

The Neutered Parent

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ABSTRACT: Despite family law's broader recognition of nonmarital sexualities and nonmarital parental status in the past forty years, marriage has continued to shape the legal and social experiences of parents in a critical aspect of their lives—sexuality. Whether expressed in terms of sexual behavior or sexual orientation, the sexuality of parents has curiously drawn little attention in legal scholarship, except in contexts the law has deemed aberrant. This Article breaks ground by widening the lens on parental sexuality to examine how the law's conventional framing of evaluations of parental sexuality obscures the marriage-based structure of these appraisals.

The law of custody and visitation, in particular, reveals a legal and social preference for what is perceived as “sexually neutral” parenting, an ideal that assumes that parenting can and should occur far removed from parents' sexuality. As I argue in this Article, family law has premised this ideal on a dichotomy of parental sexuality based on marriage and on traditional, gendered norms of parental sexuality within marriage. Parents hewing to traditional marriage-based norms of parental sexuality have been held up as embodying a “sexually neutral” baseline, pursuant to which their sexuality fails to register as problematic. By contrast, parents who have strayed from these norms—historically, sexually active heterosexual mothers and lesbian and gay parents—have tended to be perceived as “sexually salient.” The legal construction of a parent as “sexually neutral” or “sexually salient” shapes how courts assess harm in making child placement decisions and influences

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evaluations of parental fitness across a variety of evolving family law contexts, including same-sex marriage.

The dichotomization of parental sexuality based on marriage obscures the ability to assess actual harm to children. Moreover, this treatment of parental sexuality “neuters” parents. It metaphorically diminishes their sexual capacity by forcing sexually nonconforming parents to adhere to a standard of sexual neutrality that is fundamentally structured in opposition to them. Moreover, this dichotomization undermines parents’ ability to achieve the laudable goal of experiencing meaningful adult-oriented parental sexuality in the context of successful parenting.

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INTRODUCTION

On May 18, 2011, the Massachusetts legislature held a hearing on a proposed bill that sought to prohibit custodial parents from conducting a “dating or sexual relationship” in the family home until a divorce or separation involving children is finalized.¹ Partly aimed at protecting children,² the bill highlights the extent to which marriage remains dominant in the law’s treatment of sexuality as it relates to parenting. This marriage-privileging view of parental sexuality persists despite family law’s broader recognition of nonmarital parental status and nonmarital sexualities in the past forty years.

Marriage has, in many ways, come to “matter less”³ as a principle means of conferring family status. This has been evident, in part, through family law’s greater recognition of a variety of family forms rooted in nonmarital sexualities—referring both to sexual orientation and to exercises of sexuality, regardless of partner preference.⁴

Moreover, family law has come increasingly to broaden its major status categories to include those who reside outside of the marriage’s boundaries. In contests over who qualifies as a legally recognized “parent,” marriage has, at least formally speaking, diminished in significance.⁵ Moreover, the removal of barriers to legal recognition of nonmarital children demonstrates the formal expansion of the status category of “child.”⁶ These reforms embody, generally speaking, more capacious notions of what qualifies as a family.⁷

1. S. 851, 187th Gen. Sess. (Mass. 2011), available at <http://www.malegislature.gov/bills/187/Senate/S00851>.

2. Chris Cassidy, *Divorcing Parents, Don't Try This at Home*, BOS. HERALD (May 16, 2011), http://www.bostonherald.com/news/regional/view/2011_0516divorcing_parents_dont_try_this_at_home.

3. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 31-32 (2008).

4. Legal reforms have included protection of cohabiting relationships through domestic partnership law (both same- and opposite-sex), see *PRINCIPLES OF LAW AND FAMILY DISSOLUTION* §§ 6.03(1), 6.05, 6.02(1)(b) (2002) (recognizing domestic partnership as a relationship between “two persons of the same or opposite sex” and applying marital property and equitable compensation principles upon dissolution of partnership); the enforcement of palimony arrangements in cohabiting relationships, see *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) (holding an oral contract between an unmarried man and woman for division of property to be enforceable); and the emergence of a doctrine of “functional equivalence” in distributing the legal benefits of coupling, see *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989) (holding that “the term family . . . should not rest on fictitious legal distinctions or generic history, but instead should find its foundation in the reality of family life.”).

5. This is evident in the recognition of second-parent adoptions by unmarried partners of legal parents, see *Matter of Jacob*, 660 N.E.2d 397, 667 (N.Y. 1995) (permitting second-parent adoption despite “half-century old termination language” requiring biological parent first to terminate parental rights), as well as in the recognition of functional parenthood, see *In re Parentage of L.B.*, 122 P.3d 161, 167 (Wash. 2005) (recognizing that “individuals not biologically nor legally related to the children whom they ‘parent’ may nevertheless be considered the child’s ‘psychological parent’”).

6. See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972) (finding unconstitutional a Louisiana statute denying equal recovery rights for workmen’s compensation to unacknowledged non-marital children); *Levy v. Louisiana*, 391 U.S. 68, 70-72 (1968) (rejecting lower court’s holding that non-marital children were not included under Louisiana statute granting children right to recover for wrongful death of parent); *De Sylva v. Ballentine*, 351 U.S. 570, 580-82 (1956) (determining that non-

The underlying thrust of these reforms is a greater willingness to confer legal status, or the benefits of legally recognized forms, on those living outside of marriage. But while nonmarital sexuality does not necessarily preclude a party from being awarded the status of parenthood, this sexuality often remains a significant factor in the legal regulation of the function of parenthood.⁸

As I discuss in this Article, sexuality as mediated (or not) through marriage plays a prominent role in assumptions and assessments of parenting. These evaluations crucially influence decision-making about custody and visitation. I explore in this Article the influence of marriage at the intersection of parental sexuality and the legal assessment of parental function.

Within custody and visitation law, in particular, marriage has persisted as a paradigmatic context for exercises of parental sexuality. This paradigm is rooted in an archetypal baseline of parental sexuality—that of mothers having sex with their husbands. Those who have hewed most closely to this norm have enjoyed the benefit of “sexual neutrality” in assessments of parenting.

By contrast, outside of traditional marriage and its presumed heterosexuality, the identities and lives of nonconforming parents—those who resist the gendered sexual archetype of mothers having sex with husbands—register as threateningly “sexually salient.” This response is particularly pronounced, historically, in regard to unmarried heterosexual mothers and lesbian and gay parents, whose sexuality has appeared to stray farthest from the marriage-based legal and social imperatives regulating parental sexuality.

In this Article, I identify the law’s dichotomized construction of parental sexuality across the marital divide. Whereas the sexuality of parents treated as

marital children are “children” of the author under the federal Copyright Act). *But see* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 384-86 (2011) (discussing how judicial application of the responsible procreation argument against same-sex marriage “reinforce[s] societal disapproval of nonmarital families and children”).

7. *See Moore v. City of East Cleveland*, 431 U.S. 494, 504-06 (1997) (holding that a housing ordinance that limits occupancy to members of a single family and defines “family” as only including a handful of relationship categories violates due process).

8. The tensions between status (or legal form) and function occur in family law contexts outside of custody and visitation. While the seminal “functional equivalence” case of *Braschi v. Stahl Associates*, 543 N.E.2d 49 (N.Y. 1989), has been lauded for expanding the scope of family in the context of rent control to include a same-sex couple, it has also been criticized for using as its standard a heteronormative, marriage-like ideal for determining whether a couple functions in such a way to deserve legal entitlement. *Compare* James D. Esseks, *Redefining the Family—Braschi v. Stahl Associates* 74 N.Y.2D 201, 543 N.E.2D 49, 544 N.Y.S.2D 784 (1989), 25 HARV. C.R.-C.L. L. REV. 183, 192 (1990) (applauding *Braschi* as “a significant advance towards the recognition of nontraditional families”), *with* Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1664-65 (1993) (“Although *Braschi* did give legal status to a ‘stable, loving’ gay couple, it did so precisely because the behavior of the couple, rather than radically calling into question the ‘nuclear’/‘normal’/ ‘genuine’ family, closely resembled it, without squarely challenging its preeminence [I]t should cast a shadow over the unbounded enthusiasm with which gay and lesbian advocates greeted the decision.”); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay “Victories,”* 4 L. & SEXUALITY 83, 108-09 (1994) (critiquing *Braschi* court for “determin[ing] the presence of emotional ties by using indicia presupposing a heterosexually structured relationship” and, accordingly, “exclud[ing] queers who choose alternative structures”).

“sexually neutral” is rendered legally invisible in assessments of parenting, the sexuality of parents viewed as “sexually salient” registers as pervasive, acute, and inevitable.

Within custody and visitation cases,⁹ common indicia courts use to determine inappropriate sexuality reveal the legally constructed contrast between married parents’ “sexual neutrality” and unmarried parents’ “sexual salience.” The aspects of domestic and social life that signal unfitness among the unmarried are mundane and even celebrated features of married parenthood.

The modern “nexus” approach for considering sexual conduct and sexual orientation in custody and visitation decisions, while eschewing presumptions based on sexuality and requiring a showing of harm to children, does little to unsettle the marriage-based determinance of custody and visitation law. In its construction and operation, this approach perpetuates gendered concepts of sexual fault and the assumption that married parents’ and nonmarital parents’ sexualities are fundamentally different in kind.

While scholars have discussed sexuality-based discrimination in custody and visitation law against those whom those courts have deemed aberrant—sexually active heterosexual mothers and lesbian and gay parents¹⁰—this

9. I confine my discussion to custody and visitation cases, specifically those involving divorced opposite-sex couples, rather than discussing adoption cases. Although lesbian and gay and unmarried adoptive parents face legal bias, there are enough differences in the relative posture of the parties and also in observed outcomes to address the concepts of sexual neutrality and sexual salience in the adoption context elsewhere. Indeed some commentators have noted that factors that give judicial pause in the custody and visitation contexts might place lesbian and gay individuals seeking to adopt at an advantage. See Nancy G. Maxwell & Richard Donner, *The Psychological Consequences of Judicially Imposed Closets in Child Custody and Visitation Disputes Involving Gay or Lesbian Parents*, 13 WM. & MARY J. WOMEN & L. 305, 340 (2006) (“The phenomenon of trial courts accepting the stereotypical fears about homosexuals rarely appears in adoption cases. For example, it is very likely that the courts view with approval sexual minority couples in the adoption cases who share a bed and display mutual affection and support for each other.”). I discuss custody and visitation together in this Article because predominant approaches to parental sexuality—reflected in sexual neutrality and sexual salience—do not generally distinguish between these two contexts.

10. For discussion of heterosexual mothers’ sexuality in the custody or visitation contexts, see Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 881 (2000) (noting some appellate courts’ determinations of sex discrimination in different approaches to mothers’ cohabitation, as compared to fathers’ cohabitation); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 688, 699 (1998) (noting differences in how courts view mothers’ boyfriends as compared to fathers’ girlfriends); Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 868, 980-81 (1996) (observing gendered aspects of custody law and judicial attitudes about female sexuality); Mary Becker, *Judicial Discretion in Child Custody: The Wisdom of Solomon?*, 81 ILL. B.J. 650, 651 (1993) [hereinafter Becker, *Judicial Discretion*] (discussing judicial attitudes about mothers’ sexuality outside of marriage); Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN’S STUD. 133, 175-77 (1992) [hereinafter Becker, *Maternal Feelings*] (observing cultural bias against maternal sexuality); Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN’S STUD. 15, 40 (1992) (examining cultural attitudes toward mothers, including expectations that mothers will sacrifice their sexuality); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 303 (1992)

Article makes a unique contribution to family law scholarship by widening the lens on parental sexuality to examine how the law's conventional framing of questions of parental sexuality obscures the marriage-based structure at their core.¹¹ In so doing, this Article identifies and theorizes the constructs of "sexual neutrality" and "sexual salience" that characterize the marriage-based dichotomization of parental sexuality.¹²

To be sure, law and culture scrutinize parents as a matter of course.¹³ It is difficult, then, to disentangle the law's treatment of parental sexuality from general cultural tendencies to judge parents.¹⁴ As I argue in this Article,

(observing gender-based differences in treatment of mothers' "sexual misconduct," as compared to fathers' misconduct).

For discussion of lesbian and gay parents' sexuality in the context of custody or visitation, see CARLOS BALL, *THE RIGHT TO BE PARENTS: HOW LGBT MOTHERS AND FATHERS HAVE REVOLUTIONIZED FAMILY LAW* (forthcoming 2012) (discussing history and development of law pertaining to LGBT parenthood); Kim H. Pearson, *Mimetic Reproduction of Sexuality in Child Custody Decisions*, 22 YALE J.L. & FEMINISM 53, 59-66 (2010) (discussing biased application of orientation-blind nexus standard to homosexual parents); Nadine A. Gartner, *Lesbian (M)Otherhood: Creating an Alternative Model for Settling Child Custody Disputes*, 16 L. & SEXUALITY 45, 55-58 (2007) (discussing how judiciary furthers homophobic ideals through the "best interest of the child" standard); Maxwell & Donner, *supra* 9, at 309-18 (discussing custody and visitation cases involving sexual minority parents); Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 392 (2006) (evaluating, in part, legal approaches to sexual orientation in custody disputes); Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 L. & SOC'Y REV. 285, 315 (2002) (noting how "[m]ost judicial narratives [in custody cases] . . . have exhibited, either explicitly or subtly, courts' efforts to legally and discursively control and inhibit alternative sexualities"); Kathy T. Graham, *How the ALI Child Custody Principles Help Eliminate Gender and Sexual Orientation Bias from Child Custody Determinations*, 8 DUKE J. GENDER L. & POL'Y 323, 327 (2001) (discussing how the child custody principles of the American Law Institute (hereinafter ALI) limit judicial bias regarding gender roles and sexual orientation in custody disputes); Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 694 (1976) (discussing judicial bias in the application of the nexus standard in child custody disputes between lesbian mothers and heterosexual fathers).

11. This Article continues the critical project undertaken in my other work to probe further the social and legal role of marriage in constructing hierarchy, both within its confines and outside of it. I have discussed elsewhere the internal and external hierarchies attendant to marriage as constructed through language, names, and labels. See Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893 (2010). I have also explored the effect of the pursuit and attainment of same-sex marriage on the hierarchical relationship between marriage and other family forms. See Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37 (2011) [hereinafter Kim, *Skeptical Marriage Equality*]. The present Article's exploration of sexuality adds an important dimension to identifying and understanding the relationship between marriage and hierarchy.

12. Julie Shapiro's early work on lesbian and gay parents' custody rights provides a useful starting point for my discussion of sexual neutrality and salience. Shapiro has argued that custody and visitation law has "penalize[d] lesbian and gay parents for conduct that would be entirely unremarkable for heterosexual parents." Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 648 (1996). Her argument, arising prior to the ALI's 2002 approval of the nexus standard, focuses on lesbian and gay parents as compared to heterosexual parents, however, and leaves unexamined the influence of marriage—both historically and more recently—on the law's construction of parental sexuality.

13. This is evident, in part, through the state's "long-recognized interests as *parens patriae*." *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (citing *Reno v. Flores*, 507 U.S. 292, 303-04 (1993); *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Parham v. J.R.*, 442 U.S. 584, 605 (1979); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

14. While scrutiny of parents may be universal, parental sexuality may be more heavily weighed toward criticism instead of praise. For example, a Google search performed on August 5, 2011 using the

however, the predominant approach to parental sexuality produces a variety of unique harms.

