

**Innocence Interrupted: Reconstructing Fatherhood
in the Shadow of Child Molestation**

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ABSTRACT

This Article shows why criminal law should be regarded as parenting law, as child molestation statutes formally categorized as criminal statutes are increasingly being used to regulate parents' behavior as they engage in mundane childcare practices. In the hands of legal decision-makers, these laws end up being enforced in ways that reconstitute traditional gender norms. This Article charts the problem by showing how the inquiry authorized by today's broad, far reaching child molestation statutes invites and even requires judges, juries other legal decision-makers to rely on gendered notions of cultural "common sense" to resolve child molestation cases involving fathers providing seemingly mundane intimate care. The Article shows why child molestation statutes are interpreted in the intimate care cases in ways that enforce gendered parenting norms, showing that legal decision-makers turn to these stereotypes because the concepts of sexual injury at the heart of child molestation law are radically undertheorized. The article considers the role feminist legal theory has played in this undertheorization problem, addresses the stumbling blocks to future feminist theorizing on this issue, and examines the material consequences of the current undertheorized concepts of sexual injury for the practice and experience of fatherhood.

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INTRODUCTION

When James Lloyd Emmett prepared his son for the child's evening shower he scarcely imagined that his actions would cause him to be charged with child molestation.¹ Emmett by all lights seemed to be your average father: neither a particularly skilled parent nor a particularly incompetent one. But for unknown reasons, perhaps to save time or water, he decided to shower *with* his five-year-old son, rather than have the child bathe alone. After the shower, Emmett finished the job by rubbing baby oil on himself and his son's skin.² The events recounted here may make some readers uneasy or give others pause. What exactly is it that Emmett did wrong? Much of this unease stems from the concern that Emmett violated certain unspoken social norms; however, the substance of these norms and the logic that informs them is unclear. One thing is sure. No one sanctioned Emmett for the shower — indeed, no alarm was even raised, until sometime later, when the little boy alleged that his father had rubbed his genitals against the child on *another* occasion.³ Shortly thereafter a firestorm of controversy ensued that made the father-son shower suspect, led Emmett to be charged with child molestation, and took the case to the highest court in the state of Utah.⁴

What should we make of Emmett's story? Was Emmett an innocent father who took a shower with his son or a pedophile engaged in an act of child molestation? Some are prepared to argue that the shower was categorically inappropriate. It constituted sexual abuse regardless of what specific acts occurred.⁵ For others its inappropriateness would turn on what Emmett did during the shower. They would ask, "did he knowingly touch the boy in an inappropriate fashion?"⁶ Still others would argue that meaning of the shower turns on Emmett's specific intent.⁷ They would ask whether Emmett's object was to experience sexual arousal in bathing his son, even if no clearly illicit touching occurred. These critics would point to the boy's allegations regarding another instance of inappropriate touch as evidence suggesting that something clearly illicit was intended during the shower as well. These questions are extremely difficult, yet resolving them seems key to the resolution of Emmett's case. By answering these questions, it is argued,

¹ *State v. Emmett*, 839 P.2d 781 (Utah 1992).

² *Id.* at 782.

³ *Id.*

⁴ *Id.*

⁵ Paul Okami, *Childhood Exposure to Parental Nudity, Parent-Child Co-Sleeping and "Primal Scenes": A Review of Clinical Opinion and Empirical Evidence* 32 J. OF SEX RES. 51-52 (1995) (discussing mental health, legal and social services professionals' view that parent-child co-bathing and similar behavior constitutes sexual abuse); Paul Okami *et. al.*, *Early Childhood Exposure to Parental Nudity and Scenes of Parent Sexuality*, 27 ARCHIVES OF SEXUAL BEHAVIOR 361 (1998) (same). Okami reports that empirical evidence to support the view that co-bathing is abusive is "exceedingly scant" at this time. Okami, *supra* note 6, at 52.

⁶ This approach tracks the inquiry conducted under "general intent" child molestation statutes, which cause liability to attach when one "knowingly" and "intentionally" or "purposely" touches a child in an area statutorily defined as sexual in nature. *See, e.g.*, ALA. STAT. 11.81.900 ("knowingly"); ALA. CODE § 13A-6-69.1("purposely")

⁷ This approach tracks the logic of "specific intent" child molestation statutes, under which liability attaches when a person acts with the specific intent to sexually arouse himself or his victim. *See, e.g.*, K.R.S. § 510.010 ("intent to arouse"); LA. R.S. 14:81 (same)

we can better sort out exactly how it is we define child molestation. By sorting through these issues, we can more precisely determine when it is that parental care takes an ugly turn and constitutes sexual abuse.

The questions outlined in the previous discussion track a classic debate in child molestation law, one that explores the relative merits of general versus specific intent child molestation statutes.⁸ While these technical questions are important, it would be a mistake to allow this elements-based inquiry to dominate our concerns. For, as this Article shows, the general versus specific intent debate cannot get at the heart of the controversy in *Emmett*, or in many of the other child sexual abuse cases involving parental intimate care. Instead the debate produces false assurances that tend to hide the degree to which these cases are determined by social “common sense” — our unexamined gut level views about gender norms. For, as this Article shows, regardless of whether one examines *Emmett* as a general or specific intent case, the formal legal inquiry used in child molestation cases invites legal decision-makers to assess the appropriateness of parental conduct by referring to traditional gender role norms. Consequently, fathers like Emmett who “dare to mother,” who engage in traditional caregiving tasks, find they must negotiate gender stereotypes that promote sexual suspicion about fathers that provide intimate care.

Naming sexual abuse statutes’ role in enforcing gendered notions of parenting forces us straight into the heart of the lion’s den. In analyzing this problem we must engage with certain unresolved questions in feminist legal theory and criminal law scholarship. Thus far, criminal justice scholars have focused their attention on ensuring that child molestation statutes are broad enough to catch both actual and would be perpetrators.⁹ Similarly, feminists have called for more broadly defined child molestation laws to ensure that children are believed when they claim injury and that the state has the tools required to take corrective action.¹⁰

⁸ See A.B.A. NAT’L L. RESOURCE CENTER CHILD ADVOC., RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY SEXUAL ABUSE CASES (1982) (hereinafter *ABA Report*) (emphasizing general versus specific intent distinction). See also, Vicki J. Benma, *Protective Cruelty: State v. Yanez and Strict Liability as to Age in Statutory Rape*, 5 ROGER WILLIAMS U.L. REV. 499 (2000) (arguing specific intent statutes are necessary to prevent child molestation offenses from becoming strict liability crimes); Kay Levine, *Negotiating the Bounds of Crime and Culture: A Sociological Perspective on Cultural Defense Strategies*, 28 L. & SOC. INQUIRY 39 (2003) (arguing specific intent statutes are necessary to protect cultural minorities accused of abuse when their caregiving practices do not comport with “American” cultural norms).

⁹ See, e.g., Jennifer M. Collins, *Lady Madonna Children at Your Feet: The Criminal Justice System’s Romanticization of the Parent Child Relationship* 93 IO. L. REV. 131, 146-149 (2007) (praising decision to punish parent perpetrators under general purpose sexual abuse statutes); Leigh Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1501 (1998)(same).

¹⁰ Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL’Y & L. 479 (1997) (arguing that courts’ unnecessarily limited definition of child sexual abuse causes them to disbelieve child victims’ abuse narratives); Mary E. Becker, *The Abuse Excuse and Patriarchal Narratives*, 92 NW. L. REV. 1459 (1997) [hereinafter *Abuse Excuse*] (arguing courts unnecessarily filter sexual abuse cases through patriarchal social norms); Liz Kelly, *What’s In A Name: Defining Child Sexual Abuse* 28 FEMINIST REV. 65 (1988) (calling for broader definitions of sexual abuse that match victims’ experiences).

However, both communities of scholars have proceeded without full consideration of the ways in which the expansion of the category of sexual injury has simultaneously increased the regulatory power of the state to define normal parenthood and re-instantiate traditional gender norms. Moreover, under the current inquiry fathers who, to coin a phrase, “dare to mother” face special risks; many legal decision-makers claim to support a greater role for men in children’s lives, but the intimate care cases reveal that they are still fundamentally uncomfortable with men who perform tasks traditionally associated with maternal care.¹¹ I argue that the treatment that “mothering fathers” receive under child molestation law reveals society’s deep ambivalence about whether men should perform caregiving roles.

This Article proceeds in four parts. Part I explores the extraordinary regulatory power child molestation law has over parenting, as it regulates the most mundane of caregiving practices. Part I also reveals the ways in which judges, prosecutors and a host of other legal decision-makers are invited by the formal legal inquiry in child molestation cases to incorporate traditional gender norms into their analyses when cases involve parental intimate care.¹² My goal is to ensure that our “innocence is interrupted” about the role that child molestation law plays in the instantiation of gender-specific parenting understandings.

Part II of the Article questions why feminist scholars, whose primary project is to reveal and disrupt social subordination based on gender, have failed to address the risk of gender bias against men posed by the current interpretation of child molestation statutes. The discussion highlights how dominance feminists’ early efforts encouraged legislators to recognize the sexual risk posed by fathers, as well as expand the category of harm recognized as child sexual abuse.¹³ However, dominance feminist analyses failed to take account of other competing feminist concerns, including the simultaneous efforts by liberal feminists to shift some of the burdens of childcare to men, as well as their efforts to encourage fathers to embrace an ethics of care.¹⁴ Additionally, dominance feminists did not anticipate

¹¹ Andrea Doucet provides a useful definition of “mothering,” describing it as the exercise of authority and responsibility for the “day-to-day primary care of a child.” ANDREA DOUCET, *DO MEN MOTHER: FATHERING CARE AND DOMESTIC RESPONSIBILITY* 9 (2007). In this discussion, I further instrumentalize this definition focusing on certain core, sensitive care-giving activities: providing affection, bathing and offering toileting assistance.

¹² See generally, Myrian S. Denov, *The Myth of Innocence: Sexual Scripts and the Recognition of Sexual Abuse by Female Caretakers*, 40 J. OF SEX RES. 303 (2003) (showing how sexual scripts defining mothers as sexually passive distort social workers, psychologists and legal decision-makers ability to identify maternal sexual abuse).

¹³ See Henderson, *supra* note 10, at 479-482 (urging courts to recognize more narratives covering a broader class of injuries committed by male caretakers); *Patriarchal Narratives*, *supra* note 10, at 1459-61 (same).

¹⁴ For discussion of the liberal feminist vision of “nurturing” fatherhood, see NANCY E. DOWD, *REDEFINING FATHERHOOD* 41-46 (2000) (discussing emergent norms for a more “nurturing fatherhood” but noting that precise definition of what this entails remains unclear); Andrea Doucet, *Estrogen-filled Worlds: Fathers as Primary Caregivers and Embodiment*, 54 SOCIOL. REV. 696, 697 (2006) (discussing emergence of fatherhood norms that challenge traditional masculinity and prioritize caring.); Oriell Sullivan, *Changing Gender Practices Within the Household: A Theoretical Perspective* 18

post-dominance feminists concerns about autonomy-compromising State regulation of private-sphere, intimate family relationships, including those between parents and children.¹⁵ The did not consider the ways in which their arguments would reduce women’s power to renegotiate default gendered parenting norms, norms that traditionally have made women primarily responsible for providing intimate care to children. Part II concludes by arguing that the criminal law’s treatment of men who mother reflects a certain unfinished debate between liberal feminists, dominance feminists, and post-dominance feminists about the proper role of fathers in the care of children. I suggest that feminists will not be able to assist courts in sorting through the intimate care cases until each group of scholars considers the ways in which their vision of fatherhood and parental care present challenges to the project of gender equality.

Part III offers a portrait of fatherhood, as reconstructed in the shadow of child molestation law. Using insights from Foucault, Part III explores the broad regulatory power amorphous child molestation statutes have, arguing that they particularly tax socially vulnerable fathers, and incentivize all men to internalize the law’s sexual suspicion of men who take on caregiving roles.¹⁶ Part III shows how in the absence of clear normative understandings about how sexual injury occurs in the intimate care cases,¹⁷ fathers tend to doubt and police their own behavior, as the law itself is unclear about how we should determine when male caretakers have engaged in legally prohibited action. Part III then shows how Foucault’s theoretical insights are born out at present by the facts on the ground, providing qualitative evidence from fathers explaining how the experience of fatherhood is shaped by sexual anxiety and fear of misplaced accusation. Part IV addresses likely critiques and concerns about altering child molestation laws in ways attentive to the needs of men who mother.

The Article concludes by arguing that we must disrupt structures that encourage the taxing of fathers who engage in mothering activities. I argue that the law’s current sexual suspicion of fathers has disproportionate effects on the most

GENDER & SOC. 207, 213-214 (2004) (discussing emergence of “new nurturing father” as alternative to fatherhood associated with traditional masculinity).

¹⁵ See Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006) (raising concerns about prosecutors’ enforcement of protective orders in ways that compromise the autonomy choices of domestic violence victims); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253 (2009) (highlighting ways in which the State uses criminal law to subsidize certain kinds of “private” family relationships).

¹⁶ SEE MICHEL FOUCAULT, DISCIPLINE AND PUNISH 195-228 (1979) (discussing disciplinary constraints of the Panopticon).

¹⁷ Karen Harrison-Speake & Frank N. Willis, *Ratings of the Appropriateness of Touch Among Family Members*, 19 J. NONVERBAL BEHAVIOR 85 -86 (1995) (recognizing that there “are no empirically derived norms on touch among family members” making it “difficult or impossible to state whether a given touch is deviant”). The authors find certain norms in their community sample, but other studies demonstrate significant variation depending on political ideology, cultural background, religion, institutional affiliation and other factors. Ron Craig, et. al., *Examining Norms for Potentially Suspect Parent-Child Interactions* available at

<http://psychology.edinboro.edu/rcraig/pdf/craigapa2000.pdf>.

See also notes infra at 63 & 151.

socially vulnerable fathers including: gay fathers (who may not have a female co-parent available to provide care), single, divorced and widowed fathers (who often must provide care on their own), as well as poor and working class fathers (who often cannot afford to contract for female caretakers when a child's mother is not present to provide care). Current arrangements also burden heterosexually partnered working mothers, who are saddled with additional childcare obligations despite the availability of an otherwise competent male partner willing to share the childcare role.¹⁸ I argue that until we fundamentally change our understandings regarding the role fathers should play in intimate care we will suffer negative social, economic and structural effects, stunt the evolution of parenting roles, and prevent the practice of parenting from being a driving force that challenges the evolution of gender itself.

I. *POLICING PARENTS, POLICING GENDER*

It is the rare legal scholar in the current cultural environment that dares question the scope and trajectory of child molestation law. Rather, as cultural studies scholars like James Kincaid have observed, there appears to be near universal agreement on the basic questions that inform the child molestation debate.¹⁹ These questions tend to take the following form: "How can we spot the pedophiles and get rid of them?" or alternatively, "How can we protect our children?"²⁰ Because of the relatively narrow band of questions that get explored in the legal literature on child molestation, legal scholars rarely question whom these laws target and how they define molestation. Any scholar who does so risks appearing suspect, cavalier or critically misguided.²¹ Yet increasingly child molestation law plays a significant role in shaping parent actions that bear little relation to the obviously wrongful acts that motivated these statutes' passage. As post-dominance feminist scholars like Professor Melissa Murray have explained, criminal law should be regarded as family law when it regulates the scope and substance of intimate relationships, immunizing certain kinds of conduct between intimates and prohibiting other kinds of behavior.²² Part I extends this insight to an analysis of child molestation law, revealing that *child molestation law is parenting law*. It shows that child molestation statutes currently are being used to power a particular interpretive project for parenting standards, one that proceeds in fits and starts, but ends up maintaining conservative, traditional gender-specific parenting roles.

¹⁸ See Frank F. Furstenberg, Jr., *Fathering in the Inner City: Paternal Participation and Public Policy*, 7 *FATHERHOOD: CONTEMPORARY THEORY, RES., AND SOCIAL POLICY* 119, 120-21 (1995) (noting that fathers in traditional families still spend comparatively little time participating in child care).

¹⁹ JAMES R. KINCAID: *EROTIC INNOCENCE: THE CULTURE OF CHILD MOLESTING* 7-8, 21 (expressing concern that scholars fail to critically analyze how molestation concerns are deployed to legitimate otherwise controversial social interventions). Cf. Katherine Beckett, *The Culture and Politics of Signification: The Case of Child Sexual Abuse*, 43 *SOC. PROBS.* 57, 59 (1996) (arguing that framing of the child sexual abuse problem often hides highly contested aspects of the problem).

²⁰ KINCAID, *supra* note 26, at 21.

²¹ *Id.*

²² Murray, *supra* note 22 at 1253-1256.

A. **Regulating the Mundane: The Plain Meaning of Child Molestation Law**

Does child molestation law really regulate parenting? The idea seems counterintuitive given American legislators' well-documented preoccupation with "stranger danger" – the molestation risk posed to children by the stranger lurking in the park.²³ However, review of child molestation statutes shows that state legislators seem equally focused on the risks posed by a child's nearest and dearest.²⁴ Many state child molestation statutes either specifically refer to parents when defining molestation²⁵ or refer to parents in sentencing provisions that govern child molestation crimes.²⁶ Other states show their concern about parents by extending the statute of limitations for molestation crimes involving a parent.²⁷ These statutory references to parents typically serve the purpose of increasing the range of penalties available to sanction sexually predatory parents, signaling society's special contempt for individuals who would molest their own children.

The express references to parents in state child molestation statutes and related provisions mark a clear break from a prior era in which sexually offending

²³KINCAID, *supra* note 26, at 180-184 (discussing American's preoccupation with molestation incident to child abduction); JOEL BEST, THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD VICTIMS 73 (1990) (same).

²⁴ See, e.g., Ruby Andrew, *Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking*, 39 U.C. DAVIS. L. REV. 1851, 1870 (2006)(arguing that inclusion of parents in the definition of child sexual abuse (as opposed to incest) constituted one of the most important philosophical shifts in the evolution of child molestation law).

²⁵ For example, Iowa defines child sexual abuse as "the commission of a sexual offense with or to a child . . . as a result of the acts or omission of a person responsible for the care of a child." The paradigmatic "person responsible for the care of a child" is the child's parent, the first person listed in the statutory definition of this term. Many other states refer to parents when defining the crime of child molestation. SEE IOWA CODE ANN. § 232.68(1), (2), (4), (5), (7) (West 2001). See also, W. VA. CODE ANN. § 49-1-3(a)-(c), (e), (g), (h), (j)-(n), (q) ("As to a child who is less than 16 years of age, any of the following acts which a parent, guardian or custodian shall engage in . . . [including] sexual intercourse; sexual intrusion; or sexual contact"). For other examples, see ILLINOIS COMP. STAT. CH. 325, § 5/3; KENTUCKY REV. STAT. § 600.020; LOUISIANA CH. CODE ART. 603; MARYLAND FAM. LAW § 5-701; NEW JERSEY ANN. STAT. § 9:6-8.21; NEW MEXICO ANN. STAT. § 32A-4-2; NORTH CAROLINA GEN. STAT. § 7B-101; RHODE ISLAND GEN. LAWS § 40-11-2; SOUTH CAROLINA ANN. CODE § 20-7-490; SOUTH DAKOTA ANN. LAWS § 26-8A-2; VIRGINIA ANN. CODE § 63.2-100; WEST VIRGINIA ANN. CODE § 49-1-3. Some states continue to deal with this issue as a kind of "incest." See, e.g., HAWAII REV. STAT. § 350-1; IDAHO CODE § 16-1602; UTAH ANN. CODE § 62A-4A-402. However, other jurisdictions specifically have eliminated statutory terms that originally limited application of their child molestation statutes to scenarios involving non-parental care. Compare K.S.A. 21-3504 (1988) with K.S.A. 21-3504 (1993) (changing language of the statute in 1992, effective in 1993)

²⁶ Indiana's sentencing code assigns increased penalties when a child is molested by a person in a "position of trust," identifying as a paradigmatic example, the child's parent. Other states that impose sentencing enhancements when the molester is a parent include Iowa, California, Indiana, Colorado, West Virginia and Washington state. (cites eliminated due to space constraints)

²⁷ These states include Arkansas, Mississippi, New Mexico, South Carolina and West Virginia. (cites available)

parents were more likely to be charged with incest,²⁸ a crime that historically carried lesser penalties. This shift in approach is also consistent with the American Bar Association's 1982 recommendations for prosecuting child sexual abuse²⁹ and marked a major philosophical change in the treatment of offending parents.³⁰ The shift to more explicit acknowledgment of parents' risk of offending was welcomed in many quarters, as advocates of the change point to the substantial empirical evidence showing that children are typically sexually abused by someone that is known to them. Yet this shift, in another respect, may have made matters more confusing. Research shows that children *are* more likely to be abused by a family member, family friend or intimate, rather than a stranger,³¹ but studies also suggest that the number violated by a primary parent may be quite low.³² More concerning, empirical data tends to emphasize the threat specifically posed by male relatives without critical reflection and, consequently, has naturalized the view that gender itself is a risk factor for abuse,³³ rather than the more significant consideration,

²⁸ Scholars have criticized incest provisions for creating a lesser standard of justice for related victims, *See, e.g.*, Andrew, *supra* note 24, at 1870; Collins, *supra* note 9, at 146-149 (recognizing that parents are regulated by sexual abuse statutes but arguing that penalties assigned to parents are weak compared to penalties assigned to unrelated perpetrators); Bienen, *supra* note 9, at 1501 (praising shift from specific incest prohibitions to standards that include parent-child abuse under more general definitions of sexual abuse).

