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EXPECTING THE UNATTAINABLE: CASEWORKER USE OF THE "IDEAL" MOTHER STEREOTYPE AGAINST THE NONOFFENDING MOTHER FOR FAILURE TO PROTECT FROM CHILD SEXUAL ABUSE CASES

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INTRODUCTION

Imagine for a minute that you are a mother. You have three children: two boys, ages two and four, and a little girl, six years old. On a Monday morning you are walking your daughter to school. She tells you, "Sometimes Daddy puts his thing in my butt." Your heart skips a beat.

But you can't cry. She can't see you cry. You ask her for more details, but she does not say much else. You decide that you need to process this information. Why would she lie about this? He is a loving, affectionate father who would never lay a finger on your children, isn't he? No, he would never do that to your baby girl. You decide on your way home that you are going to make an appointment for you and your daughter to go see a therapist together, someone who knows how to deal with this kind of thing, and it will all be figured out. You call and set up an appointment.

Tuesday rolls around and you get a call from your daughter's school principal. You think it has something to do with her being late recently. She tells you your daughter confided in the school guidance counselor that her father was sexually abusing her. The principal calls in a report to the Administration for Children's Services (ACS). Your husband is arrested. A caseworker comes to your home that day and asks you how you are feeling. You tell her you are not sure whether or not you believe that this could happen. You are scared that your husband will be imprisoned for a long time. This is all so traumatic and new.

Two days later you are called into court. You are put on the witness stand to testify. You admit that, while you didn't initially think that something like this could happen in your family, you have had some time to process this information, and now you believe your daughter. You tell the judge that if your husband is released from prison you will not allow him to enter your home. You "exercised poor judgment," the judge says. A year later, you finally go to something that seems like a trial. You are charged with neglect for failure to protect your daughter from sexual abuse. All three of your children are taken away from you that day to live with their aunt, because the judge decides they are in danger living with you. The judge says that you should have known about the abuse.

While this may seem like an exceptional case, variants of this storyline abound in neglect and abuse investigations and in proceedings in family court. This Note analyzes caseworker treatment of the nonoffending mother in family court child sexual abuse cases. Using anecdotal evidence supported by social science literature,[1] this Note argues that the use of gender stereotypes during

1. Some legal scholars propose using social science research as an appropriate lens through which to analyze legal issues surrounding the intersection of gender discrimination and motherhood. *See, e.g.*, Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the*

caseworker investigations abounds, and that reliance on such stereotypes contributes to the large number of cases brought against nonoffending mothers.

Part I.A briefly describes the workings of a child protection proceeding. Part I.B outlines the legal standard for the "failure to protect" provision of the Family Court Act under which ACS brings these cases. Part II explores the stereotype of the "ideal" mother. Part II.A addresses anti-stereotyping theory, which this Note provides to contextualize its arguments.[2] Part II.B describes the specific gender stereotype of the "ideal" mother, and assesses how this stereotype continues to influence family court proceedings, even though the Supreme Court denounces its use. Part II.B.2 provides a particularly egregious example of how this stereotype influenced the outcome of an emergency removal proceeding in a failure to protect from sexual abuse case. Part III shifts the focus to ACS caseworkers, who often are a family's first contact with the family court system. This Part illustrates two scenarios where the "ideal" mother stereotype influences caseworkers' decisions to substantiate cases against nonoffending mothers. The first is whether the mother takes action immediately upon discovering the abuse. The second is whether the mother believes her child. Social science literature is used to demonstrate the problems with caseworkers' reliance on these two factors. Finally, Part IV presents three recommendations for caseworkers so that they can continue to protect the child while understanding that the discovery process is complex and traumatic for mothers.

"Cluelessness" Defense, 7 EMP. RTS. & EMP. POL'Y J. 401, 403 (2003) (documenting the social psychology behind two forms of sex discrimination to "help employment lawyers use social science to tell a convincing story in meritorious cases of sex discrimination").

2. This Note does not attempt to argue that caseworker treatment of mothers in failure to protect cases rises to a constitutional violation. Rather, an understanding of the constitutional issues relating to stereotypes about motherhood is necessary to appreciate the importance of combating these stereotypes. This Note articulates a non-constitutional remedy intended to influence caseworkers on the ground.

I.
A NEW YORK CHILD PROTECTION PROCEEDING FROM START TO FINISH

A. The Process

Article 10 of the New York Family Court Act (FCA) governs child protection proceedings.[3] The proceedings usually commence when a teacher or doctor, for example, calls in a report of suspected child abuse or maltreatment to the state central register.[4] The report is then referred to the appropriate child protection agency, which undertakes an initial investigation.[5] After this initial investigation, the agency may determine that the report of alleged child maltreatment is "unfounded."[6] If, however, the report is deemed "indicated,"[7] then the child protective agency will file a petition with the family court reporting the facts surrounding the alleged abuse or neglect.[8] A fact-finding hearing is held in family court to determine if the child has been abused or neglected.[9] It is

3. N.Y. Fam. Ct. Act art. 10 (McKinney 2010). For a succinct description of the child protection process, see Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 Fordham L. Rev. 2285, 2298–2302 (1998).

4. Susan R. Larabee, *Representing the Government in Child Abuse and Neglect Proceedings*, *in* Child Abuse and Neglect: Protecting the Child, Defending the Parent, Representing the State, at 59, 103 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 148, 1988).

5. N.Y. Soc. Serv. Law § 424.6 (McKinney 2013). This initial investigation must include: (1) an evaluation of the environment of the child named in the report and any other children in the home, *id.*; (2) a determination of the risk to such children if they continue to remain in the existing home environment, *id.*; (3) a determination of the nature, extent, and cause of the conditions enumerated in the report and the name, age, and condition of the other children in the home, *id.*; (4) seeing to the immediate safety of the children including taking the children into protective custody to protect them from further abuse or maltreatment when appropriate in accordance with the Family Court Act, *id.* § 424.9; (5) offering services to the family as appears appropriate (the agency must advise the parents that the agency has no legal authority to compel the acceptance of services, but may inform them of the agency's obligations and authority to petition the family court for a determination that the child is in need of care and protection), *id.* § 424.10; and (6) in cases where an appropriate offer of services is refused, and the child protective service determines for this or any other appropriate reason that the child requires family court or criminal court action, initiating an appropriate family court proceeding or making a referral to the appropriate district attorney, or both, *id.* § 424.11.

6. *Id.* § 424(7).

7. *Id.*

8. Fam. Ct. Act § 1031.

9. *Id.* § 1044.

the family court equivalent of a trial.[10] The fact-finding concerns only things that happened *before* the filing of the petition—anything that happens after the petition is filed is irrelevant for purposes of the fact-finding.[11]

There is a possibility that the child may be removed from his or her family before the allegations are even proven at fact-finding. If ACS determines that the child's life or health is in imminent danger the child may be removed without a court order.[12] In this case an emergency hearing is held to determine whether or not there is actually an imminent danger.[13]

At every stage of these proceedings, ACS maintains a great deal of power and control over the respondent parent.[14] This places ACS in a delicate position. Before fact-finding,[15] ACS has extensive contact with the parent, as the agency is responsible for creating and implementing the service plan imposed upon the family.[16] At the same time, ACS is the parent's adversary in court, trying to convince the judge that the parent or parents mistreated the child.[17] Because the role of ACS is two-sided in this way, it is vital that a caseworker investigate the case on the front end with due respect for the complexities of a mother's process of discovery as she sorts out what has happened to her child.

B. Legal Standard for Failure to Protect

Any parent or guardian, male or female, can be charged in family court with abuse or neglect. A parent's failure to protect his or her child can rise to the level of neglect, and the court may enter a finding against the parent if the court rules that ACS has estab-

10. Bailie, *supra* note 3, at 2300.

11. FAM. CT. ACT § 624.

12. *Id.* § 1024.

13. *Id.* §§ 1027–28.

14. Bailie, *supra* note 3, at 2302. "Respondent" includes "any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child." FAM. CT. ACT § 1012(a).

15. Often *long* before the fact-finding. *See* Ann Moynihan et. al., *Fordham Interdisciplinary Conference: Achieving Justice: Parents and the Child Welfare System*, 70 FORDHAM L. REV. 287, 300 (2001) ("Contrasting New York with many other states in which it [was] routine for fact finding and disposition to be completed within sixty to ninety days after placement, the Panel noted that [i]t [was] not uncommon for children to be in care for a full year, at which point an [Adoption and Safe Families Act] permanency hearing [was] required, without having had a disposition of the original protective proceeding.") (internal quotation marks omitted).

16. Bailie, *supra* note 3, at 2302.

17. *Id.*

lished certain elements, which I discuss in the next two sections, by a preponderance of the evidence.

1. Establishing Neglect

A "neglected child" is:

> [A] child . . . whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by . . . allowing to be inflicted harm, or a substantial risk thereof . . . .[18]

The New York Court of Appeals expanded upon this statutory definition in *Nicholson v. Scoppetta*,[19] in which it interpreted the New York law. First, the court held that the statute contains a causation requirement that must be satisfied to establish neglect. The actual or threatened impairment must be "clearly attributable" to the parent's failure to exercise a minimum degree of care toward the child.[20] The term "imminent," as used in the FCA, means "near or impending, not merely possible."[21] Second, the court held that a minimum degree of care is a "baseline of proper care for children that all parents, regardless of lifestyle or social or economic position, must meet."[22] The statutory test is "'*minimum* degree of care'—not maximum, not best, not ideal—and the failure must be actual, not threatened."[23] This stringent standard for neglect means that the analysis of whether a parent has neglected his or her child is an objective one, and should not be distorted by subjective beliefs about how the "ideal" mother should act. This is especially relevant in failure to protect from child sexual abuse cases, where stereotypes about the ideal mother permeate judicial and caseworker decisionmaking.[24]

18. FAM. CT. ACT § 1012(f).
19. 820 N.E.2d 840 (N.Y. 2004).
20. *Id.* at 845–46.
21. *Id.* at 845.
22. *Id.* at 846 (internal citation omitted).
23. *Id.*
24. *See infra* Part III.

2. Failure to Protect

While the criminal law does not usually punish omissions,[25] New York child protective laws are not so forgiving. The FCA establishes that a mother may be charged with failing to protect her child from the abuse or neglect of the primary offender.[26] In other words, when one parent "allows"[27] someone to abuse or neglect her child, a finding may be entered against the nonoffender. This is called "failure to protect." The FCA specifically lists sexual abuse as one of the offenses from which a parent may fail to protect her child.[28] On one end of the spectrum is a parent who witnesses or sees incontrovertible evidence of the abuse or neglect and does not act.[29] On the other end is a parent who notices a suspicious injury or observes unusual behavior but fails to act on those unsubstantiated suspicions.[30] However, as discussed in Part III.B.2, sometimes a parent will be charged with failure to protect when she had no idea anything was going on.

Courts have held that the test for failure to protect from child sexual abuse is "whether a reasonable and prudent parent would have so acted (or failed to act) under circumstances then and there existing."[31] They have further expanded upon the FCA's definition and have held that the law must pertain to "a parent who should have known about the abuse and did nothing to prevent or stop it."[32] A parent's actions or failure to act must be evaluated in light of objective evidence available to the parent at the time of the abuse.[33] Courts applying this standard to sexual abuse find that a parent neglected her child when she "reasonably should have

25. Gary S. Solomon, *Child Abuse and Neglect Proceedings: Allowing Abuse or Neglect*, *in* 10 N.Y. PRAC., NEW YORK FAM. CT. PRAC. § 2:30 (Merril Sobie ed., 2d ed. 2013).