Repurposing Martha Fineman's sex-based rhetoric in her ground-breaking book, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies*, I argue that the prevailing legal construction of parental sexuality both within marriage and outside of it results in a metaphorical "neutering" of parents.¹⁵ This construction figuratively diminishes sexually nonconforming parents' sexual capacity by forcing them to adhere to a standard of sexual neutrality that is fundamentally structured in opposition to them. Moreover, it undermines parents' ability to achieve the laudable goal of integrating meaningful sexuality and successful parenting.

In pursuing my argument, I rely on an understanding of sexuality that pushes beyond common contemporary understandings limited to sexual orientation.¹⁶ This broader definition contemplates a wide range of sex acts, desires, imagination, and pleasure and those things which pertain to this realm of life. These can include sex with another or "solo sex";¹⁷ erotic feeling; fantasy and frustration; and the consumption of pornography.

This Article proceeds in four parts. Part I explicates the metaphor of "neutering" that animates my argument. Part II develops an historical account of the marriage-based and gendered sexual archetype that grounds the dichotomization of parental sexuality. Part III explores the construction of "sexual neutrality" and "sexual salience" and also articulates the harms that result from prevailing norms of parental sexuality. Part IV addresses the interplay of sexual neutrality and sexual salience in the context of important shifts and proposals in family law and policy—the rising trend toward same-sex marriage, the increasing proportion of children born to cohabiting heterosexual parent couples, the greater visibility of polygamous parents, and proposals for facilitating nonconjugal parent relationships. In the conclusion, I offer a preliminary proposal for reform.

phrase "bad parent" yields 213,000,000 results, whereas "good parent" yields only 28,100,000. For a compelling critique of the overlooked way law has judged parents based on geography and rural dwelling, see Janet L. Wallace & Lisa R. Pruitt, *Judging Parents, Judging Place: Poverty, Rurality and Termination of Parental Rights*, 77 MISSOURI L. REV. 95 (2011).

15. Martha Fineman conceived the term "neutered" as applied to mothers. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 67 (1995). I develop the term in relation to parents, both male and female, and of varied sexual identities.

16. See, e.g., THE PENGUIN DICTIONARY OF PSYCHOLOGY (4th ed. 2009) (defining "sexuality" as "all those aspects of one's constitution and one's behavior that are related to sex").

17. Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 838 (2010) (arguing for a richer legal conception of the importance of sex acts by discussing the potential values of various forms of sex, including masturbation).

I. NEUTERING AS METAPHOR

This Article relies on multiple meanings of the terms “neuter” and “neutered” to describe both the process of dichotomizing parental sexuality as well as the results of this process. The terms “neuter” and “neutered” bear several definitions animating the framework for parental sexuality I identify here. I address each of these in turn, but first discuss the origin of this Article’s title.

In her foundational book *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies*,¹⁸ Martha Fineman relies heavily on sexual metaphor to argue that the concept of “motherhood” has been “divested of many of its traditional, positive aspects in legal discourse.”¹⁹ Fineman describes this inappropriately discredited figure as “the neutered Mother.”²⁰

Fineman’s use of the term “neutered” comports with one of its figurative definitions: “rendered harmless, ineffective.”²¹ This meaning of the word supports Fineman’s observation that while legal discourse devalues the “Mother,” it overvalues “the sexual family.”²² This is the family premised on the “sexual affiliation of a man and woman.”²³ According to Fineman, “the sexual family is considered the ‘natural’ form for the social and cultural organization of intimacy. . . . The dominant paradigm. . . privileges the couple as foundational and fundamental.”²⁴ Fineman argues that the “sexual family” harmfully takes precedence in law and policy over the “Mother-child dyad”²⁵ and, thus, critiques the disempowered, “neutered” status of “the Mother.”²⁶

This Article builds on the theme of disempowerment, using the figure of the “neutered parent” to highlight the ways in which marriage-based norms compromise parents in the specific context of sexuality. To the extent that sexuality is a powerful and important aspect of individual identity and personal fulfillment, the “neutered parent” embodies the dramatic stakes in the legal interplay between sexual neutrality and sexual salience.

Biologically-based meanings of the term “neuter” also inform my use of the term “neutered parent.” Entomology and botany both describe as “neuter” organisms lacking in sexual organs.²⁷ Being “rendered neuter” or being “neutered,” accordingly, suggests a state of sexual incapacity.²⁸ The “neutered

18. FINEMAN, *supra* note 15.

19. *Id.* at 67.

20. *Id.*

21. OXFORD ENGLISH DICTIONARY (OED) (3d ed. 2003).

22. FINEMAN, *supra* note 15, at 67.

23. *Id.* at 145.

24. *Id.* at 143, 145.

25. *Id.* at 143, 199-200.

26. *Id.* at 67.

27. See OXFORD ENGLISH DICTIONARY, *supra* note 21 (providing entomological and botanical definitions for “neuter”).

28. The OED defines “neutered,” in part, as “rendered neuter.” *Id.*

parent,” accordingly, is the parent who has metaphorically been reduced to this state of incapacity due to the legal and social devaluation of her or his sexuality.

Lastly, two related meanings of “neuter” now considered archaic provide a useful way to consider sexually conforming parents—those who meet traditional parental sexuality standards—as “neutered parents” as well. According to the Oxford English Dictionary, “neuter” once meant “neutral.”²⁹ Similarly, “to stand neuter” was defined as “to remain neutral, declare neutrality.”³⁰

These “neutrality”-based definitions of “neuter” suggest that the label “neutered parent” may also apply, strictly speaking, to sexually conforming parents who function as the putatively “neutral” standard for parental sexuality. As I explore later, however, the connection between neutering and sexual neutrality is more than definitional; the traditional dichotomy of parental sexuality neuters all parents—the sexually conforming and the sexually nonconforming—alike.

II. HISTORICAL ROOTS OF NEUTERING

As I argue here, the law of custody and visitation has, traditionally, rendered archetypal the married mother who demonstrated sexual fealty to her husband. Concepts of what I call “gendered sexual fault” reflect and reinforce this archetype by applying formal or *de facto* presumptions of custodial unfitness to those who depart—through sex acts or orientation—from this marriage-based, heterosexual paradigm of parental sexuality. Without the cover of marriage, the identities and lives of nonconforming parents—those who resist the favored gendered sexual archetype—register as parentally inappropriate and threatening to children. This is particularly true of unmarried heterosexual mothers and of lesbian and gay parents, whose sexuality appears to stray farthest from the legal and social ideal of the married mother who has sex with, and only with, her husband.

This section develops an historical account of marriage-based sexual archotyping in custody and visitation law through the concept of sexual fault. It briefly traces, through developments in the law of marriage and divorce, the persistence of gendered sexual fault in custodial determinations.

The norm of maternal sexual fealty arises in the context of broader, gendered norms about sexuality. As Mary Joe Frug argued in *Postmodern Legal Feminism*, the law has tended to construct a model of women’s sexuality along three main themes: “Monogamy, Heterosexuality, and Passivity.”³¹ “[B]y

29. *Id.*

30. *Id.*

31. MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* 141 (1992).

directly or indirectly penalizing conduct which does not conform to a particular set of sexual behaviors,” Frug argues, legal rules promote this model of female sexuality.³² In other words, “legal rules favor those women who marry, who have sex only with their husbands, and who defer to their husbands in determining when, how often and in what manner marital sex takes place.”³³ Frug observes, “[i]n contrast, legal rules discourage women from being celibate or from having sex outside marriage—with one partner, with multiple partners, or with other women; they also deter women from being more assertive than their husbands want them to be about the management of marital sex.”³⁴

While the model of female sexuality Frug sets forth provides a useful framework for considering female sexuality, it leaves untouched the legal construction of parental sexuality. In this Article, I develop an account of the norm of maternal sexual fealty that has animated custody and visitation law’s treatment of parental sexuality. This section’s discussion of the social construction of ideal parental sexuality sets the stage for my discussion in Part III of family law’s dichotomized treatment of married parents as “sexually neutral” and nonmarital parents as “sexually salient.”

A. Parental Sexuality in the Era of Marital Fault: Prior to 1970s

In the era of marital fault-based divorce, custody and visitation law played a critical role in reinforcing as paradigmatic the sexual loyalty of a mother to her husband. *Per se* approaches to sexual conduct or sexual orientation that were prevalent in the law of custody and visitation during the era of marital fault made non-marital sexual conduct or sexual orientation categorical bars to obtaining or maintaining custody and decisive factors in determining visitation rights.³⁵ While the *per se* approach to sexual conduct and sexual orientation couched judicial concerns in general terms of morality, these putatively moral judgments rested on social judgments about parents’ sexuality.

Breaches of parental sexuality norms played an explicit role in judicial assessments of parental ability. Marital sexual conduct informed legal and social assessments of suitability as a parent and custodian. Judges often denied custody to a parent for being at “fault” in the divorce context³⁶ and,

32. *Id.*

33. *Id.*

34. *Id.*

35. *Commonwealth ex rel. Bachman v. Bradley*, 91 A.2d 379, 382 (Pa. Super. Ct. 1952) (ordering full custody to heterosexual mother with visitation for homosexual father limited as mother feels necessary because, in the custody of the father, the children will be exposed to “improper conditions and undesirable influences”).

36. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 802 (2d ed. 1988) (noting that “where a husband and a wife are divorced because of the marital misconduct of one of them, the law, as a general rule, favors the innocent spouse in awarding the custody of the children”) (citing *Settle v. Settle*, 185 S.E. 859, 861 (W. Va. 1936)); Carl A. Weinman, *The Trial Judge Awards Custody*, 10 LAW & CONTEMP. PROBS. 721, 731 (1944) (“When the parent who seeks custody of the

specifically, for engaging in adultery.³⁷ Many states refused as a matter of law to award custody to, or maintain custody vested with, a parent who had committed adultery, preferring instead the “innocent” parent, “because it is assumed that the child will be reared in a cleaner and more wholesome moral atmosphere.”³⁸ The presumed injury to the child resulting from adultery was so great that it could not necessarily be remedied by the errant party’s subsequent marriage to the individual with whom the parent had committed adultery.³⁹ This treatment of adultery as a bar to custody reflected not only the fault-based regime’s view of marriage as a life-long contract,⁴⁰ but also the view that sexual conduct and parenting were intimately related.

The legal treatment of parental sexuality arose in the context of gendered norms about sexuality, as reflected in divorce law.⁴¹ As Joanna Grossman and

child is guilty of immoral conduct, the general rule is that the custody of the child will be denied to such parent.”); C.T. Drechsler, Annotation, *Award of Custody of Child to Parent Against Whom Divorce Is Decreed*, 23 A.L.R.3d 6, § 4(b) (1969) (“All the cases support the proposition, either expressly or by necessary implication, that in determining in a divorce proceeding which parent shall be awarded the custody of the child, the courts may, and possibly must, take into consideration the cause of the divorce and the guilt of the party against whom the divorce was decreed insofar as these facts may tend to illustrate the relative fitness of the parents for bringing up and educating the child.”).

37. CLARK, *supra* note 36, at 802 (citing *Settle v. Settle*, 185 S.E. 859, 861 (W. Va. 1936)) (noting that “where a husband and a wife are divorced because of the marital misconduct of one of them, the law, as a general rule, favors the innocent spouse in awarding the custody of the children.”); Weinman, *supra* note 36, at 731 (“When the parent who seeks custody of the child is guilty of immoral conduct, the general rule is that the custody of the child will be denied to such parent.”); *see also* Swoyer v. Swoyer, 145 A. 190, 196 (Md. 1929) (“Usually, where a divorce is granted on the ground of adultery, the custody of the children is awarded to the innocent party.”); *Hild v. Hild*, 157 A.2d 442, 447 (Md. 1960) (“Ordinarily, when a divorce is granted on the ground of adultery, the custody of the child is usually awarded to the innocent party The courts generally—in this state as well as those in other jurisdictions—refuse to permit children to be awarded to or remain with a mother who has been guilty of adultery.”); *Bunim v. Bunim*, 83 N.E.2d 848, 849 (N.Y. 1949) (awarding custody to father based upon mother’s adultery).

38. *See, e.g., Swoyer*, 145 A. at 196; *see also Hild*, 157 A.2d at 447; *Bunim*, 83 N.E.2d at 849; Drechsler, *supra* note 36, at § 5(b) (“[M]any courts have used in addition more positive language and have taken the position that such a decree [based on adultery] creates a strong presumption against the fitness of the spouse guilty of adultery to have custody of the minor children and that in the absence of special circumstances such custody should be awarded to the innocent spouse.”).

39. *Hild*, 157 A.2d at 447 (“The fact that she subsequently marries the paramour has not been regarded as meeting the requirements of such a showing [to overcome the usual rule against awarding custody to an adulterous mother].”) (citing *Pangle v. Pangle*, 106 A. 337 (Md. 1919); *Stimis v. Stimis*, 47 A.2d 497 (Md. 1946); *McCabe v. McCabe*, 146 A.2d 768 (Md. 1958); *Johnson v. Johnson*, 111 So. 207 (Ala. 1927)).

40. *See* Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2311 (1994) (“Under fault-based absolute divorce, marriage remained a lifetime contract”); J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 593 (2007) (“No-fault divorce has been denounced for eroding ‘the idea of marriage as a presumptively permanent relationship—as a structure of incentives for individuals to contribute to the well-being of the family, and a framework of reasonable expectations of reciprocal benefits over the lifetime of the partnership.’”) (citing William A. Galston, *Divorce American Style*, PUB. INT. L. REV., Summer 1996, at 13)).

41. A substantial body of scholarship focuses on the regulation of sexuality through the institution of marriage and the law pertaining to it. For recent examples, *see* MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 96 (1999) (describing marriage as the way that the state “regulates and permeates people’s most intimate lives; it is the zone of privacy outside of which sex is unprotected.”); Ariela R. Dubler, *Sexing Skinner: History and the Politics of the Right to*

Lawrence Friedman have observed, “Wives were supposed to be chaste, loyal homemakers. Men were breadwinners, with stronger sexual appetites.”⁴² This was evident, in part, through gender-based differences in the legal treatment of men’s and women’s premarital sexuality. According to Grossman and Friedman, as of 1935, in a number of states a husband was entitled to a divorce “‘when the wife at the time of marriage was pregnant by another than her husband.’”⁴³ Notably, “[n]othing was said about a woman’s right to divorce, if her groom had made some other woman pregnant.”⁴⁴ Moreover, under at least one state’s code, for example, “the husband was entitled to a divorce if, unknown to him, the woman, before the marriage, had committed ‘illicit carnal intercourse with another man.’ There was no comparable stricture about men.”⁴⁵

A norm of deference to husbands’ sexual prerogatives pervaded the appellate law of marriage and divorce.⁴⁶ For example, Susan Appleton has observed that family law reflected an intense focus on husbands’ sexual gratification through sexual intercourse, while showing little interest in the same for women.⁴⁷ Moreover, the long-standing marital rape exemption vividly illustrates husbands’ sexual privilege.⁴⁸

Marry, 110 COLUM. L. REV. 1348, 1374 (2010) (recognizing that, in a post-*Lawrence v. Texas* world, “[m]arriage still sits at the top of the legal hierarchy of intimate relationships and maintains its position as the most privileged game in town. Indeed, marriage is still invoked as the proper regulator of potentially procreative sex”); Katherine H. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2688-89 (2008) [hereinafter Franke, *Longing for Loving*] (arguing for recognition of same-sex marriage without “denigrating or shrinking an affective sexual liberty outside of marriage”).

42. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 162 (2011).