²⁹ *ABA Report*, *supra* note 9, at 1.6 .

³⁰ *See* Andrew, *supra* note 24, at 1870.

³¹ LOUISE SAS & ALISON CUNNINGHAM, TIPPING THE BALANCE TO TELL THE SECRET: THE PUBLIC DISCOVERY OF CHILD SEXUAL ABUSE, 26 (1995) (noting that 80-85% of children are abused by someone they know vs. 15-20% by a stranger)

³² By primary parent, I am referring to parents that provide regular nurturing and care. Current studies, however, tend to define this term by reference to biology. *See* David Finkelhor *et. al.*, *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 CHILD ABUSE & NEGLECT 19, 21 (1990) (reviewing nationally representative sample showing only 3% of female victims were sexually abused by a biological parent and 0% of male victims.) These numbers may be artificially low, as they rely on self-reports and victims' reluctance to disclose parental abuse may have distorted these estimates. *Compare* A.J. SEDLACK ET AL., FOURTH NAT'L INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES 6-3 (2010) (relying on child welfare sample and reporting that 37% of children are molested by biological parents). Child welfare samples, however, may lead us to inflated estimates regarding the risk posed by biological parents, as they tend to be composed primarily of cases involving abuse and neglect proceedings (as opposed to criminal case referrals) and often involve marginal, socially-contested "abuse" behaviors that arguably are not the core concern of many child protection advocates (e.g. parent exhibitionism, incidental exposure to parent sexual activity, or co-bathing). *See* BEST, *supra* note 22, at 61-64, 71 (raising definition and measurement concerns).

³³ *See, e.g.*, Leslie Margolin & John L. Craft, *Child Sexual Abuse by Caretakers*, 38 NAT'L COUNCIL ON FAMILY RELATIONS 4, 450, 451 (1989) (reporting that 26.7% of children are sexually abused by a male biological parent and listing gender as a risk factor). Margolin & Craft ultimately acknowledge that other factors, such as biological, social or institutional connection, appear to be equally if not more probative than gender. *Id.* at 453-54. For an overview of sociological, psychological and historical studies treating gender as a risk factor, as well as implications of studies for feminist theory, see generally ANNE COSSINS, MASCULINITIES, SEXUALITIES AND CHILD SEXUAL ABUSE

whether the party involved is a person that attends to the care of his children. For research suggests that children are *less likely* to be molested by a person that actually attends to their intimate care,³⁴ as caregivers are less likely to experience the kind of role confusion that can lead to molestation.³⁵ Consistent with this view, I suggest that fathers whom, either by default, interest or necessity, end up routinely providing intimate care to their children will have a fundamentally different and non-sexual orientation to their children, much more so than fathers that do not participate in these activities. Consequently, there are special incentives to attend to the need for protections in child molestation law for men who perform caregiving roles.

Critics may argue that, even if child molestation law “technically” applies to parents, this does not mean that these restrictions effectively “regulate” parenthood, for one assumes that the prohibitions ensconced in child molestation statutes would not trouble the average parent properly discharging his duties. Rather, the claim is that the paradigmatic examples, those standard instances of molestation covered by child molestation statutes — typically explicit sexual acts, have little or nothing to do with proper parenting. Under this view, the only parents that would be affected by child molestation statutes are those marginal parents involved in clearly wrongful or bizarre conduct. To the extent that child molestation law applies to parents, it would seem that it only regulates an outlier group: parents with ill intent, those who would knowingly sexually violate their children.

This assumption, however, about the disconnect between “normal,” everyday parenting practices and the statutory coverage of child molestation provisions proves naïve when one more closely examines the wording of child molestation laws. What one finds is a series of overlapping, broadly worded statutes that approximate touch with sexual assault. These broadly worded statutes potentially criminalize a wide range of “normal” parental behavior, including touch

(2000). Again, the data establishing gender disparities is sound, but I suggest that gender may be a sloppy proxy for other risk factors and the current gender focus leads to unnecessary stereotyping.

³⁴ Hilda Parker, Seymour Parker, *Father Daughter Sexual Abuse: An Emerging Perspective*, 56 AMERICAN J. OF ORTHOPSYCHIATRY 531–549 (1986) (discussing research suggesting that fathers’ involvement in providing care is a factor that mitigates against sexual abuse); Linda M. Williams & David Finkelhor, *Paternal Caregiving and Incest: Test of a Biosocial Model* 65 AMERICAN J. ORTHOPSYCHOLOGY 101 (1995). Specifically, the authors found that the fathers who provided care to their children in early life, particularly between the ages of 4 and 5, were less likely to engage in sexual abuse than those that did not. The researchers posit there is something about providing care, rather than mere proximity to a child, that reduces the likelihood of abuse. *See also*, Margolin & Craft, *supra* note 32, at 450 (recognizing the need for more research on caregiving as a relevant sexual-abuse risk factor)

³⁵ Researchers suggest that child molestation by a primary parent often occurs when a parent fails to see a child in a maternal or parental manner. *See, e.g.*, Roland Summit & Jo Ann Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 AM. J. OF ORTHOPSYCHIATRY 237, 249-250 (1978) (discussing role confusion as one of the causes of sexual abuse); Pamela C. Anderson, *Application of Attachment Theory to the Study of Sexual Abuse*, 60 J. CONSULTING & CLINICAL PSYCH. (discussing role reversal as warning indicator of abuse).

incident to bathing, toileting and other intimate care activities— particularly those associated with young children. For example, Arizona has very broad child molestation provisions prohibiting “intentional[] or knowing[] . . . sexual contact . . . with a child.”³⁶ This definition seems uncontroversial until one considers that sexual conduct is defined under the statute as “any direct or indirect touching . . . or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object.”³⁷ Technically, under this statute, acts as “innocent” as a diaper change, a baby massage, or toweling a toddler off after his evening bath could be legally troubling.

Alaska similarly offers a broad definition of child sexual abuse, defining it as when a person “engages in sexual contact” with a child.³⁸ This prohibition again seems relatively uncontroversial until one considers Alaska’s capacious definition of sexual conduct, which covers any “knowing[] touching directly or *through the victim’s clothing*” of the victim’s “genitals, anus or female breast” or “knowingly causing the victim to touch directly or through clothing the defendant’s or victim’s genitals anus or breast”.³⁹ As one Alaska Court noted this standard makes “nursing a baby, carrying a child on one’s shoulders or lap, bathing a child, and changing a child’s diapers . . . all acts that can be construed to fall within the literal statutory definition of ‘sexual contact.’”⁴⁰ The court further notes that “all the [child molestation] statute requires for conviction is that the acts be knowingly performed.”⁴¹ Some states proscribe an even broader range of conduct. California has a statutory scheme prohibiting the “intentional touching of [a child’s] genitals and intimate parts,” which are defined to include the “breasts, genital area, groin, *inner thigh and buttocks or the clothing covering them.*”⁴² Given its broad definitions, one is not surprised to find that California, despite having some special statutory protections for parents, has its fair share of parental intimate care cases.⁴³

Given the risks posed by the expansive statutory definitions used in child molestation statutes, one expects that prosecutors would simply exercise “common sense,” reserving their energy and attention for true cases of sexually problematic behavior. Unfortunately, it turns out that common sense is not that easily discerned. Parents have been charged with child molestation for a range of acts, including obviously wrongful acts such as sexual intercourse, but also for touch incident to a host of “normal” caregiving activities. These cases, which tend to almost exclusively involve fathers, cover acts from the classic to the mundane. Cases include disputes in which a father is accused for giving a child a bath,⁴⁴ wiping her

³⁶ See, e.g., ARIZ. REV. STAT. § 13-1410 (A)

³⁷ *Id.* at §13-1401(A)

³⁸ ALASKA STAT. 11.41.436 (2)

³⁹ ALASKA STAT. 11.81.900

⁴⁰ *Flink v. State*, 683 P.2d 725, 738 (Alaska Ct. App. 1984).

⁴¹ *Id.*

⁴² SEE CAL. STAT. 288. The statute has a requirement of sexual intent and has a reasonable caretaking exception.

⁴³ See, e.g., *In re Julia B.*, 2010 WL 2620806 (Cal. Ct. App. June 30, 2010) (future stepfather accused of molestation based on bathing female child without washcloth); *People v. Marokity*, 2010 WL 779778 (Cal. App. 2 Dist.) (father accused based on kisses of children’s naked bodies after bath and diaper changes).

⁴⁴ See *In re R.A.*, 403 N.W.2d 357 (1987)(biological father bathing female child) ; *In re Julia B.*, *supra* note 43 (future stepfather bathing female child). Cf. *Emmett*, *supra* note

after going to the bathroom⁴⁵, dealing with incontinence issues⁴⁶, giving kisses after a bath or diaper change⁴⁷, and even tucking his daughters into bed.⁴⁸ Fathers can and will be charged for a diverse array of practices, ranging from co-sleeping to tickling. One sees that the broad definitions of child sexual abuse are not just abstract potential threats, but actually result in criminal and civil sanctions.

How is it that fathers find themselves caught in these thorny inquiries in child molestation cases involving intimate care? Some would argue that the broad coverage under contemporary child molestation statutes is no mistake. Part of the reform project headed by dominance feminist scholars was intended to bring more parent-child interaction into the domain of sexually troubling behavior. Importantly, this reform project dovetailed with the interests of more conservative child welfare authorities concerned about parent-child interactions. Paul Okami, a psychologist who studies parent-child intimacy, notes that child protection experts have long been interested in exploring the potentially sexually troubling nature of so-called innocuous parenting behaviors. These behaviors include “parental nudity;⁴⁹ parent-child co-bathing or the parent bathing the child; “excessive displays of physical affection (such as kissing the child on the lips or belly), frequent hugging, sensuous teasing or “flirting with a child. Additionally, parents are criticized for exposing their children to behavior that is part of maintaining intimacy with other family members. This behavior includes exposing a child through visual or auditory proximity to instances of adult sexual behavior and allowing a child to sleep in the parental bed.”⁵⁰ As cultural studies scholar James Kincaid explains, “we have expanded the category of sexual abuse to include issues that would have been regarded three decades ago as nuisances or nothing: a wide variety of touching, some of it at least ambiguous; suggestive language; exhibitionism that used to be passed off as casual; and voyeurism.”⁵¹

Okami and Kincaid raise concerns about a criminal justice regime that has run off the rails, powered by clinicians and social workers ever eager to pathologize

1, at 78 (father co-bathing with preadolescent son); *In re Parentage of S.*, 117 WASH. APP. 1036 (2003) (mother’s partner co-bathing with 5 year-old female child);

⁴⁵ See, e.g., *Montgomery Cty v. Dept of Soc. Svcs.*, 37 Md. App. 243 (March 06, 2001)(father wiping toddler daughter after going to bathroom); *Bratcher v. Surrette*, 848 So.2d 893, 894 (Miss. Ct. App. 2003) (father toileting toddler son); *State v. Lansberry*, 2001 Ohio App. LEXIS 51 (Jan. 10, 2001) (same). Cf. *Hicks v. Larson*, 884 N.E.2d 869 (Ind. Ct. App. 2008) (grandfather applying diaper cream to toddler granddaughter).

⁴⁶ *In re D.C.*, 648 A.2d 816 (1993) (father treating daughter’s incontinence problem); *Rice v. VA Dep’t of Social Svcs.*, 2007 WL 895753 (Mar. 27, 2007)(same).

⁴⁷ *Marokity*, *supra* note 43. Cf. *J.S. v. Com., Dept. of Pub. Welfare*, 557 A.2d 801 (1989) (sustaining abuse allegations based on playtime open mouth kisses father gave adopted daughter between ages 4-8)

⁴⁸ *Markiton v. State*, 139 N.E.2d 440 (Ind. 1957) (father accused based on tickling and hugging while tucking teenaged daughters into bed). Cf. *In the Matter of Michael M.*, 591 N.Y.S.2d 681, 683 (1992) (reviewing abuse allegations based on father tickling and wrestling with puberty age male children).

⁴⁹ *T.G. v. Kaplan*, No. A-5523-08T3, 2011 WL 1004645 (N.J. Super. Ct. App. Div. Mar. 23, 2011 (dismissing father’s civil claim against mother for allegedly unfounded child sexual abuse allegations when father conceded that he had showered naked with his child, and therefore presumably subjected the child to potential harm)

⁵⁰ Okami, *supra* note 6 at 51-52; Okami, et. al, *supra* note 6 (same)

⁵¹ KINCAID, *supra* note 26 at 78

more conduct and compromise parental autonomy. Their work has been marginalized by many child protection advocates, who are not swayed by these concerns. However, Okami and Kincaid's insights should concern feminists and other scholars concerned about the social norms enforcement power of child molestation provisions. For child molestation law, in some jurisdictions, can function as a powerful tool in the state's arsenal for establishing moral codes about nudity, decency and sexuality. Once coupled with the child welfare norms that inform social workers' understanding of this social problem, the reach of child molestation law seems endlessly expansive. Okami shows just how far the child molestation inquiry can reach. Quoting from the Encyclopedia of Social Work, he asks "[i]s a father who routinely walks around his house naked in front of his children sexually abusing them?" "Social workers may conclude that this "situation is ambiguous."⁵² Yet this practice, which on its face does not seem sexual in the traditional sense, has already triggered actual charges of child sexual abuse in a number of jurisdictions.⁵³ Other issues that arise concern "sexualized attention" or as some clinicians describe it, "the grey area between sexual abuse and normal interaction." Activities in this domain include "tickling various parts of a baby's body, rubbing noses, stroking baby's buttocks and arm, allowing a baby to put his fingers into one's mouth and playful interactions in the context of diaper changes [when such behaviors are observed] in the context of repetitive patterns of interactions that are non-reciprocal and that appear to reflect parental needs, rather than those of the baby."⁵⁴ The primary concern is stimulation of the child's "erogenous zones."⁵⁵ Yet as we will see, identifying much less regulating stimulation of the child's erogenous zones is more difficult than it seems.

Others might suggest that the expansive reach of child molestation statutes in the parental intimate care cases is simply an instance of what sociologists call "definitional creep," a phenomenon in which standards used to define a concept get stretched to accommodate a greater range of social problems. Criminal law scholar William Stuntz discusses definitional creep in the criminal law, noting how categories of prohibited conduct defined by criminal statutes tend to be interpreted in ways that swallow ever larger categories of so-called wrongful behavior.⁵⁶ But Stuntz chooses not to focus on the potential political consequences of this definitional creep, the primary concern of our discussion here. For we know that child molestation law is not being interpreted in an arbitrary fashion.⁵⁷ The amorphous definitions of sexual conduct in child molestation statutes were initially intended to address parental behavior that approximated in lesser degree the

⁵² BEST, *supra* note 22, at 71.

⁵³ See, e.g., Hicks, *supra* note 44 at 869 (discussing molestation allegations raised against grandfather based on practice of co-sleeping with granddaughter as well as allowing granddaughter to see him in the bathroom naked in the shower); *Paquette v. State*, 528 So. 2d 995 (Fla. Dist. Ct. App. 1988)(discussing abuse allegations against father based on his allegedly inappropriate exposure of child to his naked body).

⁵⁴ Okami *supra* note 6 at 51-52.

⁵⁵ *Id.*

⁵⁶ William Stuntz, *The Pathological Politics of Criminal Law*, 509 MICH. L. REV. 505, 509 (2001)

⁵⁷ SEE KINCAID, *supra* note 26 at 79 (discussing political reasons for "definitional creep"); BEST, *supra* note 22, at 65-66 (describing same phenomenon as "domain expansion").

paradigmatic crime of sexual assault.⁵⁸ Over time, however, they have come to be redeployed to address more incidental touches that pique more socially controversial concerns, including parental modesty and children’s sexual modesty.⁵⁹ Also psychologists’ research on parent-child intimacy would problematize both mothers’ and fathers’ conduct,⁶⁰ but curiously the criminal cases show a more aggressive preoccupation with fathers’ behavior. In short, while many psychologists’ analyses raising questions about parent-child intimacy have been gender neutral, their enforcement through the criminal law has a decidedly gender specific articulation.⁶¹

Surprisingly, there has been little outcry over the ever expanding reach of child molestation law in the parental intimate care cases, and its role in enforcing a kind of gender orthodoxy. Legislative history provides precious little insight into how to limit the scope of these statutes, as legislative debate tended to focus on incest and explicit sexual practice, and only rarely discusses other kinds of parental intimacies as a source of concern.⁶² Stuntz makes clear the risks posed by broad legislation with unclear goals. For when legislators fail to clearly define the scope of criminal conduct covered by a statute, interpretive responsibility effectively gets ceded to lower level legal actors, such as prosecutors, police officers, and social service workers, as they must pick and choose what should be the scope of their

⁵⁸ Kerwin Kaye, *Sexual Abuse and the Wholesome Family: Feminist, Psychological and State Discourses in REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY* 147-148 (2005) (discussing initial feminist articulation of the problem as involving “father rape”).

⁵⁹ Bienan, *supra* note 17 at 1574-1575 (recognizing that shift to broader definitions “significantly expanded the definition of criminal sexual conduct, especially within the family.”) Bienan recognizes that legislators were concerned about criminalization of potentially trivial conduct within the family, but claims (without support) that these family care cases never materialized. *Id.*

⁶⁰ Some psychologists have continued to assert that both parents (male and female) are at risk for engaging in sexual abuse, particularly in its more subtle form. See Summit & Kryso, *supra* note 35 at 240. For other examples of concerns about female behavior, see sources at *infra* note 61.

⁶¹ See Devno, *supra* note 11, at 303-314 (showing how sexual scripts that construct women as sexually passive distort prosecution and reporting rates of maternal sexual abuse). See also, Christine Lawson, *Mother-Son Sexual Abuse: Rare or Underreported? A Critique of the Research*, 17 CHILD ABUSE AND NEGLECT 261 (1993) (discussing methodological problems and reporting bias that prevents criminal justice system and social welfare authorities from properly addressing maternal sexual abuse of male children); Tracey Peter, *Speaking About the Unspeakable: Exploring the Impact of Mother-Daughter Sexual Abuse*, 14 VIOLENCE AGAINST WOMEN 1033 (2008) (discussing same in maternal sexual abuse cases involving female children). Although the psychological literature tends to concentrate on the ways in which sexual stereotypes discourage reporting of crimes perpetrated by women, my contention is that sexual scripts about men allow the characterization of apparently non-sexual behavior as potentially sexually motivated.