26. N.Y. FAM. CT. ACT § 1012(e), (f)(B) (McKinney 2010).

27. *Id.*

28. *Id.* § 1012(e)(iii). While failure to protect from sexual abuse is listed in the statute under abuse, these cases are often brought as neglect cases against the nonoffending parent. *See infra* Part III.

29. Solomon, *supra* note 25.

30. *Id.*

31. *In re* Katherine C., 471 N.Y.S.2d 216, 218 (Fam. Ct. Richmond Cnty. 1984); *see also, e.g.*, *In re* Scott G., 124 A.D.2d 928, 929 (N.Y. App. Div. 1986) ("When the issue is whether the parent allowed the child to be abused, the trier of fact is required to determine whether a reasonable and prudent parent would have acted, or failed to act, under the circumstances as presented.").

32. *Katherine C.*, 471 N.Y.S.2d at 219.

33. *In re* Sara X, 505 N.Y.S.2d 681, 682 (App. Div. 1986) (holding that petitioner "failed to prove that there was objective evidence available to the Respondents . . . which should have prompted more adequate protective measures").

known that the child was in imminent danger of being sexually abused," and her "behavior constituted a willful omission in the protection of the subject child."[34]

II.
GENDER STEREOTYPES AND ANTI-STEREOTYPING PRINCIPLES

This Part briefly discusses anti-stereotyping principles before analyzing gender stereotypes both more generally, as used in family court, and narrowly, as applied to failure to protect from child sexual abuse. As will be clear by the end of this Part, a "top-down" approach (i.e., Supreme Court decisions influencing caseworker treatment on the ground) to ending gender discrimination in family court has not worked. The constitutional underpinnings for rejection of the "ideal" mother stereotype are essential, however, for understanding this Note's normative claim that use of the stereotype is wrong.

Rebecca Cook and Simone Cusack recently provided a workable definition of stereotype: "[A] generalized view or preconception of attributes or characteristics possessed by, or the roles that should be performed by, members of a particular group."[35] In other words, an individual, simply by belonging to a specific group (e.g., gender, race, or religion), is believed to conform to a generalized model, without regard to her abilities or specific situation.[36] This Note focuses on a gender stereotype of the "ideal" mother and how this stereotype affects the treatment of women in failure to protect from child sexual abuse cases.

A. Anti-Stereotyping Theory

Anti-stereotyping theory embraces limitations on laws that perpetuate sex-role stereotypes,[37] as well as prohibitions against more

34. *In re* Jasmine B., 771 N.Y.S.2d 540, 540 (App. Div. 2004); *see also In re* Anna Marie A., 599 N.Y.S.2d 66, 67 (App. Div. 1993) ("A reasonably prudent parent would have observed signs of sexual abuse . . . and taken action to protect her children from further abuse.").

35. Alexandra Timmer, 10 HUM. RTS. L. REV. 583, 583 (2010) (reviewing REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES).

36. *Id.* at 583–84.

37. *See generally* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) (discussing the anti-stereotyping principle and its new frontiers).

subtle reliance on stereotypes, such as in employment decisions.[38] It seeks to prevent people from acting in ways that reflect or reinforce traditional conceptions of men's and women's roles.[39] Even where laws classify based on differences that are supposedly inherent, or "real," the U.S. Supreme Court explicitly prohibits "generalizations about 'the way women are.'"[40] Anti-stereotyping theory is neither strictly anti-classificationist nor anti-subordinationist.[41] Rather the theory is aimed at the particular institutions and social practices that perpetuate inequality in the context of sex.[42]

1. Early Articulations of Anti-Stereotyping Principles

Constitutional recognition of the role of gender stereotypes and anti-stereotyping principles came about rather recently. The Supreme Court struck down a law discriminating between men and women for the first time in 1971.[43] *Reed v. Reed* involved a challenge to an Idaho law mandating a preference for men over women in choosing between two people who are both equally entitled to administer the estate of someone who dies intestate.[44] Under rational basis review, the lowest level of constitutional scrutiny, the Court held that the preference for men over women was arbitrary, and thus unconstitutional.[45]

Five years later, in *Craig v. Boren*,[46] the Court officially announced that a stricter level of scrutiny, "intermediate scrutiny," applies to gender classifications. The Court struck down an Oklahoma statute that prohibited the sale of low alcohol content beer to men under the age of twenty-one, while women were allowed to purchase the beer at the age of eighteen.[47] The Court also articu-

38. *See* David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1725–28 (2002) (discussing employment sexual harassment case that relied on "sex-stereotyping theory").

39. Franklin, *supra* note 37, at 88.

40. United States v. Virginia, 518 U.S. 515, 517 (1996).

41. Franklin, *supra* note 37, at 88 (explaining anti-stereotyping theory as not strictly anti-classificationist because it "permit[s] the state to classify on the basis of sex in instances where doing so serve[s] to dissipate sex-role stereotypes," and as not strictly anti-subordinationist because, since "discrimination against women had traditionally been viewed as a benefit to them, [there was a concern] that anti-subordination principle would provide courts with too little guidance about *which* forms of regulation warrant constitutional concern.").

42. *Id.*

43. Reed v. Reed, 404 U.S. 71 (1971).

44. *Id.* at 71–73.

45. *Id.* at 74.

46. 429 U.S. 190 (1976).

47. *Id.* at 191–92.

lated its heightened standard of review: "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[48] The Court clarified how this level of scrutiny fell in line with what the Court had been doing for years, since *Reed*:

> "[A]rchaic and overbroad" generalizations concerning the financial position of servicewomen and working women could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.[49]

This passage makes clear that from its earliest inception, the Court's sex discrimination jurisprudence hinged on anti-stereotyping principles. By requiring classifications by gender to be substantially related to the objectives of a given law, the Court announced that it would not permit either overbroad or outdated generalizations to drive lawmakers.

These instances of anti-stereotyping in Supreme Court jurisprudence are early indicators of how the Court deals with such issues today. By subjecting gender classifications to intermediate scrutiny, the Court effectively recognized the harm caused by such stereotyping and laid the foundation for future treatment of both "real" and "perceived" differences between the sexes.

2. Anti-Stereotyping Principles in Sex Discrimination Doctrine Today: Stereotypes About Motherhood Implicate Anti-Stereotyping Theory

Stereotypes about motherhood are a specific instance of the more general phenomenon of sex discrimination. The Supreme Court's understanding of sex discrimination has evolved to encompass stereotypes about motherhood. The Court's treatment of such stereotypes provides a germane vantage point for thinking about

48. *Id.* at 197.

49. *Id.* at 198–99 (internal citations omitted).

the validity of laws regulating women, including the application of failure to protect statutes.

Price Waterhouse v. Hopkins stands for the proposition that sex stereotyping can be a form of gender discrimination under Title VII.[50] The case involved a suit under Title VII of the Civil Rights Act of 1964[51] by a plaintiff who claimed she was passed over for a promotion in an accounting firm because she did not conform to the traditional stereotype of her gender. The Court held that in the specific context of sex stereotyping, an employer who acted on the basis of a stereotype had acted on the basis of gender for Title VII purposes.[52] While evidence of sex stereotyping does not inevitably prove that gender has played a role in an employment decision, "stereotyped remarks can certainly be *evidence* that gender played a part."[53] Lower courts have followed suit: the Second Circuit Court of Appeals recently held that stereotyping about the qualities of mothers is itself a form of gender discrimination.[54]

United States v. Virginia[55] and *Nevada Department of Human Resources v. Hibbs*[56] illustrate the evolution of the Court's sex-based equal protection doctrine. *Virginia* involved a challenge to Virginia Military Institute's (VMI) male-only admissions policy.[57] Virginia's main argument in support of the policy was that "the actual physiological, psychological, and sociological differences between males and females"[58] made integration impossible without having to abandon the school's "adversative method" and alter its core mission.[59] In holding for the United States, the majority opinion framed the discrimination against women in the context of the "separate spheres" tradition. The Court in *Virginia* was particularly bothered by "how the state's enforcement of sex-role stereotypes

50. 490 U.S. 228, 243 n.9 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 107, *as recognized in* Univ. of Tex. Sw. Med. Ctr. V. Nassar, 133 S. Ct. 2517 (2013).

51. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2011).

52. *Price Waterhouse*, 490 U.S. at 251–52.

53. *Id.* at 251.

54. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 119–20 (2d Cir. 2004) (holding that stereotyped remarks can be evidence that gender played a part in adverse employment decision).

55. 518 U.S. 515 (1996).

56. 538 U.S. 721 (2003).

57. *Virginia*, 518 U.S. at 516.

58. Franklin, *supra* note 37, at 143–44 (quoting Brief for the Cross-Petitioners at 17 n.9, *Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107)).

59. *Virginia*, 518 U.S. at 515.

has served to cement women's traditional place in the social order."[60]

More recently, in *Nevada Department of Human Resources v. Hibbs*, the Court analyzed the Family and Medical Leave Act (FMLA) through an anti-stereotyping lens.[61] The issue in *Hibbs* was whether providing male and female employees with an entitlement to twelve weeks of family leave was a valid means of enforcing the Constitution's equal protection guarantee.[62] The Court concluded that mutually reinforcing stereotypes about men's and women's roles had given rise to "a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees."[63] It held, in other words, that the "self-fulfilling cycle of discrimination" wrought by sex-role stereotyping was a constitutional problem of such magnitude that Congress had the authority to affirmatively grant a leave of twelve weeks.[64]

These cases make clear that anti-stereotyping theory applies to gender stereotypes relating to motherhood. The Court's reasoning is important to keep in mind when analyzing caseworkers' application of failure to protect statutes to nonoffending mothers in child sexual abuse cases.

3. Anti-Stereotyping Theory as Applied to Failure to Protect from Child Sexual Abuse

Anti-stereotyping theory is a lens through which to assess the treatment of women in failure to protect from child sexual abuse cases. This is because the theory does not look to whether or not laws are gender neutral or formally equal,[65] as it is clear that abuse and neglect statutes are. Anti-stereotyping theory is appropriate in this context because even though the laws are gender neutral on paper,[66] their actual application is not.

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60. *Id.* at 516; *see also* Franklin, *supra* note 37, at 146.

61. 538 U.S. 721 (2003).

62. *Id.* at 728–30.

63. *Id.* at 736.

64. *Id.* at 736–37; Franklin, *supra* note 37, at 151–52.

65. KATHARINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 1, 1 (5th ed. 2010) ("Formal equality means equal treatment: Individuals should be treated alike, according to their actual characteristics rather than on the basis of assumptions (or 'stereotypes') about their sex, race, or other irrelevant characteristic.").

66. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2010).