43. *Id.* (citing KAN. STAT. ANN. § 60-1501 (1935)).

44. Grossman & Friedman, *supra* note 42, at 162.

45. *Id.* (citing MD. CODE. ANN., FAM. LAW § 38 (1924)).

46. Although appellate decisions do not necessarily reflect the law as it operates at the trial level, particularly where appellate review is so deferential, as it is in family law, appellate decisions provide a useful window on the social norms of the time.

Accounts of widespread collusion to manufacture grounds for divorce has called into question the legitimacy of divorce law during the marital fault era. See Grossman & Friedman, *supra* note 42, at 163-68 (discussing the marital fault era as the “age of collusion”). This historical phenomenon speaks more to the incongruity between people’s desire for divorce and the available law, however, rather than to the value of examining appellate decisional law.

This Article is not intended as an exhaustive empirical study of all cases on the subject of parental sexuality. It is, instead, an attempt to identify themes and trends. Geographical trends are certainly relevant, especially to the extent that cases emerge in southern or Midwestern states. A deep analysis of the impact of geography, as a social force, on the construction of norms of parental sexuality lies beyond the scope of this Article. Such a project would further the project of this specific paper by highlighting the ways in which what law and society take as neutral norms are actually socially constituted.

47. Appleton observes that “despite the salience of gender equality in contemporary family law, the field remains preoccupied with performances that produce heterosexual men’s orgasms while ignoring, marginalizing, or rejecting women’s interest in orgasmic pleasure.” Susan Frelich Appleton, *Toward a “Culturally Cliterate” Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 268-69 (2008). In exploring possible reasons for this lack of interest in women’s sexual satisfaction, Appleton asserts, “privacy cannot provide a complete explanation, for impotence has long played a role in divorce and annulment cases, adultery continues to be a divorce ground in many states, and ‘an unjustifiable persistent refusal of sexual intercourse’ can be a divorce ground as well. But if that’s so, is there any

Although formally framed in gender-neutral terms, the fault-based divorce system disparately regulated women's sexuality.⁴⁹ Economic inequality and the marital benefits regime made divorce "financially risky" for many women, and "complying with anti-adultery rules enable[d] [women] to avoid giving their husbands a legal reason for divorce."⁵⁰ The pressure to comply with anti-adultery rules may have been reinforced by differences in the social perception of the adultery of wives and husbands. For example, Appleton asserts that extramarital sex has gendered implications, with such conduct traditionally treated as more socially acceptable for husbands than for wives.⁵¹

Norms for parental sexuality existed within this gendered context of marital fault. Although during the age of fault-only divorce, a maternal presumption applied for custody, under which children of "tender years" were placed with mothers,⁵² this presumption gave way when a mother was deemed "morally unfit," through sexual fault, such as adultery.⁵³

reason why 'an unjustifiable persistent refusal' to attend to a wife's interest in clitoral stimulation should not be accorded equal weight?" *Id.* at 319-20 (citations omitted).

48. "[H]usbands long had exclusive control over whether and when to seek their own sexual pleasure with their wives because of the marital exemption to rape laws." *Id.* at 285 (citing *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984) (invalidating long-standing marital exemption to rape laws)). Jill Hasday has discussed the persistence of the marital rape exemption in the law. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1484-85 (2000) ("A majority of states still retain some form of the rule exempting a husband from prosecution for raping his wife. Some states require a couple to be separated at the time of the injury (and sometimes extend the exemption to cover unmarried cohabitants). Some only recognize marital rape if it involves physical force and/or serious physical harm. Some provide for vastly reduced penalties if a rape occurs in marriage, or create special procedural requirements for marital rape prosecutions. Almost all of this law, moreover, is the product of political advocacy and legislative action, rather than constitutional adjudication, so that the nature and continued path of change is insecure. Enforcement of the existing statutes recognizing some forms of marital rape has certainly been very infrequent.") (citations omitted).

49. See, e.g., Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1117 (1999) (arguing that "the fault-era's emphasis on sexual practices and traditional gendered family roles reinforced patriarchy and tended to hurt custodial parents—primarily women—and children."); Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2526 (1994) ("The traditional fault paradigm, still dominant in some states, reflected an obsession with controlling women and their sexuality.").

50. FRUG, *supra* note 31, at 143.

51. Appleton, *supra* note 47, at 318-19 (discussing gendered operation of fault grounds such as adultery based on wives' infidelity as triggering divorce more often than adultery based on husbands' infidelity).

52. "Tender years" were usually those before the age of seven. GROSSMAN & FRIEDMAN, *supra* note 42, at 215.

53. See, e.g., *Ferster v. Ferster*, 207 A.2d 96, 98 (Md. 1965) ("[I]n cases such as this where the mother was found guilty of adultery, custody of young children should be in the father where he is shown to be a fit and proper person."); *Wallis v. Wallis*, 200 A.2d 164, 165 (Md. 1964) ("[O]rdinarily, where a divorce is awarded on the ground of the mother's adultery, the father, if he is shown to be a proper person, is granted custody of children of tender years."); *Insogna v. Insogna*, 181 A.2d 677, 681 (Md. 1962) ("Usually, the fact that the mother has been guilty of adultery will be taken as indicating that she is not a proper person to have custody, and a strong showing must be made to overcome the usual rule or presumption against awarding custody to an adulterous mother.") (quoting *Parker v. Parker*, 158 A.2d 607, 610 (Md. 1960)); *Beck v. Beck*, 120 N.W.2d 585, 589 (Neb. 1963) ("[W]here a wife is found to be guilty of adultery she is an unfit person to have care and custody of her minor children as against the husband that she has wronged.").

To the extent that divorce and custody doctrine in the fault era discouraged mothers' sex outside of marriage, it also seemingly required some kinds of maternal sex within marriage. For example, in *Stech v. Stech*, an Indiana appellate court affirmed a trial court's award of custody to the father where his only allegation against his wife and mother of his children was that she refused to have sexual relations "for the fun of it," which the husband argued satisfied the fault-based divorce ground of "cruel and inhuman treatment."⁵⁴

This gendered portrait of parental sexuality resonates with earlier twentieth century views of the proper relationship between a wife's sexuality and motherhood. For example, a 1943 study in the *American Journal of Orthopsychiatry* discussed prevailing views on the appropriate role of sexuality in mothers' lives.

There are some women who are so completely absorbed in their devotion to their children and so active in their behalf that they lose interest in their sexual, passively directed relationship to their husbands. These women come to regard their husbands merely as providers for the all-important children and, as a result, the marital relationship suffers.⁵⁵

In this view,

[n]ormal development consists in the attainment of a balance between passivity and activity. The passive aim of being loved and sexually assaulted must remain the source of satisfaction in the marital relationship, but the mature woman must also be capable of finding joy in the active expression of strong maternal feelings for her children.⁵⁶

On this perspective, being sexually available to one's husband and actively devoted to one's children were both necessary features of mature womanhood. In other words, a proper mother adhered to the social expectation that she receive the sexual advances of her husband while she actively engage in the business of mothering.⁵⁷

54. *Stech v. Stech*, 240 N.E.2d 557, 558 (Ind. App. Ct. 1968); see also Iglesias, *supra* note 10, at 980-81 (arguing that "custody laws [have] become the vehicle through which state intervention is available to enforce maternal deference to paternal prerogatives and compliance with judicial norms of female sexual morality").

55. See, e.g., Florence Clothier, *Psychological Implications of Unmarried Parenthood*, AM. J. ORTHOPSYCHIATRY 531, 540 (1943).

56. *Id.*

57. This view of married women's sexuality as passively subject to husbands' active pursuits finds support in contemporaneous marriage manuals. See Michael Gordon & Penelope J. Shankweiler, *Different Equals Less: Female Sexuality in Recent Marriage Manuals*, 33 J. MARRIAGE & FAM. 459, 459 (1971) (studying eighteen best-selling marriage manuals of previous two decades and finding that "the woman is still assumed to have less sexual interest and experience than the man, who is ascribed

B. Parental Sexuality After the Advent of No-Fault Divorce: 1970s to 1980s

With the advent of no-fault divorce in the 1970s, concepts of sexual fault no longer formally determined the status relationships of men and women in divorce. Concepts of sexual fault did, however, persist in marking the terms of the parent-child status relationship. Even after the advent of no-fault divorce, some courts continued to factor sexuality-based marital fault into custodial decision-making.⁵⁸ Outside of the context of extramarital sex, consideration of sexuality frequently took the shape of categorical or *per se* approaches to sexual conduct⁵⁹ or sexual orientation,⁶⁰ which reinforced traditional norms about parental sexuality.

This is evident in the approach adopted by many courts to treat a mother's cohabitation or non-marital sexual conduct, or a lesbian or gay parent's sexual orientation, as a decisive factor against awarding custody or limiting visitation. For example, in the prominent 1979 case of *Jarrett v. Jarrett*, the Illinois Supreme Court treated a mother's living with a man to whom she was not married as a *per se* indication of her parental unfitness. The court addressed whether a change of custody predicated upon "the open and continuing cohabitation of the custodial parent with a member of the opposite sex" was proper even "in the absence of any tangible evidence of contemporaneous adverse effect upon the minor children."⁶¹ Without any showing of harm to the

the instrumental role of cultivating his wife's sexuality" and "[w]hile greater female initiative and 'cooperation' in sex is advocated, the male continues to be the dominant partner").

58. The 2002 ALI approach to custody and sexual conduct aimed to address the courts that continued to use fault-based approaches to custody as of that time. See PRINCIPLES OF LAW OF FAMILY DISSOLUTION § 2.12 (1)(e) (2002) (prohibiting consideration of "the extramarital sexual conduct of a parent [for the allocation of custody], except upon a showing that it causes harm to the child"); *id.* § 2.12 cmt. f (limiting the consideration of parental "sexual misconduct" to "prevent courts from exaggerating the significance of parental practices of which they disapprove . . ."); *id.* § 2.12 reporter's notes, cmt. f ("Appellate courts in several jurisdictions have permitted trial courts to infer harm to the child from a parent's sexual infidelity or a cohabitation relationship outside of marriage.") (citing *Lacaze v. Lacaze*, 621 So. 2d 298, 300 (Ala. Civ. App. 1993); *Marriage of Diehl*, 582 N.E.2d 281, 292 (Ill. App. Ct. 1991); *Langerman v. Langerman*, 336 N.W.2d 669, 671 (S.D. 1983); *Madison v. Madison*, 313 N.W.2d 42, 44 (S.D. 1981); *Merriam v. Merriam*, 799 P.2d 1172, 1176-77 (Utah Ct. App. 1990).

59. See *Commonwealth ex rel. Myers v. Myers*, 360 A.2d 587, 589 (Pa. 1976) ("a parent's nonmarital relationships must be given close scrutiny in determining custody matters."); *Gunter v. Gunter*, 361 A.2d 307, 313 (Pa. Super. Ct. 1976) ("An extra-marital, or to speak more generally, a non-marital, relationship will always be a fact requiring the most careful consideration in a custody proceeding."); see also Annotation, *Custodial Parent's Sexual Relations with Third Person as Justifying Modification of Child Custody Order*, 100 A.L.R.3d 625, § 2(a) (1980).

60. See, e.g., *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) ("Father's continuous exposure of nine-year old daughter to his immoral and illicit [homosexual] relationship renders him an unfit and improper custodian as a matter of law.").

61. *Jarrett v. Jarrett*, 400 N.E.2d 421, 423 (Ill. 1979).

children, the court concluded that she possessed improper moral values and declined to maintain custody in her.⁶²

In the context of lesbian and gay parents, sexual orientation was often decisive in this period as the sole ground for denying custody or visitation.⁶³ Judicial reasoning for such denials was often based on concerns that the parent would attempt to "convert the child to homosexuality," concerns "that the child [would] be subjected to social disapproval and harassment if he lives with a homosexual parent," or fears that the parent would engage in "immoral conduct which presumably will contaminate the morals of the child."⁶⁴

Legal rules pertaining to heterosexual mothers in nonmarital relationships and lesbian and gay parents who, definitionally, lived outside of marital borders demonstrated the sense in which certain parental sexualities were deemed dispositive on the subject of parenting ability.

62. *Id.* at 426. Julie Shapiro has described this case as an example of a "permissible determinative inference," allowing the parent's sexual conduct to be decisive, rather than mandating this result as would be the case under a strict *per se* rule. Shapiro, *supra* note 12, at 641 ("Jarrett allows a trial court to adopt the premise that all cohabiting mothers (or perhaps cohabiting parents) will cause their children harm."). I do not draw a strong distinction between a strict *per se* approach and a "permissible determinative inference," because, in my view, the permissible determinative inference operates like a *per se* rule although it may not be one in form.

63. See, e.g., Thigpen v. Carpenter, 730 S.W.2d 510 (Ark. Ct. App. 1987); S. v. S., 608 S.W.2d 64 (Ky. Ct. App. 1980); Irish v. Irish, 300 N.W.2d 739 (Mich. Ct. App. 1980); ; J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989); G.A. v. D.A., 745 S.W.2d 726 (Mo. Ct. App. 1987); S.E.G. v. R.A.G., 735 S.W.2d 164 (Mo. Ct. App. 1987); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865 (Mo. Ct. App. 1982); L. v. D., 630 S.W.2d 240 (Mo. Ct. App. 1982); M.J.P. v. J.G.P., 640 P.2d 966 (Okla. 1982); Constant A. v. Paul C.A., 496 A.2d 1 (Pa. Supr. Ct. 1985); Bennett v. O'Rourke, 1985 WL 3464 (Tenn. Ct. App. Nov. 5, 1988); Collins v. Collins, No. 87-238-II, 1988 WL 30173 (Tenn. Ct. App. Mar. 30, 1988); Black v. Black, No. 7, 1988 WL 22823 (Tenn. Ct. App. Mar. 10, 1988); Dailey v. Dailey, 635 S.W.2d 391 (Tenn. Ct. App. 1981); Roe, 324 S.E.2d at 693.

64. See Jacobson v. Jacobson, 314 N.W.2d 78, 81-82 (N.D. 1981) (commenting that if the children were to live with their mother and her partner full-time they would have to encounter society's resistance to accept homosexuality and its disapproval of that lifestyle much more than if they resided with their father and had visitation with their mother); M.J.P., 640 P.2d at 969 (agreeing with expert testimony that living with a lesbian mother and her partner would force a child to defend its family to peers and ultimately force child to reconcile society's moral values and his mother's life choices); Roe, 324 S.E.2d at 694 ("However that may be, we have no hesitancy in saying that the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large."); CLARK, *supra* note 36, at 805 (citing S., 608 S.W.2d at 66, *cert. denied*, 451 U.S. 911 (1981) (noting that a child with a lesbian mother is forced to isolate him or herself from peers because of the community's reaction to mother's sexual orientation)). Although these concerns are seen less frequently in explicit judicial reasoning, up until recently they continued to animate trial level decision-making. See Jacoby v. Jacoby, 763 So. 2d 410, 413 (Fla. Dist. Ct. App. 2000) (criticizing the circuit court for basing its custody determination on a strong social stigma attached to homosexuality); Fox v. Fox, 904 P.2d 66, 70 (Okla. 1995) (overturning court of appeals' determination that detriment would likely result from "'community members' disapproval of or disagreement with the parent's sexual orientation"); Damron v. Damron, 670 N.W.2d 871, 873 (N.D. 2003) (reversing lower court's decision that the "open homosexual relationship may endanger the children's emotional health and impair the children's emotional development."); Bruce D. Gill, *Best Interest of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody*, 68 TENN. L. REV. 361, 370-74 (2001) (discussing the "fear of social stigma" as grounds for denying homosexual parents child custody).