⁶² See Comment, *Child Sexual Abuse in California, Legislative and Judicial Responses*, 15 GOLDEN GATE UNIVERSITY L. REV. 437 (1985) discussing concerns about explicit sexual abuse but declining to comment on concerns about other more subtle kinds of parent-child intimacy), *Incest, The Need to Develop A Response to Intrafamilial Sexual Abuse*, 22 DUQUESNE L. REV. 901(same); Kerry R. Callahan, Comment *Protecting Child Sexual Abuse Victims in Connecticut*, 22 CONN. L. REV. 411 (1989)(same).

concern. Indeed, what one sees in the intimate care cases is that judges, jurors, prosecutors and social workers are actively working through their own conflicted views about social norms regarding parenting without considering the risk of gender stereotyping or whether we have any shared understanding of parent-child intimacy issues.⁶³

B. Intention Matters: How the Intent Inquiry Encourages The Use of Conservative Gender Norms

1. General Intent and Specific Intent Statutes

Critics may argue that, although child molestation statutes may appear to have a broad reach, legislatures have strived for balance, as these statutes include specific protections for “normal” parent-child activities. Yet, close review suggests that these protections are more form than substance, as they tend to drag legal decision-makers ever deeper into the effort to problematize mundane conduct. For example, states with general intent statutes, ones that criminalize any intentional touch legally defined as illicit, have created reasonable caretaker exceptions, which allow a parent to raise an affirmative defense that the practice he is accused of should be immunized from prosecution.⁶⁴ States with specific intent statutes feature laws that require that touch be motivated by sexual or otherwise illicit intent before it is eligible for prosecution. These statutes provide that a parent can defend by showing that he is acting based on a desire to provide appropriate care, and therefore that he did not have the “illicit intent” necessary to be convicted under a state’s child molestation statute. However, importantly, there are no categorical exceptions for “typical” parent-child interactions under either the general or specific intent inquiry. Instead, in the intimate care cases, standard mundane child care practices are mined for evidence of whether they are “reasonable” or present a risk of sexual impropriety.

Consider Alaska for example, a general intent jurisdiction with a statutory “normal caretaker” defense for parents. On its face, the statutory defense seems to offer broad protection. It requires jurors to decide whether the defendant’s action “may reasonably be construed to be normal caretaker responsibilities.” The parent must be acquitted unless “no reasonable person would construe the defendant’s act as normal caretaking.”⁶⁵ The statute quite reasonably recognizes that there may be a range of parenting norms in a particular jurisdiction. It therefore ensures that parents subject to a child molestation inquiry are given a fair degree of latitude when jurors assess their conduct. However, in the course of establishing this “protection” the language of statute only confirms the primary point being made here: that even the most routine of child care practices will still be reviewed to

⁶³ Harrison-Speake & Willis, *supra* note 17 at 85-86 (recognizing lack of empirically-established consensus); Dorothy Scott, *The Social Construction of Child Sexual Abuse* at 120 (showing that different racial groups historically have held very divergent views on about parent-child intimacy).

⁶⁴ See, e.g., Alaska (AL. STAT. 11.81.900(b)(58(B))), California (CAL. PEN. CODE § 11165.1), Florida (FLA. STAT. ANN. § 39.01, §415.102) Tennessee (TEN. STAT. ANN. §37-1-602), Vermont (33 V.S.A. §6902) and Washington (WA. REV. CODE §§ 26.44.015; 26.44.020).

⁶⁵ *In re Parentage of S.*, *supra* note 44, at 1036.

determine if it is being conducted in a manner that *matches a range of socially accepted practices*. Additionally, because the statutory inquiry does not require legal decision-makers to consider how gender understandings inform their views about parenting norms, it allows them to make decisions about the appropriate scope of fatherly care without considering the social backdrop against which these parenting norms are formed. Fathers are forced to hope that the legal decision-makers reviewing their cases come to these inquiries with progressive understandings about gender-neutral parenting, but there is nothing built into the statutory inquiry to ensure that anything other than socially conservative gendered-understandings control.

Father fare little better under specific intent statutes, as these statutes play the same social norms enforcement function. Regarded by some as a more parent-protective approach to child molestation questions, fathers in the specific intent cases often fall prey to social stereotypes because circumstantial evidence is typically used to prove specific intent, and the evidentiary basis provided is often exceedingly thin. Specifically, courts recognize that perpetrators in child molestation cases often do not make statements that establish their “specific intent.” Jurors therefore have little else to rely upon except the context in which the conduct occurred.⁶⁶ While this context-based inquiry might prove helpful in identifying certain cultural scenarios that are explicitly sexual in nature, it becomes a vehicle for sex role stereotyping when analyzing intimate care interactions. That is, when a father like *Emmett* faces a sexual abuse charge based on mundane caregiving activities like bathing, often there is nothing implicitly about the context that suggests something sexual occurred. In these cases jurors implicitly are making a determination about whether a father’s touch is welcomed in such circumstances.

2. *The Proper Role of Social Norms*

The social norms inquiry used in child molestation cases need not be deemed inherently problematic. Problems stem from the fact that its contours have not been adequately fleshed out by scholars or by the courts. For we have not yet fully considered the repercussions of using a social norms framework as a tool for identifying sexual abuse injuries. Are we prepared to disregard the privacy claims of a mother and child when they claim that a father’s decision to bathe with a child is not injurious, even when third parties witnessing the event deem his actions to violate social conventions?⁶⁷ What about when the mother is disturbed by the father’s bathing practices, but many third parties would view his actions as normal? When should the parent be charged with a crime? In cases where community norms play a controlling role, prosecutions raise important questions about parental autonomy in negotiating parental roles. In contrast, in cases where the maternal caretaker’s views about the range of appropriate care plays a central role in a

⁶⁶ Specific intent jurisdictions have been praised by some scholars as arguably allowing for more protection for parents with seemingly idiosyncratic parenting. Levine, *supra* note 10 at 43-45. However, in the more common circumstance, idiosyncratic practice is associated with sexual interest, leaving parents in both general and specific intent jurisdictions with the same persuasion burdens.

⁶⁷ See, e.g., *In re Parentage of S.*, *supra* note 50, at 1036 (concluding that, although mother granted boyfriend permission to co-bathe with her child, the practice was still a basis for sanction).

court's analysis, the social norms analysis gives legal imprimatur to what psychologists describe as maternal gatekeeping, another issue that forestalls the gender-neutral evolution of parenting roles.⁶⁸ At bottom, however, the social norms cases present a risk of gender stereotyping because courts do not require decision-makers to reflect on the ways that parents' roles historically have been gender specific and are instantiated in the cultural imagination. By representing these cases as being about "intent" the formal legal inquiry hides the degree to which gender norms set the context for intimate care and tend to make such care the appropriate province of mothers rather than fathers.

Some may argue that the social norms inquiry, while troubling, is critically necessary, as it is the only way to catch illicitly motivated parents attempting to game the system. For the social norms inquiry provides a way to analyze the actions of the savvy molester who attempts to find a way to sexually titillate himself with a child by tracing the margins of what is legally prohibited. They will note that there is a broad range of conduct that can trigger concerns about sexual intrusion;⁶⁹ social norms provide a key touchstone in determining the law's role. Also, the social norms inquiry allows us to sanction those parents that use "normal" childcare as a cover for sexual gratification.⁷⁰ As one California court explains, "It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and groomed as part of a normal and healthy upbringing. On the other hand, any of these intimate acts may also be undertaken for the purpose of sexual arousal."⁷¹ A social norms analysis gives us a way to more tightly assess mundane activity that may be undertaken for illicit reasons. Last, the social norms inquiry provides the best means of ensuring that the state can address parental activity that really functions as sexual abuse grooming. Admittedly, some parents may use mundane caregiving as a staging group, as a way of desensitizing their children to certain kinds of intimate conduct that provides an entryway into sexual abuse. Arguably a departure from established conventions in providing care might signal that abuse has or is about to occur.

The concerns outlined above are real and deeply disturbing. Additionally, it is clear that many of these concerns are well attended to under a legal inquiry that is based on a social norms analysis. However, we should not imagine that a child protection regime premised on social norms is costless to children and parents. For it is clear that our current inquiry, which attempts to identify grooming or marginal child molestation cases undertaken in the context of routine care, now threatens to sexualize caregiving practices to such a degree that it is no longer clear what constitutes morally blameless or appropriate conduct. Certainly, one of the benefits of a social norms analysis is that many decision-makers will recognize that we are in a time period where gender norms about parenting are in flux, and they may be

⁶⁸ Psychologists define "maternal gatekeeping" as actions taken by mothers that encourage fathers to feel inadequate about their ability to provide childcare. See Naomi Cahn, *The Power of Caretaking*, 12 YALE J. L. FEM. 177 (2000)(discussing research).

⁶⁹ *ABA Report*, *supra* note 9, at 14.

⁷⁰ *In re Y.B.*, 2007 WL 2309798 (Cal. Ct. App. Aug. 14, 2007) (concluding mother used diaper change as cover to explain why she engaged in illicit touch of child's genitals); *State v. Blackburn*, 643 A.2d 224 (1993) (concluding father used diaper change and puppet play as cover for illicit sexual touch of child).

⁷¹ *People v. Martinez*, 903 P.2d 1037, 1037 (1995).

willing to recognize more progressive gender-neutral understandings. Indeed, in some of the parental care cases, one can see that courts are aware of growing support for norms that encourage fathers to engage in activities that have historically been the domain of mothers. However, these same courts show a dogged refusal to acknowledge the role that gender plays in making determinations in the intimate care cases. Their failure to make gender a formal part of the social-norms analysis leaves fathers at the mercy of the social prejudices of individual decision-makers as they find them.⁷²

4. *The Rise of Sexual Privacy Logic*

Courts that do not use an explicit social norms analysis have offered a different understanding of sexual harm – one based on sexual privacy. However the sexual privacy inquiry raises closely related concerns, for close analysis reveals it to be an example of what Reva Siegel describes as “preservation through transformation.”⁷³ Specifically, these analyses rely on slightly different language to the power the same interpretive project that the social norms inquiry historically has played: one finds that it ensures that conservative understandings regarding gender-specific parenting roles are preserved.

What is sexual privacy? By sexual privacy, I am referring a concept courts use to describe a child’s interest in being protected from interactions that make him aware of his sexuality or the fact of his body might be a site of sexual interest.⁷⁴ The sexual privacy concept is deployed in two ways child molestation cases. In the first category of cases, an objective definition of sexual privacy is used. Courts cordon off certain kinds of touches as inherently violative regardless of whether the child makes a complaint. In this category of cases, the sexual privacy logic functions nearly identically to a traditional social norms analysis. In the second more dangerous set of cases, a subjective definition of sexual privacy is used.⁷⁵ These touches may concern pre-defined sexual areas of the body or involve

⁷² See Finkelhor *et. al*, *supra* note 32; See also Hilda Parker, Seymour Parker, *Father Daughter Sexual Abuse: An Emerging Perspective*, 56 AM. J. OF ORTHOPSYCHIATRY 531–549 (1986).

⁷³ Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997)

⁷⁴ Some courts have offered insight into the inchoate nature of the sexual privacy issue. For example, one court explains,

“Normal interplay between a parent and child, particularly in the early stages of a child’s development often involve acts of touching, squeezing, patting, and pinching various parts of a child’s body including buttocks and at times genitalia. The difference is, that what might be socially acceptable when a child is an infant or toddler, becomes less so as a child grows older and becomes more aware of himself as a separate human being. Thus a parent’s respect for the child’s right to the privacy of his person should increase as the child grows and matures. Some parents, however, lack this understanding in child development and persist in dealing with an older child with the same kind of intrusive handling as when the child was an infant.”

In the Matter of Michael M., *supra* note 48, at 683.

⁷⁵ Courts occasionally comment on the difficulties associated with identifying prohibited parent behavior. One New York court explains, “When the challenged conduct is the touching of a child by a parent, the consideration of whether the conduct was for sexual gratification must take into account the nature and circumstances of the

other less socially charged domains. In these cases the child's complaint of sexual touch plays a key role, as the complaint is viewed as proof positive that the caretaker has acted with illicit intentions.

Indeed, in the parental intimate care cases involving fathers the subjective sexual privacy concept plays a critical role. As explained above, children may complain about touch in sexual abuse cases although the touch is not explicitly sexual in nature. The subjective sexual privacy concept allows the court to attribute sexual intent to routine care, effectively driving men away from the domain of mothering care and pathologizing their activities. These cases are particularly troubling in light of the psychological literature showing that young children often have difficulty distinguishing between mere unwanted touch and touch motivated by illicit sexual interest. Also, children develop their "personal" views about sexual privacy in the context of "good touch/bad touch instruction," instruction that may be based on conservative understandings about gender as well.⁷⁶ This education, in the hands of conservative social actors, would effectively cordon off certain touch and practice as the domain of female caretakers. Consequently, courts that utilize a subjective sexual privacy logic in the intimate care cases may merely be giving effect to a socially constructed gendered understanding of touch, even as they claim that they are merely "listening to children." The risk is that, by uncritically adopting the child's complaint as proof of the caretaker's illicit intent, the court is effectively adopting certain culturally specific understandings about sexual privacy, allowing the child molestation analysis to piggyback on reductionist, often heterosexist and occasionally homophobic understandings of sexual harm.

An additional concern about subjective sexual privacy analysis is that fathers subject to this kind of complaint have little notice *ex ante* about what might trigger legal sanction. They also have little *ex post* recourse when a child finds touch offensive, a particularly troubling result when they are accused based on mundane caregiving behavior. Last, by adopting this way of framing the issue, courts avoid discussion of the ways in which their analyses collectively and over the long term will specially tax fathers. In this way, the unproblematic use of children's subjective understandings of sexual privacy presents a risk to the evolution of parenting roles beyond established traditional gender norms.

Finally, like the social norms analysis, the sexual privacy logic suffers from being radically undertheorized. For we have not considered how much respect we are willing to grant a child's subjective sense of sexual privacy. In the parental intimate care cases, a focus on subjective understandings of sexual privacy calls on

act, since the same conduct which constitutes an act of sexual abuse by a stranger could be a mere expression of affection on the part of a parent." *In re A.G.*, 253 A.D.2d 318, 327 (1997).

⁷⁶ Deborah Daro, *Prevention of Child Sexual Abuse*, THE FUTURE OF CHILDREN 202(1994) (explaining that children exposed to sexual abuse education sometimes develop "negative attitudes towards not only clearly negative touches but also benign or natural touches such as tickling or bathing); Belle Liang, *et.al*, *Differential Understanding of Sexual Abuse Prevention Concepts among Preschoolers*, 17 CHILD ABUSE & NEGLECT 643 (1993)(discussing young children's difficulty distinguishing marginal forms of sexual abuse).

us to ask: when a child experiences a bath as sexually intrusive or offensive, is her complaint sufficient to establish that sexual abuse has occurred? Should we still respect the child's sense of privacy and conclude that molestation has occurred if the child's mother watches the father giving the child a bath and concludes his actions are harmless and normal? What if the mother and child are offended, but third parties reviewing the interaction would conclude the bath was in no way illicit in nature? As a culture, we must resolve how far and under what circumstances are we prepared to respect a child's understanding of sexual privacy. Yet in some jurisdictions, prosecutors are primarily motivated by this interest in children's understanding of harm and act on this basis, even with young children who are just beginning to develop these understandings.

Some will defend the use of a sexual privacy analysis in the intimate care cases. They will argue that, even if our notions of sexual privacy are based on somewhat dated gender norms, this does not change the fact that persons who hew to these traditional gender understandings experience psychological injury when their views about sexual privacy are disturbed by cross gender contact. They may rightly argue that we should not work through our social experiment regarding gender-neutral parenting roles on the backs of children, a vulnerable constituency that is relying on adults to provide them with protection. Proponents of this view would argue that, even if our legal enforcement of sexual privacy understandings confirms social stereotypes about gender this is an unavoidable and acceptable cost of our effort to protect children. Yet I would suggest that the sexual privacy question is a great deal more flexible than this spirited defense suggests. Moreover, I argue that it will be impossible to disrupt cultural understandings about sex-specific parenting roles if we do not interrogate our views about sexual privacy. Parents simply will not have the space to re-negotiate default caregiving norms if the subjective sexual privacy logic proceeds in the way it is currently constructed.

In summary, this section has shown that the subjective sexual privacy analysis represents a dangerous shift for fathers, for it has opened the door to a variety of prosecutions for conduct that historically has been seen morally unproblematic. In contrast to the more developed conversations about social norms governing gender-neutral parenting, the role of sexual privacy in these debates has gone unexplored. Since the contours of children's sexual privacy interests are in flux and fundamentally unresolved, fathers do not have clear notice about how to conform their conduct to what would be considered legally appropriate behavior. As a consequence, we find fathers who "dare to mother" have a limited range of discretion.

C. Reversing the Groups: Case Studies on The Gender Norm Enforcement Power of Child Molestation Statutes

Section C presents a series of case studies that reveal the heavy pall of sexual suspicion that hangs over fathers the intimate care cases. Drawn from a range of jurisdictions, this section shows that when child molestation law is applied in the intimate care cases, men who dare to mother are subject to a higher degree disciplinary scrutiny than their female counterparts. Regardless of whether a social norms analysis or sexual privacy logic guides courts' inquiries, men who mother are held to a higher standard in arguing for the legitimacy of their conduct. To make the contrast in treatment clear, the cases presented here address activities that

some would describe as the basic, core (if less glamorous) aspects of mothering: toileting, bathing, and the giving of kisses. Admittedly, the analysis is not comprehensive, as I have chosen to focus on compelling cases involving routine, mundane conduct, rather than attempting to give a full account of how the law is applied in any particular jurisdiction. Also, the analysis is not a pure treatment of how criminal courts apply criminal standards. Instead I explore how civil disputes take up and turn on the criminal law standards, in an effort to show the wide variety of ways in which the criminal law shapes the experience of fatherhood. For many accused fathers are not subject to criminal prosecution. Instead the criminal law is used to provide structure to child custody challenges, visitation disputes,⁷⁷ termination of parental rights proceedings and abuse and neglect proceedings.

As we review each case, you will be asked to “reverse the groups”⁷⁸ to consider whether a mother in the same position would have found herself subject to claims of illicit sexual interest. Also consider how the particular interpretive framework used in each case (under a sexual privacy or a social norms analysis), presents distinct risks for fathers. On the whole, the cases suggest that the intimate care cases will play an important role, either encouraging or stymieing the movement toward gender-neutral parenting norms. After reviewing the cases one is compelled to conclude that the fathers involved, regardless of whether they are ultimately vindicated, are likely to find the scrutiny and sanctions they are subject to pose a substantial impediment to continuing to mother.⁷⁹ That is, regardless of the ultimate outcome in a case, fathers are more inclined to submit to the disciplinary project that makes them feel suspicious for attempting to become a father who provides intimate care.

1. *Toileting*

Mothering can be a dirty business. Its less glamorous side is rarely discussed in law review articles, but when it becomes a site for legal sanction it must be explored. In addition to classic nurturing activities: singing, daily games of patty-cake and play in the park, one of the primary caregiving duties that mothers attend to is the toileting of their children. What happens to fathers who take on these responsibilities, historically the hidden domain of mothers? Certainly, in this context, one assumes that fathers would be able to successfully defend against molestation allegations. Practices like changing a diaper seem fairly standard; one should easily be able to identify those borderline cases that involve illicit activity. Yet when fathers waded into this field of action, one finds that legal decision-makers are willing to presume sexual interest in rather surprising

⁷⁷ *Hicks, supra* note 44, at 869.

⁷⁸ David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 956-65 (1989). Feminist scholars have conducted a similar kind of analysis by asking the “woman” question, considering how facially neutral statutes have gendered effects when applied, in light of contemporary social conditions. See Kate Bartlett, 103 HARV. L. REV. 829, 837-49 (1990). Here we would be called upon to “ask the fatherhood” question. However, I have chosen Strauss’s “reverse the groups” formulation instead, because this framework asks us to consider the privileges afforded to the culturally dominant group (here mothers) and whether they should be extended to fathers, as well as assuming that the law should be broadened to accommodate the distinct practices and interests of an excluded group.

