnancy . . .") (citations omitted).

14. See generally *Nicholson*, 203 F. Supp. 2d at 153.

15. *Id.* at 251.

16. Individual women and children filed suits in 2000, but did not seek class certification until January 2001. See *id.* at 164-65.

17. See *In re Nicholson*, 181 F. Supp. 2d 182, 184 (E.D.N.Y. 2002) (amended memorandum, order and preliminary injunction) (noting that ACS had systematically and repeatedly removed children of battered mothers because the mothers had "engaged in" domestic violence by being victims).

18. See *id.* at 183 (issuing a preliminary injunction against ACS because of the "serious and imminent danger to plaintiffs caused by defendants' continuing constitutional violations" of plaintiffs' rights).

19. See *Nicholson*, 203 F. Supp. 2d at 165 (describing the chain of events in the case). The court ordered the certification of two subclasses, one of children and one of parents, primarily mothers, and, during the summer of 2001, weeks of testimony in the preliminary injunction. See *id.* The court also stayed the preliminary injunction for a period of six months to allow the City of New York time to correct its constitutionally flawed ways. See *id.*

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memorandum by acknowledging that the ACS practice constituted widespread cruelty against battered mothers, a practice that he characterizes as “pitiless double abuse.”²⁰ Judge Weinstein understood the predicament of battered mothers and set about to correct it.²¹

The list of wrongs ACS perpetrated against battered mothers and, by extension, their children,²² is long indeed. The city would pursue reports of neglect against mothers when the sole allegation was that the mother had “engaged in domestic violence.”²³ Arguably, this is a reasonable—or, at least, not a constitutionally offensive policy—until one uncovers the meaning of “engaged in domestic violence.” Notwithstanding a suggestion of mutuality²⁴ by combatants implied in the phrase “engaged in domestic violence,” here it meant that the mother had been battered, and *perhaps* had the audacity to be abused while her children were present.²⁵

ACS was aware that the phraseology “engaged in domestic violence” and its underlying policy were misguided. The agency’s director of Domestic Violence Policy and Planning testified that the language distorted the dynamics of domestic violence but that no one told the legal arm of ACS to use new language because that would require telling “them what would be appropriate language [to use] instead.”²⁶ It is hard to determine which is worse: the director not taking the time to advise the legal players of “appropriate” language, her willingness to admit it, or the legal team’s apparent inability to craft suitable language in the petitions they file.

20. *Id.* at 163.

21. In so doing, however, Judge Weinstein makes some sweeping statements that, while utopian, bear no basis to reality. For instance, he asserts that physical abuse of mothers and children, or the threat thereof, “is not tolerated in our American society.” *Id.* at 164. Well, one need not be steeped in feminist principles to challenge the validity of that statement. Indeed, Weinstein’s own opinion, recounting the class action suits against the City of New York for the institutionalized maltreatment of children, belies this assertion. *See id.* at 194-96. This illustrates well the paradox, recognized in *In re Vaughn*, that domestic violence is “both intolerable and too readily tolerated.” 664 N.E.2d 434, 437 (Mass. 1996).

22. Weinstein leaves no doubt that the children, a separate subclass in the cause of action, are victims of the city’s policy. He states that “as a matter of policy and practice, ACS does not merely fail to advance the best interests of children . . . they harm children.” *Nicholson*, 203 F. Supp. 2d at 250-51.

23. *Id.* at 214.

24. Of course, one of the dilemmas of domestic violence is that mutuality is often asserted when there is none or self-defense is reconfigured as mutuality and necessary relief for the non-aggressor is then withheld.

25. *See Nicholson*, 203 F. Supp. 2d at 168-93 (providing case histories of the ten plaintiffs, all victims of domestic violence, who were sometimes abused in the presence of their children).

26. *Id.*

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Experts in the lawsuit testified that one of the reasons that ACS seeks to hold mothers accountable over 90% of the time while proceeding against the batterer in just over 50% of the cases is that the mother is the "focal point" of the child abuse and neglect system.²⁷ This point is consistent with Schneider's theme that mothers bear primary responsibility for children. Thus, when childrearing goes awry, mothers also bear the primary burden, evidenced by the percentage of cases brought against battered mothers in contrast to cases filed against the abuser.²⁸

Further, Judge Weinstein found an ACS "agency-wide practice of removing children . . . without evidence of a mother's neglect and without seeking prior court approval."²⁹ ACS removed children for any of several reasons, including an agency policy that resolved any ambiguity in favor of removal and as a way to "motivat[e]" the mother to cooperate with ACS.³⁰ The judge found that return of children who had been removed was also fraught with difficulty.³¹ Although some returns were delayed due to "administrative inefficiency,"³² other children were kept from their mothers simply because the agency had the power to do so.³³ According to Weinstein, the untimely returns were explained by reasons unrelated to protecting children.³⁴ Those reasons include employee pique and the power to punish or coerce the mother and child into compliance with agency

27. *See id.* at 209, 211 (maintaining that historically, ACS has not given fathers much attention and does not expect that they will participate in referral services).