C. Parental Sexuality Under the Nexus Standard: 1980s to Present

By the late 1980s, courts had begun increasingly to apply a “nexus” approach to the intersection of sexuality and custody and visitation.⁶⁵ In contrast with previous categorical approaches, the “nexus” standard rejected the treatment of sexual conduct or sexual orientation as decisive in custodial or visitation decision-making. Sexuality—in the form of sexual conduct or orientation—would only be relevant upon a showing of some connection to (or nexus with) the child’s best interests.⁶⁶ The “nexus” standard has been described as the majority rule regarding heterosexual parents’ sexual conduct and the sexual orientation of lesbian and gay parents.⁶⁷

65. This trend generally emerged in heterosexual parent cases in the 1970s and in cases involving gay or lesbian parents by the late 1980s. *See, e.g.*, *Anonymous v. Anonymous*, 475 P.2d 268, 270 (Ariz. 1970) (mother awarded initial custody where her heterosexual relationship “did not have a harmful effect on the child.”); *Dinkel v. Dinkel*, 322 So. 2d 22, 24 (Fla. 1975) (“Where the trier of fact determines that the spouse’s adultery does not have any bearing on the welfare of the child, the act of adultery should not be taken into consideration in reaching the question of custody of the child”); *Davis v. Davis*, 372 A.2d 231, 235 (Md. 1977) (“[W]hereas the fact of adultery may be a relevant consideration in child custody awards, no presumption of unfitness of the parent of the adulterous parent arises from it; rather it should be weighed, along with all other pertinent factors, only insofar as it affects the child’s welfare.”); *Bezio v. Patenaude*, 410 N.E.2d 1207, 1216 (Mass. 1980) (“In the total absence of evidence suggesting a correlation between the mother’s homosexuality and her fitness as a parent, we believe the judge’s finding that a lesbian household would adversely affect the children to be without basis in the record.”); *Doe v. Doe*, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983) (“There is no evidence to show that the wife’s [lesbian] life-style will adversely affect [the child].”); *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 284 (Mo. Ct. App. 1989) (“[T]he rule appears to be that ‘[t]here must be a nexus between harm to the child and the parent’s homosexuality.’”) (quoting *S.E.G.*, 735 S.W.2d at 166); *Anonymous v. Anonymous*, 120 A.D.2d 983, 983-84 (N.Y. App. Div. 1986) (“In the absence of proof that the child has been adversely affected by plaintiff’s [lesbian] life-style, the court correctly determined that plaintiff’s sexual preferences do not render her an unfit parent.”); *Commonwealth ex rel. Steiner v. Steiner*, 390 A.2d 1326, 1328 (Pa. Super. Ct. 1978) (“Assuming, however, that the mother is involved in a meretricious relationship, that alone would not be sufficient reason to deny her custody The critical question is the effect of such a relationship on the children.”) (citations omitted); *Stroman v. Williams*, 353 S.E.2d 704, 705 (S.C. Ct. App. 1987) (requiring that child “was being exposed to deviant sexual acts or that her welfare was being adversely affected in a substantial way” before modifying custody due to mother’s lesbian relationship).

66. *See S.N.E. v. R.L.B.*, 699 P.2d 875, 878 (Alaska 1985) (applying nexus standard regarding parent’s sexuality for best interest of the child); *Jacoby v. Jacoby*, 763 So. 2d 410, 413 (Fla. Dist. Ct. App. 2000) (same); *Moses v. King*, 637 S.E.2d 97, 101 (Ga. Ct. App. 2006) (same); *In re Marriage of R.S.*, 677 N.E.2d 1297, 1300 (Ill. App. Ct. 1996) (same); *Pleasant v. Pleasant*, 628 N.E.2d 633, 640 (Ill. App. Ct. 1993) (same); *Downey v. Muffley*, 767 N.E.2d 1014, 1020 (Ind. Ct. App. 2002) (same); *D.H. v. J.H.*, 418 N.E.2d 286, 293 (Ind. Ct. App. 1981) (same); *Bezio*, 410 N.E.2d at 1216 (same); *Doe*, 452 N.E.2d at 296 (same); *Gould v. Dickens*, 143 S.W.3d 639, 643 (Mo. Ct. App. 2004) (same); *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 284 (Mo. Ct. App. 1998) (same); *Helgenberger v. Helgenberger*, 306 N.W.2d 867, 870 (Neb. 1981) (same); *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 967 (N.Y. Spec. Term 1986) (same); *Anonymous*, 120 A.D.2d at 983-84 (same); *Damron*, 670 N.W.2d at 874 (same); *Fox*, 904 P.2d at 69 (same); *M.J.P.*, 640 P.2d at 968 (same); *M.A.T. v. G.S.T.*, 989 A.2d 11, 17-18 (Pa. 2010) (same); *Stroman*, 353 S.E.2d at 705 (same); *Van Driel v. Van Driel*, 525 N.W.2d 37, 39 (S.D. 1994) (same); *Massey-Holt v. Holt*, 255 S.W.3d 603, 610 (Tenn. Ct. App. 2007) (same); *Berry v. Berry*, No. E2004-01832-COA-R3-CV, 2005 WL 1277847, at *3 (Tenn. Ct. App. May 31, 2005) (same).

67. *See BALL, supra* note 10, at 4 (“The clear trend in appellate decisions since [the mid-1980s], however, has been to reject this type of categorical approach. Instead, starting in the late 1980s, most appellate courts that have addressed the issue have rejected the notion that parents’ same-sex sexual orientation and relationships, on their own, justify restricting their custody and visitation rights. These

Notably, the “nexus” standard, as often described in commentary and case law, treats sexual conduct and sexual orientation the same way: disallowing the consideration of either factor in making child placement decisions in custody and visitation unless there is a showing of harm to the child’s “best interests.” For example, as described by Michael Wald, under the “nexus” standard, “a parent’s sexual orientation will be deemed relevant only if there is evidence that the parent’s sexual orientation is having, or is likely to have, a negative impact on the child.”⁶⁸ Commentators and judges also apply the nexus standard to parental sexual conduct, such as extramarital sexual conduct.⁶⁹

The American Law Institute (ALI) Principles of the Law of Family Dissolution, as revised in 2002, on the other hand, distinguishes between sexual orientation and sexual conduct in its legal approaches. In listing prohibited criteria for determining “parental value” when making “parenting plans,” the ALI prohibits from consideration “sexual orientation,” along with “race,” “ethnicity,” and “sex of a parent or child.”⁷⁰ “Extramarital sexual conduct of a parent” is not categorically prohibited from consideration in the same way; it is prohibited “except upon a showing that it causes harm to the child.”⁷¹ In its plain text, then, the ALI’s “nexus” approach seems technically only to apply to

courts have almost uniformly called for the application of the nexus test, which as we have seen, demands the showing of a link between a parent’s same-sex orientation and relationships and actual or potential harm to the child.”); Shapiro, *supra* note 12, at 633 (discussing the predominance of the nexus approach regarding sexual conduct and parents’ sexuality); Wald, *supra* note 10, at 422 (“The majority of state courts have moved away from presumptions or assumptions that a parent’s homosexuality or same-sex relationship is likely to negatively impact the child. Most courts now apply what is commonly called the nexus test.”).

68. Wald, *supra* note 10, at 422.

69. See Anderson v. Anderson, 771 N.E.2d 303, 309 (Ohio Ct. App. 2002) (applying ‘direct adverse impact’ test to a parent’s ‘immoral’ lifestyle to “ensure that a trial court’s denial or severe restriction on visitation will be based on objective criteria, rather than merely on the personal moral code of the trial judge”); Shapiro, *supra* note 12, at 633.

70. AMERICAN LAW INSTITUTE: PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12 at 272 (2002). In the publication’s General Materials, the ALI recognizes that its suggested provisions “prohibit consideration of race, ethnicity, sex, and sexual orientation.” *Id.* at 1, 2 GM (f).

71. *Id.* § 2.12(1)(e). The Principles also list other factors—like religious practices and financial status—that are not to be considered in some circumstances in evaluating parental value for parenting plan purposes. See *id.* § 2.12(1)(c), (f). The following text quotes the factors that are prohibited from consideration when determining the parental value of a parent:

(1) In issuing orders under this Chapter, the court should not consider any of the following factors:

- a. the race or ethnicity of the child, a parent, or other member of the household;
- b. the sex of a parent or the child;
- c. the religious practices of a parent or the child, except to the minimum degree necessary to protect the child from severe and almost certain harm or to protect the child’s ability to practice a religion that has been a significant part of the child’s life;
- d. the sexual orientation of a parent;
- e. the extramarital sexual conduct of a parent, except upon a showing that it causes harm to the child;
- f. the parents’ relative earning capacities or financial circumstances, except the court may take account of the degree to which the combined financial resources of the parents set practical limits on the custodial arrangements.

Id. § 2.12(1).

sexual conduct, with sexual orientation prohibited from consideration regardless of a showing of harm. In other words, sexual orientation may be viewed as more strongly excluded from consideration than sexual conduct.

Regarding sexual conduct, ALI advised a requirement to show harm, not just a presumption of its existence, based on parental extramarital sexual conduct: “[e]ven a child’s awareness of such a relationship, or dislike of the individual with whom a parent has developed an intimate relationship, should not justify inferences relating to the child’s welfare or parental fitness; children cannot be protected from every source of unhappiness and unease.”⁷² If the sexual conduct results in specific harm to the child, however, then courts may properly factor in the conduct.⁷³

While the nexus approach improves upon previous categorical or *per se* approaches, where harm was merely inferred,⁷⁴ the problem of discriminatory treatment of nonconforming parental sexuality persists. The problems with the nexus standard are manifold. Others have stated them, so I revisit them only in an effort to highlight how the dichotomization of parental sexuality can inform alternatives. First, the mere existence of the rule calls attention to sexual orientation or sexual conduct. As Michael Wald argues, the nexus approach “lends itself to making the parent’s sexual orientation, rather than the general nature of the parent-child relationship, the focus of the proceedings.”⁷⁵ He argues further that the nexus approach may actually generate concern about sexual orientation.⁷⁶ Moreover, the requirement of a showing of harm prompts

72. *Id.* § 2.12 cmt. f.

73. It is worth noting that the analysis for harm is a standard “not as rigorous as the severe and almost certain harm standard applied to restrictions on consideration of religious practices.” *Id.*

74. Although Shapiro is critical of many aspects of the nexus standard, she has observed that “[i]f the nexus test is given appropriate content, if it is scrupulously applied, and if appellate courts carefully review its application, it can assist courts in determining the best interests of the child.” Shapiro, *supra* note 12, at 636; see also Graham, *supra* note 10, at 331 (“The *Principles* create a standard that focuses on the needs of the child, and seeks to remove any gender or cultural bias from the decisionmaking process.”); Jeffrey L. Hall, *Coming Out in West Virginia: Child Custody and Visitation Disputes Involving Gay or Lesbian Parents*, 100 W. VA. L. REV. 107, 134 (1997) (“The requirement of demonstrable proof of harm to the child as a result of the homosexual parent’s lifestyle, and not mere speculation or unfounded fears of harm, will defeat frivolous claims. The nexus standard serves the best interests of the child, and heterosexual parents concerned with their child’s development will be protected where they can show their children are harmed by the nontraditional lifestyle of the gay or lesbian parent.”); Andrea Lehman, *Inappropriate Injury: The Case for Barring Consideration of a Parent’s Homosexuality in Custody Actions*, 44 FAM. L.Q. 115, 129-30 (2010) (“The clear nexus approach is a dramatic departure from both the presumption and the *per se* approaches because it properly places the burden on the parent seeking to restrict a gay or lesbian parent’s custodial rights to prove that the parent is actually harming the child. The court must make a finding of fact that *this* child is being harmed *because* of a parent’s sexual orientation.”).

75. Wald, *supra* note 10, at 427-28.

76. *Id.* (“Singling out sexual orientation, and no other parental characteristic, implies that a parent’s sexual orientation is of special concern. It makes it too easy for judges to speculate that any behavior problems a child may be exhibiting result from the gay parent’s sexual orientation. It can encourage heterosexual parents to disparage the gay parent’s sexuality in the presence of the child.”).

an inquiry that can itself be damaging by prompting lengthy and intrusive evaluations that can cause harm themselves.⁷⁷

The nexus approach leaves significant room for categorical thinking to seep into evaluations of harm in the context of sexual conduct as well. For example, in the 2002 case *Anderson v. Anderson*, the trial court awarded custody to the father on the ground that the wife's extramarital affairs during the parents' marriage had a "direct adverse effect" on the children,⁷⁸ a standard analogous to the requirement for a showing of "harm" under the "nexus" approach. In Ohio, the direct adverse effect standard allows for consideration of a parent's morals, if there is a showing of "direct adverse impact" on the child. The absence of any discussion of whether the standard had been met by sexual conduct in the form of the mother's adultery suggests the persistence of morals-based attitudes about sexuality.

In its judgment directing custody to the children's father, the trial court explained, "[The mother's] repeated willingness to engage in numerous extramarital affairs during both of her marriages, while not evidence *per se* of extreme moral impropriety. . . does reflect consistent poor judgment and impulsiveness, and raises questions regarding her long-term parenting skills."⁷⁹ In the trial court's reasoning, the mother's sex with a man other than her husband suggested bad morals, which, in turn, suggested bad parenting. This chain of association all occurred in the process of what the appellate court concluded was a proper application of the "direct adverse impact" standard in granting custody to the father.⁸⁰

Although the appellate court, in affirming the custody award, disavowed *per se* morals-based reasoning, the nexus standard allowed for sexuality-related, morals-based reasoning through the requirement of a showing of harm. The appellate court noted that the trial court had "emphasized the harmful effects of appellant's lifestyle, rather than the immorality of her affairs,"⁸¹ but the appellate court pointed to little in the record or the trial court's judgment to support the claim of "direct adverse impact" on the couple's children. Rather than requiring an actual showing of effects on the children from the mother's conduct, the appellate court approved the trial court's assertion that the mother's "lifestyle created an unstable environment for the children."⁸²

As shown in *Anderson*, judges may apply their own assessments of harm to the children's best interests from parental sexual conduct or sexual orientation,

77. *Id.*

78. See *Anderson v. Anderson*, 771 N.E.2d 303, 308 (Ohio Ct. App. 2002) (citing *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987) ("[W]hether the issue is custody or *visitation*, before depriving the sexually active parent of his crucial and fundamental right of contact with his child, a court must find that the parent's conduct is having, or is probably having, a harmful effect on the child.")).

79. *Id.* at 309 (citing trial court judgment).

80. *Id.*

81. *Id.* at 312.

82. *Id.*

which can reproduce the effects of earlier fault-based or categorical approaches.⁸³ The variable, and often lenient, standards for what qualifies as harm also contribute to this problem. For example, while most courts using the nexus standard have begun to require harm to the child to be actual,⁸⁴ the standard does not foreclose others from assuming harm.⁸⁵

In addition, while the purest (and ALI recommended) form of the “nexus” approach requires the party challenging custody or visitation to show harm, often the party seeking custody or visitation faces the burden of demonstrating the absence of harm⁸⁶ or of rebutting a presumption of harm. In light of the troublingly vague “best interests of the child” standard, the latter requirement is challenging, and the former nearly impossible.⁸⁷

Problems in the operation of the nexus standard harm lesbian and gay parents not only in litigation but also in private negotiation.⁸⁸ As Shapiro has noted, “[o]ne indication of legal hostility’s effect on private ordering may be

83. In her early critique of the nexus standard, Julie Shapiro argued, “Though most jurisdictions have moved away from rules which explicitly incorporate negative assumptions about lesbian and gay parents and have embraced the general principles of the nexus test, the nexus test is not consistently or effectively applied.” Shapiro, *supra* note 12, at 626-27.