Scholars consistently identify various ways in which gender stereotypes influence courts, Congress, and our entire legal system[67]—a subject addressed more thoroughly in Part II. More narrowly, however, institutional actors—including judges and attorneys but especially caseworkers—apply these laws in family court, and specifically in failure to protect from sexual abuse cases, according to antiquated gender stereotypes and assumptions about the way an ideal mother "should" act. Judges and attorneys, for example, rely on gender stereotypes in the way they question a parent during a fact-finding or emergency hearing.[68] Caseworkers, in a unique position as the parent's first contact with the family court process, rely on these stereotypes at the most important stage: the decision to file a petition, which formally commences the child protection proceeding. As will be discussed in Part III, caseworkers often hinge their decision to file a petition against a nonoffending mother on a stereotype of how the ideal mother should respond in a given situation. When a mother does not respond in the ideal way, a caseworker often files a petition against her.

B. The Ideal Mother

The stereotype of the "ideal" mother and its repercussions in the legal realm is well-recognized among scholars.[69] The stereotype is premised on the idea that mothers possess superior child-rearing and nurturing skills that require that they stay in the home and take care of their children and the domestic sphere.[70] The concept originated from an ideology of separate spheres: women were the natural leaders of the family and in the home—the private sphere—while men worked outside of the home in the public sphere.[71] For a time, the Supreme Court embraced this ideology.[72]

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67. *See, e.g.*, Caroline Rogus, Note, *Conflating Women's Biological and Sociological Roles: The Ideal of Motherhood, Equal Protection, and the Implications of the* Nguyen v. Ins *Opinion*, 5 U. PA. J. CONST. L. 803, 804–815 (2003) (identifying the influence of gender stereotypes in the Supreme Court on citizenship and abortion, among other things).

68. *See supra*, Part II.B.2.

69. *See, e.g.*, Rogus, *supra* note 67, at 803 ("[T]he traditional ideas of women's proper roles have continued to subtly and not so subtly influence our legal system's highest court."); Christa J. Richer, *Fetal Abuse Law: Punitive Approach and the Honorable Status of Motherhood*, 50 SYRACUSE L. REV. 1127, 1138 (2000) ("Through strictly defined sex roles and power distributions, a concept of the 'ideal mother' has emerged and been adopted in many arenas, including but not limited to: education, politics, and even the legal system.").

70. Richer, *supra* note 69, at 1139.

71. Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149, 1157–1160 (2010).

While the Court has since unequivocally denounced it,[73] the separate spheres ideology has carried over into present day discourse, continuing to influence our understanding of women's proper role in society.[74] Professor April Cherry cites one sociological study finding that survey subjects assigned married mothers the greatest number of positive personality traits as compared to divorced mothers, step-mothers, never-married mothers, and women in general.[75] She concludes that "the stereotypes defining both married motherhood and never-married motherhood reinforce the notion that women's proper role is that of married mother, or motherhood within patriarchal norms."[76]

Professor Caroline Rogus analyzes how the ideal mother stereotype conflates a woman's biological and sociological roles, shedding light on how the stereotype acutely affects women in the family law context. Professor Rogus explains that "[b]ecause women who are biological mothers are presumed to be sociological mothers, they are expected to strive to meet society's ideological standards of motherhood . . . ."[77] The ideology puts pressure on women to have and care for children not because they *want* to become mothers, but because it is their destiny.[78] Conflating the biological and sociological roles essentially turns motherhood into a "public experience through a woman's interaction with experts such as doctors, social workers, and psychologists during pregnancy, labor, childbirth, and childrearing."[79]

Caseworkers' treatment of mothers in failure to protect from child sexual abuse cases is an example of how separate spheres ideology influences outcomes in the courtroom today and turns moth-

72. *See, e.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.") (Bradley, J., concurring); Muller v. Oregon, 208 U.S. 412, 422 (1908) (upholding maximum-hours legislation for women "to protect [women] from the greed as well as the passion of man.").

73. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 14–15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.").

74. April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 103–04 (2001).

75. *Id.* at 103 (citing Lawrence H. Ganong & Marilyn Coleman, *The Content of Mother Stereotypes*, 32 SEX ROLES 495, 501–08 (1995)).

76. *Id.* at 104.

77. Rogus, *supra* note 67, at 804.

78. *Id.* at 819.

79. *Id.*

erhood into a public spectacle, even though the Supreme Court denounced such logic years ago.

1. The Ideal Mother in Family Law[80]

The stereotype of the ideal mother continues to permeate various aspects of family law:

> Much of family law is premised on the ideal construction of the family that presumes an arrangement that is almost nonexistent today—a mother at home with minor children and a father working outside the home. The law sets standards for child placement decisions, however, based on a view of a mother's proper role that has changed little since the 1950s.[81]

This ideal is far from reality. Unwed mothers gave birth to 40.6% of babies born in 2008.[82] These statistics mean that there are fewer "ideal" mothers out there than the ideological construction would suggest. Therefore social workers and the law must accept and incorporate the non-ideal paradigm of motherhood, shucking the rigid adherence to 1950s-style treatment of mothers and embracing a more modern conception.[83] The following sections are intended to illustrate how this stereotype infects courts.

a. Child Custody Proceedings

The stereotype of the ideal mother is pervasive in child custody proceedings. By the middle of the twentieth century a maternal pre-

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80. This is not to say that the stereotype does not also impact other areas of the law, including criminal law. *See, e.g.*, Suzanne D'Amico, *Inherently Female Cases of Child Abuse and Neglect: A Gender-Neutral Analysis*, 28 FORDHAM URB. L.J. 855, 857 (2001) ("The treatment women receive in the criminal justice system is often based more on who they are and what they represent in society, than on their conduct. The woman who does not fit the traditional role of woman and mother is treated harshly by the court, the media, and society; the woman who fits the role of ideal mother is treated more leniently."); Richer, *supra* note 69, at 1129 (using the example of fetal abuse law, arguing that "traditional gender-based stereotypes often shape the criminal justice system.").

81. Jane C. Murphy, *Legal Images of Motherhood: Conflating Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 690 (1998).

82. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT 69 (2012), *available at* http://www.census.gov/prod/2011pubs/12statab/vitstat.pdf.

83. For an extensive discussion of prescriptive stereotypes, see Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 665, 667 (1999) ("[T]he prescriptive component is expected to lead to discrimination against women who violate shared beliefs about how women should behave. Such discrimination generally takes the form of disparate treatment, in which women who violate prescriptive stereotypes of femininity are punished . . . .").

sumption, which provided that mothers should have custody of their children, especially those under five years, prevailed in contested custody cases.[84] It was premised on the stereotype of the ideal mother, granting mothers custody of their children because they were "biological[ly] superior[ ]" as parents.[85]

The women's movement in the 1960s and 1970s was successful in pushing for a replacement of the maternal presumption standard in favor of a "best-interests-of-the-child" standard.[86] However, judges are still permitted to decide these cases "based on their own conceptions of the 'good mother,'"[87] thus turning gender neutrality on its head. Mothers who work outside the home are at risk of losing custody of their children. Working mothers often lose custody because they work long hours, or because the father has married a new stay-at-home wife who is favored over the working biological mother.[88] Trial judges hassle mothers in custody disputes who want to relocate because of their professional aspirations.[89] Often courts give the mother the difficult choice of relocation or custody.[90] While the "best-interests-of-the-child" standard has indeed replaced an explicit preference for the ideal mother, the ideal mother stereotype continues to play a role in favoring the "home-sphere" mother, which forces a woman to either adhere to the stereotype or risk losing her child.

b. Child Protection Proceedings

Another area of family law where the ideal mother stereotype drives court actors is the adjudication of civil neglect and abuse proceedings, the subject of this Note. These proceedings are particularly susceptible to the perverse influence of stereotyping because the decisionmaking processes of all the actors involved go fairly unchecked. First, because the concepts of "neglect" and "abuse" are somewhat vague, it is difficult, if not impossible, for appellate courts

84. Murphy, *supra* note 81, at 694. Through the nineteenth century, there was a paternal presumption in custody cases, whereby the fathers almost always received custody. *Id.* at 693.

85. *Id.* at 694.

86. *Id.* at 695.

87. *Id.* at 696–97. For a particularly interesting case study pertaining to this subject, see Craig Nickerson, Comment, *Gender Bias in a Florida Court: "Mr. Mom" v. "The Poster Girl for Working Mothers,"* 37 CAL. W. L. REV. 185 (2000) (describing how gender bias in Florida's courts adversely affected one family, and focusing particularly on gender bias against fathers in custody court).

88. Murphy, *supra* note 81, at 696–97.

89. *Id.* at 697.

90. *Id.* at 698.

to examine the potential influence of stereotyping when trial courts apply the standards to the facts.[91] Moreover, caseworkers make discretionary judgments based on their personal ideas of what constitutes a bad mother, and these decisions go unchecked as well.[92] One ACS caseworker who worked in New York City explains that since the standards for intervention are incoherent and vague, "caseworkers and supervisors are given discretion to make a 'gut' call," making it impossible to divorce an intervention decision from personal prejudices no matter how capricious the decision may be.[93] The result is a child protective system in which caseworkers make decisions based on their own value judgments, which go unchecked by the courts.

The effects of class and race further influence caseworkers and their use of the ideal mother stereotype in the child protection context. Low-income, minority parents are substantially overrepresented in these proceedings.[94] The ideal mother standard is impossible to meet for these mothers, because the stereotypically ideal mother is financially secure and white.[95] Because the mothers

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91. *See id.* at 706–07.

92. *Id.* at 707; *see also* Norman B. Lichtenstein, Book Review, 17 PACE L. REV. 391, 392 (1997) (reviewing NEW YORK FAMILY COURT PRACTICE (Merril Sobie ed., 2d ed. 2012)) ("Whenever a caseworker decides to remove a child or allow the child to remain at home, or a judge endorses that decision, personal views concerning child rearing, as well as subjective or biased impressions of the parent, can contaminate the decision making process.") (internal quotation marks and citations omitted).

93. Kurt Mundorff, Note, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 131, 152–53 (2003).

94. *See generally* Candra Bullock, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023 (2003). Bullock describes the overrepresentation of low-income, minority parents in the child protection context:

> In the United States, approximately three million cases of child abuse and neglect are reported annually to child protective service agencies. Children from low-income households are more likely than children from middle and high-income households to be reported to child protective service agencies. According to the United States Census Bureau's poverty data for the year 2000, approximately 31.1 million people were classified as poor—this figure includes 22.1% of African Americans, 21.2% of Hispanics and 10.8% of Asians and Pacific Islanders in comparison to 7.5% of Caucasian Americans. Thus, children from some ethnic minority families, specifically African Americans and Hispanics, are three times more likely to be poor than Caucasians. Low-income children, as compared to middle and high-income children, are disproportionately reported to child protective service agencies, which results in a disparate impact on racial or ethnic minorities being reported.

Id. at 1023–24.

95. Rogus, *supra* note 67, at 818.

interacting with ACS are predominantly women of color, poor women, and single women, they are "never allowed to be viewed as ideal mother material."[96] Women who are brought to family court fight an uphill battle against the stereotype of the ideal mother.

c. Application of Failure to Protect Statutes

While failure to protect statutes are gender-neutral, their application is not. Mothers are substantially more likely than fathers to be charged—both civilly and criminally—with failure to protect their children from abuse.[97] The following example demonstrates how stereotypes of ideal motherhood can lead to child removal proceedings that are unfairly biased against the woman.