⁷⁹ See *Markiton, supra* note 48, at 440.

circumstances.

In our first toileting case, *Montgomery County Department of Health and Human Services v. P.F.*⁸⁰ a father faced diffuse child molestation allegations that stemmed from wiping his daughter's bottom after she went to the bathroom. The father had divorced from the child's mother. During a Saturday visit when he was her primary caregiver he allowed her to squat in a public park and wiped her with napkins he retrieved from McDonalds. The allegations soon morphed into a claim that he had inserted his finger into the child's vagina. Although Child Protective Services was adamant that abuse occurred, appealing two court decisions against them, the courts to their credit reviewed the child's testimony and concluded that no abuse had been shown. However, *Montgomery* is important because it allows us to see how even progressive courts routinely *look past* children's subjective sexual privacy complaints about mothers in the search for subjective sexual privacy evidence against fathers. Indeed, as the court summarizes the statements the child made to the investigating administrative worker, it treats the child's complaints against her mother as mere "white noise." The Court explains,

"When asked if her mother has talked to her about people not touching her, [Susan] said "yes". When asked if anybody touched her that she didn't like, she said "no". When asked if people wiped her in the bathroom, [Susan] said, "No I wear pants." **And when asked if anyone had hurt her pee-pee, the girl answered Mom. When asked where, she said at home.** [Susan] was [again] asked if anyone had tickled her pee-pee, she answered "no". And when asked if her Daddy tickled her pee-pee, the girl said, "No, he put his finger inside my pee-pee." The girl said that it happened at Uncle McDonald's, which is what she calls McDonald's restaurant. She stated that her father was carrying her in his arms, outside of the McDonald's going in. When asked if it hurt, the girl replied that it did. And when asked if her father had stuck his finger under her pants the girl again said, "yes", and when asked if her father put his finger inside her pee-pee she again said, "yes, inside"

Again, *Montgomery* on the whole is a positive case, a dispute in which the father was cleared by the court of allegations stemming from mundane conduct; however, it sharply reveals how mothers' conduct is often rendered invisible even as courts are ostensibly focused on identifying subjective sexual privacy violations. The courts and the administrative workers failure to acknowledge the mother's conduct becomes even more remarkable as we consider later cases in our analysis, ones in which the mother's touch is figured as ideal, the reference point against which all other acts of caregiving are measured.

Additionally, when we review the social worker's actions, *Montgomery* also gives us an opportunity to consider the ways in which sexual suspicion against fathers is activated in cases involving mundane conduct. For in reviewing the social service agency's actions in the case, we must ask, "what is it about the

⁸⁰ 137 Md. App. at 243. For a simpler example, see *In re D.C.*, 648 A.2d 816 (1993) (analyzing trial court's conclusion that sexual abuse occurred when father treated daughter's incontinence problem).

father's actions that so strongly suggested sexual wrongdoing?" Certainly, one may question the wisdom of the father's actions. He is unlikely to win any parenting awards for allowing his child to relieve herself in a public park. Yet these facts in the case offer scant basis to conclude that the father was motivated by a desire to engage in sexual molestation. This conclusion seems equally clear when one reverses the groups. Would a mother who wiped her daughter's bottom after the child relieved herself then find herself accused of having acted based sexual interest? Would the child's testimony, as documented here, have morphed into the social worker's claim: that the child had complained that her father digitally penetrated her while carrying her into a McDonalds? It seems unlikely, particularly given that the administrative worker simply ignored the child's clear testimony that her mother's touch had injured and offended her.

Our next example is *Hicks v. Larson*,⁸¹ a case in which a maternal grandfather had his visitation rights to his two year old granddaughter extinguished after the court concluded that there was evidence sufficient to establish that he had sexually molested his granddaughter. The grandfather was subject to a broad range of diffuse allegations regarding his conduct as he had allowed his granddaughter to sleep alone with him in bed, and let her walk into the bathroom while he was naked in the shower. But the case ultimately hinged on an instance in which he applied diaper cream to her genitals. The grandfather argued that there was no basis for extinguishing his rights, as there was no evidence that he had applied the diaper cream to his granddaughter for sexual reasons. The court disagreed. It explained that the grandfather had *only* proved that he applied the cream in the context of a diaper change at the instruction of the child's grandmother. However, he had not proved that this was the *only* reason that he applied the diaper cream. Consequently, the child's father had sufficient basis to believe the grandfather had sexually abused the child, and the court entered an order terminating the grandfather's visitation.

After reading *Hicks* one again is left with precious little understanding of the sexual injury that occurred. Here there was no testimony regarding a complaint from the child, so the court's specific intent inquiry turns on a social norms analysis: whether the context in which Hicks touched his granddaughter was sufficient to establish sexual motivation. Yet there is nothing about the diaper change at issue in this case to suggest anything out of the ordinary occurred. Moreover, when one reverses the groups, the risk of bias becomes clear. Would a grandmother, or mother for that matter, be required to establish that her *sole* reason for applying diaper cream was for hygienic reasons? As a practical matter, how could this proof standard be satisfied? *Hicks* again reveals the extraordinary scrutiny that attaches to male caretakers involved in mundane care and the willingness to read sexual interest into male caretakers' actions. The court's failure to acknowledge the role gender plays in the case makes it appear that the suspicion attached to Hick's conduct is simply a manifestation of the complaining father and stepmother's well meaning concern. Instead, the court is effectively endorsing a general social anxiety about the range of appropriate care and intimacy for male caretakers.

These cases are particularly compelling, but they are not outliers. A review

⁸¹ *Hicks*, *supra* note 51, at 869.

of the intimate care cases shows that a large number concern seemingly mundane toileting incidents or diaper changes where children subsequently complain of pain or display sexualized behaviors, actions which are taken as proof positive that a father has engaged in abuse.⁸² Yet as anyone who has cared for a child knows, children touch themselves, show irritation, and display a host of behaviors which suggest pleasure, pain, and growing impatience with being touched. But perhaps diaper changes, given the need for genital contact are a more thorny site for analysis. But as our next section makes clear, the problem of gender role stereotyping resurfaces in a variety of other areas.

2. Bathing

In our next set of cases we move from away from the less glamorous task of diaper changing to a space represented as a site of bubbles and fun: the child's daily bath. But those unfortunate fathers subject to legal scrutiny find that intimacies exchanged in this space can be a source of legal trouble, yet another moment for their innocence to be interrupted about the exchange of touch between father and child. In these cases, one can see the growing power of the subjective sexual privacy analysis in the intimate care cases, and the need for further theorization of this understanding of molestation and harm.

a. *In re Julia B*

Our first bathing case, *In re Julia B*,⁸³ arose in the context of abuse and neglect proceedings where child welfare authorities alleged that a four-year-old female child was at risk for abuse in her mother's home. The dispute centered on the mother's fiancée actions during a bath he gave to the child while the child's mother was taking college classes after work in the evenings. The little girl complained that during the evening bath her mother's fiancée had "pushed his fingers inside [her] vagina"⁸⁴ while washing her, and it hurt. A physical exam revealed that the child had some irritation that could have been caused by soap or by touch, and that there was evidence of some penetration. The fiancée admitted to washing the child without a washcloth, but not to penetration. He further explained that the child always cried when her vagina was washed by a caretaker because she suffered from perpetual vaginal irritation stemming from her failure to properly wipe herself when going to the bathroom. The court recognized that the child had suffered irritation in the past, but concluded that the fiancée's actions in this instance were cause for suspicion. In reviewing the facts associated with the bath, the Court explained,

"There's no reason to shove your finger up inside [a] child. And sure it hurt. And she didn't make this up. And he may have rough hands, and that's fine. . . . [But] the idea of washing someone with your hands, especially a small child, it's inappropriate. It may not be against the law, but it's inappropriate. And if someone has an irritation that everyone is aware of, a soft

⁸² See cases discussed *supra* note 45.

⁸³ *In re Julia B.*, *supra* note 43, at 1.

⁸⁴ *Id.*

rag and a gentle washing is sufficient. I can only construe from the circumstance that there was sexual intent.”⁸⁵

Here again, one sees the limits of a specific intent analysis in the child molestation cases in the absence of a studied inquiry into the role that gender norms play in such cases. For the court concludes that washing a small child with a bare hand is entirely inappropriate and serves as circumstantial evidence that there was sexual interest in this case. Yet the court’s conclusion, that bathing a small child with one’s bare hand is illicit, would seem decidedly strange if the caretaker involved were a woman. That is, we are aware that a mother may bathe a child in haste without using a washcloth, but few would conclude that this action by itself establishes that a mother is sexually motivated in this kind of interaction. Also, while the court concludes that the barehanded washing of a child is not “illegal,” its analysis effectively treats this action as such, as the court concludes that the child is in continuing need of court supervision. Moreover, the court accepts the fiancée’s concession that he will move out of the mother’s home in an effort to convince the court that the little girl will no longer be forced to interact with him. He agrees, as he puts it, that he will “never bathe the [mother’s] two little girls ever again.” The case stands as a striking example where legal scrutiny of a male caretaker ensures that the default gendered norms for intimate care are permanently re-established in a mother’s home. It is a striking example where a mother’s attempt to renegotiate these default norms results in a clear sanction, as both of her children are declared at risk of neglect because of the incident and her family is subject to long term court supervision.

Importantly, *Julia B* is a subjective sexual privacy case, as it is really the child’s complaint about the fiancée’s touch that functions as proof for the court that the fiancée acted with illicit motivations. And while my goal is to trouble the *Julia B* Court’s analysis, nothing I say here should be read to mean that the child’s sexual privacy complaint *should not be believed*. Rather, it is clear that she experienced pain from her bather’s touch but also, arguably, a kind of psychological pain from sexual intrusion. Yet giving full weight to a four-year-old child’s sexual privacy complaints offers precious little direction on how the case should be resolved. Again, psychologists’ research underscores that young children often have difficulty sorting out attempts at sexual abuse from caregiving scenarios that they find offensive but involve no illicit intent.⁸⁶ When viewed through the framework of a gender norms analysis, this insight suggests that a child may respond unfavorably to a male caretaker’s touch, not because of the male caretaker is sexually motivated, but because the child is unfamiliar with certain tasks being attended to by a male caretaker. Importantly, when the court analyzes the fiancée’s touch, no space is made for a critical view of whether the child’s experience of touch has been shaped by gender norms. The challenge is that the fiancée may not have acted with sexual interest, but still in the end (because of gender norm understandings) caused sexual injury to the child at issue.

The inchoate nature of these sexual privacy claims in parental care cases is deeply concerning. For, if we take *Julia B*’s complaints seriously, does this mean that only the child may determine who provides intimate care? Anyone who has

⁸⁵ *Id.* at *3.

⁸⁶ Liang, *supra* note 76, at 643.

cared for a child realizes that children are often inadvertently chaffed, scratched or grabbed by a parent during prep for the day's bath⁸⁷ or during a clothing change. Mothers arguably suffer these mishaps without triggering legal sanctions. Again, when we reverse the groups, we realize that a mother may in haste bathe a child without a washcloth or in a rough manner, yet her failure to use certain sanitary techniques or her decision to act in haste is not treated as evidence suggesting her illicit intentions. Yet somehow people's intuitions change when a scenario involves a male caretaker acting in a motherly role. Suddenly, the child's protestations more ominous; the irritated genitals seem more sinister.

b. *In re R.A.*

Some may argue that the *Julia B* case is not ideal case for considering the problems posed by our gendered understanding of care giving, as we should be more suspicious of a non-biological father that is involved in giving care. Yet our next case, *In re R.A.*, reveals that biological fathers are equally subject to sexual suspicion when they engage in mothering. Specifically, in *In re R.A.*, father was charged with neglect based on sexual abuse allegations stemming from bathing his three-year-old daughter.⁸⁸ Here the report of a sexual privacy violation was provided by the little girl's brother, a six year old who alleged that he saw his father's finger go up inside his sister's genitals while the father bathed her. The boy reported that this was the only time he saw his father engage in this kind of activity and that his father had never touched him in a sexual manner. The three-year-old victim confirmed her brother's report, complaining that her father had penetrated her vagina with his finger during her bath. Her mother, somewhat unsure about the complaint, questioned her daughter to be sure that her father had not accidentally touched the little girl while bathing. The three year old confirmed that the touch was not accidental. The mother testified at trial that the child did have frequent vaginal infections that might have made her sensitive, but she also relayed that she had properly instructed the father on bathing techniques and therefore abuse may have occurred.

In *In re R.A.*, the sexual privacy claim is seemingly stronger as it is confirmed by the two children present during the bath. However, this corroboration raises more questions than it answers, as it is possible that *both* the little boy and his sister may have been more sensitive to their father's touch in this particular mothering domain. More specifically, both children may have had heightened suspicion about certain kinds of touch from male caretakers as being illicit in nature. Again, my point is not that the children should not be believed, but only that the failure to consider the gendered nature of these interactions leaves the court in a dangerous position with regard to the enforcement of conservative gender understandings. *In re R.A.* is also significant in that it allows us to see how the court's analysis strengthens gender norms; a mother's caregiving practices are treated as the default ideal, the backdrop against which father's actions are measured. Specifically, the mother's effort to train the father about proper bathing practices is used to show that the father has been given notice about the proper scope of touch in bathing his female child. Deviation from her practice is viewed

⁸⁸ *In re R.A.*, 403 N.W.2d 357 (1987).

as evidence of illicit behavior. There is no space in the court's analysis for the possibility that a well-meaning father's may have deviated from the mother's instructions. There is no space for the possibility that a father's potentially well-meaning misstep may have caused his daughter to feel sexually violated.

In re R.A. is also significant in that it reveals the disciplinary power child molestation law has over fathers in the subjective sexual privacy cases, for the defendant in this case is so traumatized by the idea that he *could* have sexually violated his child that he seems willing to accept the conclusion that he is guilty, even though he is not sure that as a technical matter anything illicit occurred. The case reveals the confusion fathers face in negotiating mundane caretaking practices that can be rendered illicit by a child's complaint. A father's hesitation and confusion about how to negotiate such cases can become a liability. For the father's testimony in *In re R.A.* played a key role in the prosecution's case, as the father first alleged he had not touched the child, then admitted he was unsure, and then said the horror of having potentially hurt her may have made him block out the event. Based on this testimony, the court concluded that sexual abuse had occurred and the defendant father should submit to counseling. One wonders, why would an "innocent" father display such confusion? Part III provides a more detailed discussion about the ways in which child molestation law shapes a father's consciousness, arguing that fathers may so internalize the assumption of sexual suspicion that is associated with their conduct that they cannot offer a coherent account of why their actions are not culpable when they provide intimate care to their children.

b. *Emmett v. State Revisited*

Armed with this understanding of the role subjective sexual privacy complaints play in the parental intimate care cases, we can view *Emmett v. State* in a new light. Recall that *Emmett* was a co-bathing case that arose in a specific intent jurisdiction.⁸⁹ Therefore, the Utah statute under which Emmett was charged required a showing that he sexual touched his child *and* that that he acted "with the [specific] intent to arouse or gratify the sexual desire"⁹⁰ of the child targeted. The court then was required to look at context to determine whether specific intent was established in the case. What was it about the context in the *Emmett* case that established that the father was motivated by sexual interest in this particular interaction? The prosecutor offered that Emmett took a shower with his son, and rubbed baby oil on himself and on the child's skin, including the child's genitals.

Emmett again, on the surface, is a "happy case." On review, the Utah Supreme Court concluded that the shower Emmett engaged in was "hygienic," and therefore "innocent" in nature — that the father had no illicit intentions in showering with his son. However, this hygiene characterization leaves the attentive reader wanting, as the language of hygiene simply allows the court to characterize the shower by one of its potential functions, rather than delve into the fundamental analytical questions that would determine whether sexual abuse actually occurred. For we know that illicitly motivated parents can use

⁸⁹ *Emmett*, *supra* note 1, at 781.

⁹⁰ *Id.* at 784.

“hygienic” practices as a cover for child molestation. Why then does the court focuses on hygiene, despite the limited analytic assistance the hygiene construct actually provides? The answer seems clear. The hygiene language allows the *Emmett* Court to mask the real dispositive inquiry under consideration: mapping they grey and shifting boundary between proper parental care and sexually intrusive touch. By resorting to the language of hygiene, the court avoids discussion of this boundary line and, in particular, the unspoken gender-specific social norms governing the distinction between proper parental care and sexually illicit activity. For, most legal decision-makers in reviewing the *Emmett* case will ask themselves, is it proper for a *man* to take a shower with his five year old son, and conclude that social norms establish a much narrower field of appropriate conduct for a father than a mother in a similar circumstance. By relying on the language of hygiene, the court can offer a special near medical justification for Emmett’s father’s behavior, taking his behavior out of the domain of discretionary intimate care into a realm of authorized medical touch beyond sexual suspicion.

Viewed through this lens, one questions whether Emmett truly is a positive case. For the court turns to the language of hygiene rather than engage with the gender norm issues that currently shape the intimacy questions at the heart of the case. Indeed, as one reviews the prosecutor’s actions, it is clear that gendered parenting norms are central to the analysis. For the prosecutor in the case made much of the fact that the father applied oil to his child, but *the child’s mother had neither authorized the purchase of the oil or its application*. The prosecutor therefore invites the court to play a maternal gatekeeping function, to conclude that mothers define the scope of appropriate parent-child interaction. Our concern grows deeper when we reverse the groups. Would a mother who showed with and lotioned her *same sex* female child be presumed to have acted based on sexual interest? By avoiding a discussion of gender, the court sidesteps a discussion of the homophobia and homoerotics that are central to the case.

The *Emmett* Court’s decision is also significant in that it reveals how a subjective sexual privacy complaint can have broad effects, allowing reinterpretation of a host of other seemingly neutral parent-child interactions. For the case was brought first and foremost because Emmett’s son indicated that his father had touched his genitals in a wholly unrelated, separate interaction. While the appeals court grants Emmett relief, exonerating him for his conduct in the shower, no guidance is offered to fathers or prosecutors about how broadly a child’s sexual privacy complaint should be read. More specifically, we have no understanding of whether and when a child’s complaint about another interaction should give rise to sexual suspicion regarding a parents other “normal” caregiving behavior in separate circumstances.

3. Kisses

There are few things as pure as a mother’s kiss. But what about a father’s ? In our final set of intimate care cases, we consider the proper scope of fatherly affection, and the ways in which undertheorized understandings of social norms and sexual privacy inform intimate care cases. As we will see, in these cases in particular, courts mobilize an undertheorized social norms and sexual privacy analysis that leave fathers at the mercy of socially conservative assumptions about

gender-specific parenting roles.

c. *People v. Marokity*

In *People v. Marokity*, a defendant father appealed his conviction for sexual abuse based on allegations that he engaged in inappropriate displays of affection with his children.⁹¹ Marokity was the father of a young boy and a young girl, ages 2 and 3. The criminal sexual abuse allegations in his case were based in part on the claim that Marokity would kiss and smell the area around his son's and his daughter's stomach, thighs, genitalia, and buttocks after bathing them or changing their diapers. The children's mother complained that Marokity seemed "excited" and "not really there" when he kissed his children. The children's mother instructed Marokity to stop kissing the children while they were naked. Marokity agreed that he would try, but he indicated that he probably would not be able to stop entirely. Marokity admitted at trial that he was very affectionate with his children, and that he had kissed them on their thighs and buttocks, but did not recall if he kissed their genitals.⁹² However, in his view, the precise location of his kisses was irrelevant; he expressed an unrepentant belief that it was not wrong to kiss their genital area.⁹³ The children also testified that Marokity had inserted his fingers into each child's genitals and anus, and they had experienced pain as a result. The children's testimony on the whole was deemed equivocal, and Marokity denied wrongdoing. He explained that any genital or anal touching that occurred was the result of diaper changes. Marokity was ultimately convicted of lewd and lascivious conduct with his children and sentenced to prison.