84. See, e.g., *Massay-Holt v. Holt*, 255 S.W.3d 603, 610 (Tenn. Ct. App. 2007) (“If Father’s testimony about nonspecific, speculative potential effects [of mother’s homosexuality] . . . were enough to establish a ‘negative effect’, then for all practical intents and purposes, a ‘per se bar’ would be established”); *Jacoby v. Jacoby*, 763 So. 2d 410, 415 (Fl. Dist. Ct. App. 2000) (overturning circuit court’s custody determination because the court “penalized the mother for her sexual orientation without evidence that it harmed the children”); *Maradie v. Maradie*, 680 So. 2d 538, 543 (Fla. Dist. Ct. App. 1996) (“[T]he mere possibility of negative impact on the child is not enough. This is not to say that the trial court must have evidence of actual harm, past or present. The trial court can base a decision on proof of the likelihood of prospective harm.”).

85. See, e.g., *Larson v. Larson*, 902 S.W. 2d 254, 256 (Ark. Ct. App. 1995) (finding mother’s cohabitation and openly affectionate lifestyle to be inherently detrimental to the children); *Pulliam v. Smith*, 501 S.E.2d 898, 904 (N.C. 1998) (finding the culmination of father’s cohabitating gay lifestyle as creating an “improper influence” and hence “detrimental to the best interests and welfare of the two minor children”).

86. Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. L. REV. 915, 919-20 (2001) (“Under the ‘true’ nexus approach, the burden of persuasion is allocated so that there must be proof that parental sexuality will have an adverse impact on the child. Nonetheless, some courts presume adverse impact, demanding that the sexual minority parent prove an absence of harm to the children.”) (citing *Thigpen v. Carpenter*, 730 S.W.2d 510, 513-14 (Ark. Ct. App. 1987) (presuming that “illicit sexual conduct on the part of the custodial parent is detrimental to the children”)).

87. The difficulty in proving affirmatively the absence of a genuine issue of material fact in the summary judgment context provides a useful analogy. See Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433, 465-66 (1987) (discussing the “legal labyrinth” of summary judgment where movants likely must prove negatively any genuine issues of material fact); Robert M. Bratton, *Summary Judgment Practice in the 1990s: A New Day Has Begun—Hopefully*, 14 AM. J. TRIAL ADVOC. 441, 461 (1991) (discussing the “monumental burden to foreclose the possible existence of any and all material facts raised by the non-movant” under *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

88. Shapiro, *supra* note 12, at 642 (citing Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Richard Neely, *The Primary Caretaker Parent Rule, Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168, 177-79 (1984)).

the frequency with which lesbian mothers initially agree to either joint custody or father custody rather than seeking sole custody.”⁸⁹

Because of the dichotomization of parental sexuality, just eliminating the nexus standard (either as articulated by courts or by the ALI), will not solve the problem. To the extent that we live in a society in which people notice and penalize departures from sexual norms, it makes sense to require a showing of harm. Based on history, merely relying on the nebulous best interest approach is not likely to advance egalitarianism or other goals threatened by the dichotomy of sexual neutrality and sexual salience. Given the historical treatment of heterosexual and lesbian mothers and gay fathers, there is significant expressive and practical value in a requirement to show harm.

The fundamental problem with proposals like Michael Wald’s that advocate abandoning the nexus standard in favor of a best interest approach that focuses on parents’ conduct⁹⁰ is that they assume that courts will honor the distinction between conduct and the context in which that conduct arises, such as sexual orientation. The prevailing framework for parental sexuality indicates, however, that this boundary is easily blurred. The traditional workings of sexual salience suggest that, even in a regime that formally excludes it from consideration, sexual orientation can make its way into the discussion. This is because courts have tended to treat the mundane conduct and daily lives of those historically treated as sexually salient as indications of parental sexuality. This contrasts with the legal construction of those viewed as sexually neutral, who do not register as sexual from the standpoint of assessing parenting. In other words, for the sexually salient, a wider swath of life is perceived as sexual conduct. Thus, orientation often collapses into conduct.

A deeper understanding of the constructions of parental sexuality that inform judicial notions of conduct, however, can contribute significantly to improving applications of the nexus standard. This Article’s examination and critique of the prevailing framework for evaluating parental sexuality sheds light on the ways in which judges view sexuality only in those who stray from marital, gendered sexual norms and traces that sexuality through areas of life deemed mundane in marriage.

89. *Id.* at 642 (citing, as an example, *Johnson v. Schlotman*, 502 N.W.2d 831, 832 (N.D. 1993) (involving stipulated divorce settlement between lesbian mother and father for joint custody, where children nevertheless continued to live with father)).

90. See Wald, *supra* note 10, at 427-28 (“Where parents dispute physical custody, courts are directed to give primary custody based on the child’s relationship with each parent, the past caretaking arrangements, and the ability of each parent to meet the physical and emotional needs of the child in determining who should have primary physical custody.”).

III. NEUTERING THROUGH DICHOTOMY: SEXUAL NEUTRALITY AND SEXUAL SALIENCE

In this section, I set forth my theory of the dichotomization of parental sexuality that has endured even in the era of the nexus standard. In the context of custody and visitation, married parents' sexuality is constructed as "sexually neutral," whereas the sexuality of parents outside of marriage has been constructed as "sexually salient." Identifying this treatment is critical toward a more nuanced understanding of how we construct norms of parenting in general and parental sexuality in particular.

By "sexually neutral," I refer to a legal and social construction of married parents' sexuality as legally invisible and unproblematic in evaluations of parenting. "Sexual salience," on the other hand, refers to a perception of "sexually nonconforming"⁹¹ parents and their lives as acutely, pervasively, and inevitably sexual. Sexual neutrality and sexual salience dynamically relate to one another. The perception of sexual neutrality of some parents reinforces the sexual salience of others, which, in turn, reinforces the seeming neutrality of the former.⁹² In this way, sexual neutrality and salience are fundamentally constructed in opposition to one another.

Despite the robust rights afforded to those deemed parents under the law,⁹³ having sex in front of children—even while married—can be a basis for removal of custody.⁹⁴ Traditional approaches to sexually nonconforming parents suggest, however, that these parents have had to do much less to be perceived as having sex in front of children. This is evident in two ways: first, in the role that marriage has played in "curing" seemingly untoward parental

91. A small number of scholars have used this phrase previously to describe women and men who challenge norms about sexual conduct and sexual orientation. *See, e.g.,* Kathryn Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality*, 57 UCLA L. REV. 1135, 1138 n.12 (2010) (discussing the feminist argument that society distinguished "respectable women," who included "middle class, sexually conforming women," and "other women," who included "working class and poor women, immigrants, and sexually nonconforming women"); Shapiro, *supra* note 12, at 646 (discussing judicial misapplication of the nexus standard to "sexually nonconforming parents," namely lesbian and gay parents).

92. This dynamic relationship resembles the process Hegel identified of defining the self in reference to the other. *See* G.W.F. HEGEL, *THE PHENOMENOLOGY OF MIND* 214-67 (J. B. Baillie trans., rev. 2d ed. 1949). *See also* G.W.F. HEGEL, *SCIENCE OF LOGIC* 761-77 (A. Miller trans., 1969).

93. *See* *Troxel v. Granville*, 530 U.S. 57, 58 (2000) (noting that if parent is fit then she is presumed to be acting in the best interest of the child and the State should not intervene); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (recognizing fundamental right of parent to be free in decisions regarding child's religious upbringing); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (finding a right of parents or guardians to "direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923) (recognizing "the power of parents to control the education of their own [children]" and describing a child's education as the "natural duty of the parent").

94. *See* *Harris v. Texas Dep't of Health & Prot. Servs.*, No. 13-96-202-CV, 1997 WL 33760712, at *3 (Tex. App. Apr. 3, 1997) (affirming termination of parental rights due to provision of "unsafe" environment for children, including instances of sexual abuse, such as having sex in front of children).

sexuality; and second, in the aspects of domestic and social life that courts have frequently viewed as traces of inappropriate parental sexuality.

The law of custody and visitation has overseen shifts in perceptions of sexual nonconformity over the past forty years. In dissolutions of opposite-sex marriages involving custody or visitation issues, heterosexual mothers' sexuality—either during the marriage (in the form of extramarital sexual conduct) or post-divorce (in the form of nonmarital sexual conduct)—was at issue more often in the 1970s, 1980s, and 1990s than it is today. The sexuality (in the form of sexual conduct or orientation) of lesbian and gay parents now attracts greater judicial attention in the divorce context relative to that of heterosexual mothers.

As I argue here, however, there have been important links between the legal construction of parental sexuality involving straight parents and gay and lesbian parents. Sexual salience is most often attributed to parent populations that depart from the gendered archetype of maternal sexual fealty—unmarried or formerly married gay and straight mothers and gay fathers. Sexual neutrality and salience, thus, police parental sexuality in accordance with a marital norm.

This Part first explicates the sexual neutrality attributed to married parents. It then provides an account of the sexual salience of parents outside of marriage as compared to the supposed sexual neutrality of parents within marriage, as seen through aspects of social and domestic life supposedly indicating sexuality. Third, this Part explores various harms that result from this neutering through dichotomized treatment of parental sexuality.

A. Construction of Sexual Neutrality

Custody and visitation law's approach to the intersection of parenting and sexuality favors a performance of parenthood that appears devoid of sexuality. This norm assumes that the process of parenting may occur apart from the varied aspects of life that constitute sexuality, including sex acts and activities and sexual desires, fantasies, and frustrations.⁹⁵ In other words, the law aims to disaggregate parenting and sexuality⁹⁶ through the view that parenting can and should be "sexually neutral."

The ideal of keeping children far removed from parental sexuality is socially contingent. It emerges, for example, against a backdrop of social

95. See discussion of "sexuality," *supra* Introduction.

96. This disaggregation corresponds with the failure of family law to recognize the intersectionality of parental sexuality. Parents, for example, are not just parents. They are also women, men, workers, immigrants, members of racial and ethnic groups, poor, wealthy. While parents, as a general matter, enjoy robust protection of their status as parents, they do not enjoy sexual rights as parents.

The absence of specifically designated parental sexual rights may be explained by the nature of parenthood. It is not solely an individual status, but arises from one's status relative to a child. The role of parents regarding their children, however, does not necessarily preclude the enjoyment of robust rights that parents might otherwise enjoy.

factors, such as spatial norms, culture, and wealth, that encourage and permit particular domestic arrangements in which to rear children. For instance, the common practice during the 18th century of “bundling” for warmth, pursuant to which entire families slept in the same bed, did not permit the physical distance more modern sensibilities take for granted.⁹⁷ Given such practices, it was not unusual for children to witness aspects of parental sexuality.⁹⁸

Parenting standards based on the perceived necessity of physical separation in the home between children and parents have come into being only in the 20th century. The “Standard American Homes” (SAH) campaign of the early decades of the century promoted a particular vision of domestic suburban life as the best setting in which to rear children.⁹⁹ But the recommended spaciouly laid-out homes with separate bedrooms and play spaces were not luxuries all parents could afford.

Norms and law look to married parents’ sexuality as exemplifying the ideal state of parenting apart from sexuality. In the types of parental evaluation that inform custody and visitation decision-making, married parents’ sexuality does not read legally as sexual.¹⁰⁰ In other words, married parents function as the neutral norm to the salient, unmarried Other.¹⁰¹

Recent developments in parenting trends have begun to favor approaches based on “attachment,” including co-sleeping with infants and children.¹⁰² Despite the potential this interaction poses for exposure to parental sexuality, I have yet to find a case in which married parents’ co-sleeping posed an issue. For those parents who do not want to risk children’s exposure, the common sense reaction is to abstain from sexual behavior during the period of co-sleeping. As I discuss below, current trends in intensive parenting and legal

97. See DAVID FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND* 78-79 (1972) (describing the practice of bed-sharing to stay warm).

98. *Id.* at 79-83.

99. See Paul C. Luken & Suzanne Vaughan, *Standardizing Childrearing through Housing*, 53 SOC. PROBLEMS 299, 305-18 (2006) (describing a Standard American Houses campaign consisting of three individual movements—The Children’s Bureau, The Own Your Own Home Campaign, and the Better Homes in America movement—that all promoted “a framework for how their children should be housed and how they should act in the home and for how the women should remedy or change their housing situations”).

100. See discussion *infra* Part III.B.

101. For discussion of the related hierarchical self/other dichotomy, see EDWARD W. SAID, *ORIENTALISM: 25TH ANNIVERSARY EDITION* 32 (Vintage Books ed., Random House 1979) (1994).

102. Dr. William Sears is often credited as the leader of the popular attachment parenting movement, which recommends co-sleeping with children. See WILLIAM SEARS & MARTHA SEARS, *THE ATTACHMENT PARENTING BOOK: A COMMONSENSE GUIDE TO UNDERSTANDING AND NURTURING YOUR BABY* (2001); see also *What AP Is: 7 Baby B’s*, ASK DRSEARS, <http://www.askdrsears.com/topics/attachment-parenting/what-ap-7-baby-bs> (last visited Feb. 12, 2012); Bruce Feiler, *Married, but Sleeping Alone*, N.Y. TIMES, July 23, 2010, <http://www.nytimes.com/2010/07/25/fashion/25FamilyMatters.html> (“Dr. William Sears, a leader of the “attachment parenting” movement.”); Matthew L. Williams, *Student Work: Let ‘Em Work, Let ‘Em Nurse: Accommodation for Breastfeeding Employees in West Virginia*, 111 W. VA. L. REV. 1017, 1019 n.14 (2009) (“Dr. Sears and his wife Martha are two of the leading proponents of the ‘attachment parenting’ theory.”).

assumptions of sexual neutrality interact in harmful ways to the detriment of parental fulfillment.¹⁰³

The explicit role of sexuality in constructing the legal institution of marriage,¹⁰⁴ however, reveals the socially-driven basis of married parents' status as "sexually neutral." Counterintuitively, while marriage institutionalizes sexuality—and indeed has traditionally required certain forms of sexuality—the sexual neutrality ascribed to married parents obscures their sexuality. For instance, as I discuss in the next section, in the context of custody and visitation, marriage performs a "curative" function by seeming to efface the sexuality of the heterosexual relationship at its core. I do not suggest that being labeled as sexually neutral means that married parents are not sexual or that the institution of marriage is defined in law as asexual. I argue, on the contrary, that to the extent the law views sexuality as posing harms in the parenting context, the concept of sexual neutrality privileges certain forms of sexuality by overlooking their sexual connotations as they might arise in parenting evaluations.

This effect is achieved, in part, by the assumption that, in marriage, sex is benignly procreative.¹⁰⁵ The "accidental procreation" argument against same-sex marriage presupposes a view of marriage as the appropriate venue for (intentionally or unintentionally) procreative sex.¹⁰⁶ The treatment of married parents' sexuality as sexually neutral, accordingly, flows from a "repronormative" view of married parental sexuality—that it is inevitably reproductive in nature.¹⁰⁷

103. See discussion *infra* Part III.C.

104. See discussion *infra* Part III.B.1.

105. Susan Appleton has observed that the "channeling" into marriage "sanitizes sex." Appleton, *supra* note 47, at 278-79.