2. An Example: *In re KA*

The ideal mother stereotype applies to mothers before family court proceedings, as illustrated in Part III, but it is also prevalent during them. One egregious example is *In re KA*,[98] a case where, after an emergency hearing, the judge granted ACS's removal of a nonoffending mother's two children. The mother temporarily lost custody of her children after the judge found that she was to blame for the sexual abuse of her daughter. The judge concluded that the father had to find sex elsewhere in the home because his wife, the child's mother, did not perform sexual acts for her husband.

a. The Facts

The mother in the case was charged with failure to protect her daughter, KA, from alleged sexual abuse by her biological father.[99] At the emergency hearing all parties consented to the removal of KA from the home.[100] The issue was whether her newborn son, KY,

96. *Id.*

97. *See, e.g.*, Jeanne A. Fugate, Note, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 274 (2001) ("Defendants [criminally] charged and convicted with failure to protect are almost exclusively female."). In fact, women are the focus of the state's intervention in all child protective cases because they are overwhelmingly a child's primary—or only—caretaker. *See* Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 584–85 (1997) ("[T]he vast majority of the parents involved in the child protective system are mothers.").

98. *See* Order Granting ACS's 1027 Application, *In re* KY, No. NA-05512-10 (N.Y. Fam. Ct. Feb. 9, 2010) (on file with author).

99. Conversation with Julia Hiatt, Attorney for the Mother, Brooklyn Family Defense Project, July 2011.

100. Transcript of Emergency Hearing at *7, *In re* KY, No. NA-05512-10 (N.Y. Fam. Ct. Feb. 9, 2010) [hereinafter KY Transcript] (on file with author).

was at imminent risk of harm if he were to remain in the home with his mother.[101] The father was imprisoned.[102]

The facts underlying the alleged sexual abuse, as described by the caseworker, are as follows: KA disclosed to her guidance counselor, HA, that her father "put[ ] his . . . mambo in her mouth, and was trying to pee in it."[103] KA told HA that she had told her mom, and that her mom and dad would fight about it.[104] KA also told HA that she told her grandmother, who would tell the father to stay away from KA.[105] KA told HA that the sexual abuse had been going on since her baby brother was born, and that her brother was "zero."[106] Because this was an emergency removal hearing—in which the inquiry is about imminent risk—rather than a fact-finding, the judge redirected the questioning to what, if anything, the mother did upon learning of the information KA gave.[107] The mother never took KA to the doctor or the hospital.[108] When approached by the caseworker and the detective assigned to the corresponding criminal case, the mother said, "the man that she knows is not capable of doing something like this."[109] The mother denied that KA ever told her about the alleged sexual abuse.[110]

ACS asked the caseworker about a conversation she had with the detective. ACS asked the caseworker if she had asked the detective about "the respondent father's relationship with the mother."[111] The caseworker did not understand the question,[112] so the attorney rephrased it:

Q: Did you speak to Detective S about the respondent father's rel-, sexual relationship with the respondent mother?

A: Yes.

Q: What, if anything, did the Detective S tell you about that?

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101. *Id.* at 10–11.

102. *Id.* at 9.

103. *Id.* at 17.

104. *Id.* This information is corroborated by the fact that KA reported the same story to the teacher. *Id.* at 20.

105. *Id.* at 18.

106. KY Transcript at 19.

107. *Id.* at 22.

108. *Id.*

109. *Id.* at 23–24. While the mother did not initially believe her daughter's allegations, by the time of the hearing, she did in fact believe her daughter and had promised she would not let her husband back into her home. *Id.* at 54–55, 75. The issue of belief and trauma on the part of nonoffending mothers is discussed in Part III.B, *infra*.

110. KY Transcript at 25.

111. *Id.* at 30.

112. *Id.*

[Objection]
[Objection overruled]
A: He said that he sleeps on the sofa and his wife doesn't give him oral sex.
Q: And is that a statement that the respondent father made to the Detective?
A: Yes.
Q: Was there anything else that the respondent father stated to the Detective that the Detective told you?
A: Just that he denied the allegations, uh, that's basically it.[113]

The judge then took the opportunity to cross-examine the caseworker:

Q: Okay. And, um, you at some point learned that the father had reported to the Detective that he and the mother of KA do not in, uh, uh, the—the mother of KA does not give him any type of oral sex, is that correct?
A: Yes.
Q: Did you ask the mother whether that's true?
A: No. No. We asked her about her sexual relationship with the father and she said it was great until, you know, she had the baby 'cause, you know, she just had the baby two months ago, so she's—they've been have—not having sex.
Q: So are you telling me that the mother essentially said that she has not had any sex with the father of these children, uh, since KY was born?
A: Yes.
Q: Did you ask her whether that was unusual?
A: No.[114]

The judge's subsequent line of questioning suggests that this was an investigation into whether KA would have had any other way of understanding the mechanics of oral sex without having experienced it with her father.[115] However, the line of questioning regarding the sexual habits of the mother and father continued *further* on redirect of the caseworker by ACS:

113. *Id.* at 30–31.
114. *Id.* at 38–39.
115. *Id.* at 42. The judge asked the caseworker whether there was any indication that KA watched pornographic movies at home or whether the mother indicated that KA could have observed her and the father engaging in sexual activities. *Id.* During her cross-examination of the caseworker, the judge asked whether "[t]he only explanation that she gave, in terms of the anatomy of the father, as well as the pee, was that he walks around the house naked, and she may have seen him peeing [in] the toilet," to which the caseworker answered, "[y]es." *Id.*

Q: And so [KA]—she said that the sex abuse occurred before the child?
A: She said when the baby was in mommy's belly.

This subject was explored further, over objection, during ACS's cross-examination of the mother:

Q: Ms.—Ms. IN, how was your, um, how was your sex life—your sexual relationship with, um, your husband since the baby was born?
A: We are—we had sex a couple of time since I had the—I had the baby, because when I had a C-section, when I had my son, and I had to wait six weeks for my postpartum before anything else could be done.
Q: And did your husband ever express to you or speak to you about, um, have any conver-, withdrawn. And did you ever—did your husband ever have any conversations with you, um, about any sexual frustration he was having?
A: No.
[Objection]
[Overruled]
A: No.[116]

The judge then cross-examined the mother, and asked again, this time extensively, about her sexual history with her husband:

Q: Now, with respect to your relationship with your husband, I'm sorry for asking you these personal questions, but I think they're very relevant to this case. Can you tell me what the nature of your sexual relation—well, withdrawn. Are you in fact legally married to this gentleman?
A: Yes, I am.
Q: You are. How long have you been legally married to him?
A: 12—19—about 12 years, coming up.
. . .
Q: And can you tell me, prior to becoming—prior to becoming aware that you were pregnant with KY, can you tell me, um, essentially, uh, describe the nature of your sexual relationship with your husband?
A: We had—we had sex. It's-
Q: [Interposing] And was there a general, um, amount of frequency to the sexual interaction you were having?
A: Once or twice a week we had sex.
Q: I'm sorry, how often?
A: Wo-, once or twice a, a week we had sex.

116. KY Transcript at 72.

Q: Per week, is that—
A: [Interposing] Yes.
Q: —what you're saying?
A: Uh huh.
Q: Okay. And once you became aware that you were pregnant with KY, did the nature of your sexual, um, interaction with your husband change, or—
A: [Interposing] No.
Q: —did it remain about the same?
A: It remained about the same.
Q: It did?
A: Yeah.
Q: All the way up until the time you gave birth—
A: [Interposing] Uh huh.
Q: —to your son?
A: Yeah.
Q: Okay. And what about after you gave birth to KY? Did the nature of your sexual relations and interaction with your husband change?
A: We—we—instead of having sex we would hug more and—and stuff, because it—it was not—at that time I couldn't have sex.
Q: And, um, you've heard that your husband reported to the Detective that you don't engage in any, um, oral sex—
A: [Interposing] It was never part of our—it was never part of our relationship.[117]

At the end of the hearing the judge decided that KY, the baby boy, was at imminent risk of harm in his mother's home. Her decision relied in part on the fact that the father had to find sexual pleasure elsewhere, because his wife was not satisfying him:

> Also in terms of the sexual activity, [the mother] concedes that this was not sexual activity that she engages within—with her husband, so this would not have been any activity that this child would have seen in her own home. And, um, it's reasonable to conclude that her husband would have sought it from somebody else in the home, which is—which is the daughter, according to what KA's reported. So I—I find it serves the best interests of KY to come into foster care, to remain in the so-, same home with KA, with Ms. B.[118]

117. *Id.* at 88–90.
118. *Id.* at 146.

b. Discussion of Stereotype Use

By focusing the questioning on the mother's sexual relationship with the father and mentioning it in making her ruling, the judge clearly relied on the testimony that the mother was not having sex with the father. Furthermore, the judge's line of questioning and her statement that "it's reasonable to conclude that [the mother's] husband would have sought it from somebody else in the home" demonstrates that the judge blamed the mother for the sexual abuse of her daughter, attributing the acts of the father to frustration caused by the lack of sex with the mother.

In so doing, the judge relied on the antiquated belief that sexual abuse is caused by sexual frustration, leading to role reversal.[119] This theoretical formulation dominated the early child sexual abuse literature.[120] The use of these theories, this Note argues, implicates assumptions about the ideal mother.

The mother in this case was punished by having her newborn baby removed from her custody because in part she did not perform her duties as a wife. She was not awarded the privilege of performing her duties as a mother, because she proved to be a "bad mother" in the judge's eyes—a "co-conspirator" in the sexual abuse of her daughter. In contrast, the ideal mother is a caretaker, a nurturer. By blaming this mother for the sexual abuse of her daughter, the court concluded that she did not perform as the ideal mother would have. The court's conclusion illustrates that the use of stereotypes in these proceedings is still alive and well as a vehicle through which to ascribe blame and maintain control over motherhood and over families.[121] When courts rely on stereotypes in taking away someone's child, it sends a message that in order to get their chil-

119. Rebecca M. Bolen, *Nonoffending Mothers of Sexually Abused Children: A Case of Institutionalized Sexism?*, 9 VIOLENCE AGAINST WOMEN 1336, 1342 (2003).

120. In the 1960s, the themes of "role reversal, sexual withdrawal, collusion, and psychological problems" were promulgated with authority by social scientists. *Id.* at 1341–42. Bolen notes that mothers were blamed for setting up the abuse by initiating role reversal and by deserting their husbands sexually. *Id.* By the 1980s, feminists developed competing views of the nonoffending mothers that recognized the often misogynistic nature of family dynamics. *Id.* at 1345. These views "recognized factors such as the power imbalances in these families, financial dependence on the perpetrator, and battering." *Id.* Due to the influence of these new views, studies were conducted to assess the validity of "role reversal" theory, concluding that the "literature had limited empirical support." *Id.* at 1345–46.

121. *See also, e.g.*, Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75, 99 (1993) ("Mothering is taken out of its context in abuse prosecution and is judged by a judiciary that assumes middle-class, sexist, and racist norms. Mothers—across classes and cultures—are expected to perform in ways that satisfy those norms.").

dren back, a parent can be expected to subscribe to that stereotype. This is a dangerous form of state control over the family, one that assumes that there is one right way to be a mother, and one right way to satisfy one's husband. It perpetuates the "self-fulfilling cycle of discrimination"[122] wrought by sex-role stereotyping, which the Supreme Court has vowed to remove from society in cases like *Price Waterhouse*, *Virginia*, and *Hibbs*.

c. Attacking the Stereotype at Its Inception

The procedural outcome of *In re KA* highlights court actors' reliance on stereotypes in removing IN's son from her custody. IN's attorneys immediately filed an order to show cause for why KY was at imminent risk of harm in his mother's care.[123] IN won the stay, and was subsequently granted custody of her baby.[124] Given the outcome of the case—that there was no legal basis to conclude that IN's son was at imminent risk of harm in his mother's care—the most likely and reasonable conclusion is that that both ACS and the trial court judge relied on stereotypes in adjudicating and deciding the case.