28. *See id.* at 210 (reporting that ACS "prosecutes the victim of domestic violence for neglect in Family Court in approximately 935 cases a year . . . [whereas] [t]he abusive partner is charged with causing harm to the child by engaging in domestic violence in only 15.4% of cases."). It is worth noting that it is possible that the abusing men could not have been respondents in child dependency charges because they were neither biologically parents nor acting in loco parentis. Of course, the absence of a parental nexus would not preclude the filing of criminal child endangerment charges.

29. *Id.* at 215.

30. *See id.* (indicating that ACS often delays judicial approval of the removal to first attempt to "work things out with the mother.").

31. *See id.* at 216 (finding that ACS unnecessarily delays the return of separated children to their mothers even after the Family Court has ordered their reunion).

32. *See id.* (citing employee abuse of power as reason for delay in many instances).

33. *See id.* (stating that ACS could remove a child without judicial approval simply on the basis of suspicion of future harm to child, or merely on information submitted in the first report prior to conducting an investigation).

34. "Untimely" is often used in legal parlance. But untimely, under the facts of some of the *Nicholson* plaintiffs, included weeks passing without visits between mother and children, missed birthdays, and illness and physical harm to the children while in the care of foster parents. *See id.* at 168-69.

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fiat.³⁵ Pitiless double abuse indeed.

Judge Weinstein found that it was ACS's pervasive practice to treat mothers unfairly as a group.³⁶ Such pervasive governmental practice, he said, ran afoul of the Fourth, Ninth, Thirteenth, Fourteenth, and Nineteenth Amendments.³⁷ Moreover, the judge declared that the constitutionally offensive and affirmatively harmful separation of children from their battered mothers rested on "false assumptions and findings . . . that she [the mother] permitted or encouraged her own mistreatment."³⁸ The court credited expert testimony that ACS policy and training were based on antiquated views of domestic violence.³⁹ Those views result in assumptions that battered women "suffer from learned helplessness."⁴⁰ The judge further found that the city, as a policy and practice, had failed to investigate what steps the battered mother had taken to protect her children, and what services the agency could have offered to bolster the mother's individual attempts.⁴¹

This failure is consistent with the harsh judgment and facile solutions visited upon the battered woman. The specter of learned helplessness hangs over her and rarely, if ever, is she credited with taking appropriate steps to protect herself and her children. The label of "battered woman" has stuck with societal force. With the second label of "battered mother" superimposed over the first, she stands virtually no chance of being viewed as a competent, loving mother.⁴² If this conclusion were ever in doubt, one only need look as far as the findings in Judge Weinstein's order to confirm the pernicious effects of the stereotype.

A mother's status as "battered" is the complicating factor. If the woman were simply a "mother," rather than a "battered mother," she would be deemed capable of foreseeing and tending to all of her children's needs. Indeed, no less would be accepted from her, as societal expectations of the "good mother" would be the norm. But,

35. *Id.* at 216.

36. *Id.* at 248.

37. *See id.* (finding that separating a mother from her children solely because she has been abused violates her constitutional rights).

38. *Id.* at 252.

39. *See id.* at 217 (explaining that caseworker training at ACS inadequately equips workers to "recognize or even address the essential dynamics of domestic violence.").

40. *Id.*

41. *See id.* at 250 (noting that as a matter of practice, ACS removes children before investigating a particular situation).

42. *See SCHNEIDER, supra* note 1, at 154 (suggesting that society has difficulty imaging that a woman who is battered could be a good mother).

as Schneider points out, women as mothers are cast in one of only two possible roles: the “good mother” or the “bad mother.”⁴³ In this binary system, if the woman is not the “good mother,” she is the “bad mother.” She is a mother who is not all-sacrificing, who has chosen—ostensibly by her behavior or her own “poor” choices—to be placed in another, unacceptable role. There is little or no societal hesitation in this rush to judgment. Nor is there questioning of whether this recasting is warranted. No one asks whether it is the woman’s own behavior that is fault-worthy. To ask the question is to give the answer: it is not the woman’s behavior, but rather that of the batterer, that is to blame.