106. This argument appears, for example, in the plurality opinion in *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006). The court concluded in this case that since sexual intercourse between men and women "has a natural tendency to lead to the birth of children" and since the legislature could find that such sexual intercourse is "all too often casual or temporary," the legislature could offer an "inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other." *Hernandez*, 855 N.E. 2d at 7. As described and critiqued by Edward Stein, the "accidental procreation" argument against same-sex marriage maintains that "the central aim of marriage law is to channel different-sex couples into stable living situations in order to best provide for any unplanned children." Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 419 (2009). See also Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 90 (2011) (observing that the "accidental procreation" argument pays a "back-handed compliment to gay and lesbian couples by deeming them too responsible for marriage" (quoting Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples are the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 24 (2009))).

107. Katherine Franke critiques legal feminism's "repronormativity," manifested in its assumption that most women become mothers without examination of the social forces that urge women toward this path. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001). This repronormative view of sexuality relates to the law's preference for particular types of sexuality over others. Despite the popular view of *Lawrence v. Texas* as a success for sexual autonomy, Laura Rosenbury and Jennifer Rothman critique the case's protection of sex as limited to that perceived as tied to emotional intimacy. Rosenbury & Rothman, *supra* note 17, at 835-49.

It is worth considering that one possible doctrinal explanation for the difference in legal treatment of married as opposed to unmarried parental sexuality may lie in the norm of marital privacy.¹⁰⁸ However, while cases like *McGuire v. McGuire* construct a narrative of nonintervention into the marital sphere, the law has remained interested in promoting certain models of sexuality. Marital privacy has not operated neutrally. In arguing that the law has undervalued female sexual pleasure, Susan Appleton has pointed to selective incursions into the so-called private realm in support of heterosexual male-centric sexual gratification.¹⁰⁹ This is further evident in the gendered ideal of parental sexuality demonstrated during the fault-based divorce regime.¹¹⁰

1. Effacing Parental Sexuality

Married parents' status as "sexually neutral" has proceeded from the traditional role of marriage in effacing parental sexuality and "curing" sexuality-based concerns about parenting.¹¹¹ Early cases during the "nexus" era demonstrate this sexual cure effect.

For example, in *Holmes v. Holmes*, the father sought a change in custody due to change in circumstance since the original custody award was entered, based on the fact that the mother "had engaged in extra-marital affairs."¹¹² The father pointed to the affairs she had when they were separated and also to extramarital affairs she had during her subsequent marriage.¹¹³ At the time of the case the mother was living unmarried with another man after her second marriage had dissolved.¹¹⁴

Critical to the trial court was the fact that the mother's goal was marriage and that this goal was achieved. The court observed that the mother planned to marry her boyfriend, who "was financially able and personally willing to adequately provide for her and her children" and that after she married, "she

108. See *Graham v. Graham*, 33 F. Supp 936, 938-39 (E.D. Mich. 1940) (refusing to enforce inter-spousal contract that varies from duties of marriage); *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (designating zone of nonintervention by holding that court may not enforce duties of marriage during intact marriage).

109. See *supra* note 47 for a discussion of Appleton's argument.

110. See discussion *supra* Part II.A. Jill Hasday has provided counter-narratives to related family law canons. She has argued that the common view that family law does not permit and enforce economic exchange in intimacy is inaccurate. Indeed, in intimate relationships like marriage, the law selectively enforces economic exchange in support of particular visions of marriage. Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 499-507 (2005).

111. See Jennifer E. Horne, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073, 2096-101 (1993) (discussing, in part, "remarriage as redemption" cases in which courts approved of parents remarrying because they viewed marriage as remedying parents' moral defects).

112. *Holmes v. Holmes*, No. CA 90-80, 1990 WL 162102, at *1 (Ark. Ct. App. Oct. 24, 1990).

113. *Id.*

114. *Id.*

would be able to stop working and stay at home with the children.”¹¹⁵ After the first hearing on the father’s custody modification petition, the mother married her boyfriend. The trial court subsequently denied the father’s petition to change custody to him because it viewed the problems about which he complained “cured.” The mother had married the man with whom she had been living, she was no longer working and could stay home with the children, and they all lived together in a new home.¹¹⁶

In *Holmes*, marriage redeemed the mother for her sexual faults—past extramarital affairs and living with a man without being married. The mother’s relationship with her now-husband presumably remained the same from a sexual standpoint—if they were in a sexual relationship before the marriage (although the case does not detail this, the father and the trial court seems to have assumed they were), then we have no reason to believe they stopped carrying on a sexual relationship once married. But in the mode of sexual neutrality, marriage effaced this sexuality, wiped out the nonmarital sexuality from two previous marriages, and secured the mother’s position as a proper custodian.

Leszinske v. Poole similarly exhibits the legal predisposition to view marriage as a remedy for parental sexual breaches. In this case, the mother entered into a sexual relationship with her uncle while married to her children’s father. She continued this relationship after the parties divorced. The father sought custody of the children on the grounds that the relationship could prove damaging to the children. The trial court indicated that the mother’s custodial fitness turned on whether she and her uncle married. They subsequently did so in Costa Rica; their residence state, California, recognized the marriage as valid.¹¹⁷

The conversion of the mother into a married parent obviated the sexuality-based concerns that the trial court had about the mother-uncle relationship. What had been a problematic performance of parental sexuality was no longer a danger in the marital context. Marriage effaced the mother’s troublesome sexuality.

2. *Performing Sexual Neutrality*

Regardless of whether married parents are actually more or less sexually active or sexual than unmarried parents, married parents’ “sexual neutrality” is defined by their seemingly nonsexual “performances” of parenting.

Judith Butler’s theory of gender “performativity” provides a useful framework for considering the construction of married parents’ sexuality in

115. *Id.*

116. *Id.* at *2.

117. *Leszinske v. Poole*, 798 P.2d 1049 (N.M. Ct. App. 1990).

parental fitness evaluations. Gender, according to Butler, is not something natural or otherwise pre-ordained, but something that is performed.¹¹⁸ Her theory of performativity seeks “to show that what we take to be an internal essence of gender is manufactured through a sustained set of acts, posited through the gendered stylization of the body.”¹¹⁹ “In this way,” she continues, “it show[s] that what we take to be an ‘internal’ feature of ourselves is one that we anticipate and produce through certain bodily acts, at an extreme, an hallucinatory effect of naturalized gestures.”¹²⁰

As Clare Huntington has asserted, despite the relevance of performativity to the family and family law contexts, family law scholars have largely overlooked this framework.¹²¹ In the context of family law, the “sustained set of acts” involved in the performance of parenthood includes those behaviors associated with sexuality, comprised of sexual conduct as well as sexual orientation. This performance includes acts and practices that comport (or fail to comport) with socially and legally accepted standards of parental sexuality.

The law of custody and visitation at the intersection of parenting and sexuality has preferred parents who perform “sexual neutrality,” parenting without appearing to display their sexuality. On one end of the spectrum are those putatively indiscreet parents who appear to “expose” their children to parental sexuality.¹²² On the other end are parents who seem to behave “discreetly.”¹²³

118. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1999).

119. *Id.* at xv.

120. *Id.*

121. Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. (forthcoming 2013) (on file with author). Huntington has identified this void and begun to fill it by examining the many ways in which the “family” and roles within the family are “performed” through legal and social pressure. Huntington helpfully identifies the areas outside of family law to which legal scholars have applied the tropes of performance. *Id.* (manuscript at 6) (“legal scholars have drawn upon performance literature to gain insights into the legal effect of the performance of race, sexual orientation, and gender, but have not engaged in a similar exploration of the performance of family.”).

122. Courts often cite concerns about displays of homosexuality to justify restrictions on custody or visitation. *See, e.g.*, *Weigand v. Houghton*, 730 So. 2d 581, 586 (Miss. 1999) (discussing father’s decision not to display affection with partner in front of child); *Lacey v. Lacey*, 822 So. 2d 1132, 1138 (Miss. Ct. App. 2002) (“overnight visitation with [the mother’s] girlfriend or visitation in the girlfriend’s home was detrimental to the children due to the children’s exposure to the sexual nature of the relationship between [the mother] and [her girlfriend].”); *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 285 (Mo. Ct. App. 1989) (quoting *G.A. v. D.A.*, 745 S.W.2d 726, 728 (Mo. Ct. App. 1987)) (“Even if mother remains discreet about her sexual preference . . . a parent’s homosexuality ‘can never be kept private enough to be a neutral factor in the development of a child’s values and character.’”); *Chicoine v. Chicoine*, 479 N.W.2d 891, 893 (S.D. 1992) (quoting *Kallas v. Kallas*, 614 P.2d 641, 645 (Utah 1980)) (“‘manifestation of one’s sexuality and resulting behavior patterns are relevant to custody and the nature and scope of visitation.’”); *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *3 (Tenn. Ct. App. 1988) (“This is the chosen [homosexual] lifestyle of the Mother, yet it is a situation that only a small percentage of adults can fully understand. The request that we expose a young, female child to this has caused us great concern.”); *Roe v. Roe*, 324 S.E.2d 691, 693 (Va. 1985) (upholding the lower court’s characterization of father’s sharing a bed with partner while child was home as “one of the greatest degrees of flaunting that one could imagine. It . . . flies in the face of society’s mores.”); *A.O.V. v. J.R.V.*, Nos. 0219-06-4, 0220-06-4, 2007 WL 581871, at *6 (Va. Ct. App. Feb. 27, 2007) (considering the extent to which the child was “exposed” to gay father’s relationship and holding that trial court did

Measures of discretion vary. For instance, lesbian and gay parents who have not lived as closeted have been perceived as inappropriately displaying sexuality.¹²⁴ In *J.B.F. v. J.M.F.*, the Alabama Supreme Court evaluated a trial court's decision to change custody from the mother to the father on the grounds that the mother was no longer keeping her relationship "discreet."¹²⁵ The court justified the custody change as based in part on the "change in the mother's homosexual relationship, from a discreet affair to the creation of an openly homosexual home environment."¹²⁶ According to the court, the mother's sin was not being a lesbian, but exposing this lesbian-ness to her daughter. The "openly homosexual environment" to which she exposed her child included the mother sharing a bedroom with her partner, the child occasionally sleeping with them in their bed, and kissing in the child's presence.¹²⁷

Cases concerning lesbian and gay parents resonate with early cases challenging sexually active heterosexual mothers' custody. These cases also revealed deep concern about performing parenthood in sexually revealing ways. Failure to conceal relationships with a sexual component was interpreted as a sign of moral unfitness. For example, the appellate court in the 1972 case of *Carmichael v. Carmichael* affirmed a trial court's transfer of custody from the mother to the father because the mother did not conceal her relationship with her "lover" from her children. Moreover, the court noted that the mother "had no regret. . . . and apparently feels it is perfectly proper for her

not abuse its discretion by granting joint custody to gay father while also placing restrictions on father's visitation; noting that father was "discreet" in his relationship and relationship did not have an "adverse impact" on child).

123. See *A.O.V.*, 2007 WL 581871 at *5 (finding father's homosexual relationship "discreet" where partner pretended to be a friend and partner never slept over during children's visits); *In re R.E.W.*, 471 S.E.2d 6, 8 (Ga. Ct. App. 1996) (finding that father carried on a discreet homosexual relationship based on his mother's testimony that she was unaware of her son's homosexual lifestyle until the initiation of custody proceedings); *Hodson v. Moore*, 464 N.W.2d 699, 700-01 (Iowa Ct. App. 1990) (finding that mother and partner were "discreet with respect to their sexual relationship and do not engage in any inappropriate behavior in [the child's] presence."); *Peyton v. Peyton*, 457 So. 2d 321, 324-25 (La. Ct. App. 1984) (finding the mother was carrying on a discreet relationship with her partner in front of the children); *M.A.B. v. R.B.*, 134 Misc. 2d 317, 323 (N.Y. Sup. Ct. 1986) (finding father's homosexual lifestyle "discreet, not flamboyant"); *Van Driel v. Van Driel*, 525 N.W.2d 37, 39 (S.D. 1994) (recognizing that while the mother and her partner were "affectionate and attentive toward the children," they remained "discreet about the sexual aspects of their own relationship."). See also COURTNEY G. JOSLIN & SHANNON P. MINTER, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER LAW* § 1:15 (2011) (discussing judicial emphasis on a homosexual parent's "discreetness" when ruling in favor of a gay or lesbian parent).

124. See, e.g., *L.A.M. v. B.M.*, 906 So. 2d 942, 947 (Ala. Civ. App. 2004) (negatively weighing a mother's cohabitating lesbian lifestyle in custody modification); *Scott v. Scott*, 665 So. 2d 760, 766 (La. Ct. App. 1995) (negatively weighing mother's homosexual cohabitating relationship, despite the fact that she never engaged in sexual activity while the child was home, because "primary custody with [a] homosexual parent w[ill] rarely be held to be in the best interest of a child"); *S.B. v. L.W.*, 793 So. 2d 656, 660-61 (Miss. Ct. App. 2001) (negatively weighing mother's cohabitating lesbian lifestyle in custody determination).

125. *J.B.F. v. J.M.F.*, 730 So. 2d 1190, 1191-92 (Ala. 1998).

126. *Id.* at 1194.

127. *Id.* at 1192.

children to know of their illicit relationship because some day they intend to marry.”¹²⁸

In examining parental discretion, courts have scrutinized a variety of aspects of social and domestic life. The law’s regulation of parents’ social and home lives has aimed to render parental sexuality less visible.¹²⁹ This objective, for example, has driven limitations on parents’ visitors,¹³⁰ appropriate visitor hours,¹³¹ parents’ bed and bedroom arrangements,¹³² and displays of affection.¹³³

B. Construction of Sexual Salience

Within the prevailing framework of parental sexuality, “sexual salience” is constructed in opposition to “sexual neutrality.” While married parents’ sexuality is effaced in assessments of parenting, parents constructed as sexually salient are seen as embodying sexuality. They read as acutely and inevitably sexual. Sexuality pervades their daily lives and encounters.

Sexual salience in the context of parenting corresponds with the hyper-sexualization of women of color, for instance, in the employment context. In discussing the landmark sexual harassment case *Meritor Savings Bank v. Vinson*, Tanya Hernández has argued that scholarly attention has failed to identify the interaction of race and gender in the framework the Court established for evaluating sexual harassment claims.¹³⁴ The inquiry into whether the sexual harassment Mechelle Vinson alleged was “unwelcome,” answered through an examination of dress and speech, Hernández asserts, “embeds unconscious historical presumptions about the wantonness of Black women into the legal doctrine.”¹³⁵

According to Hernández, Mechelle Vinson’s identity as an African-American woman normalized judicial scrutiny of her clothing, which “dovetail[ed] with stereotypic notions of the sexual availability of Black women.”¹³⁶ Psychological studies have shown that African-American women experience a “double-standard” in the form of greater scrutiny of their

128. *Carmichael v. Carmichael*, 265 So. 2d 668 (La. Ct. App. 1972).

129. Relatedly, Kenji Yoshino describes custody and visitation law’s treatment of lesbian and gay parents as requiring “covering” and as “a conversion regime.” KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 101 (2006).