However, the fact that the case "worked out" procedurally does not assuage the fears of irreparable harm occurring in other cases as a result of the use of these stereotypes at the trial court level. Appealing these decisions on anti-stereotyping principles is futile. While *In re KA* is exceptional in the sense that the use of the ideal mother stereotype was so apparent on the face of the hearing transcript, the vast majority of violations are not as blatant. Furthermore, already overworked and underpaid attorneys for parents do not have the time or money to fight a crusade against stereotypes.[125] The attorneys in *In re KA* did not even challenge the trial court's decision by appealing on the basis of sex discrimination; they found the violation abhorrent, but believed an appeal would be fruitless.[126]

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122. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

123. Order to Show Cause at 2, *In re* KY, No. NA-05512/10 (N.Y. Fam. Ct. Mar. 2010) (on file with author).

124. Email from Julia Hiatt, Ms. B's Attorney, Brooklyn Family Defense Project, to the author (Nov. 7, 2011, 13:00 EST) (on file with author).

125. *See* Mimi Laver, Dir. Legal Educ., ABA Ctr. on Children & the Law, et al., Parent's Attorney Role in Improving Reunification Outcomes, Presentation at the National Child Welfare, Juvenile & Family Law Conference: Achieving Equity for Children & Families (Oct. 2010), slides 29–31, *available at* http://www.nacchildlaw.org/resource/resmgr/2010_conference_presentations/d3.pptx.

126. This information comes from my own conversations with the attorneys involved.

Given these impediments, a better stage at which to attack the use of the ideal mother stereotype is its inception—the filing of the petition. Caseworkers, who have immense discretion in filing a petition against a parent, and few checks on their decision once it is made, can be regulated at little cost and effort. Thus, the rest of this Note focuses on caseworkers' application of failure to protect statutes.

III.
THE DECISION TO FILE A PETITION IN NONOFFENDER CHILD SEXUAL ABUSE CASES

This Part uses two case studies to illustrate the pervasive use of motherhood stereotypes by ACS caseworkers. The first case demonstrates the extent to which caseworkers hinge their decision to substantiate a child sexual abuse case on the mother's actions, or reactions, immediately following disclosure. The second case illuminates caseworkers' reliance on whether the mother believes her child's disclosure of child sexual abuse. These two cases are particularly illustrative because a mother's initial actions and whether she believes her child's disclosure are described by one caseworker as "two of the top factors [considered by caseworkers] in deciding what happens with the case."[127] After a discussion of the facts of each case, this Part critiques the caseworkers' assumptions of how mothers "should" act by drawing from a body of social science literature on the empirical realities of the nonoffending mother in child sexual abuse cases.

A. Mothers Are Disproportionately Charged with Neglect for Child Sexual Abuse When Compared with Their Rates of Offense

Professor Rebecca Bolen, an expert on nonoffending mothers of children subject to sexual abuse, has studied the disproportionate number of mothers charged with child sexual abuse when compared with their rate of offense.[128] Bolen's analysis reveals that

127. E-mail from Rachel Gordon, former caseworker, Ga. Child Protective Servs., to the author (Nov. 6, 2011, 20:52 EST) [hereinafter Gordon E-mail] (on file with author).

128. Bolen, *supra* note 119, at 1337. In a random prevalence study, only 0.01% of the respondents was sexually abused by a mother, and mothers accounted for 0.6% of all retrospectively reported parental sexual abuse and 0.05% of all retrospectively reported sexual abuse, whereas fathers accounted for 8% of all abuse. *Id.* However, mothers commit 44% of all *identified* abuse, and 53% of all *identified* parental abuse. *Id.*

mothers are identified as offenders by child protective services at 880 times their rate of actual abuse.[129]

In addition to a number of pragmatic reasons for caseworker focus on the nonoffending mother,[130] the historical legacy of the "ideal" mother stereotype discussed in Part II.B.1 also contributes to the uncharitable treatment of these mothers by caseworkers.[131] These historical trends may have merged with statutes and policies to influence the child protective services system in place today.[132]

The next Section closely analyzes two recent ACS interventions involving the nonoffending mother, concluding that there is still a strong reliance on these stereotypes.

B. The Case Studies

Caseworkers, in investigating whether or not to file a petition against a nonoffending mother for failure to protect her child from sexual abuse, often rely on their individual perceptions of how a mother in this situation *should* act.[133] Though many caseworkers no

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129. *Id.*

130. First, child protective services agencies' prioritization of intrafamilial abuse may account for this disparity. Bolen, *supra* note 119, at 1348. Even though most states have laws authorizing CPS agencies to investigate all types of abuse, in practice a lot of agencies refer extrafamilial sexual abuse to law enforcement. *Id.* Intrafamilial abuse has "preferential access . . . and treatment." *Id.* This means that when sexual abuse is identified, caseworkers work with the nonoffending guardian in developing strategies to protect the child. *Id.* at 1349. However, because attention is concentrated narrowly on intrafamilial abuse, the focus on nonoffending guardians has typically been directed toward nonoffending *mothers*. *Id.* This "may have made the actions of the nonoffending mother not only more visible, but also more salient." *Id.*

A second factor is the scarce resources of child protection agencies. Bolen, *supra* note 119, at 1349. In the 1970s and 1980s, an increasing number of sexually abused children and previously abused adults came to the attention of professionals. *Id.* At the same time, child protection services agencies had to contend with budgetary crises. *Id.* This resulted in prioritizing cases, which "contributed to the overrepresentation of parental incest and thus, the salience of the support of nonoffending mothers in reported cases." *Id.* at 1350.

The third major factor for the focus on nonoffending mothers is that alleged offenders are not removed from the home. Bolen, *supra* note 119, at 1350. Because most alleged offenders are not or cannot be legally removed from the child's environment, child protective services' mandate to protect abused children becomes especially onerous. *Id.* at 1351. One of the methods by which they have addressed this task has been to place the responsibility for protecting the child on the nonoffending mother. *Id.*

131. *Id.* at 1355.

132. *Id.*

133. One caseworker, for example, describes her own struggle in trying to leave behind her own perceptions of how a mother should act:

doubt intend to take into account the grave realities of the nonoffending mother, they often fall short, relying instead on their personal, preconceived notions of motherhood. This Note is intended to help caseworkers think more broadly about their roles. The following case studies elucidate ways in which they should realign their approaches so as to lower the incidence of false accusation.

1. Case Study #1: The Ideal Mother Does Not Need Time to Process a Disclosure That Her Daughter Has Been Sexually Abused. She Will be Proactive, Immediately. Mothers Who Do Not React in This Way Will Be Blamed for the Abuse.

The example in Part II.B.2 showed a nonoffending mother being blamed by both ACS attorneys (speaking on behalf of the caseworkers in court) and the judge for the sexual abuse of her child because she did not have oral sex with her husband. Unlike in the *KA* case, where the abusive father was present to bear responsibility, in the case that follows, the agency pursued a charge alleging neglect against only the mother because ACS could not locate the father. The case, described in detail below, demonstrates that the caseworker placed the blame on the mother, disregarded the trauma involved in processing the information that her child had been abused, and ignored the myriad things the mother did do correctly. Instead, the caseworker focused on the mother's natural actions and reactions immediately following her daughter's disclosure of the sexual abuse.

a. The Facts

The allegations in the petition against Ms. L were that she "did not take any action" when her daughter, Z, reported that her bio-

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I know that I, as a caseworker, tried really hard not to let my own upbringing and my own values come into play when I was evaluating a situation, but I don't know that all caseworkers do that. If I were to compare each family I worked with to my own, they would almost always fall very, very short, because the families I worked with just didn't have the resources that my family had. So, the "ideal mother" stereotype I think probably does come into play, because it is really difficult to leave your own values behind in evaluating situations like this, though I tried really hard to be neutral.

Gordon E-mail, *supra* note 127; *see also* Mundorff, *supra* note 93, at 152–53 ("Since statutes and guidelines are vague, caseworkers and supervisors are given discretion to make a 'gut' call. In making a gut call, it is nearly impossible for the caseworker to divorce himself from his cultural and class prejudices. This leads to differential treatment of the poor and non-whites. With no coherent guidelines, child welfare officials can justify nearly any interference, no matter how capricious.").

logical father sexually abused her.[134] Ms. L's daughter told her on Wednesday, February 13, 2008 that her father had touched her inappropriately.[135] The very next day Ms. L researched sexual abuse counselors who could assess the level of abuse Z was reporting and help Ms. L determine the best course of action.[136] On Friday, two days after she told her mother, Z told her school counselor about the abuse.[137] The counselor called Ms. L to inform her and asked her to come to school.[138] Together Ms. L and the principal called ACS to make the report to the State Central Register.[139] That same day Ms. L took her daughter to the District Attorney's office where she and Z cooperatively participated in interviews with a detective from the Special Victims Unit and with ACS's child protective specialist.[140]

In her interviews with ACS, Ms. L described her actions and reactions upon learning of her daughter's abuse. She said when the school told her "she cried in the street and rushed to the school."[141] Ms. L admitted that she had spoken with Z that Wednesday, "and she told Z that if she don't [sic] want she never has to see her father. She said she had decided that she would not allow the father to have any contact with Z since he has not had any contact since he left her."[142] In fact Z had not had any contact with her father since January, one month prior to the disclosure.[143] Ms. L said that when her daughter told her about the abuse, "[Ms. L] was in shock and she was very angry."[144] Ms. L told the ACS specialist "she [wa]s willing to do whatever to keep [the father] away from her or Z."[145]

In deciding to file a petition against Ms. L, a supervisor at ACS noted that "[t]he mother may not have known about the abuse until 2/13/08 as indicated; however, she exercised extremely poor judgment in not notifying the police and she did not take any ac-

134. Petition, add. 1, ¶ 3, *In re* ZLF, No. NA-978/08 (N.Y. Fam. Ct. Feb. 29, 2008) (on file with author).

135. *Id.*

136. Letter from Ms. L's Attorney to ACS Attorney 1 (May 1, 2008) (on file with author) (requesting that ACS withdraw the case against her client).

137. Admin. for Childrens Servs., Investigation Progress Notes, *In re* ZLF (note entered Feb. 15, 2008, 5:16 PM) (on file with author).

138. *Id.*

139. *Id.*

140. *Id.* (note entered Feb. 16, 2008, 7:05 PM).

141. *Id.*

142. *Id.*

143. Investigation Progress Notes, *supra* note 137.

144. *Id.* (note entered Feb. 20, 2008, 9:30 AM).

145. *Id.* (note entered Feb. 16, 2008, 7:05 PM).

tion to protect the child."[146] The supervisor failed to note that Ms. L had spent an entire day researching counselors that specialized in sexual abuse, or that she ran to the school to make the phone call to ACS with the principal (who, incidentally, concluded that Ms. L was "highly cooperative"[147]).