It is no surprise that the child abuse and neglect system blames the mother. The expert testimony in *Nicholson v. Williams* demonstrates this,⁴⁴ as does Schneider.⁴⁵ The mother is the focal point of the abuse system and, therefore, the available blame inexorably is hers. Occasionally, of course, the abuser may be nominally “blamed”; for example, he may be named in the neglect petition along with the mother.⁴⁶ In the way of real consequences, however, the battered mother still absorbs the lion’s share, even if the batterer is named in court proceedings. First, if the children are removed, they are taken from their mother and she will have to deal with the trauma—both hers and theirs—flowing from the removal. Next, even if the system tags the abuser as deserving of blame, it is the battered mother who must achieve the only goal that matters: return of the children and cessation of state interference. Often, the conditions she must satisfy are boilerplate, punitive, unnecessary, intrusive, and quite conceivably, affirmatively harmful.⁴⁷ Yet if she fails to jump through these bureaucratic hoops, the return of her children will be delayed.

Ironically, the battered mother who takes affirmative steps to help herself and her children is most likely to become entangled with the child welfare system.⁴⁸ As both the *Nicholson* case and Schneider

43. *Id.* at 152.

44. See *Nicholson*, 203 F. Supp. 2d at 211 (citing expert testimony explaining that ACS targets mothers who are victims of domestic violence).

45. See SCHNEIDER, *supra* note 1, at 153 (explaining that the battered mother is likely to be held responsible for child abuse or neglect because of her presumed failure to protect her children, or because of her silence).

46. See, e.g., *Nicholson*, 203 F. Supp. 2d at 209 (highlighting testimony indicating that abusers were named in petitions some 50% of the time, and that battered mothers were named over 90% of the time).

47. See generally *id.* at 253 (finding that “the city’s practices and policies in this field harm children much more than they protect against harm.”).

48. In the District of Columbia, a woman who seeks help in getting a civil protection order through the Domestic Violence Intra-Track Center, a coordinated

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demonstrate, women whose battering results in contact with the “system” risk losing their children.⁴⁹ It may not matter whether the contact is spontaneous—such as a telephone call to 911 during or immediately after an assault—or voluntary, such as a court appearance to seek a protection order.

The battered mother faces a Hobson’s choice. If she does nothing “official” regarding her abuse, her lack of action may be labeled a “failure to protect” her child if the matter otherwise comes to the attention of the authorities. This is true even if her “unofficial” private actions are focused solely on the protection of herself and her children. She may indeed be the self-sacrificing “good mother,” even substituting herself as a punching bag for the batterer in lieu of her children. She does so, however, in a way that is hidden from view and misunderstood.

On the other hand, if she does voluntarily choose to seek help from official sources, she may be reported to the child welfare system for doing precisely what society expects of her and precisely what she must do to avoid condemnation. Imagine the absurdity: a battered woman seeks help for herself and, by direct implication, her children by seeking the law’s protection from her batterer. And the law’s response? To charge the battered mother criminally or civilly for failing to protect her child.⁵⁰ As Mr. Bumble once remarked, “the law is an ass”⁵¹

In her *Motherhood and Battering* chapter, Elizabeth Schneider foretells many of the problems that are so vividly apparent in the *Nicholson* case. Judge Weinstein’s lengthy and openly critical opinion may well be considered a victory of feminist lawmaking in the area of

intake facility run by five private and public agencies, risks being reported to the child abuse hotline if she is interviewed by an employee of the Office of Corporation Counsel, an agency also responsible for prosecuting child abuse and neglect cases. A report, even if unfounded, can have severe and lasting consequences. Furthermore, the potential is enormous for such a policy to discourage women from receiving the help that they need and the help that they will be blamed for not getting.

49. See *Nicholson*, 203 F. Supp. 2d at 173-76 (noting that one of the plaintiffs, April Rodriguez, lost custody of her three children after she reported a domestic violence incident to the police, which resulted in the batterer’s arrest). Shockingly, the batterer, who was the children’s father, received custody of the children. *Id.*; see also SCHNEIDER, *supra* note 1, at 153 (explaining that battered women may be charged with criminal conduct, held liable for abuse and neglect, or have their parental rights terminated because they are presumed to have failed to protect the welfare of the child).

50. See SCHNEIDER, *supra* note 1, at 159-67 (discussing several cases in which the state prosecuted a battered mother on charges such as first-degree murder, manslaughter, child abuse, and child neglect).

51. CHARLES DICKENS, *OLIVER TWIST* 354 (Kathleen Tillotson ed., Oxford Univ. Press 1966) (1838).

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battered mothers. This trial court opinion, however, is only the first step, since the case is being appealed.⁵² The final result and impact of *Nicholson*, along with any ability it may have to ameliorate some of the problems that plague battered mothers and their children, will be eagerly awaited by battered mothers and domestic violence advocates alike.

52. *See supra* note 3.