Like the fathers in our other intimate care cases, on appeal, Marokity challenged whether sufficient evidence had been presented to establish that his conduct was motivated by sexual interest. He argued that, at most, all that had been established was that he engaged in a kind of battery - a kind of unwanted touching. The court it appears was moved by the sexual privacy complaints of the children, but again one questions how this decision long term affects male caregivers. And while the appeal in the case focuses on a series of evidentiary questions that are not central to our analysis, the court offers that the evidence against Marokity was overwhelming, despite his claims of error. In particular it notes that the evidence of illicit conduct in his case was quite strong, as Marokity admitted to the inappropriate kissing of his children as well as his *inability to stop*. It explained that Marokity's admission that he had an *irrepressible urge to kiss his children was clear evidence of deviant desire*.

What is it about the social context in which Marokity's conduct occurred that allows a finding of illicit interest? It is unclear. One way of reading the case is that Marokity is sanctioned because his way of expressing affection does not match his wife's understanding of the gender norms that should govern fathers' behavior. Yet one wonders why a court should enforce the mother's gendered understanding, unless it is intending to perform a maternal gatekeeping function. Alternatively, one might say that Marokity's problems stemmed from the way he described his

⁹¹ *Marokity*, *supra* note 43.

⁹² *Id.*

⁹³ *Id.*

affection for his children. But how then should fathers' express such interest? Would a mother who confessed to an irrepressible urge to kiss her child's naked body be subject to the assumption that sexual interest motivated her actions? One is all too aware that mothers routinely engage in similar conduct, and are rarely subject to notice much less criticism. The question presented by the *Marokity* case, but never fully answered is – what is the appropriate domain of affection for a father when he interacts with his children? The court refuses to engage our gendered understanding of this question.

Some may resist the claim of gender bias in the *Marokity* case. They would point to the children's subjective sexual privacy complaints as proof positive that something illicit occurred. Also, in their view *Marokity* was correctly decided because, if the court concluded that Marokity kissed his children's genitals, he was guilty of sodomy, a practice that would always be condemned even if the defendant was a woman. Yet this objective view of what counts as sexual violation does not hold in all child molestation cases. Courts have offered special immunity to parents to engage in this practice when the defendant parent invokes a cultural defense to explain his or her conduct. For example, Dominican mothers and Middle Eastern fathers have been exonerated for far more extensive contact with their children's genitals in cases where they claim that these nurturing practices are permitted in their home countries.⁹⁴ These cases establish that the kissing of a child's genitals does not as an objective matter count as sodomy, nor establish that these kisses violate a child's objective sexual privacy interests. For courts' willingness to sanction the kisses that foreign parents give their children makes little sense if we believe that these practices, objectively viewed, constitute molestation.

The cultural defense cases have much to teach us about the social norms function of the intimate care cases. Feminist legal scholar Leti Volpp explains the normalizing function cultural defenses in criminal cases play, allowing courts to localize socially troubling practices as specific to foreign communities and outside of the American polity.⁹⁵ As applied here, her analysis suggests that by identifying troubling parent-child interaction as something other cultures engage in, we can avoid considering the wide range of parenting practices in Americans families. Her analysis allows us to see that Marokity's claims represents a special kind of threat to American families and to fatherhood. For Marokity, despite being a Hungarian immigrant, insists that he is a normal American father, and that his way of expressing affection should be understood as a normal American parenting practice. The court rejects this understanding of American fatherhood and, as a result, *Marokity* faces the full sanction of the criminal law. Yet an honest examination of the range of ways that female parents kiss, cuddle and play with their children, and the complaints children raised about their touch, might place his behavior in a more ambiguous category, not clearly immoral or sexual in nature.

⁹⁴ See, e.g., *People v. Kargar*, 679 A.2d 81(1996) (dismissing sexual abuse charge against Afghan father based on finding that giving genital kisses is common Afghan infant care-giving practice); *State v. Ramirez*, 2005 WL 3678032 (Me. Super. Nov. 9, 2005) (acquitting Dominican mother on sexual abuse charge based on finding that kissing infant-children's genitals is non-sexual Dominican caregiving practice).

⁹⁵ See Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & FEMINISM 89-90 (2000)

b. *A Father's Kiss Revisited: JS v. Dept. Welfare*

Our last case about paternal affection allows us to revisit the risks of subjective sexual privacy analysis. In *JS v. Department of Welfare*,⁹⁶ a father sought reversal of sexual abuse judgment based on his daughter's report that his kisses had disturbed her sense of sexual privacy. In this case, the child alleged that when she was between the ages of four and eight, her father would "hold her down" and kiss her face and neck with an open mouth. The daughter's concerns about her father's conduct arose years later, in circumstances that reveal the inchoate nature of children's sexual privacy understandings. The daughter explains,

Okay. And I guess you could say I had my first real kiss and I got a weird feeling inside and it bothered me for awhile and I told my mom about it; so she said maybe we should go see someone to be sure that everything's okay. So I went in and they asked me what happened. So I told her that my father used to play these games with me, okay, and he would, from my head like around my neck area, he would kiss me, he would get on top of me and do this, and his mouth would be open and he, they weren't the types of kisses that were normal. At least they made me feel uncomfortable.⁹⁷

What was it about the daughter's first kiss at age 13 that caused the young girl in this case to reinterpret her father's actions? Perhaps she had a more informed basis on which to judge the appropriate scope of fatherly conduct. Perhaps her growing sense of sexual privacy caused her to reinterpret early "innocently intended" intimacies with her father through a sexual lens. These are critical questions, yet they go explored in the court's analysis. Instead, the court treats the child's complaint as objective evidence of her father's earlier illicit sexual interest and problematizes mundane exchanges that could be viewed as a normal display of fatherly affection. When one reverses the groups, again, one is deeply troubled. Would the court sanction the decision to pathologize a mother's kiss many years after the kissing occurred, at a moment when her male child enters puberty? What role does memory play in the understanding of intimate interaction? The case reveals a number of pending unresolved issues in understanding how to view children's subjective sexual privacy complaints when they are used to trouble parental intimacy and care.

Taken together, the above described intimate care cases illustrate the substantial risks faced by fathers who "dare to mother." Men who provide intimate care are subject to a higher degree of sexual suspicion when they attempt to provide affection and intimate care to their children, but also they are aware that in many cases they are being relied upon to perform this essential function. The cases press us to consider the degree to which our current social understandings about fatherhood are under pressure, and the ways in which our understandings of sexual privacy will be forced to change to allow men more discretion to attend to intimate care. Admittedly, the problems posed by these cases will not be easy to

⁹⁶ *J.S. v. Com., Dept. of Pub. Welfare*, *supra* note 87, at 801.

⁹⁷ *Id.* at 802.

resolve. But the work required is made all the more difficult by courts' failure to make gender an explicit part of the analysis in child molestation cases. The project becomes even thornier when other legal decision-makers proceed without acknowledging the ways in which their understandings of parenting are shaped by gender norms. The strategy offered in Part I, calling on legal decision-makers to "reverse the groups," will provide legal decision-makers with some assistance in preventing their "common sense" understanding of gender norms to distort their views in such cases. However, debiasing protocols are only the first step, for, until we develop a deeper understanding of the social norms and sexual privacy understandings we are willing to enforce through child molestation law, men who dare to mother will face a disproportionate risk of sanction.

II. **FEMINIST AND CRIMINAL RESPONSES TO CHILD MOLESTATION**

Part I demonstrates how child molestation statutes currently shape the practice of fatherhood, in particular burdening those fathers that "dare to mother." Part II considers why feminists, whose primary project is to interrogate structures that compromise gender equality, have not considered the burdens child molestation law imposes on men who dare to mother.

A. **Expanding the Concept of Injury: Feminist Interventions in Child Molestation Law and Scholarship**

Feminist scholar Kerwin Kaye explains that it was feminists who first convinced the State to take parent-child sexual abuse seriously.⁹⁸ Prior to feminist interventions in the late 1970s, child sexual abuse was not regarded as a major social problem. Sexual abuse within families was particularly invisible, as it was segregated from the general problem of child sexual abuse and denominated incest, an offense category that triggered surprisingly mild sanctions.⁹⁹ In the 1970s, however, dominance feminists began a period of intense activism to ensure that the danger posed by parent-child sexual abuse received a more appropriate legal response.¹⁰⁰ Dominance feminists first task was to address the popular perception that child molestation was really the problem of older men being seduced by "Lolitas" — sexually precocious young girls.¹⁰¹ They revealed how the Lolita figure both minimized the harm suffered by sexual abuse victims and ended up declaring victims complicit in their own violation and exploitation.¹⁰² Feminists second task was to shift debate away from discussions about sexual activity between children and unrelated parties and refocus this attention on the ways that children were at risk for sexual exploitation in their own homes. Specifically, dominance feminists challenged us to consider how power dynamics in the nuclear family put mothers and children at risk for sexual exploitation by fathers.¹⁰³

⁹⁸ Kaye, *supra* note 58, at 143.

⁹⁹ Andrew, *supra* note 24, at 1870.

¹⁰⁰ Kaye, *supra* note 58, at 144 ; Henderson, *supra* note 10, at 486.

¹⁰¹ Henderson, *supra* note 10, at 489-49. Kaye, *supra* note 58, at 145 (noting that child sexual "abuse victims were identified as willing partners, sexual deviants that needed to be controlled.")

¹⁰² Kaye, *supra* note 58, at 154 (noting that dominance feminist critiques of the family were "pushed aside")

¹⁰³ VIKKI BELL, INTERROGATING INCEST 91-92 (1993)(describing dominance feminists' claim "that fathers have a certain amount of . . . power in the Family [and this] means

Dominance feminists enjoyed a number of clear victories in the effort to secure child protective legislation, but these early victories masked the degree to which their understandings about child molestation diverged from other feminist activists and scholars. Specifically, when dominance feminists began their efforts to reform child molestation law they found widespread support for their view that child molestation laws merited more attention and needed stiffer penalties. By the 1990s dominance feminist had made substantial gains, convincing legislatures to amend general purpose child molestation statutes to allow these statutes to be used to prosecute parents. Social welfare authorities as well welcomed this shift, as the legal changes effected gave child welfare workers more tools and options for intervening in troubled families. While incest laws are still used in many jurisdictions, the modern trend is for prosecutors to rely on these more powerful general purpose child molestation statutes to sanction sexually troubling interactions between parents and children.

Dominance feminists more controversial views about the inherently predatory nature of male sexuality also resonated with some child welfare authorities.¹⁰⁴ This view appeared to be confirmed by empirical data showing higher incidence rates for male versus female perpetrators, suggesting that fathers had greater propensity to engage in child sexual abuse than mothers.¹⁰⁵ Unsurprisingly, then, welfare authorities began to devote their efforts to scrutinizing fathers' behavior. Yet liberal feminists, who often did not fully hew to these understandings about predatory male sexuality or the threat posed by the nuclear family, failed to articulate their concerns. As a consequence there was no clear dissenting feminist voice as child protection workers and advocates began to sharpen their focus on male caretakers.

Scholars like Kaye have argued that dominance feminists' critiques of the nuclear family and male sexuality were *not* adopted by the state, but instead the more radical elements of their claims were contained. Kaye argues that social welfare authorities have instead adopted an understanding of the causes of molestation that is based on highly individualistic models drawn from psychology, models that treat sexually predatory behavior as a sign of individual deviance.¹⁰⁶ Other feminist scholars like Vikki Bell see a closer alignment between dominance feminist arguments, the legal system and cultural common sense. Bell convincingly argues that dominance feminists' critique of traditional male sexuality, while not formally reflected in the law, has shaped the cultural backdrop legal actors use to identify and define child molestation.¹⁰⁷ Specifically, she suggests that the paradigmatic case that child welfare authorities and other legal actors use in identifying sexual abuse has become the molesting father who treats his children as sexual property, and this shift demonstrates the influence dominance feminists have had on cultural understandings. Indeed, while social welfare authorities do

at their sexual abuse of children is not so much a deviation from normal familial relations as an illustration of them.”)

¹⁰⁴ *Id.*

¹⁰⁵ See data cited *infra* in Part IV.

¹⁰⁶ Kaye, *supra* note 58, at 161-163 (criticizing child protective services agencies for their unwillingness to intervene in ways that would truly disrupt social norms encouraging nuclear family arrangements).

¹⁰⁷ See BELL, *supra* note 103, at 180-184.

tend to turn to the psychological literature to understand the dangers of intimate parent-child contact, they do not use this literature to trouble *both* male and female caretakers interaction with children. Instead, when one considers how this literature is actually used, how it shapes the consciousness of police officers, social workers, judges and prosecutors, one sees that legal decision-makers have a more focused preoccupation with scrutinizing men's behavior. One way of explaining the state's selective use of psychological materials, is to acknowledge that dominance feminists' representations of men and male sexuality have influenced legal decision-makers, even as dominance feminists' critique of the nuclear family may have been cabined.

Dominance feminists' claims about predatory male sexuality gained sway in part because activists and scholars were extraordinarily effective in offering child molestation stories that became a part of the cultural backdrop used to identify and analyze molestation cases. As feminist scholar Vikki Bell explains, dominance feminists were committed to using narrative instead of theory to analyze the problem of child sexual abuse, arguing that these narratives would help us to understand the wide range of ways in which sexual abuse causes harm.¹⁰⁸ Consistent with this view, dominance feminists like Mary Becker and Lynne Henderson, devoted their efforts to orienting criminal justice actors to be more accepting of victim's accounts.¹⁰⁹ Their goal was to expand the range child molestation narratives that were deemed credible¹¹⁰ and thereby ensure that a broader range of child molestation injuries were recognized. By listening to victims' stories, it was argued, we could better understand how more subtle sexual conduct could be injurious to victims. These narratives typically focused attention on the extraordinary power fathers wielded in nuclear households and described a male sexuality that was predatory and exploitative, one that eroticized children precisely because they appear vulnerable and available.¹¹¹

For example, Lynne Henderson in her article *Without Narrative: Child Sexual Abuse* provides insight into how dominance feminists' used narrative to convince legislators to expand their understanding of child molestation. Henderson explains that child molestation cases typically feature intensely difficult, troubling allegations, allegations that tend to make people turn away from and shut out victim's stories – in particular those of female victims.¹¹² Her goal was to shed light on the ways in which feminists were using a variety of methods, including but not exclusively using empirical data to “define and expand” on the notions of sexualized harm.¹¹³ Similarly, Mary Becker in her article *The Abuse Excuse and*

¹⁰⁸ See *id.* at 4 (explaining that narrative was a core part of dominance feminists' analyses). They believed that, by reducing victims' stories to component parts of an overarching theory about sexual harm, they did violence to women's understandings.

¹⁰⁹ See Henderson, *supra* note 10 ; *Abuse Excuse*, *supra* note 10, at 1459; Mary Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 280-281 (1993); Leslie Feiner, *The Whole Truth: Restoring Reality to Children's Narrative in Long-Term Incest Cases*, 87 J. CRIM. L. & CRIMINOLOGY 1385 (1997). Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495 (2001).

¹¹⁰ Kaye, *supra* note 58, at 152-158

¹¹¹ SEE BELL, *supra* note 103 at 60-61 (summarizing trends in radical or dominance feminists analyses)

¹¹² Henderson, *supra* note 18, at 508.

¹¹³ *Id.* at 508 - 510.

Patriarchal Narratives compared different child molestation narratives to show that the legal system was selectively recognizing certain narratives about child molestation and rejecting others, with an eye towards protecting patriarchal fathers.¹¹⁴ The closest example of a more theoretical approach to these issues was offered by British dominance feminist scholar Liz Kelly in her article *What's In A Name: Defining Child Sexual Abuse*¹¹⁵. Kelly applauds feminists for petitioning lawmakers to create analytic categories that better match with female victims' lived experiences,¹¹⁶ but she offers little in the way of normative or theoretical principles that would allow us to clearly identify sexually predatory or exploitative conduct. A closer examination of her analysis reveals the ways in which reliance on narrative, while it supported the drive to expand our understanding of sexual abuse, created a host of problems that currently complicate the ability to sort out proper parental behavior from sexual exploitation.

Specifically, in *What's In A Name*, Kelly argues that child molestation definitions must be greatly expanded. She argues that "forms of sexual violence fade into one another" and notes that different victims will describe different assaults in different terms.¹¹⁷ Consequently, she explains, we should be wary of overly restrictive definitions of child molestation. As she makes the case for expanding the category of harms recognized as sexual injury, Kelly's analysis relies primarily on narratives from female victims complaining about the conduct of fathers and male relatives. The narratives Kelly offers include clear cases of improper conduct: fondling, masturbation and forced intercourse, but they are offered alongside other behaviors that invite more scrutiny, including teasing, comments from male relatives about breast size, as well as fathers who hug or kiss their children in ways that make them uncomfortable.¹¹⁸ Other examples of sexually threatening father behavior include kissing, hugging, telling a child she is beautiful, and giving a child backrubs.¹¹⁹ Yet Kelly offers nothing to guide us in determining when the victim's subjective sense of sexual violation constitutes proof positive of illicit sexual activity or whether there is some other social-norms-based understanding that will allow legal actors to identify acts of sexual intrusion that should be a source of legal concern.

Dominance feminists' reluctance to offer a theoretical framework for identifying sexual abuse has had costs in the long term. For narrative often does not provide a clear normative framework for identifying sexual abuse injuries. For example, if we assume Kelly's analysis is really an argument for changing social norms about parenting there are important policy considerations that should be weighed if one adopts this position. However the focus on narrative deprives us of an opportunity to consider these questions. For example, one might be concerned about the way that gender norms shape our current understandings about parenting and be concerned about a social norms analysis that tends to re-establish these gendered understandings. Also, Kelly's failure to explicitly make this claim about social norms deprives us of the opportunity to consider how a social norms analysis

¹¹⁴ *The Abuse Excuse*, *supra* note 10, at 1459-1460.

¹¹⁵ Kelly, *supra* note 10, at 65-73.

¹¹⁶ *Id.* at 66-67.

¹¹⁷ *Id.*

¹¹⁸ Kelly, *supra* note 10 at 70-71.

¹¹⁹ *Id.*

reduces female caretakers' autonomy to renegotiate the default gender norms regarding the allocation of caregiving work in their families. Alternatively, Kelly may have offered these narratives in an attempt to argue that child molestation law really should be focused on behaviors that violate the target's subjective feelings of sexual privacy. However, the sexual privacy model also runs the risk of promoting gendered understandings of touch when it allows courts and other legal players to use the victim's conservative gender understandings as an excuse for limiting fathers' behavior.

No one should underestimate the important role dominance feminists' narratives played in transforming child molestation law. Dominance feminists ably used these narratives to spur change, garnering empathy from many quarters. But the cost of this narrative approach is that dominance feminists failed to generate normative standards that would allow legislators and other legal decision-makers to *ex ante* identify principles that would allow them today to negotiate intimate care cases. Dominance feminists succeeded in expanding our understanding of sexual harm, but they failed to provide any insight into the distinctions necessary to sort out intrusive parental care and affection from sexual molestation. Liberal feminists' voices were needed here; however, thus far they have failed to issue a call for more studied assessment of how we should use child sexual abuse narratives to enrich our understanding. Moreover, when one reviews the literature on child molestation one finds that, not only did liberal feminists absent themselves from conversations with dominance feminists on this core issue, they were actively writing in other areas in ways that fundamentally contradicted the claims that dominance feminists were making about the dangers posed by fathers. The next section explores the vision of fatherhood offered by liberal feminist scholars.

B. Fathers Wanted/Fathers Need Not Apply: The Conflict Between Dominance Feminism and Liberal Feminism Over the Role of Fathers

At the same time that dominance feminists were calling for closer scrutiny of fathers' actions in their analyses of child molestation law, liberal feminists in other contexts were calling on men to take on more childcare responsibilities. Susan Olin, a prominent liberal feminist was one of the first to issue the call for greater father involvement in childcare. Writing in the late eighties, at the height of dominance feminists' activism, she argued that the cultural norm that saddles women with the bulk of responsibility for childcare and work in the home doomed the gender equality project and ensured that women would remain a marginal labor market constituency.¹²⁰ Martha Nussbaum, another prominent liberal feminist scholar, also characterized the need for more male involvement in childrearing as an important feminist issue.¹²¹ In writings that ranged from general discussions of democratic theory to more specific discussions of workplace equality issues, liberal feminists argued that both men and women were equally capable of nurturing.¹²²

¹²⁰ See Susan Okin, *Justice and Gender*, 16 PHIL. & PUB. AFF., 42, 66-67 (1987).