On February 28, Ms. L brought her daughter to ACS for a medical examination.[148] A caseworker noted that on that date, "[Ms. L] expressed frustration . . . that she was being given the runaround with the counseling referral for [Z]. [Ms. L] stated that she contacted two places so far that were given to her and she was being shuffled around because of various technicalities with the providers not accepting her insurance."[149]

The next day, ACS filed an Article 10 Petition, concluding that the "[m]other did not address the issue or take appropriate actions to protect the child."[150]

Ms. L expressed to her caseworker on multiple occasions that she felt she was being punished for the actions of Z's father. The caseworker noted that on March 11, she met with the mother along with a supervisor,

> [I]n response to the mother's expression of distress and frustration with the way her case was being handled. [Ms. L] said that she feels that she is being punished for something [the father] did and though she did not molest [the] child, she is the one being put through the ringer. [Ms. L] expressed extreme frustration regarding the difficulties she is experiencing with getting an appropriate counseling referral for herself and [the] child . . . . [The caseworker and supervisor] counseled [her] and encouraged her to allow the process to work so that she can get the help needed for herself and [the child].[151]

Again, on April 8, Ms. L "expressed more frustration regarding the fact that [the father] has not been apprehended and she feels that the authorities are not even looking for him."[152]

In pursuing a case against Ms. L, the caseworker and her supervisors disregarded the trauma involved with processing this kind of

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146. *Id.* (note entered Feb. 22, 2008).

147. *See* CHILD PROTECTIVE SERVS., INTAKE REPORT, IN RE ZLF at 3 (March 3, 2008) (on file with author).

148. INVESTIGATION PROGRESS NOTES, *supra* note 137 (note entered Feb. 28, 2008, 2:30 PM).

149. *Id.*

150. *Id.* (note entered Apr. 3, 2008).

151. *Id.* (note entered Apr. 14, 2008, 4:00 PM).

152. *Id.* (note entered Apr. 15, 2008, 9:00 AM).

information, focusing on the mother's actions in the less than forty-eight hours following her daughter's disclosure.

b. The Discussion

By concentrating on this two-day period in ACS's decision to file a petition, the agency discounted everything Ms. L did correctly in protecting and supporting her daughter—consistent with an expectation of maternal perfection. As explained by Cecilia L. Ridgeway and Shelley J. Correll, "[c]ontemporary cultural beliefs about the mother role include a normative expectation that mothers will and should engage in 'intensive' mothering that prioritizes meeting the needs of dependent children above all other activities."[153]

However, discovery of child sexual abuse is a process, not an event.[154] The process is "generally [ ] unexpected and confusing."[155] Upon initially receiving the information that her daughter had been sexually abused, and in the time following, Ms. L did everything a protective, traumatized mother could be expected to do. It was normal, yet perhaps not ideal for purposes of an ACS investigation, for Ms. L to be shocked, for her to cry, and for her to take some time before reporting the disclosure to either the police or to child protective services. It was expecting too much (to say the least) for ACS to believe that Ms. L should have actually had the wherewithal to take action immediately upon receiving this information.

It is simpler for investigative and decisionmaking purposes to rely on the assumption that there is one correct reaction to a discovery. When mothers do not behave in that way (which they very likely will not), ACS can swiftly file a petition alleging that they did not act in the ideal manner. There is in fact no "ideal" reaction when a mother first discovers her child may have been sexually abused:

> First, because alleged perpetrators generally deny the abuse and there is rarely physical or medical evidence or eyewitness

153. Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60 J. Soc. Issues 683, 690 (2004); *see also* Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 Gender & Soc'y 139 (1990) (describing the impossible expectations that society imposes upon mothers to have "nearly superhuman capacities" and put their families ahead of everything else).

154. Carol A. Plummer, *The Discovery Process: What Mothers See and Do in Gaining Awareness of the Sexual Abuse of Their Children*, 30 Child Abuse & Neglect 1227, 1228 (2006).

155. Ann N. Elliott & Connie N. Carnes, *Reactions of Nonoffending Parents to the Sexual Abuse of Their Child: A Review of the Literature*, 6 Child Maltreatment 314, 314 (2001).

> testimony, a parent's belief that the abuse occurred often rests on the word of the child versus the word of the perpetrator. Second, because most sexual abuse is perpetrated by someone known to the child, it may be difficult for the nonoffending caregiver to comprehend that someone they know, and perhaps trust, could commit such an act. Thus, when abuse is first disclosed, it is not surprising that there is considerable variability in the extent to which parents believe, support, and protect their children.[156]

Furthermore, a nonoffending mother who takes time to process the situation before taking action is not outside the range of behavior of other similarly situated mothers. Depending on personal coping patterns, some mothers find it hard to believe abuse is happening or has happened, some deny it when there is clear evidence, and "other mothers may actually seek additional information or confirmation before they elect to take decisive action."[157] Thus it is unwarranted to punish nonoffending mothers for their reasonable reactions immediately following the disclosure of sexual abuse—especially when, as here, there is not imminent harm to the child.[158]

By dragging Ms. L through this process instead of allowing her to focus on her daughter and the treatment they *both* needed, ACS was doing more harm than good.[159] Rather than spend copious amounts of time trying to obtain a finding of neglect against Ms. L as punishment for her failure to conform to unattainable expectations, the caseworker should have expended more energy on ensuring that Ms. L and Z were processing these events in a safe way.[160] The caseworker should have waited longer than just shy of two weeks before filing a petition against Ms. L. Perhaps other measures would have been more time- and cost-effective. For example, time

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156. *Id.* at 315 (internal citations omitted).

157. Plummer, *supra* note 154, at 1228.

158. This is not to say that Ms. L could take any action without facing repercussion. If, for instance, she actively sought to cover up the abuse, or if she waited weeks or months to take any action, these would obviously warrant a finding of failure to report child sexual abuse.

159. *See* Jane M. Spinak, *Reforming Family Court: Getting It Right Between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11, 34 (2009). This article was sparked by the New York Law Journal's request that Spinak comment on the success of the New York family court reforms. *Id.* at 11. Spinak implicitly questions whether the procedures of family court do more harm than good for families, and suggests that the goal should be diversion from court, which is more effective in engaging the family in needed services. *Id.* at 35–36.

160. This recommendation will be discussed in more detail in Part IV, *infra*.

the family spent in court may have been more productively spent in therapy.

2. Case Study #2: The Ideal Mother Does Not Question Her Child's Allegation of Sexual Abuse. She Believes Her Child Immediately. A Mother Who Does Not Immediately Believe Her Daughter's Allegation Is a Bad Mother.

This next case focuses on the issue of belief. Like the first case study, it concerns assumptions about the way ideal nonoffending mothers react to an initial disclosure of sexual abuse. In this case, even though the mother (Ms. M) cooperated with ACS and completed the tasks requested of her, she did not believe her daughter, who had recanted a similar allegation in the past. ACS victimized the mother, refusing to acknowledge signs that perhaps she was going through a traumatic period, and filed a petition in family court against her just one week after the initial meeting.

Belief in the truth of a child's allegation should not be a reason for filing a petition against a nonoffending mother. First, belief is an acutely complicated element that is part of the traumatic process of discovery touched upon above. Second, a mother's lack of belief is not legally sufficient for a finding of neglect.

a. The Facts

The petition filed by ACS on May 28, 2009, alleges that Ms. M knew or should have known that her boyfriend sexually abused her ten-year-old daughter, JA, and yet she failed to adequately protect her.[161] JA made similar allegations the year before, but recanted them.[162] JA said that she recanted previously because her mother "became sad and distraught."[163] JA disclosed to a child abuse prevention program worker on May 22, 2009, that her mother's boyfriend had been sexually abusing her since she was seven years old.[164] On the same day an ACS caseworker and a detective both spoke with Ms. M at the child advocacy center.[165] The detective disclosed to Ms. M what her daughter had alleged.[166] Ms. M "got upset immediately."[167] She immediately started to tell the caseworker that

161. Petition, add. 1, ¶ 5, *In re* JA, No. NA-15870-09 (N.Y. Fam. Ct. May 28, 2009) (on file with author).

162. *Id.* at ¶ 2.

163. *Id.*

164. *Id.*

165. Admin. for Childrens Servs., Investigation Progress Notes, In re JA (note entered May 25, 2009) (on file with author).

166. *Id.*

167. *Id.*

JA had made these allegations before and that she recanted because they were not true.[168] At the child safety conference on May 26, 2009, Ms. M said that her daughter was lying, that her daughter had a problem, and that Ms. M was the victim in this situation even though it was her daughter who was molested.[169] The caseworker noted that "[Ms. M] seemed to be in denial of the incident, felt that she was being victimized and had a difficult time dealing with the situation."[170] A petition against both Ms. M and her boyfriend (the perpetrator) was filed in family court,[171] and an order of protection was issued against the perpetrator.[172] Ms. M fully complied with the order of protection.[173] Her children were never removed from her custody, and during a court appearance on June 11, 2009, she "stated that she did not know where [the perpetrator] was."[174] The caseworker commented on this date that "there [were] no safety issues with the children,"[175] and that the perpetrator "is alleged to be out of the home."[176] She concluded that "[t]he children are safe in the care of their mother."[177]

The fact-finding was not held until over a year after the petition was filed, in November 2010. As noted above, a finding of neglect can only be entered on the basis of acts or omissions *before* the filing of the petition.[178] The cross-examination of the caseworker by the attorney for JA's siblings brings to light the fact that the only thing Ms. M did wrong that led to the filing of the petition was disbelieving her daughter's allegation:

> Q: And when you told her about [JA's allegation of sexual abuse], did she appear to be shocked or a little bit surprised?
>
> . . .
>
> A: Yeah. Ms. M stated that, immediately, she said she doesn't believe this. She doesn't believe that she has to go through this again. Her daughter is a liar, and she is tired of it.

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168. *Id.*

169. *Id.* (note entered May 27, 2009).

170. CHILD PROTECTIVE SERVS., FAMILY SERVS. PROGRESS NOTES, *In re* JA (note entered May 27, 2009) [hereinafter FSPN JA] (on file with author).

171. Petition, *In re* JA, No. NA-15870-09 (N.Y. Fam. Ct. May 28, 2009) (on file with author).

172. FSPN JA, *supra* note 170 (note entered June 26, 2009).

173. *Id.* (note entered May 27, 2009).

174. *Id.* at 5.

175. *Id.*

176. *Id.*

177. *Id.*

178. N.Y. FAM. CT. ACT § 624 (McKinney 2010).

Q: Okay. And did she say why she thought her daughter was a liar?
A: Yes.
Q: And?
A: She stated that her daughter is a liar, because her daughter put her through this in Miami, and now her daughter is putting her through this in New York, and none of it is true.
. . .
Q: So, what is it that you told the mother had to be done with reference to her children at that point? What did she have to do, according to you? Well, first of all, did you say that you're willing to leave the kids in her home if she followed certain procedures?
A: Yes.
Q: And what procedures—even despite her being shocked and not believing her daughter—what procedures did you wanted put in place for her to do to keep the kids?
A: To temporarily exclude [her boyfriend] from the home.
. . .
Q: To your personal knowledge, are you aware that she violated what you asked her to do by allowing him back in the home prior to the case going to Court and orders being issued by the Court?
A: . . . In my personal knowledge, I don't think she violated it.
Q: Okay. And then, what else did you ask her to do? What, what actions did you ask her to take immediately?
A: No. That was it, immediately.
Q: And after that, what actions—eventually, you talked to her again, and did you have any other requests for her with reference to her daughter, JA, or the other children, about what you wanted her to do?
. . .
A: Just come to the Child Safety Conference and discuss the case.
Q: And when was that? What day was that?
A: That was on May 26th of 2009.
. . .
Q: Okay. So, the 26th, you have the Safety Conference. She was there? Did she show up?
. . .
A: Yes.
. . .
Q: [W]hat else did you ask her to do that day?