130. See discussion, *infra* Part III.B.1.b.

131. *Id.*

132. See discussion, *infra* Part III.B.1.d.

133. See discussion, *infra* Part III.B.1.e.

134. Tanya K. Hernández, “What Not to Wear”—Race and Unwelcomeness in the Sexual Harassment Law: The Story of *Meritor Savings Bank v. Vinson*, in *WOMEN AND THE LAW STORIES* 277, 303 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

135. *Id.*

136. *Id.*

workplace clothing in a “racially charged” manner.¹³⁷ In the parlance of sexual salience, this scrutiny reflects the historical view of African-American women as pervasively sexual insofar as mundane aspects of life, such as clothing and shoes, take on a sexual charge.¹³⁸

This perception of all-encompassing sexuality has also been observed by scholars in the context of sexual orientation. As Kimberly Richman has observed, LGBT people have historically encountered the view that they “are overly sexualized and promiscuous to the point of depravity.”¹³⁹ Marc Fajer has similarly maintained that lesbians and gays have been subject to the “sex-as-lifestyle assumption,” based on the view “that sex is an element of every aspect of gay people’s lives.”¹⁴⁰ None of these approaches addresses the specific and important intersection of sexuality and parenting.

1. *Indicating Parental Sexuality*

The sexual salience of some parents is reflected in and reinforced by the very markers that courts treat as indicia of inappropriate parental sexuality. Ordinary aspects of life, indeed those that are mundane or even celebrated in a marital context, hold an intense sexual charge outside of marriage.

In this Part, I explore the legal and social construction of these indicia across the marital divide—living together, entertaining guests, sharing a bed or bedroom, displaying affection, and consuming pornography. Insofar as displays of sexuality are viewed as troublesome in parenting, then what is “not sex” within marriage is suddenly, outside of marriage, a sign of “sex.”

As these examples show, while critics of marriage often focus on the institution’s domesticating effect on sexuality,¹⁴¹ custody and visitation law

137. Nicole Therese Buchanan, *Examining the Impact of Racial Harassment on Sexually Harassed African American Women* 24 (May 2002) (unpublished Ph.D. dissertation, University of Illinois, Urbana-Champaign) (on file with author). One particularly telling example is the study participant who changed into a red dress after work before meeting her husband for a dinner date, after which a “White colleague told her, ‘You’re looking like you’re getting ready to go stand on the corner,’ implying that she looked like a prostitute.” *Id.* at 23.

138. This view that Hernández describes is consistent with historical, race-based differences in legal regulation of nonmarital sexuality. Katherine Franke has contrasted the Reconstruction Era’s “lax enforcement” against whites of marriage laws criminally penalizing nonmarital sexual conduct with the “uncompromising enforcement” of the same laws against African-Americans. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 292 (1999).

139. Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 *LAW & SOC’Y REV.* 285, 294 (2002).

140. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 *U. MIAMI L. REV.* 511, 538 (1992).

141. See, e.g., WARNER, *supra* note 41, at 96 (describing marriage as the way that the state “regulates and permeates people’s most intimate lives; it is the zone of privacy outside of which sex is unprotected”). Katherine Franke also focuses on protecting “affective sexual liberty outside of marriage” and raises concerns that the same-sex marriage movement threatens this extra-marital space. Franke, *Longing for Loving*, *supra* note 41, at 2688.

shows marriage disciplining sexuality even further by both constructing and obscuring its appearance.

a. Making Love

When unmarried parents—straight or gay—have sex, particularly at home, they have tended to raise the suggestion of inappropriate conduct in the presence of children. This contrasts with legal and cultural views of married parental sex, which is generally treated as occurring in the presence of children only when it actually occurs in their presence.

According to Courtney Joslin and Shannon Minter, in recent years, courts have less frequently found that recently discovered knowledge that a parent is lesbian or gay qualifies as a “sufficient change in circumstances” to modify custody or visitation.¹⁴² The past fifteen years, however, have witnessed the persistence of cases in which courts have held that “living in an ‘open’ same-sex relationship may be a sufficient change of circumstances.”¹⁴³ Sexual activity in the home with one’s partner has qualified as this type of “openness.”

For example, in the 2004 case of *L.A.M. v. B.M.*, the fact that a lesbian mother “admitted to having sexual relations with [her partner] while the child was in the home” was a relevant factor in an Alabama appellate court’s approval of a transfer of custody from the mother to father.¹⁴⁴ The record, however, showed that the court-appointment psychologist reported no difficulty in the relationship between the child and her mother’s partner.¹⁴⁵

Similarly, in the 1998 case *Pulliam v. Smith*, the North Carolina Supreme Court expressed similar concern about sexual activity in the home.¹⁴⁶ The state high court reversed the intermediate appellate court and held that the trial court was correct to modify the prior custody arrangement to transfer custody from the gay father to the mother based on the fact that the father “was regularly engaging in sexual acts [with his partner] in the home while the children were present” in the home.¹⁴⁷

With lesbian and gay parents seeming to stray farthest from the gendered paradigm of maternal sexual fealty, it is not surprising that their just being

142. JOSLIN & MINTER, *supra* note 123, § 1:26.

143. *Id.*

144. 906 So. 2d 942, 947 (Ala. Civ. App. 2004).

145. *Id.* at 945. Moreover, according to testimony in the trial court, the mother and her partner did not “flaunt” their relationship nor did they show “‘inappropriate’ affection to each other while in front of the child.” *Id.*

146. 501 S.E.2d 898, 903-04 (N.C. 1998).

147. *Id.* at 904. Other courts have modified custody based on the fact of lesbian or gay parents’ sexual activity in the home. See *Larson v. Larson*, 902 S.W.2d 254, 256 (Ark. Ct. App. 1995) (affirming modification of custody from lesbian mother to father based on mother’s “conduct,” consisting of “sexual relations [with same-sex partner] when children were at home” and child sometimes sleeping between mother and same-sex partner in bed).

sexually active while a child is in the home—but not in front of the child—can factor negatively in custody and visitation.

This treatment of lesbian and gay parents' sexual activity in the home resonates with earlier treatment of heterosexual mothers' sexual conduct while children were at home. In the particularly illustrative 1975 case of *Culbertson v. Culbertson*, the Nevada Supreme Court approved a trial court's change of custody from mother to father where the mother's boyfriend visited in her home and stayed in her bedroom.¹⁴⁸ This amounted, in the trial court's view, to the mother having continually engaged in "illicit" and "immoral" conduct in her home "in the presence of her children."¹⁴⁹

The sexually neutralizing effect of marriage on parental sex is evident in the 1998 case *K.T.W.P. v. D.R.W.*, which involved sexual relations occurring literally in the presence of a child.¹⁵⁰ In the case, a gay father living with his partner sought to enforce his visitation rights against his ex-wife.¹⁵¹ When the child visited his home, the father and his partner did not share a bedroom.¹⁵² After the divorce, the mother remarried. For six months, the mother, her new husband, and her daughter shared one bedroom in the mother's parents' house.¹⁵³ During this time, according to the mother and stepfather's testimony, they engaged in sexual relations while the child was asleep in the same room.¹⁵⁴ According to the stepfather, "any sexual activity occurred while the child was asleep and the 'bedroom was big enough where she wouldn't have seen us anyway.'"¹⁵⁵ When asked about the possibility of the child witnessing their sexual activity, the stepfather said, "Well, that's part of living with a man, sleeping with a woman."¹⁵⁶ The mother testified, "I would rather her see my husband and myself in bed together than [the father] and [his sexual partner]."¹⁵⁷

Rather than give the court pause on the underlying custody arrangement, the married couple's sexual relations in the same room as the child merely prompted the appellate court to affirm the restriction previously placed on both parents of not being allowed to have sexual relations in front of the child.¹⁵⁸

148. *Culbertson v. Culbertson*, 533 P.2d 768, 770-71 (Nev. 1975).

149. *Id.* See also *In re Marriage of Kramer*, 297 N.W.2d 359, 362-63 (Iowa 1980) (holding that trial court properly considered mother's nonmarital sexual relationship with male partner "in presence of her children" in determining that father of minor children was able to minister more effectively to long-term best interests of children).

150. 721 So. 2d 699, 701 (Ala. Civ. App. 1998).

151. *Id.*

152. *Id.* at 702.

153. *Id.* at 701.

154. *Id.*

155. *Id.*

156. *K.T.W.P. v. D.R.W.*, 721 So. 2d 699, 701 (Ala. Civ. App. 1998).

157. *Id.*

158. *Id.* at 703. The appellate court held that the trial court needed to specify the precise instances in which the mother denied the father his visitation rights or vacate its contempt order against the mother. *Id.* at 702.

The outcome was a strange one, given that even in a context of deference to trial courts, appellate courts have modified custody for nonconforming parents doing much less in front of children.¹⁵⁹

A marital default favoring married parents' sexual activity operates in tandem with traces of paternal sexual prerogative, even in the nonmarital context. While in *L.A.M.*, the lesbian mother's sexual activity in the home (but not in the child's direct presence) was reason for a custody change,¹⁶⁰ in the 2008 case *McCormick v. Ethridge*, a father's sexual activity with his fiancée, allegedly inadvertently viewed by the father's autistic child, received more lenient treatment.¹⁶¹

During the trial in *McCormick*, the father testified he did not believe his son actually witnessed any sexual activity as alleged, and, if his son did, the father argued, he was unaffected due to his inability to process information normally.¹⁶² Informed by the father's lay assessment of his child's cognitive ability, the trial court declined to modify custody,¹⁶³ although the ability to understand sexuality rarely factors into assessments of harm to children. On the contrary, children's failure to understand sexual orientation and conduct has been cited as a reason to assume harm from exposure.¹⁶⁴

In contrast with its treatment of parental sex outside of marriage, family law showcases heterosexual sex as a vital element of marriage. Sexual relations have been treated as an unspoken term in the marriage contract, a term that spouses cannot dispense with or regulate through private agreement.¹⁶⁵ Moreover, the refusal to engage in sexual relations can be a basis for a fault-based divorce,¹⁶⁶ while concealed impotence can be a ground for annulment.¹⁶⁷

159. See, e.g., *Lundin v. Lundin*, 563 So. 2d 1273 (La. Ct. App. 1990) (overturning sole custody award to lesbian mother and remanding for joint custody determination based on conclusion that best interest of the child required exposure to male and female gender roles).

160. 906 So. 2d 942, 947 (Ala. Civ. App. 2004).

161. *McCormick v. Ethridge*, 15 So. 3d 524, 528 (Ala. Civ. App. 2008).

162. *Id.*

163. *Id.* at 529.

164. See, e.g., *Lacey v. Lacey*, 822 So. 2d 1132, 1139 (Miss. Ct. App. 2002) (recognizing as detrimental the "daughter's confusion as to the nature of her mother's relationship with [her partner]").

165. See Twila Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 14-15 (2003) (recognizing that "the law considers sexual relations between spouses to be one of the 'essential' duties of marriage."); *Graham v. Graham*, 33 F. Supp. 936 (E.D. Mich. 1940) (illustrating the rule against interspousal contracts in an ongoing marriage); *Steinberger v. Steinberger*, 33 N.Y.S.2d 596, 597 (N.Y. Sup. Ct. 1940) ("Capability of consummation is an implied term in every marriage contract; potentia copulandi is of its very essence."); *Lang v. Reetz-Lang*, 488 N.E.2d 929, 933 (Ohio Ct. App. 1985) ("Consummation of the marriage was an inherent part of the marriage contract and was an implied condition of the agreement.");

166. See *Pfeil v. Pfeil*, 100 A.D.2d 725 (N.Y. App. Div. 1984) (holding that wife's refusal to have sex led to divorce). See also Sally Goldfarb, *Family Law, Marriage and Heterosexuality: Questioning the Assumption*, 7 TEMP. POL. & CIV. RTS. L. REV. 285, 289-90 (1998) ("In some jurisdictions, refusal to have sexual relations with a spouse can furnish the basis for divorce such as desertion, constructive abandonment, cruelty, or indignities.");

167. CLARK, *supra* note 36, at 102.

Sex holds a celebrated place in the law of marriage, and this privileging applies to married parents as well.

While unmarried parent sex may be viewed as “just sex,” any sex that might occur between married parents may read as more “intimate,” enjoying the benefit of the long-standing coupling of sex and intimacy in the law, as identified by Laura Rosenbury and Jennifer Rothman.¹⁶⁸

Marriage, most of all, enjoys the benefit of this coupling of sex with intimacy. And when it comes to parenting, the assumption that sex is intimacy reinforces the neutral presumption applied to married parents’ sexuality, in contrast with the view of unmarried parents’ sexuality as the functional equivalent of having sex in front of children.

b. Making a Home

What may be treated as “making a home” in the marital context has tended to raise red flags for parents who seek to share a home with another person outside of traditional marriage. In the past, it was not uncommon for courts to place limits on parents’ ability to live with nonmarital partners.¹⁶⁹ While this type of restriction is less common today,¹⁷⁰ restrictions on the presence of partners during custodial time effectively function as modern-day limits on living together.

Three cases decided in 2007 demonstrate this effect. In *Sirney v. Sirney*, a Virginia appellate court upheld a trial court’s prohibition of any person to whom a lesbian mother was not married from staying overnight during the mother’s visitation with her children.¹⁷¹ This restriction forced the mother’s same-sex partner out of the home that she shared with the mother.¹⁷²

Similarly, in *A.O.V. v. J.R.V.*, the Virginia appellate court affirmed a trial court’s imposition of a restriction on a gay father’s overnight guests to prohibit the father’s cohabiting partner from sleeping in the couple’s shared home when the children were in the care of their father, who had joint custody with the children’s mother.¹⁷³

168. Rosenbury & Rothman, *supra* note 17, at 810-11. According to Rosenbury and Rothman, the law has inappropriately entangled sex and intimacy, failing to account for the independent significance of each without the other. *Id.* at 836-38.

169. JOSLIN & MINTER, *supra* note 123, § 1:20 (citing Marcus C. Tye, *Gay, Bisexual, and Transgender Parents*, 41 FAM. CT. REV. 92, 99 (2003) (observing that “many standard custody agreements contain a stipulation that custody or visitation is contingent on there being no unmarried partners or nonblood relatives cohabiting in either parent’s house”)). Joslin and Minter discuss the unique burdens such restrictions placed on lesbian and gay parents, for whom marriage is not an option in the overwhelming majority of states. *Id.*

170. *Id.*

171. No. 0754-07-4, 2007 WL 4525274, at * 4-5 (Va. Ct. App. May 22, 2007).

172. *Id.*

173. No. 0219-06-04, 2007 WL 581871 (Va. Ct. App. Feb. 27, 2007).

Lastly, in *Holmes*, an Arkansas appellate court affirmed the trial court's transfer of custody from the lesbian mother to the father because the mother had violated a restriction prohibiting either parent from having overnight guests during custodial time.¹⁷⁴

This recent treatment of lesbian and gay parents' residential arrangements echoes earlier judicial approaches to heterosexual mothers' decisions to live with boyfriends outside of marriage. In these cases, mothers' living with men out of wedlock justified transfers of custody from mother to father or supported conditioning custody on termination of cohabitation.¹⁷⁵

To the extent that living together suggests a sexual relationship between a parent and her or his companion, one price lesbian and gay parents pay for living with others is the pressure to perform sexual neutrality by disclaiming sexual relationships with those whom they seek to share a home.¹⁷⁶

There are numerous reasons why a parent might share a home with another, even an actual or potential sexual partner, that do not pertain to sex. These include, but are not limited to, friendship, commitment, care, companionship, and romantic love. And while sex may indeed be a significant aspect of sharing a home for some unmarried parents, this motivation is assumed outside of marriage, while it goes unacknowledged in the marital context.