¹²¹ MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 272-273 (1999)

¹²² See, e.g., NUSSBAUM, SUPRA note 121, at 272. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM RETHINKING THE FOURTEENTH AMENDMENT 114-118 (1994)(arguing that uneven parenting burdens profoundly limit women's political participation and autonomy); Naomi Cahn, *Gendered Identities: Women and Household Work* (discussing same in the context of workplace equality concerns); Mary Joe Frug,

They explained that men must be required to take on more responsibility for children in order to free women to fully and fairly compete in the world of paid work and pursue other self realization goals.¹²³ Louise Silverstein, in her article, *Fathering Is A Feminist Issue*, makes the stakes of the issue clear. She explains that “limiting the definition of father to the provider in the family has been central to the problem of male privilege and thus to the subordination of women in society at large.”¹²⁴

Liberal feminists’ arguments regarding increasing fathers’ caregiving roles were in part based on basic claims about fairness; however, liberal feminists also suggested that getting men more involved in caregiving would transform American society, improving our ability to construct a truly democratic polity committed to equality between the sexes. Martha Nussbaum for example argues that, by participating in caregiving, men develop the capacities necessary for citizenship in a democratic society.¹²⁵ Sociologist Scott Coltrane reports that his interviews with fathers confirm this claim. He explains that “the more involved fathers are in housework and particularly child care, the less misogynist men are and the more social and political power women have.”¹²⁶ Martha Nussbaum further argues that gender-neutral childcare is important for children’s development. She explains that children first learn about fair treatment and justice considerations by witnessing family relations. Children raised in homes where childcare is equally divided are therefore socialized to expect and respect conditions of equality, rather than the feudal gender dynamics that shape traditional family arrangements.¹²⁷ Additionally, Louise Silverstein explains that an emphasis on nurturing fathers would “actually contribute to an acceptance of diverse family forms. If fathering were seen as equivalent to mothering, then gay fathering couples and father headed families would be more likely to be accepted as legitimate family structures.”¹²⁸ By viewing fatherhood and father care differently, we advance the equality interests of persons who have formed non-traditional family structures in which male caregivers play a central role.

Apart from these wider social benefits, liberal feminists also promised that, by increasing fathers’ nurturing obligations, men themselves would be transformed. Martha Nussbaum for example argued that men suffer certain emotional and cognitive losses by not participating in care work and that these problems are alleviated when they take on mothering roles. Nancy Dowd convincingly shows that increasing fathers’ role will cause men to live more emotionally rich and satisfying lives. Reporting on the work of psychologists such as Diane Erenhshaft, Nancy Dowd reports that mothering is “a compensatory, . . . corrective emotional

Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U. L. REV. 55 (1979) (same).

¹²³ Okin, *supra* note 139 at 66-67. SEE ALSO NUSSBAUM, *supra* note 121, at 272-273 (discussing workplace and larger equality concerns relevant to political theory)

¹²⁴ Louise B. Silverstein, *Fathering Is A Feminist Issue*, 26 PSYCHOL. WOMEN Q. 3, 6-10 (1996)

¹²⁵ NUSSBAUM, *supra* note 121, at 272.

¹²⁶ SCOTT DOWD, FAMILY MAN, FATHERHOOD, HOUSEWORK AND GENDER EQUITY (1996)(cited in N. DOWD *supra* note 14 at 54)

¹²⁷ NUSSBAUM, *supra* note 121, at 272-273.

¹²⁸ See Silverstein, *supra* note 124, at 6.

experience that could restructure men's other relational abilities,¹²⁹ spilling over from parenting into other arenas of life."¹³⁰ Drawing attention to the work of Ronald Levant and Dorothy Dinnerstein to support her claims about emotional growth, Dowd specifically explains that "fathering may contribute to men's development of emotional skills, and rejection or compensation for the learned responses of anger, avoidance and lack of communication."¹³¹ Additionally, she suggests that requiring men to take on nurturing duties promises to decrease men's homophobia, as gay men have been stigmatized for being more willing to acknowledge the importance of the emotional dimensions of life, as well as their ability to value connectedness, and their capacity for nurturing.¹³²

Liberal feminist scholars' calls for men to take on more childcare responsibilities have continued into the present, but without any attempt to cabin the dominance feminist critique that increasing fathers' care obligations will create grave risks for children.¹³³ The attempt to respond to dominance feminists' claims, if any has been made, is offered by implication rather than any direct and sustained conversation.¹³⁴ Indeed, rather than engage this problem, feminists like Nancy Dowd and Louise Silverstein have simply announced that "fathering" is a feminist issue, and proceeded directly to the project of reimagining masculinity in a way that will allow men to focus on nurturing.¹³⁵ However, by implication, both Dowd and Silverstein suggest that there is something wrong with traditional masculinity, suggesting that liberal feminists themselves have been influenced by the sexual suspicion claims made by the dominance feminist camp.¹³⁶ Liberal feminists may have their own critiques of traditional masculinity, but it would be worth considering how and why they are troubled by traditional masculinity before we begin to advocate for new models for male gender performance.

¹²⁹ ROBIN WEST, *CARING FOR JUSTICE* (1997) (arguing that caregiving is required for the development of moral decisionmaking). This draft does not further discuss the rich literature provided by cultural feminists/care feminists on mothering, although their arguments dovetail in interesting ways with liberal feminists' claims regarding the transformational role caregiving might play in male socialization and shaping masculinity more broadly. See, e.g., MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 53-55, 56 (2d ed., 2003) (explaining that "cultural feminism aims at changing men and society by stressing female virtues.") Sociological studies of fatherhood tend to support the claim that mothering or parenting can play this transformative role. See, e.g., Aaron B. Rochlen et al., "I'm Just Providing for My Family: A Qualitative Study of Stay-at-Home Fathers," 9 *PSYCHOLOGY OF MEN & MASCULINITY* 1, 8-9 (2008) (covering stay at home fathers describing how their experiences made them feel more "emotionally connected," emotionally "aware," "nurturing" and "civilized."). See also, DOUCET, *supra* note 11, at 9.

¹³⁰ N. DOWD, *supra* note 14, at 53.

¹³¹ *Id.* at 43.

¹³² *Id.* at 191-192.

¹³³ Nussbaum's comments rest on the assumption that there is something inherently wrong with traditional masculinity as it relates to childcare.

¹³⁴ N. DOWD, *supra* note 14; Silverstein, *supra* note 124, at 6.

¹³⁵ See notes and text at *supra* note 154.

¹³⁶ Nussbaum has argued that co-equal parenting is essential to reform gender relations. She argues that children that grow up in homes where both genders value childcare implicitly value and prioritize gender equality. SEE NUSSBAUM, *supra* note 121, at 272-273.

Liberal feminists' apparent avoidance of questions regarding dominance feminists' representations of men and fathers may be understandable. Dowd offers one consideration that could explain liberal feminists' reluctance to problematize dominance feminists' accounts of masculinity and fatherly care, pointing to the disturbing claims made by fathers' rights activists about the central role that fathers should play in childrearing.¹³⁷ Liberal feminists rightly may be concerned that their attempts to productively critique dominance feminists' claims may be co-opted by fathers' rights groups in ways that would support patriarchal arrangements in families. Specifically, because fathers' rights groups emphasize the central and unique role that fatherhood plays in child development, they threaten to both devalue women's contribution to childcare and complicate child custody disputes.¹³⁸ Martha Fineman, as well, worries that a gender-neutral model of parenting, one that suggests fathers and mothers are equally responsible for nurturing and care, ignores material realities; she argues that these models prioritize formal equal treatment of the sexes over the real concerns of mothers.¹³⁹

The challenges described above are not insubstantial. However, again, liberal feminists' reluctance to critique dominance feminists' understandings about men and childcare compromises their ability to offer a compelling account of how and why fatherhood must change to allow for co-equal parenting. Certainly, liberal and dominance feminists may not agree about fathers' roles in the family; however, a more engaged acknowledgement of the competing and contrary claims that dominance and liberal feminists have made in their work would enrich both groups of scholars' analyses.

C. Post-Dominance Feminists and Fear of the State

While dominance feminists and liberal feminists have proceeded apace without discussing the apparent conflicts between their perspectives, a new camp of post-dominance feminist scholars has emerged. This camp makes arguments that trouble the seemingly thin areas of agreement between liberal and dominance feminist scholars. For dominance feminists and liberal feminists seem to agree that harnessing the power of the state is essential to ensure that women and children are not subject to the whims of abusive fathers if family relations are relegated to the private sphere.¹⁴⁰ Post-dominance feminists challenge this argument because of its overly sanguine view of state power. They suggest instead that state intervention in private life can be authoritarian, paternalistic and compromise women's autonomy.

¹³⁷ N. DOWD, *supra* note 14 (discussing fathers' rights movements)

¹³⁸ Silverstein, *supra* note 124, at 3.

¹³⁹ Martha Albertson Fineman, *Fatherhood Feminism and Family Law* 32 MCGEORGE L. REV. 1031, 1034 (2000)

¹⁴⁰ This was particularly true in the context of discussions of domestic violence. *See, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 193-94 (1989); Elizabeth M. Schneider, BATTERED WOMEN AND FEMINIST LAWMAKING 13 (2000); Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1869 (1996) ("[M]uch of feminist academic discourse concerning domestic violence has centered on the argument that 'private' violence must be reconceptualized as 'public' in order to compel state intervention.").

For example, scholars like Melissa Murray have called on us to look more deeply at so-called private relationships, like family relations, which are represented as being shaped by civil law, but really are subsidized by seemingly unrelated criminal statutes that encourage the creation of certain family forms. In her article, *Strange Bedfellows*, Murray describes how criminal sodomy and adultery statutes historically subsidized marriage, which technically was civilly defined, because these criminal statutes helped ensure that marriage was the only legal space in which sexual activity could occur.¹⁴¹ Jeannie Suk also raises questions about using the criminal law to regulate intimate relationships, describing the ways in which prosecutors use protective orders in domestic violence cases to effectively institute a *de facto* divorce between cohabitating couples that the state believes should no longer be intimate partners.¹⁴² Specifically, Suk shows that the liberal feminist response to domestic violence, to use the protective order as a shield to prevent abusers returning to the home, has had the unintended consequence of depriving women of the autonomy to make their own decisions about wanted intimate relationships.¹⁴³ By automatically entering protective orders whenever there are domestic violence allegations, and prosecuting the returning paramour for burglary should he enter the home, prosecutors can effectively prevent couples that previously lived together from making another attempt at cohabitating.¹⁴⁴

The determinative, key feature in post-dominance feminists' work is a renewed focus on women's autonomy and liberty. Fairly viewed, their positions are only tenable because of the early work done by dominance feminists and liberal feminists, as early feminist efforts calling for state regulation effectively secured women a certain baseline level of fair treatment, leading them now to explore their right to freedom in so-called private family arrangements. That being said, post-dominance feminists are rightly suspicious of state regulation, recognizing that it does not always advance women's equality. The autonomy concerns raised by Murray and Suk gain new force when we think about how tightly child molestation law regulates parenting, as it now allows parents to be sanctioned for exposing their children to primal scenes, cross gender conduct that violates social norms and interactions that contradict widely held cultural beliefs about parental modesty and children's modesty. Post-dominance feminists would argue that when the law intervenes in these cases it is being paternalistic and it prevents women from exercising personal agency to decide what kinds of family relationships they would like to form. Certainly, the danger is great when the law ignores "private" family abuse, they would argue, but it is equally dangerous when it stamps out privately negotiated intimate relations in the name of enforcing a uniform state-sponsored consistency that tramples on women's ability to negotiate caregiving responsibilities in the family.

Given the disconnect between the various groups of feminist scholars writing about family relations, some general suggestions can be offered for improving feminist conversations about gender neutral parenting and the risks children face from sexual exploitation. Arguably, the contribution dominance

¹⁴¹ Murray, *supra* note 22

¹⁴² Suk, *supra* note 22

¹⁴³ *Id.*

¹⁴⁴ *Id.*

feminists have made in our understanding of child molestation law has dampened feminists' interest in uncovering the ways in which more radical forms of feminism have shaped the child molestation conversation in limiting and problematic ways. But this Article shows that there is a way to enter the lion's den and move past the current impasse to some productive end. Each collective of feminist scholars writing on these questions raises important questions, but each group's arguments present challenges for the project of gender equality.

First, although dominance feminists were successful in convincing legislators to expand the category of injury recognized as harm in the child molestation cases, they have devoted insufficient attention to theorizing when and how we should recognize that harm has occurred. This undertheorization problem is a key stumbling block in the prosecution of child molestation cases involving intimate care, and it leads courts to rely on gendered parenting norms and sexual privacy arguments in their analyses. Second, dominance feminists have encouraged a view of male sexuality as inherently aggressive and threatening to children. They have not considered the ways in which their suspicion of male sexuality has dovetailed with a more conservative gender project, more associated with child welfare authorities, authorities that are fundamentally uncomfortable with and ambivalent about men who mother. Dominance feminists are likely to hold to their initial position — that men are not welcome in the domain of intimate care. However, they must come to grips with how their recruitment of the state in enforcing this understanding reduces women's autonomy and specially burdens women's ability to negotiate caregiving responsibilities in ways that tend to keep women in the socially subordinate role of primary caretaker.

Liberal feminists also have a great deal of work ahead in deciding how liberal feminists intend to reimagine fatherhood. They have not considered how the sexual suspicion of men at the heart of the dominance feminist critique is currently being deployed in the legal system in a way that threatens men who have adopted an ethic of care. They have not considered the degree to which this sexual suspicion may have shaped their own understandings of traditional masculinity. Relatedly, liberal feminist will need to spend more time considering whether masculinity studies can provide assistance in determining how to subsidize state arrangements that encourage men to adopt models of masculinity that celebrate nurturing and care.¹⁴⁵ They will need to consider whether there is anything associated with traditional masculinity that should be integrated into models of parenting. Only then can they advance models of parenting that do not reify motherhood as the ideal model. Only then can they credibly claim that they are advocates of gender neutral parenting.

Finally, post-dominance feminists must engage with the risks posed by their focus on autonomy issues. They should honestly address the continuing threat posed by male domination in some families, and the risk that the veil of privacy may leave some children unprotected. We may want state intervention that looks judgmental and even paternalistic if it is used to provide some baseline, minimum level of protection for children. Certainly, post-dominance feminists can

¹⁴⁵ See David S. Cohen, *Keeping Men "Men and Women Down: Sex Segregation, Anti-Essentialism and Masculinity"*, 33 HARV. J. GENDER & L. 509, 511 ("Without investigating the way law constructs men and masculinity, equality will be illusive.")

contribute important insights by highlighting the ways in which the dominance feminist critique undercuts women’s ability to renegotiate the default gender norms that allocate childcare responsibilities, a consideration that has thus far gone unexplored. However, autonomy and liberty arguments can function as a double edged sword, We may want legal structures that try to prevent some of the dangers associated with past liberty arguments.

Feminists of all stripes should also engage with the broader theoretical questions raised in Part I about the limits of a social norms analysis and the use of sexual privacy logic in the intimate care cases. Feminist analysis is needed to negotiate how to resolve children’s sexual privacy complaints, and to assess the degree to which feminists are prepared to challenge sexual privacy claims that rest on established gendered social norms. Finally, contemporary feminists should begin to pay more attention to the ways in which society can subordinate and punish certain men when they become allies of feminist projects. These male allies are sympathetic to feminists’ values, such as the importance of providing care, and feminists need to support and subsidize the efforts of individuals that push at the boundaries of traditional gender roles. Some feminists have begun to do more work to recognize the contributions of these male allies. The next step is to ensure that feminist men who adopt a commitment to care do not find themselves being sanctioned using standards that feminists called for in another historical era. Consistent with this view, this article attempts to acknowledge the debt feminists owe to men that have stepped beyond traditional notions of masculinity and embrace activities that traditionally have been associated with a female gendered understanding of care.¹⁴⁶

In summary, I cast my lot with liberal feminist scholars who argue that we need a reconstructed vision of fatherhood that ensures that childcare obligations are divided more evenly.¹⁴⁷ There is in effect a “patriarchal dividend,” a natural state of affairs where childcare responsibility “naturally” falls more heavily on women, making it harder for them to participate in wage labor and professional life. However, feminists must have a more honest and open discussion about the questions and concerns raised by different constituencies within feminism about what role men should play in addressing this issue.

III. *RECONSTRUCTING FATHERHOOD IN THE SHADOW OF CHILD MOLESTATION LAW – THEORETICAL AND PRACTICAL CHALLENGES*

Part III takes on the project of theorizing fatherhood in the shadow of child molestation law. Specifically, Part III shows how the conceptual problems that plague fathers’ conduct in legal cases involving intimate care, also create anxiety for fathers as they engage in the daily experience of caregiving. As a consequence, men inclined to provide care men face incentives to opt out of caregiving arrangements or orchestrate their activities to ensure that they confirm conservative gendered understandings of parenting.

A. *Child Molestation Law and the Disciplining of Fatherhood*

How does child molestation law affect the practice and experience of

¹⁴⁶ N. DOWD, *supra* note 14, at 53-55.

¹⁴⁷ See text and sources at *supra* note 14.

parenthood? First, I dispose of the notion that there is any simple, uncomplicated process by which fathers are educated about child molestation statutes. Most fathers are most likely unaware of the specifics of child molestation laws in force in their communities. Additionally, as I have argued in Part I, simple notice about the statutory requirements would not provide fathers with meaningful guidance, as child molestation provisions are so broadly worded that they could not on their face provide fathers with any fair notice about what is prohibited. Instead fathers are forced to rely on a series of imperfect proxies that interpret what the law requires and these proxies (or institutional players) inform fathers when they have run afoul of child molestation provisions. Socially vulnerable fathers: gay male parents, poor fathers, as well as single, widowed and divorced fathers are subject to this imperfect disciplinary process far more extensively than socially privileged fathers. However, all fathers, at some level face these challenges. This phenomenon requires a more detailed explanation.

Foucault explains how institutional players interpret and deploy institutional norms and find ways to enforce these understandings. In his book *Discipline and Punish*, he discusses the ways in which social actors are “disciplined” by institutions or, more specifically, they are taught how to conform their behavior to institutional requirements.¹⁴⁸ Foucault describes two key elements of a disciplinary regime: hierarchical surveillance and normalizing judgment.¹⁴⁹ Each combines to create incentives for the person subject to a disciplinary regime to conform his behavior to institutional requirements, as well as internalize those institutional requirements through an anxiety laden process that makes those requirements part of his “common sense” thinking.

Foucault’s analysis of how institutionalized players exercise “disciplinary” power and judgment draws our attention to some of the special features of child molestation law. First, his analysis requires us to consider the special conditions fathers’ face with regard to surveillance and “normalizing judgment,” the process used to determine whether a subject has conformed with institutional norms.¹⁵⁰ Caregiving fathers face a regime in which the criminal law outlines the express prohibitions that will be used to assess a father’s conduct; however, the normalizing judgment produced by these prohibitions is far from uniform. Indeed, as Part I shows, the broad, vague nature of child molestation statutes, their potential to assign error for both clearly illicit conduct and more mundane behavior, gives institutional players extraordinary discretion to interpret these requirements and, by extension, police fathers’ behavior. Socially vulnerable fathers, who typically are subject to a great deal of scrutiny, also know that they will be subject to review and assessment by a vast number of actors with very different institutional positions, players who often have confused and conflicted understandings about the law and fathers’ proper role in providing nurturing care. These actors include: judges, prosecutors, social workers, psychologists, school authorities, media and sometimes even the spousal partner who shares caregiving responsibilities.

¹⁴⁸ Foucault, *supra* note 24, at 177-187.