A: . . . [W]e tried to just work with her at that point, to see if she can, you know, if she's willing to accept services. Ms. M was very upset and we couldn't work with her at that point. At that point, my manager told me that we would have to file the case.
Q: Okay. Now, what I'm trying to find out is, between the 22nd and when you filed, did you ask her also to bring [JA] or all of the children for a physical exam?
A: . . . [A] physical exam was done—I think prior to [filing].
. . .
Q: And was that something that you needed a warrant, to get the kids? Or did Ms. M bring the kids in voluntarily for a physical exam?
A: She brought them in voluntarily when we asked.
[No further questions.][179]

It is clear from both the investigation progress notes and the caseworker's testimony at the fact-finding that the primary motivating factor for filing the petition against Ms. M was her disbelief of her daughter, even though she did everything else that was asked of her relating to the safety and well-being of her children.

b. The Discussion

Belief is perhaps the most complicated element associated with discovery of sexual abuse. To hinge a decision to file a neglect petition solely on disbelief is irresponsible and may send the family into even greater trauma. Often, however, this is exactly what is done. Whether or not a mother believes her child's allegations, or wavers in her belief, directly affects whether or not cases are substantiated by caseworkers (i.e., whether a petition is filed against the nonoffending mother). In one study, if "[the mother] wavered in her belief that abuse occurred, she was 23 times more likely to be substantiated [by the caseworker]."[180]

Choosing to file a neglect petition on this basis illuminates another aspect of the use of the ideal mother stereotype in child sexual abuse cases. The ideal mother believes her child's allegations immediately, even when the child has recanted in the past. However, belief is not normally an automatic response to discovery of evidence of sexual abuse. As stated above, discovery is a process, not

179. Transcript of Fact-Finding at 51-59, *In re* JA, No. NN-15868-71/09 (N.Y. Fam. Ct. Nov. 23, 2010) (on file with author).

180. Carol Coohey, *How Child Protective Services Investigators Decide to Substantiate Mothers for Failure-to-Protect in Sexual Abuse Cases*, 15 J. CHILD SEXUAL ABUSE 61, 77 (2006).

an event. A child rarely comes forward with a clear-cut report after the first incident of abuse:

> By the time the child is experiencing severe abuse, several things may have occurred: he/she may feel responsible, may feel guilty for not telling sooner, may become inappropriately acclimated to the abuse as a normal life event, or may even enjoy certain aspects of the relationship with the perpetrator and thus cooperate with protecting him/her. The child may fear being disbelieved or causing the family trouble with a disclosure. Children are also frequently threatened not to tell . . . . In some cases, the mother may even approach the abused child with her concerns and have the child blatantly deny any abuse, or disclose and then retract the disclosure. Further, 20–50% of children may be initially asymptomatic, making detection even more difficult. *Needless to say, these factors can be very confusing to mothers* . . . . Because mothers sometimes have to piece together a puzzle of facts, hunches, and fragments of what they have seen and heard, the discovery process may take time.[181]

At the same time as the mother is attempting to gain more information about the allegation, she is experiencing the internal process of accepting that this horrible thing may have happened or did happen.[182] One scholar postulates that "a progression of maternal responses may mirror those observed with someone grappling with grieving a death: denial, guilt, depression, anger, and finally acceptance."[183]

To make matters worse, caseworkers and clinicians may mistake less effective coping mechanisms for ambivalence or disbelief. The nonoffending mother may experience the disclosure as an "extreme stressor," leading her to use less effective coping mechanisms.[184] Clinicians and caseworkers might assess this as ambivalence, which was exactly the circumstance in which Ms. M found herself. Those nonoffending guardians with the greatest stressors and the fewest resources (i.e., the mothers who end up in family court[185]) "may be at greatest risk for experiencing the spiral-

181. Plummer, *supra* note 154, at 1228 (emphasis added) (citations omitted).

182. *Id.*

183. *Id.* (citing Margaret H. Myer, *A New Look at Mothers of Incest Victims*, 3 J. Soc. Work & Hum. Sexuality 47 (1985)); *see also* Elliott & Carnes, *supra* note 155, at 314 (explaining that when parents discover that their child has been sexually abused, many experience a process similar to that of a parent who learns of his or her child's tragic death).

184. Rebecca M. Bolen & J. Leah Lamb, *Ambivalence of Nonoffending Guardians After Child Sexual Abuse Disclosure*, 19 J. Interpersonal Violence 185, 203 (2004).

185. *See supra* text accompanying note 94.

ing losses that lead to more depleted coping mechanisms and ambivalence in response."[186] Furthermore, mothers "who have the greatest costs associated with disclosure can least afford to lose the support provided by the perpetrator and thus may react with the greatest ambivalence."[187]

For these reasons, Part IV.B suggests that caseworkers should not rely on the element of belief at the time of disclosure as the primary factor in their decision to substantiate a case of neglect against a nonoffending mother.

IV.
RECOMMENDATIONS

To reduce the use of the ideal mother stereotype in caseworker decisions, reformers must reconcile caseworker investigations with the legal framework and the social-scientific realities of child sexual abuse disclosure. Caseworkers should be careful that they do not punish the "bad mother," who may be imperfect in the way she handles the initial disclosure, when deciding whether to substantiate a case and in litigating a case against the nonoffending mother of a child subject to sexual abuse. However, the extensive social science literature on the subject shows that the idea of an ideal mother in this situation is a myth.[188] While the case studies analyzed in Parts II and III are just three examples, many scholars support the idea that these practices are prevalent. As illustrated in Part III.B.ii, caseworkers are twenty-three times more likely to substantiate cases where the mother does not believe the child.[189] The literature, and other cases,[190] also supports the proposition that caseworkers focus

186. Bolen & Lamb, *supra* note 184, at 196.

187. *Id.*

188. *See, e.g.*, Plummer, *supra* note 154, at 1228 and accompanying text; Elliott & Carnes, *supra* note 155, at 314 and accompanying text.

189. Coohey, *supra* note 180, at 77.

190. For example, in deciding to return a nonoffending mother's child to her after an emergency hearing, the judge concluded that "she did not have good judgment . . . when she did not immediately take actions to repo[r]t this incident, to call the police, or to take the child to her. That was bad judgment." Transcript of Emergency Hearing at 165, *In re* AL, No. NA-3385/10 (N.Y. Fam. Ct. Sept. 13, 2010) (on file with author). However, the judge decided to return the child to the mother because she had since then complied with services and "learned her lesson." *Id.* at 165–66, 168. Nonetheless, the judge granted ACS's motion for summary judgment, and entered a finding of neglect based entirely on the transcript from the emergency hearing. Decision and Order on Motion for Summary Judgment, *In re* AL, No. NA-3385/10 (N.Y. Fam. Ct. Apr. 28, 2011) (on file with author). Thus, the decision hinged on the mother's actions immediately following disclosure. *See id.*, at 7.

on the initial response of the mother. There seems to be a lack of awareness by individual caseworkers that the mother is experiencing a trauma—a trauma that is exacerbated by the filing of a case against her in court.

ACS tangentially acknowledges the needs of the nonoffending mother. For example, the agency published supplementary guidelines for post-disclosure investigation of child sexual abuse in November 2010.[191] These guidelines include a rudimentary summary of disclosure effects on the nonoffending parent. The guidelines explain that the nonoffending parent may have difficulty believing the incident could have happened,[192] that the parent may not understand why the child did not come to her or him when the abuse first occurred,[193] and that the nonoffending parent may express a range of emotions, including confusion over a close relationship with the alleged perpetrator and the desire to protect the child.[194] The guidelines also require caseworkers to make referrals for counseling and educational workshops for the nonoffending parent, the child, and siblings.[195] However, the guidelines are focused on avoiding a child's recantation of an abuse allegation, rather than on an appreciation of what the nonoffending mother may be experiencing.[196]

The Child Welfare Training Institute (Institute) provides training for caseworkers and the multidisciplinary teams that intervene in these cases.[197] The Institute's "Common Core" training is mandatory for all new caseworkers.[198] One of the two-day required trainings for caseworkers is on sexual abuse.[199] The Institute also offers an advanced two-day course in sexual abuse interviewing, and advanced courses in the multidisciplinary team approach to sexual abuse, which includes strategies to enhance a coordinated investiga-

191. N.Y.C. Admin. for Children's Servs., Post Disclosure/Child Sexual Abuse: Guidelines for Understanding and Addressing Recantation (2010), *available at* http://www.nyc.gov/html/acs/downloads/pdf/pub_child_sexual_abuse.pdf.

192. *Id.* at 27.

193. *Id.*

194. *Id.* at 29.

195. *Id.* at 33.

196. *See id.*

197. *See New York State Child Welfare Training Institute*, Buffalo State Coll. Ctr. for Dev. of Human Servs., http://www.bsc-cdhs.org/WhatWeDo/Train/NYSChildWelfareTrainingInstitute.aspx (last updated Oct. 25, 2011 8:02 AM).

198. *Id.*

199. John Doris et al., *Training in Child Protective Services: A Commentary on the Amicus Brief of Bruck and Ceci (1993/1995)*, 1 Psychol. Pub. Pol'y & L. 479, 483–84 (1995).

tion between various agencies,[200] such as the District Attorney's Office and the New York Police Department.[201] The curriculum includes guidelines for "assessing the nonoffending caretaker."[202]

While ACS has established guidelines and trainings for caseworkers investigating cases of child sexual abuse that acknowledge some needs of the nonoffending parent, given the aforementioned statistics on these cases and the two case studies discussed *supra*, it is clear that these guidelines do little to combat the stereotypes that many individual caseworkers may harbor about nonoffending mothers. Therefore this Part proposes certain recommendations to ensure that the ideal mother stereotype does not influence a caseworker's decision to substantiate a case against the nonoffending mother. The first recommendation is procedural: More time before a petition is filed. The second is statutory: A decreased reliance on belief as the motivating factor in whether to substantiate a case. These recommendations would limit caseworker discretion and reduce the risk that the stereotype of the ideal mother affects the decision to file a petition against the nonoffending mother. The third recommendation is a specific training on the nonoffending parent in addition to the trainings about sexual abuse in general.

A. More Time Before a Petition Is Filed

As the cases in Part III illustrate, caseworkers often file a petition against the mother within a week of disclosure. This does not provide caseworkers with enough time to delve into deeper issues and problems that both the mother and the child are experiencing. Instead it forces them to rely on stereotypes of the ideal mother because, frankly, there is not enough time to base the decision on anything else. However, given the fact that mothers process disclosure of child sexual abuse in a variety of ways, it is important—both for making family members feel that they are being treated with dignity, and for ensuring that the cases brought against nonoffending mothers actually are cases where the child is at risk—that caseworkers take more time during the investigation phase.

The fact is that mothers process abuse in a variety of ways, "vary[ing] widely in terms of levels of belief, supportiveness, protec-

200. *Id.* at 487–88.