¹⁴⁹ *Id.*

¹⁵⁰ DOUCET, *supra* note 11, at 118 (father discussing incident in which infant massage teacher targeted him for a warning out of concern that he could not distinguish between nurturing, intimate touch versus sexual touch)

Importantly, socially vulnerable fathers are often forced to submit to the judgment of persons with an imperfect understanding of legal prohibitions in child molestation law, as they know that a mere complaint can be sufficient basis for criminal or civil sanction. The process of continually submitting to these players' judgments tends to leave fathers with less discretion when they play mothering roles. For these institutional players are accurate in their view that gender norms currently are an important part of the child molestation analysis. Consequently, institutional actors tend to believe that fathers' behavior should be more circumscribed; they believe that there are more kinds of conduct that should cause fathers to be sanctioned. For example, a mother's kisses to her child tend not to invite scrutiny. However, as we see in *Marokity, JS* and other cases, when fathers are involved, the length of a kiss, its style, placement and its timing are all questions that invite inquiry into the potential for sanctions. A mother's decision to give a child a bath typically raises little attention. For fathers' again, the manner in which the bath is conducted, its length or duration, and even whether a washcloth is used, all can provide a basis for a claim of illegality or violation. Consequently, on the whole one sees that institutional players tend to grant fathers less discretion to engage in nurturing and intimate care than mothers.¹⁵¹

As Part I explains, part of the reason for the wide variance in how different institutional players interpret child molestation law stems from the undertheorized understanding of injury that informs these statutes. When the law is unclear, when underlying compliance norms are in flux, persons subject to legal prohibitions can become compulsive in their attempt to comply with legal requirements. A father that turns to social norms to understand his proper place knows that the norms any given institutional player uses may not match with his understandings. Similarly, the sexual privacy analysis provides no assurances, particularly when a subjective sexual privacy understanding controls.¹⁵² Fathers cannot reliably count on their moral instincts and intuitions to guide them safely away from prohibited behavior.

Foucault suggests that the experience of surveillance by these institutional players, being subject to this repeated process of normalizing judgment, has a powerful effect on an individual's consciousness. As he explains, the ideal disciplinary subject is "caught up in a power situation of which they themselves are the bearers." In short, fathers have been properly disciplined when they have internalized institutional norms that tell them they should be sexually suspicious or

¹⁵¹ Cf. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J 2075, (2003) (explaining that institutional actors may institute voluntary compliance norms that exceed what the law actually requires).. For example, social workers accustomed to nurturing care being the province of mothers may interpret child molestation standards in ways that strongly reinforce gender norms and that would be rejected by many judges and prosecutors. See Jodi Jones, SEXUAL OFFENDER, SEXUAL ABUSE VICTIM, AND GENERALIST POPULATION THERAPISTS' PERCEPTIONS OF PERMISSIVE PARENT-CHILD SEXUAL BOUNDARIES AND ALTERED PERCEPTIONS OF SELF, OTHERS, AND ADAPTATION TO THE WORLD AS A RESULT OF VICARIOUS TRAUMA (2008) (DISSERTATION) (describing findings showing social workers readings of allegedly abusive behavior often did not match lawyers and judges)

¹⁵² For example, if they believe that child molestation law is motivated by concerns about children's sexual privacy, then a child who dislikes the manner in which he is bathed, may have a valid claim of harm. But if the law is purely concerned about social norms, the same bath, despite the child's cries, would not be a basis for sanction.

wary of their own conduct. They have been properly disciplined when they learn that they must be ever vigilant to whether they are experiencing arousal when they provide nurturing or, conversely, that their children may experience the caregiving they provide as causing a kind of sexual violation. Consequently, one expects to find that fathers spend more time parsing their interactions with children to ensure that they do not engage in behavior that seems sexually arousing or sexually motivated. Importantly, when properly “disciplined,” fathers will engage in this constant reflexive process of internal review, regardless of whether they are actually being watched by a third party when providing care. In the end, I argue that this review produces a special kind of anxiety that discourages men from providing care. One can expect to find that many fathers only provide nurturing care when it matches with well-accepted gender-specific social norms about parenting, as this tends to decrease the risk of suspicion. Alternatively, fathers may entirely opt out of providing nurturing or intimate care to avoid the risk of sanction. Socially vulnerable fathers, however, are trapped, as they are both subject to more suspicion and fully aware that they cannot opt out of a caregiving role. Consequently, the scrutiny that they are subject to functions in a way to make them feel unwelcome or socially suspect even as they perform essential mothering functions.

Foucault’s analysis helps us understand the “mystery” that confounds sociologists and feminist legal scholars about why it is that men have not become more actively involved in providing childcare despite the shift in gender norms that encourages them to take on more childcare responsibilities.¹⁵³ Given the broad cultural confusion about the proper place of men in providing intimate care, fathers have incentives and indeed, even cover, to justify why their behavior tends to hew toward social stereotypes that would limit fathers’ caregiving role. Gender stereotypes effectively provide safe harbor because these stereotypes reflect gendered understandings that keep men safely away from the messy intimate care tasks that constitute “mothering.” Widespread social anxiety about child molestation allows men to rely on strong essentialist claims about women and female children’s need for sexual privacy or homophobic understandings about boys’ sensitivity to male touch as a way to explain and justify their refusal to assist with intimate care giving.

Proof of this anxiety, proof of fathers’ search for safe harbor, is readily apparent when one carefully reads child molestation cases.¹⁵⁴ One father, accused for molesting his developmentally disabled son in the context of a diaper change explains that he tended to avoid diaper changes because “he was afraid of trying

¹⁵³ See Lynn Craig, *Does Father Care Mean Fathers Share? A Comparison of How Mothers and Fathers in Families Spend Time with Children*, 20 *GENDER & SOC’Y* 259 (2006) (offering data showing that women tend to spend 50% of their time on intimate care (bathing, feeding, and dressing children) while men spend less of their time on such activities); Alice S. Rossi, *Gender and Parenthood*, 48 *AM. SOCIOLOGICAL REV.* 1 (1984) (suggesting that men distance themselves from children in early infant care).

¹⁵⁴ Fathers sometimes seek safe harbor by simply refusing to provide certain kinds of care. For example, in *In re David P.*, one father explains, “I did not touch my daughter. I don’t even bathe her. . . . I don’t bathe or wipe her because I want [her] to know its not okay for everybody to do that. I would never do any sick [thing] like that to my own daughter.”

and getting into sexual abuse.”¹⁵⁵ A father accused of penetrating his toddler age daughter during her bath reports that he is so traumatized by the idea that he has potentially sexually molested her that he cannot give a coherent account of his actions.¹⁵⁶ The cases also show that fathers willingly submit to and seek out the authorizing judgment of the female caretakers around them as a way of demonstrating the legitimacy of their own conduct. They explain that a diaper change was authorized by a female caretaker, conducted according to the precise steps she prescribed, or may even ask a female caretaker to observe their actions, lest they be accused of engaging in improper conduct.¹⁵⁷ Yet even fathers who willingly submit to surveillance and seek authorization find that their approach is not foolproof, for the sexual privacy cases are populated by men who have imperfectly performed tasks authorized and assigned by maternal caregivers.¹⁵⁸

Some feminists may have reservations about this Foucauldian reading of fatherhood, arguing that it was not so long ago that feminists did the hard work necessary to reveal patriarchal privilege in the family and demonstrate its connection to child molestation.¹⁵⁹ Dominance feminists in particular may be disturbed by the way the discussion focuses on the “microdynamics” of power as they affect individual fathers. Indeed, Foucault’s work has been rejected by many feminists for this reason, as well as a concern that some of his discussions express a cultural relativist attitude about child molestation law that is deeply disturbing.¹⁶⁰ However, my goal here is to show how the microdynamics of power tell us a great deal about why structural arrangements have not changed. To be clear, these micro-dynamics help explain why the family form has not substantially evolved in the ways urged by liberal feminists.¹⁶¹

B. *Disciplinary Authority In Practice: Anxieties On the Ground*

The theoretical account provided above makes the risk to fathers from the current child molestation standards clear; however, the real world consequences of these standards is less apparent. Certainly the cases suggest that some fathers are anxious, but how widespread is this problem? Skeptics will ask, where is the empirical evidence to establish the importance of this issue? Isn’t fathers’ resistance to providing intimate care better explained by laziness or lack of interest,

¹⁵⁵ Lansberry, *supra* note 45.

¹⁵⁶ *In re R.A.*, 403 N.W.2d 357

¹⁵⁷ See e.g., *Hicks*, *supra* note 51 at 89 (citing grandmother’s instruction to apply diaper cream to justify his actions); *In re R.A.*, *supra* note 101 (describing fact that father was instructed regarding washing by mother as evidence that his conduct was improper); *Rice v. VA Dept. of Social Services*, 2007 WL 895753 (Va. App.) (describing medical doctor father’s request to his parents to watch him insert suppositories into his daughter to ensure sexual interest was not presumed)

¹⁵⁸ See cases discussed in note 180.

¹⁵⁹ See Vanessa E. Munro, *Legal Feminism and Foucault: A Critique of the Expulsion of Law*, 28 J. OF LAW AND SOCIETY 546, 546-67 (2001)) (recognizing but cabining concerns).

¹⁶⁰ See BELL, *supra* note 103.

¹⁶¹ Lynne A. Haney, *Feminist State Theory: Applications to Jurisprudence, Criminology and the Welfare State* 26 ANN. REV. SOC. 661, 658(2000) Haney argues that a more layered approach, one that recognizes inconsistencies in application and approach by various segments of the state, would better serve feminists.

rather than the risk of criminal sanction?

While no comprehensive large-scale empirical studies of fatherhood have been done that focus on these anxieties, word from the trenches suggests that there is a fair degree of concern in many quarters.¹⁶² Andrea Doucet in her book, *Do Men Mother*, offers data from over 100 fathers who are primary caregivers to their children, many of whom report having anxiety about social misperceptions regarding their interactions with older female children.¹⁶³ Doucet's interviews suggest that fathers' anxiety is at its peak when children reach the preteen¹⁶⁴ or teenage years¹⁶⁵, but other evidence suggests there is anxiety about young children as well.

Indeed, other scholars have observed that fathers experience substantial discomfort with intimate care for infants and toddlers, particularly if their behavior is likely to be scrutinized by social workers or distrustful partners.¹⁶⁶ Some fathers may engage in care giving with less obvious alarm, but they self-discipline and perform certain tasks inadequately to avoid being perceived as having acted inappropriately. Empirical studies suggest fathers are right to be concerned. Studies show that third parties demonstrate far more acceptance for women to engage in intimacy and caregiving with children, but grant fathers far less leeway.¹⁶⁷ These studies help explain why fathers believe that they are subject to a presumption that they are not supposed to be physically close with children.¹⁶⁸ Fathers writing on the progressive blog *Daddy Dialectic* openly talk about the suspicion and gender bias they encounter when interacting with children.

¹⁶² DOUCET, *supra* note 11, at 191-192 (discussing individual cases) Close review of the intimate care cases reveal fathers avoiding certain intimate care tasks, either because they are afraid that they are violating social norms or because they may inadvertently do something that a child finds traumatic. See, e.g., *Lansberry*, *supra* note 45 (accused father explains that he didn't change son's diaper "because he 'was afraid of trying or possibly getting into abuse.'")

¹⁶³ See DOUCET, *supra* note 11, at 41-46.

¹⁶⁴ *Id.*, at 120.

¹⁶⁵ One father commented, "when puberty arrives the entire dynamic changes. You don't think much about the physical thing that goes along with your kids until then. Embracing and hugging. I am trying to think about the parallel thing that goes along with a mother and son. Obviously the same thing happens to a degree, yet far less starkly." See DOUCET, *supra* note 11, at 121

¹⁶⁶ *Notes from Working with Young Fathers Workshop*, www.rcm.org.uk/EasysiteWeb/getresource.axd?AssetID=9119 (Jan. 24, 2012) (discussing young fathers' intimacy-avoidance behavior with young children because of fear of social worker accusations); SHARON HELLER, THE VITAL TOUCH 5 (discussing parents avoidance of intimacy with children when there is partner mistrust). See also DOUCET, *supra* note 11, at 191 (discussing father's perceptions of suspicion and accusation from infant massage instructor).

¹⁶⁷ See, e.g., Toni Cavanagh Johnson & Richard I. Hooper, *Boundaries and Family Practices: Implications for Assessing Child Abuse*, 12 J. CHILD SEXUAL ABUSE 103, 121 (2003); R. DISIMONE-WEISS, DEFINING SEXUAL BOUNDARIES BETWEEN CHILDREN AND ADULTS: A POTENTIAL NEW APPROACH TO CHILD SEXUAL ABUSE PREVENTION. (1999). *Decisions and Attitudes Concerning Child Sexual Abuse: Does the Gender of the Perpetrator Make A Difference to Child Protection Professionals?* 22 *Child Abuse & Neglect* 1265-1283 (1998).

¹⁶⁸ *Id.* at 41

Comparing it to the racial profiling African Americans face from police, colloquially referred to as the risk of “driving while black”, they note that fathers face suspicion for “parenting while male.”¹⁶⁹ And while the fatherhood literature has focused on the fathers’ anxieties about mistaken accusations from other people’s children,¹⁷⁰ numerous studies and cases demonstrate that, in the right circumstances, it is all too easy to transfer that same suspicion to a father’s interactions with his own child as well.¹⁷¹

Currently, the blogosphere provides the most detailed evidence of fathers’ anxieties about interactions with young children. Websites like Baby Center and Mamapedia offer confused and anguished questions from mothers about when it is appropriate for fathers to provide care and how to address their male partners’ anxieties about molestation.¹⁷² One mother explains, “My husband refuses to wash our baby girl or wipe her well enough when he changes her diaper. He thinks that if he 'touches' her, people are going to think badly of him. How can I help him get over his fear and start taking care of our baby correctly?”¹⁷³ Responses feature a range of perspectives, many reflecting the view that fathers should only provide intimate care in a narrow band of circumstances. Confusion on these issues is not surprising, as research suggests that, there is great social variation in understandings regarding the appropriate range of intimacy and contact between

¹⁶⁹” See *Daddy Dialectic, Parenting While Male: 74 Fathers Talk About Playground Discrimination* at <http://daddy-dialectic.blogspot.com/2011/01/parenting-while-male-74-fathers-talk-html>.

¹⁷⁰ See DOUCET, *supra* note 11, at 41-46.

¹⁷¹ As of 2003, approximately two million fathers are primary caregivers for their children and working wives. See Fort Worth Star-Telegram, May 18, 2003, available at <http://www.dfw.com/mld/startelegram/living/5875857.htm?1c>.

¹⁷² See e.g., Yahoo Discussion Group, *Is it ok to let daddy change newborn baby girl diapers?* <http://answers.yahoo.com/question/index?qid=20100202162445AA19v20> (expressing concern about whether it is appropriate for a husband to change a newborn baby girl’s diaper). Most responses indicated that it was appropriate, but others established a clear boundary point during the toddler years when toileting duties should become solely the mother’s province. Cf. Mamapedia, *At What Age Does My Husband Stop Giving Our Daughter Diaper Change &/Or Baths?*, <http://www.mamapedia.com/article/at-what-age-does-my-husband-stop-giving-our-daughter-diaper-change-or-baths> (advocating gender neutral approach and offering a range of perspectives)

¹⁷³ See Baby Center Blog, http://www.babycenter.com/400_how-can-i-make-my-husband-comfortable-with-changing-our-daug_500596_1.bc?startIndex=20&sortFieldName= (discussing father anxiety over touching genitals of infant daughter).

One of the more helpful responses reveals that mothers have a more relaxed attitude about cross gender infant conduct, but have the potential to feel anxious as well.

“I wonder if there's a father out there who had a baby girl and didn't feel this way. I think it's totally normal. If he has friends with daughters send him out with the guys and encourage him to ask if they had fears. He'll realize how normal he is. Talk positively with him about his feelings, and be understanding. Remind him, however, that it's not about being inappropriate, it's about not wanting her to get an infection. Only time and practice will help him overcome his anxiety. I myself still feel funny changing my son if he gets a smile on his face while I'm wiping his penis....let's face it, it's just uncomfortable. But we do what we have to do as parents and that includes the hard or embarrassing stuff.”

family members.¹⁷⁴

Certainly, it is easy to assume that fathers' lower rate of participation in childcare is due to "lack of interest;" however, there is a wealth of qualitative evidence that rebuts this claim. Moreover, as feminist legal scholar Vicki Schultz has warned, the lack of interest trope is often used to hide institutional arrangements that play a role in promoting gendered arrangements in society.¹⁷⁵ I merely suggest that the cultural anxiety about male caregiving and concerns about sexual abuse share a dialogic relationship with the law, feeding off that cultural anxiety and adding to it, by giving interested parties a basis for social interventions. While not all fathers feel this disciplinary pressure in precisely the same ways, many fathers, particularly those who are committed to and think deeply about caregiving, find themselves negotiating this anxiety on a regular basis.

C. *Reimagining Fatherhood*

Given this understanding regarding the challenges fathers face, it is time to return to our primary concern: how to reconstruct fatherhood in the shadow of child molestation law. Liberal feminist scholar Nancy Dowd is the writer that has made the most significant effort to re-imagine fatherhood, specifically, to identify legal reforms that will allow fatherhood to evolve beyond its current focus on breadwinning and make men more inclined to take on and value nurturing activities. In her book *Redefining Fatherhood*, Dowd notes that "nothing in the law supports fathers' nurturing nor sanctions the lack thereof."¹⁷⁶ While she argues that a gender neutral model of parenting should be our goal, she also recognizes that the "vision of neutrality and its presumed link to gender equality remains unclear."¹⁷⁷ Dowd urges us to move towards an understanding of parenting that recognizes mothers and fathers as having co-equal responsibilities for caregiving, an androgynous model that recognizes both men and women as equally capable of care.¹⁷⁸ However, she rightly notes that, "there is remarkably little discussion regarding the current context of fatherhood, what the goal of fatherhood is, and what the current means are of achieving th[is gender neutral] goal." Dowd therefore calls on scholars to "carefully examine the legal structures and concepts that reflect our legal vision of fatherhood," and to consider the "changes in the law [that] are necessary to a redefined fatherhood."¹⁷⁹ This article is a response to her call for greater feminist attention to this issue.

Dowd's project while impressive has a limited scope, as her primary focus is on how we can change family law and workplace law (including family leave policies) in ways that would encourage fathers to enter the domain of care.¹⁸⁰ Her work represents a welcome beginning to feminist legal discussions about the way the law imagines and shapes fatherhood; however, her failure to discuss the

¹⁷⁴ See sources at *supra* note 63.

¹⁷⁵ See Vicki Schultz, *Telling Stories About Women and Work*, 103 HARV. L. REV. 1749, 1840-43 (1990).

¹⁷⁶ *Id.* at 7

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* Cf. DOUCET, *supra* note 11, at 135.

¹⁷⁹ N. DOWD, *supra* note 14, at 7.

¹⁸⁰ *Id.* at 10, 157-213.

impact that child molestation law has on fathers' discretion to provide care is curious in the extreme. Indeed, even as she urges us to move to an androgynous or gender neutral model of parenting¹⁸¹, she fails to consider that child molestation law is the area in which we see the most sustained engagement by legal actors in regulating fathers' practice of providing nurturing. By leaving this area of law unexplored, Dowd misses a critical opportunity to explore cultural and legal resistance to a nurturing fatherhood. She misses a key opportunity to consider how child molestation law subsidizes and rests on gender-specific norms that prevent the evolution of gender-neutral parenting models.