201. *See* David L. Lewis, *ACS, Cops Form Team Strategy to Handle Sexual Abuse*, N.Y. DAILY NEWS, (Feb. 13, 1998), http://www.nydailynews.com/archives/news/acs-cops-form-team-strategy-handle-child-sexual-abuse-article-1.795678 (reporting on cooperative agreement among caseworkers, police officers, and prosecutors).

202. Doris, *supra* note 199, at 488.

tiveness, and distress they exhibit, suggesting that there is no 'typical response'" to child sexual abuse.[203] For example, even social science studies sometimes run counter to other findings in the field, suggesting that caseworkers ought to view mothers as a heterogeneous group in the way their unique situation impacts them and their families.[204]

In fact, what mothers do with their intuitive concerns, including what actions they take, is of interest because it informs clinical approaches to early intervention and support.[205] In other words, more time during the initial investigation could mean a more positive impact in the life of both the mother and the child. In turn, more time means more individualized probing, which is crucial to resisting the "ideal" mother stereotype.

Taking more time before filing a petition against the nonoffending mother will not put the child in danger. Typically, as in the above examples, the perpetrator is locked away in jail, so there is no chance of the child being harmed by him again. If the caseworker still believes the child is at imminent risk of harm, ACS has procedures to remove the child immediately.[206] At that point, an emergency hearing will be held to determine whether this perceived risk is substantiated.[207]

B. Belief at the Time of Disclosure Should Not Be the Motivating Factor in Deciding to File a Petition Against the Nonoffending Mother

Belief at the time of disclosure should not be the motivating factor in deciding whether to substantiate a case against the nonoffending mother. Caseworkers may disagree with this recommendation, citing a concern for the child's future psychological and emotional well-being and using belief as a proxy for a mother's ability to protect her child.[208] However, relying on belief at the time of disclosure is both inconsistent with the legal standard for neglect

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203. Elliott & Carnes, *supra* note 155, at 327.

204. Ramona Allagia & Jennifer V. Turton, *Against the Odds: The Impact of Woman Abuse on Maternal Response to Disclosure of Child Sexual Abuse*, 14 J. CHILD SEXUAL ABUSE 95, 110 (2005) (finding that the authors' study runs contrary to another scholar's results).

205. *Id.*

206. *See* Part I, *supra*.

207. *Id.*

208. One caseworker explains:

> In terms of the mother believing her child, I think that it is a pretty important factor in protecting the child. Yes, technically, a mother can protect her child and keep the child safe from abuse without believing her, but that's tough and, I think, rare. Also, with cases like these, the child's future psychological

and is not a reliable proxy for a mother's ability to protect her child.

1. Relying on Belief Is Inconsistent With the FCA Standard for Neglect

To establish a finding of neglect, the law requires a failure to provide a minimum degree of care,[209] a standard objectively judged by how a similarly situated parent would act.[210] This requires an inquiry into the conduct of the parent, rather than into emotions or personal feelings. Belief, a psychological process, does not and should not factor into the legal calculus of minimum degree of care as defined by the FCA and refined by *Nicholson v. Scoppetta*.[211]

Furthermore, even if belief did factor into the calculus of minimum degree of care, the inquiry is an objective one, and courts are directed to evaluate whether "a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances then and there existing."[212] Thus, the "focus must be on whether [the mother] has met the standard of the reasonable and prudent person in similar circumstances."[213] Given the complicated reality of the child sexual abuse discovery process for nonoffending mothers, and the fact that many "reasonable" mothers in these situations struggle with the belief element, the heavy reliance on belief by caseworkers is unfounded and not supported by the law. When caseworkers rely on belief they rely on the ideal mother stereotype rather than objectively looking at the reasonable mother in the applicable situation.

2. Belief Is Not an Adequate Proxy for a Mother's Ability to Protect Her Child

Belief at the time of disclosure is not an adequate proxy for a mother's ability to protect her child. For starters, belief is a problematic indicator because it is not a static construct.[214] Given the complex nature of the discovery process, mothers "may simultane-

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and emotional well-being is always a factor, and knowing that your mother, your protector, does not believe you can have a serious damaging effect on the child's well-being.

Gordon E-mail, *supra* note 127.

209. N.Y. FAM. CT. ACT § 1012 (McKinney 2010).

210. *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 846 (N.Y. 2004).

211. *Id.*

212. *Id.*

213. *Id.*

214. Elliott & Carnes, *supra* note 155, at 315.

ously and/or sequentially experience a wide variety of reactions."[215] Focusing on belief at the time of disclosure does not take into account the complications inherent in the process of belief itself.

Furthermore, belief alone does not necessarily ensure support or protection, especially if the perpetrator is the mother's partner.[216] In addition, many mothers who exhibit ambivalent responses are still able to take actions to protect their children.[217] As one scholar suggests, "[a]doption of an empathic and nonjudgmental approach toward a parent's initial uncertainty may be more effective than a confrontational approach that is presumptive and could alienate the parent."[218]

Because belief is not a static element and it does not ensure protection of the child, an approach whereby caseworkers take account of and work through a mother's belief process may be more effective than using nonbelief as a proxy for neglect.

C. Trainings for Caseworkers on the Nonoffending Parent

An additional two-day advanced training specifically on the nonoffending parent should be included in course offerings at the Institute. Because child sexual abuse is particularly traumatic, and parental responses are diverse, it is crucial for caseworkers to receive special training on the subject so they can investigate accordingly. This will ensure that they have a better idea of which cases are necessary to substantiate against the nonoffending mother. There is a great deal of research on how mothers react when they discover their children may have been sexually abused.[219] However, caseworkers seem to ignore the reality and instead focus on what they think is the correct response.

The American Bar Association recently held a two-day training for lawyers of nonoffending mothers in child sexual abuse cases.[220] The training consisted of hashing out much of the social science

215. *Id.* For example, "although a mother may believe her child's allegation, she may also have difficulty believing that her husband could sexually abuse their child." *Id.*

216. *Id.*

217. *See id.*

218. *Id.* at 327.

219. *See supra* notes 154–58 (citing social science research concluding that mothers' reactions vary greatly when they discover their child has been sexually abused).

220. *See* Draft Agenda for Am. Bar Ass'n, Ctr. on Children and the Law, Improving Representation in the Child Welfare System: The Second National Parents' Attorneys Conference, July 13–14, 2011, *available at* http://www.docstoc.com/docs/109069188/DRAFT-AGENDA-for-Discussion.

data upon which this Note relies. Among the topics discussed were the stressors nonoffending mothers are under; the barriers they face to learning about, recognizing, and reporting sexual abuse; the importance of their response to children's disclosures; and ways they can address the children's needs going forward.[221] These issues were addressed primarily through a mock direct examination of Rebecca Bolen, a sexual abuse expert.[222] Also discussed were strategic points for counsel to address when representing the nonoffending mother at trial.[223]

Given the high number of cases brought against nonoffending mothers, it would be beneficial for caseworkers to be trained on typical reactions of such mothers and why they respond the way they do. This knowledge could aid in assessing what is important during the initial investigation. If caseworkers understand on a deeper level what nonoffending mothers experience in child sexual abuse cases, they will be in a better position to assist the mothers and get them the support they need—and the support caseworkers are required to give them.

Nonoffending mothers "often report that they did not receive the type or level of support they needed from traditional interventions such as police, caseworkers, or counselors."[224] Some mothers complain directly to their caseworkers about this lack of support.[225] Part of dispelling the myth of the ideal mother is recognizing that mothers are going through a traumatic experience along with their child.[226] It is thus important for caseworkers to take a step back and respond to the needs of the nonoffending mother as part of the initial investigation. This will not only help the mother cope, but it will also equip her with the skills to be more supportive of her child throughout the process.

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221. *See* Rebecca Bolen, Professor, Univ. of Tenn. Coll. of Soc. Work & Andrew Cohen, Dir. of Appeals, Comm. for Pub. Counsel Servs., Children & Family Law Div., Outline of Presentation at the Am. Bar Ass'n, Ctr. on Children and the Law, Improving Representation in the Child Welfare System: The Second National Parent's Attorneys Conference: Representing the Non-Offending Parent in Sexual Abuse Cases (on file with author).

222. *Id.*

223. *Id.*

224. Elliott & Carnes, *supra* note 155, at 324.

225. *Id.* at 328.

226. "Given that sexual abuse of one's child is often a highly stressful and disruptive experience, it is not surprising that parents frequently experience significant distress following disclosure. . . . In past years, parental distress in response to the abuse of one's child was frequently overlooked. However, considerable research on this topic has emerged during the past decade, as have many books in the popular and professional literature." *Id.* at 320.

Parents of sexually abused children often experience a great deal of mental anguish, and need personalized treatment. Clinically elevated symptoms of Post-Traumatic Stress Disorder have been observed in parents following disclosure of their children's abuse.[227] Anecdotal reports, confirmed by empirical studies, suggest that the sexual abuse of one's child is also associated with increased levels of general distress, depression, maternal hospitalizations, and maternal suicide attempts.[228]

Critics of this recommendation may argue that the goal of the child protection system is to protect the child, not to understand the needs of the mother.[229] However, looking beyond the actual child protective proceeding, it is clear that the goal of child protective services more broadly is to provide both protection for the child and rehabilitative services for the child *and parents* involved.[230]

Protection of the child is in fact furthered by caseworker appreciation of the mother's unique situation. An increased focus on the nonoffending mother's mental state will not only help her cope, but will benefit the child:

> Parents who are experiencing high levels of distress may have difficulty providing support to their children and difficulty following through with interventions designed to help the child. Theoretically, if nonoffending parents are provided with services designed to increase their own coping abilities, they should be better able to help their children cope effectively with abuse-related issues.[231]

In turn, greater parental support is associated with better emotional and behavioral adjustment in sexually abused children.[232] Because providing support to mothers ultimately helps the child, it thus serves the interests of ACS to provide caseworkers with the training they need to support nonoffending mothers in a meaningful way.

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227. *Id.*

228. *Id.*

229. The FCA articulates the purpose of child protective proceedings as,

> designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.

N.Y. FAM. CT. ACT § 1011 (McKinney 2010).

230. N.Y. SOC. SERV. LAW § 411 (McKinney 2013).

231. Elliott & Carnes, *supra* note 155, at 324.

232. *Id.* at 322.

CONCLUSION

This Note has analyzed, through the lens of anti-stereotyping theory, judicial and caseworker decisions to substantiate neglect cases against nonoffending mothers for failing to protect their children from child sexual abuse. It found that caseworkers often use a stereotype of the "ideal" mother in making their decisions. As Part III showed, a "top-down" approach (i.e., Supreme Court decisions influencing caseworker treatment on the ground) to ending gender discrimination in family court has not worked. Therefore the remainder of this Note focused on ways in which caseworkers rely on the ideal mother stereotype and on "bottom-up" ways to reduce their use of the stereotype. In particular, caseworkers focus on a mother's reactions immediately following discovery of the abuse. Caseworkers file petitions when the mother waits to take action, or when she does not believe her child's allegations at first. However, social science literature reveals that both of these elements are natural responses to discovering abuse. It is expecting the unattainable from mothers to hold them to any higher standards. There are ways to limit reliance on the ideal mother stereotype while still protecting the child, and the three recommendations in this Note would be a good start.