Moreover, Dowd's reform model also presents certain difficulties, as where does provide an understanding of what a new "nurturing" model of fatherhood might look like; she runs the risk of reinstating the view that mothers are the only true ideal caretakers. Certainly men's current practices have something to teach us Dowd explains. Consequently, she argues that in reforming fatherhood we "must look to the roles fathers play when they become primary caretakers, or co-equal separate caretakers." However, Dowd believes that, in practice, nurturing fatherhood looks substantially similar to what we see when "we look to the model of motherhood." Motherhood is the touchstone she explains because fathers who provide care are basically emulating mothers.¹⁸² In her view, "the motherhood role gives us a richer, fuller context to draw from in constructing a nurturing model, because more mothers have lived the practice of nurturing and because mothers have been more closely studied than fathers."¹⁸³ Yet as we see in the intimate care cases, this conceptual move can create equally serious problems, as men's behavior is often compared to specific mothers' behavior in the intimate care cases and found wanting.

Despite my reservations about Dowd's use of mothering as a touchstone, I believe that this approach may be an important conceptual way station for legal actors interested in giving fathers negotiating room to take on caregiving activities. Indeed, the intervention I make in Part I, calling on skeptics to "reverse the groups" also *runs the risk of reinstating motherhood as the ideal norm*. To be clear, in Part I, I encourage readers to consider whether fathers have acted improperly in particular intimate care cases by considering whether a mother who engaged in the identical practices would be subject to sexual suspicion. However, rather than compare a father against a specific mother in an individual case, my analysis calls on legal actors to consider the wide range of mothering practices, and determine whether a father's purpose or practice in a particular case would seem reasonable if offered by a mother. I offer this approach based on the understanding that mothers enjoy a fairly broad range of discretion in selecting caregiving behaviors, suggesting that fathers should be given the same latitude as well. However, Dowd questions whether mothers actually enjoy such freedom. She argues that, rather than enjoying broad discretion, mothers know that there is an "ideal" version of motherhood to which their actions are compared. Therefore, she argues we might question whether this ideal model of motherhood when applied to test men's behavior will be experienced as oppressive, in the same way that the ideal

¹⁸¹ *Id.* at 10.

¹⁸² *Id.*

¹⁸³ *Id.* at 8.

motherhood model has been experienced by some women.¹⁸⁴

While my views are similar to Dowd's in important ways, my approach is distinct in that it emphasizes the ways in which attention to fatherhood will unsettle motherhood. I assume that motherhood itself will change once we begin to incorporate the caregiving insights produced by male caregivers. In this way my analysis calls on us to pursue a true gender-neutral analysis in the intimate care cases, as my goal is to ensure that the parenting inquiry in child molestation cases is conducted in a way that moves us towards identifying and disrupting current gender relations. My emphasis on the questions we must resolve with regard to social norms and sexual privacy set a different agenda than the partial accommodation Dowd and other scholars endorse when they discuss how fathers may change parenting norms. My view is that gender neutral parenting will require new approaches to sexual privacy, ones that feminist scholars simply have not wrestled with in their discussions.

I also argue that when legal actors approach the intimate care cases without recognizing the ways in which caregiving practices are currently gendered, their analysis hides the hard work we must do in sorting through how and why we believe children are injured in particular circumstances. Also, to the extent that courts are *now* using mothering as an ideal default norm, in a way that allows mothers in particular cases to play a gatekeeping role, this is not an appropriate application of a gender-neutral approach. By allowing fathering practices to unsettle mothering, I ensure that we do not adopt a new "gender neutral" model of parenting that is too rigid and constrains both mothers' and fathers' conduct. Instead, a proper gender-neutral inquiry must begin with consideration of the social norms and sexual privacy understandings that inform intimate care cases, with an understanding that gender currently plays a role in defining intimate care. In considering these issues we must ask hard questions about whether and why we are defining injury in a particular case in a way that tends to reconstitute gendered understandings.

Dowd raises other important questions about how we conduct the gender-neutral inquiry in the intimate care cases, for she recognizes that gender-neutral changes to assist fathers may compromise the well being of women and children. As many feminist scholars have noted, when fathers are given more authority to provide care, courts may rule in ways that ignore the substantial contributions mothers have made to raising their children.¹⁸⁵ In child molestation cases, this may mean the court fails to respect a mother's wishes, even as she continues to do the majority of labor to raise her child. It may mean that the court ignores the well-developed preferences a child has for the kind of care given by a mother in a particular case. A responsible inquiry in the intimate care cases will have to consider these issues in the context of a social norms inquiry or an inquiry about sexual privacy issues. However, these questions must be honestly acknowledged and addressed in order to grant men more latitude to engage in caregiving activities.

Andrea Doucet, in her book *Do Men Mother*, offers different insights about the

¹⁸⁴ *Id.* at 10.

¹⁸⁵ See generally, Martha Fineman, *Fatherhood, Feminism and Family Law*, 32 MCGEORGE L. REV. 1031 (2001)

barriers to liberal feminists interested in adopting a gender-neutral parenting approach. She generally advocates for gender neutral parenting, but argues that some gender-based limitations are required because in some instances “embodiment matters.” As she explains, “at certain times and in certain sites, differently gendered bodies cannot simply be substituted for each other.”¹⁸⁶ Doucet argues that, “When a father is attending to his children – by cuddling, reading, feeding, bathing or talking to them – gendered embodiment can be largely negligible. But there are also times when embodiment can come to matter a great deal, for example a father who wants to host a girls’ sleepover for his teenage daughter.”¹⁸⁷ Doucet’s discussion of embodiment, however, could be characterized as an attempt to make biology or physicality substitute for a studied analysis of the gender norms that attach to particular bodies and our unwillingness to interrogate these understandings in certain circumstances. Her reservations demonstrate the problems associated with the absence of sustained feminist critique and discussion of the sexual privacy questions that shape our understanding of when and how men can provide nurturing and care, as well as sexual suspicion or anxiety that is associated with men’s actions.

If liberal feminists are prepared to fully reject the sexual suspicion dominance feminism brings to fathers’ touch, they can advance a project that truly allows us to reimagine fatherhood. Yet this will require us to make substantial space to accept men’s understandings of care giving, understandings that may not stack neatly up within the boundaries established by models of maternal care. Doucet agrees, recognizing in her discussion that granting space for fatherhood may not simply result in men providing mothering care, but may lead to changes in our understanding of the range of appropriate parenting practices. She explains, “we need to grant space for men’s narratives of care giving and resist the impulse to judge, measure and evaluate them through maternal standards.”¹⁸⁸ She notes that, by adopting this approach “with room for theoretical or empirical surprises,” we may develop “new ways of describing and theorizing men’s nurturing practices and ultimately novel ways of thinking about responsibility.” In my view, the next step would be to more explicitly consider how these additional ways of relating to children might enrich our understanding more generally of what it means to adopt a truly gender neutral and comprehensive understanding of providing care.¹⁸⁹ Also, by recognizing men’s ability to craft different approaches to caregiving, feminists will provide greater protection to men who adopt “marginalized masculinities.”¹⁹⁰ Indeed, perhaps the greatest way that feminism has failed caregiving men is by failing to credit them when they develop alternate ways of relating to children, and looking past the sanctions they face from other men for failure to comply with traditional gender roles. Yet feminist should devote more attention to this issue, as men can be easily dissuaded from doing this kind of work, despite evidence that they are both capable and interested in providing care at the early stages of their

¹⁸⁶ DOUCET, *supra* note 11, at 41.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 28.

¹⁸⁹ *Id.*

¹⁹⁰ BELL, *supra* note 103, at 5-10 (arguing that dominance feminist models require a more nuanced approach to masculinity).

children's lives.¹⁹¹

IV. CONCERNS, CRITIQUES AND SOLUTIONS

A. Recognizing Risk: Masculinity as Risk Factor for Sexual Abuse

Some may question the wisdom of this piece in light of the empirical evidence indicating that the majority of child molesters are male and most are related to or known by their victims.¹⁹² Logically then, critics argue, the data suggests that we should more closely scrutinize fathers' actions or, at the very least, believe a child when he or she reports that he or she was made uncomfortable by a father's touch. Although gender and racial profiling arguments are harshly attacked in other legal contexts, strangely this argument attracts little notice in discussions of child molestation. However, the case against gender profiling is clear. First, for basic fairness reasons, we cannot subject all fathers to more surveillance simply because a subset of fathers engage in illicit behavior. Gender profiling has concrete costs as it profoundly discourages men from providing care.¹⁹³ Second, as criminal law scholar Bernard Harcourt has explained, profiling effectively makes it easier for perpetrators who do not fit the established profile to engage in criminal behavior.¹⁹⁴ We must understand that our emphasis on troubling fathers' behavior leaves mothers with more latitude to engage in questionable conduct. Psychologists have raised red flags about this issue, noting that legal decision-makers ignore or recharacterize signs of maternal sexual misconduct because of gender role stereotyping.¹⁹⁵ These concerns about the failure to identify and report maternal sexual abuse raise questions about the soundness of the empirical data on which the father profiling argument rests. For, if we underreport and misrecognize maternal sexual abuse, how can we be sure that there is an empirical basis for focusing on male perpetrators? Finally, the credibility of feminist legal theory is at stake in these debates. Liberal and care feminists have urged men to provide care as a transformative experience;¹⁹⁶ the very least we can do is credit men who adopt these understandings, and ensure that they receive individualized consideration if and when disputes arise.

¹⁹¹ McMahon, *Male Readings of Feminist Theory* at 679 (discussing studies showing parents of both sexes have similar emotional reactions to their newborns but men opt out of care when allowed to do so).

¹⁹² SAS & CUNNINGHAM, *supra* note 34; See also, David Finkelhor *Current Information on the Scope and Nature of Child Sexual Abuse* 4 SEXUAL ABUSE OF CHILDREN 31 -53 (Summer - Autumn, 1994) (reporting that sexual abuse is committed mostly by men (90%) and by persons known to the child (70% to 90%), with family members constituting 30-50% of the perpetrators against girls and 10% to 20% of the perpetrators against boys).

¹⁹³ See Kelly, *supra* note 10, at 65.

¹⁹⁴ SEE BERNARD HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 235-237 (2007)

¹⁹⁵ Tracey Peter, *Speaking About the Unspeakable. Exploring the Impact of Mother-Daughter Sexual Abuse*, 14 VIOLENCE AGAINST WOMEN 1033 (2008)(discussing the impact of maternal sexual abuse)

¹⁹⁶ See notes on liberal feminist scholars, *supra* note 125 & 126.

B. Theoretical Concerns About Masculinity

At bottom, the empirical claim about the number of male child molesters often functions as a more palatable, politically-correct substitute for those who want to argue that there is something about male desire that simply makes men more likely to engage in illicit conduct with children. Dominance feminists historically have been much more comfortable making this claim explicitly.¹⁹⁷ Yet feminists from other camps have begun to challenge this proposition. Scholars such as Vikki Bell and Anne Cousins have argued that dominance feminism relies on a rigid model of masculinity, one insufficiently dynamic to deal with the wide range of male behavior. The stronger version of this critique is that dominance feminism's characterization of men relies on a kind of gender stereotyping that is entirely inconsistent with the larger goals of the feminist movement.¹⁹⁸

The proposition that enjoys more support within the feminist community is that there are certain variants of traditional masculinity that may have made men less critical of and more comfortable with sexual relationships that have exploitative or dominating dimensions. However, adopting this view does not mean that one must conclude that traditional masculinity leads men to engage in child molestation. Rather, as our understanding of multiple masculinities deepens, we recognize that some of the exploitative characteristics that are associated with masculinity may in fact be present in both genders. Feminist analysis would benefit from focusing more concretely on these exploitative impulses, rather than treating them as the exclusive or primary province of one gender.

C. Dangers of A Gender Neutral View

1. *Burdening Mothers*

Others raise concerns about moving towards a gender-neutral approach to recognizing molestation, arguing that it is not at all clear that subjecting mother-child intimacies to this same regime of suspicion that governs male caretakers will benefit children in the long run. Although social workers have focused on male perpetrators, psychologists' analyses might invite intrusions into the mother-child relationship that encourage a kind of standardization of care and second-guessing that will seem unbearably oppressive to some women. I would agree that our history of more relaxed enforcement with caregiving mothers suggests that children flourish when we give their caretakers some reasonable latitude in discharging their care obligations.¹⁹⁹ My analysis instead suggests that we take a more reasoned approach to analyzing behaviors in the abstract, as this is the only way that we can take a principled approach to the social norms and sexual privacy questions these cases raise, and avoid having our understandings regarding male and female embodiment shape our conclusions about parenting norms in unexamined ways.

¹⁹⁷ BELL, *supra* note 103, at 5 (describing dominant feminists' claim that molesters "are not aberrant males: they are acting within the mainstream of masculine sexual behavior which sees women as sexual commodities and believes men have a right to use/abuse these commodities how and whenever they can.")

¹⁹⁸ *But see, Abuse Excuse, supra* note 10, at 1459 (recognizing but not exploring repercussions of multiple masculinities).

¹⁹⁹ Lawson, *supra* note 61, at 261-279.

2. *Protecting Children*

Others have raised the concern that, by giving fathers the same degree of freedom that mothers enjoy, we might be creating a context in which children are more at risk for sexual exploitation. For, if psychologists believe that a fair degree of maternal abuse is being ignored, it makes little sense then to grant fathers the same latitude to engage in inappropriate conduct. When stated at a broad level of generality, this proposition is certainly true. However, my goal is not to “create more space for abuse,” but rather to encourage the development of a legal inquiry that examines intimacy practices in a more concrete, principled and gender neutral fashion. “Reversing the groups,” in child molestation cases creates space for us to engage in a more careful analysis of the parental behavior at issue and our commitment (or lack thereof) to certain gendered understandings.

D. **Protecting Privileged Fathers?**

Although persuaded by my critique, some may argue that this project has limited reach for, assuming that some fathers are chilled by the air of sexual suspicion that surrounds them, there are a very limited number of fathers who provide the kind of mothering that might subject them to problems. The harshest version of this claim is that this piece primarily benefits an already fairly privileged group: feminist men in middle class heterosexual nuclear families that have devoted their lives to being primary caregivers.²⁰⁰ However, this critique is misplaced, as it ignore the multiple constituencies that are adversely affected by the current enforcement of child molestation provisions. For example, working class fathers devote far more time to childcare than middle class men, and they often do so *because of economic necessity* not choice.²⁰¹ These fathers do a great deal of maternal work, when mothers are not at home, including soothing, bathing, and putting babies to sleep; but they also often hold very traditional attitudes about gender.²⁰² Consequently, they may acutely feel the sexual suspicion that surrounds male nurturing and care. Additionally, low income or economically vulnerable fathers who cannot use the breadwinner model to “perform fatherhood”²⁰³ have been found to place great value on the emotional support and physical interaction that they have with their children.²⁰⁴ The sexual suspicion that child molestation law promotes about men certainly burdens these men’s conduct as well.

²⁰⁰ See, e.g., Aaron B. Rochlen *et al.*, “I’m Just Providing for My Family:” A Qualitative Study of Stay-at-Home Fathers, 9 PSYCHOL. OF MEN & MASCULINITY 193 (2008) (discussing study conducted with white middle-class fathers).

²⁰¹ Carla Shows & Naomi Gerstel, *Fathering, Class, and Gender: A Comparison of Physicians and Emergency Medical Technicians*, 23 GENDER & SOC’Y 161 (2009)

(showing that working class fathers (EMTs) had a more nurturing model of fatherhood than middle class physicians). The authors explain that the EMTs often were members of dual wage-earning couples and therefore were required to act as primary caregivers when their spouses were at work.

²⁰² Francine M. Deutsch, *Equally Shared Parenting*, 10 CURRENT DIRECTIONS PSYCHOL. SCIENCE 26 (2001)

²⁰³ R. Forste, *et al.*, *Just Be There For Them”: Perceptions of Fathering Among Single, Low-income Men*, 7 FATHERING: J. THEORY, RES. & PRACTICE ABOUT MEN AS FATHERS 46-69 (2009).

²⁰⁴ *Id.*

Last, there are a growing number of non-traditional gay male households without a female caretaker. These households may be particularly vulnerable, as some research suggests that gay fathers provide the kind of nurturing care typically associated with mothers.²⁰⁵ Additionally, divorced fathers with custody rights, single custodial fathers, and widowed fathers all have an interest in disrupting the dynamics identified in this discussion, as well as separated or estranged fathers with visitation rights. In short, the air of sexual suspicion that attaches to their activities discourages a large diverse, and hidden community of men from providing care and nurturing.²⁰⁶

E. On Counting and Context

Finally, some may argue that the Article merely shows the potential for abuse, but does not establish that child molestation is interpreted in the troubling fashion described here in the vast majority of parental intimate care cases. But, of course, this Article has not attempted to provide a comprehensive empirical survey that charts the gender repercussions of child molestation law enforcement efforts across the nation. Indeed, this kind of vast empirical project is not necessary to my argument. Rather, my goal is to provide a selection of cases that shows the kind of abuses that can and do occur, and question whether we feel that a system that allows for such abuse is as a symbolic and practical matter a regime we feel comfortable preserving. My concern is, that even if actual cases are isolated, institutional actors can and do mobilize these understandings about child molestation in ways that discourage fathers from providing care.

Others may argue that the Article is insufficiently attentive to context as, it is really the social context we live in, not the laws that are the problem. The real problem is the motivations of warring caretakers, typically mothers, that attribute illicit intent to harmless father conduct and find institutional support in social service workers eager to believe their allegations. However, this argument is critically misguided. *The fact that these statutes can be abused counsels in favor of the development of legal schema that minimize the risk of abuse.* Also, claims about mothers using sexual abuse allegations against divorced or separated fathers tells only half the tale. One also sees that men find it helpful to use sexual stereotypes about predatory male sexuality to control the behavior of their estranged wives, preventing them from cohabitating with men or allowing new male partners access to their children. Also, social workers, psychologists and school authorities often trigger investigations when they believe a child is engaging in sexual behavior caused by a father's care. Consequently, there are multiple parties involved in mobilizing child molestation law in ways that promote sex stereotyping and discourage male caregivers.

CONCLUSION

We end back where we began our journey — with the case of *State v. Emmett*, but we arrive at the finish line somewhat less innocent as a result of our inquiries. Instead of asking the more superficial question, “whether the *Emmett* Court

²⁰⁵ N. DOWD, *supra* note 14, at 79.

²⁰⁶ As of 2003, approximately two million fathers are primary caregivers for their children and working wives. *See* Fort Worth Star-Telegram, May 18, 2003, available at <http://www.dfw.com/mld/startelegram/living/5875857.htm?1c>.

ultimately got the case right,” this Article invites the reader to share in a meta-analysis that asks how and why child molestation law has become so invested in regulating the mundane aspects of parenting. It further asks whether we have critically evaluated the way in which child molestation laws, by inviting reliance on common sense and gender-specific social norms about parenting, encourage and instantiate various forms of gender stereotyping.

The *Emmett* case also helps us realize that, in order to unpack the problems associated with gender stereotyping in child molestation cases, we will need to have a broader deeper discussion about how we define and charge child molestation. For, at present, prosecutors, judges and juries are negotiating a wide range of cases including purposeful assaults, parents who violate social norms and parents who unwittingly or not invade children’s subjective understandings of sexual privacy. What cases like *Emmett* teach us is that many of these cases cannot be addressed by quick answers and knee-jerk affirmations about the importance of prosecuting child molestation. These cases challenge us to more closely examine *how* we identify the prohibited and what interests are served by the definitions we currently use.

Certainly we can and should make reform efforts, directing our attention to debiasing protocols that can make prosecutors, judges, jurors and social workers aware of the ways in which their understanding of parenting may be shaped by gender role stereotypes. One of the easiest interventions is to require courts to consider, as a formal part of the legal analysis in intimate care cases, some consideration of how the practice of parenting has been shaped by gender norms. However, reform cannot solely focus on changing the doctrinal analysis or the language of statutes. As the late William Stuntz observed “the law on the street may remain unchanged even as the law on the books changes dramatically.”²⁰⁷ Instead we must create legal tools that force decision-makers to disrupt the “natural” gendered cultural assumptions legal decision-makers rely on when they refer, charge, try and adjudicate cases. In effect, we must change the mind of the average man or woman on the street about the appropriate scope of fatherhood, so that when men like Emmett are charged they need not solely rely on enlightened judges to vindicate their efforts.

²⁰⁷ Stuntz, *supra* note 56, at 508.