Indeed, in law and culture, the shared "marital home" is expected and celebrated, bearing little to no sexual connotation. For example, family law has assumed a shared marital home both historically and currently, as evidenced by the legal rules governing who bears decision-making authority over the couple's domicile.¹⁷⁷ Moreover, no-fault divorce requirements that couples live "separate and apart" for a period of time prior to dissolution presuppose a

174. 255 S.W.3d 482 (Ark. Ct. App. 2007).

175. See *Ketron v. Aguirre*, 692 S.W.2d 261, 263-64 (Ark. App. 1985) (ordering mother to discontinue living with man while not married in response to father's custody modification request); *Bell v. Bell*, 267 S.E.2d 894, 896 (Ga. Ct. App. 1980) (transferring custody to father upon showing that mother lived with her boyfriend); *S. v. S.*, 488 S.W.2d 663, 666 (Mo. App. 1972) (affirming removal of custody from mother who lived for several years with man without being married and asked him to leave only when former husband raised issue).

176. *Taylor v. Taylor*, 110 S.W.3d 731, 737-40 (Ark. 2003) (rejecting father's request for custody modification where lesbian mother disclaimed any sexual relationship with lesbian "roommate" and testified that she thought the "lesbian lifestyle" was "wrong"); *Hollon v. Hollon*, 784 So. 2d 943, 951 (Miss. 2001) (reversing trial court's award of custody to father where lesbian mother disclaimed sexual relationship with woman with whom she lived and eventually moved out of the home and in with her parents).

177. See *Crosby v. Crosby*, 434 So. 2d 162, 163-64 (La. Ct. App. 1983) (holding unconstitutional the requirement that a woman defer to her husband's choice of domicile); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 164 (1998) ("states have removed the vast majority of stereotype-ridden, sex-based duties and obligations under which, for example, . . . the wife was obligated to follow the husband's choice of domicile.").

shared marital home.¹⁷⁸ Lastly, the doctrine of marital privacy around which family law is organized celebrates the marital home as a place of refuge, domesticity, and nurture.¹⁷⁹ This construction of the marital home stands in contrast to seemingly sexualized environments inhabited by lesbian or gay parents living with same-sex partners or earlier heterosexual mothers living with male partners.

c. Entertaining

Restrictions on unrelated persons or guests in the home further demonstrate the sexualization of unmarried parents' social time in the home. Unmarried parents—both gay and straight—continue to face restrictions on their social time in their homes when their children are present. This regulation commonly takes the form of prohibitions of unrelated overnight visitors or partners during custodial or visitation periods.¹⁸⁰

In the 2008 case *Simmons v. Williams*, a Georgia appellate court upheld a custody order prohibiting either parent during the time of custody or visitation from having overnight guests of the opposite sex who are unrelated to the parent.¹⁸¹ In response to a challenge by the father, the court acknowledged the sexuality-oriented motivation behind the restriction: "The condition is clearly intended to preclude potential sexual relations by either of the parties with unwed partners in the presence of the children, a type of limitation within the discretion of the trial court."¹⁸²

While restrictions applying to both parents are common, lesbian and gay parents may still face visitor prohibitions applying only to same-sex partners. The 2007 cases *Sirney* and *A.O.V.*, both discussed above, are two such examples.¹⁸³ In each of these cases, the courts upheld restrictions specifically applying to lesbian and gay parents' partners.¹⁸⁴ Moreover, in *Hertzler v. Hertzler*, the Wyoming Supreme Court upheld a restriction preventing a

178. See *In re Marriage of Dennis D. Kenik*, 536 N.E.2d 982, 986-87 (Ill. App. Ct. 1989) (holding that living "separate and apart" as required by Illinois Marriage and Dissolution of Marriage Act does not require that the parties live under "separate roofs" but just live "separate lives").

179. See *Graham v. Graham*, 33 F. Supp. 936 (E.D. Mich. 1940); *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

180. See, e.g., *Simmons v. Williams*, 660 S.E.2d 435, 438 (Ga. Ct. App. 2008) (upholding custody order prohibiting parents from having overnight guests of opposite sex during time of custody/visitation); *Dilworth v. Dilworth*, 685 N.E.2d 847, 849-50 (Ohio Ct. App. 1996) (deeming appropriate custody provision limiting overnight stays of both parents' romantic partners); *Melton v. Bounds*, 553 So. 2d 614 (Ala. Civ. App. 1989) (same).

181. 290 Ga. Ct. App. at 438.

182. *Id.*

183. See discussion of *Sirney* and *A.O.V.*, *supra* Part III.B.1.b.

184. *Id.*

mother's same-sex partner from being present during the mother's visitation time.¹⁸⁵

Visitor restrictions reflect a view of parent interactions with same-sex or opposite-sex nonmarital partners as inherently sexual and, accordingly, inappropriate. The presence of a partner has been interpreted as "ostentatiously embrac[ing] conspicuously divergent lifestyles," as described by the court in *Hertzler*.¹⁸⁶ Restrictions on heterosexual parents prohibiting any member of the opposite sex who is unrelated to the parent¹⁸⁷ are even more over-inclusive, suggesting that women and men cannot just be friends.¹⁸⁸

Visitor restrictions like that in *Simmons* apply to both parents and, thus, are formally gender-neutral, as compared to earlier restrictions prohibiting only heterosexual mothers' male guests.¹⁸⁹ To the extent that mothers may be awarded greater proportions of custodial time, however, such regulation arguably affects them disproportionately.¹⁹⁰ Moreover, to the extent that mothers have been penalized in the past for leaving the home to spend time with romantic or sexual partners,¹⁹¹ restrictions on custodial parents' visitors in the home foreclose the only option available if these mothers want to be near their children and pursue a social or sexual life.

d. Sleeping Together

Beyond marriage's borders, the shared bed or bedroom has been constructed as a space of sexuality,¹⁹² far removed from the "sacred precincts"¹⁹³ of the marital bedroom.

185. 908 P.2d 946 (Wyo. 1995).

186. *Id.* at 951.

187. *See, e.g., Simmons*, 290 Ga. Ct. App. at 438.

188. Such was the subject of the 1989 popular film, "When Harry Met Sally," starring Meg Ryan and Billy Crystal. *WHEN HARRY MET SALLY* (Castle Rock Entertainment 1989).

189. *See, e.g., Parrillo v. Parrillo*, 554 A.2d 1043, 1045 (R.I. 1989), *cert. denied*, 493 U.S. 954 (1989) (prohibiting custodial mother from having overnight male guests in home when children present, upon non-custodial father's application); *Primm v. Primm*, 409 So. 2d 1288, 1290 (La. Ct. App. 1982) (holding that the trial court did not err in imposing the condition that the mother should not have the children with her at any time when she and a specific male friend visited each other).

190. Stephen J. Bahr, et al., *Trends in Child Custody Awards: Has the Removal of the Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247, 266-67 (1994) (finding that under "the best interest of the child" standard in Utah from 1970 to 1993, mothers were awarded custody 50 percent of the time, fathers 21 percent of the time, with the remainder resulting in joint or split custody).

191. *See Simon v. Calvert*, 312 So. 2d 284, 286-87 (La. 1975) (approving transfer of custody to father based on bartender mother's occasional visits to boyfriend's home after she finished nighttime work shift while children slept at home, attended by babysitter).

192. *See L.A.M. v. B.M.*, 906 So. 2d 942, 946-47 (Ala. Civ. App. 2004) (affirming change of custody to father based in part on concern about mother's same-sex relationship as evident by sharing of bedroom and having sexual relations while child is in the home); *S.B. v. L.W.*, 793 So. 2d 656, 657 (Miss. Ct. App. 2001) (affirming award of custody to father, taking into account mother's bisexuality to which child was exposed through mother's sharing of bed with woman and mother's explanation to child of her sexual preference); *Davidson v. Coit*, 899 So. 2d 904, 910 (Miss. Ct. App. 2005) (considering mother's sharing of a bed with same-sex partner as exposing children to mother's sexuality).

Sharing a bedroom has been treated, by itself, as an act of indiscretion. In the 1998 case *J.F.B. v. J.M.F.*, a father sought a custody modification once his ex-wife began sharing a bedroom with her same-sex partner.¹⁹⁴ According to the court, what was once a “discreet” relationship became an “openly homosexual environment.”¹⁹⁵

Relatedly, the act of sharing a bed has been interpreted by some courts as an example of exposing children to sexuality. For example, in the 2004 case *Davidson v. Coit*, a Mississippi appellate court affirmed a transfer of custody to the father due to the mother’s “expos[ure of her children] to “the sexual nature of her relationships with other women.”¹⁹⁶ This exposure consisted of sharing a bedroom and being found by a child watching a movie with her partner described as involving women kissing and nudity.¹⁹⁷

In contrast with the nonmarital bed, the marital bed and bedroom have enjoyed uniquely protected status both in law and culture, protected as a paradigmatic emblem of marital privacy. The Supreme Court’s treatment of the marital bedroom in *Griswold v. Connecticut* reflects and reinforces the hallowed status of the marital bedroom. When considering the constitutionality of Connecticut’s law outlawing the use or assistance in the use of contraception, the Court considered the impact of the statute’s application on married couples.¹⁹⁸

In *Griswold*, the marital bedroom, the room that the married couple presumably shared, played an important symbolic role, embodying a hallowed space that the law dare not enter. For Justice Douglas, writing for the majority, the question the case raised was nearly unthinkable: “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”¹⁹⁹

In the majority’s opinion, the marital bedroom—rather than representing unbridled sexuality—represents marriage’s venerated status. From the “sacred precincts of marital bedrooms,” the majority moves quickly to a discussion of the “right of privacy” surrounding marriage and the privileged status of marriage: “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or

193. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

194. 730 So. 2d 1190, 1191-92 (Ala. 1998).

195. *Id.*

196. 899 So. 2d at 910.

197. *Id.*

198. *Griswold*, 381 U.S. at 480.

199. *Id.* at 485-86.

social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”²⁰⁰

While *Griswold* has been widely discussed for its treatment of marriage,²⁰¹ it also displays the special place of the marital bedroom in constitutional law. In *Griswold*, the marital bedroom stands in for marriage. There is little to suggest that the celebrated and close identification of the shared bedroom with marriage is limited to non-parents. Indeed, *Griswold* made no such distinction. *Griswold*’s characterization of the marital bedroom indicates that, even for parents, the shared bedroom remains a privileged space, one that the law should not and need not enter. There is little, then, in *Griswold*’s construction of the marital bedroom that suggests troublesome sexuality.

e. Showing Love

While married parental displays of affection draw little attention and may even be culturally prized as signs of love, they have often drawn attention as sexual acts by parents outside of traditional marriage. For example, this sexual salience is evident in older cases examining the affectional displays of heterosexual mothers. The 1983 case *In re Marriage of Davis* noted that although the mother and her paramour testified that they were discreet as far as children were concerned, they admitted to other intimacies, such as caressing and kissing, in view of the children.²⁰² According to the court, these “intimacies” were sufficient to modify the decree of dissolution to give the father custody of the children.²⁰³

An “affection-as-sex” view also emerges in more recent changes in custody due to lesbian and gay parents’ displays of affection. In the 1995 case *Scott v. Scott*, a Louisiana appellate court upheld a trial court’s transfer of custody from a lesbian mother to a heterosexual father on the grounds that the mother’s “sexual lifestyle” posed harm to her children.²⁰⁴ The mother and partner maintained separate bedrooms and did not engage in sexual relations while the children were home.²⁰⁵ They did, however, “kiss, hug, embrace, and occasionally hold hands while in the presence of the children and others.”²⁰⁶ In

200. *Id.* at 486.

201. Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 424 (2006) (discussing *Griswold* as describing “the right to marry as a sacred and intimate ‘right of privacy older than the Bill of Rights. . . .’”) (quoting *Griswold*, 381 U.S. at 486)); Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1182 (2006) (discussing the Supreme Court’s “tone of reverence for sexual intimacy—that is, specifically, marital sexual intimacy—in *Griswold v. Connecticut*”).

202. 652 S.W.2d 324, 324 (Mo. Ct. App. 1983).

203. *Id.*

204. 665 So. 2d 760, 764 (La. Ct. App. 1996).

205. *Id.*

206. *Id.*

determining the existence of harm, the trial court considered whether “sex play occurred in [the children’s] presence.”²⁰⁷ While the mother and her partner did not engage in sexual activity while the children were home, the trial court maintained that “hugging, kissing, embracing, holding hands” had a “sexual underpinning” and was “sexually charged.”²⁰⁸

“Affection-as-sex” also manifests itself in positive outcomes for parents who, for whatever reason, refrain from affectional display. For example, in 2001, the Supreme Court of Tennessee lifted a restriction barring a lesbian mother from having overnight visitation when her cohabiting partner was present.²⁰⁹ The court distinguished the lesbian mother from those who “flagrantly flaunted” their relationships, noting that the mother and her partner “made no expression of ‘physical emotion or physical contact’ when [the child] was in the home,” “had not been sexually intimate in over a year,” “slept in separate bedrooms for three months prior to the hearing,” and called themselves “best friends” and “roommates.”²¹⁰

Similarly, in the 1996 case *In Interest of R.E.W.*, a Georgia appellate court removed the condition that a gay father’s visitation be supervised, noting that “[the father’s mother had] never observed any displays of affection between [the father and his partner] or anything to indicate they are more than just friends,” and that the father had testified to his commitment to “concealing the sexual aspects” of his relationship and “the fact of his homosexuality” from his daughter.²¹¹

Interestingly, even more recent cases suggest that sexually nonconforming parents face conflicting pressures both to suppress displays of affection and also to show affection. For example, in the 2000 case *Ulvund v. Ulvund*, a Michigan appellate court upheld placement in a married father’s custody based on the lesbian mother’s decision not to express affection physically in her child’s presence, as compared to the father’s shows of affection with his wife in their home.²¹²

Relatedly, failure to show affection has been interpreted as a failure to be an honest, open parent. In the 1999 case *Weigand v. Houghton*, the Supreme Court of Mississippi affirmed the denial of custody to a gay father in part

207. *Id.* at 766.

208. *Id.* at 764. This view of affectional displays is also evident in the 1998 case *J.F.B. v. J.M.F.*, 730 So. 2d 1190, 1192 (Ala. 1998) (upholding a change in custody from a lesbian mother to a heterosexual father based on the mother’s creation of an “openly homosexual environment,” including bedroom sharing, allowing her child to sleep in the bed with her and her partner, and kissing in the child’s presence). *See also* *Lundin v. Lundin*, 563 So. 2d 1273, 1277 (La. Ct. App. 1990) (granting more custodial time in joint custody arrangement to heterosexual father where lesbian mother’s “sexual preference is known and openly admitted, where there have been open, indiscreet displays of affection beyond mere friendship and where the child is of an age where gender identity is being formed”).

209. *Eldridge v. Eldridge*, 42 S.W.3d 82, 90 (Tenn. 2001).

210. *Id.* at 86-87.

211. 471 S.E.2d 6, 9 (Ga. Ct. App. 1996).

212. *Ulvund v. Ulvund*, No. 224566, 2000 WL 33407372, at *4 (Mich. Ct. App. Aug. 22, 2000).

because the father did not engage in “open sign[s] of affection” with his partner in his child’s presence. The court characterized the father as “merely retreating behind closed and locked door, hiding and secreting his own sexuality from [his child].”²¹³

Although a parent might feel forced to refrain from affectional displays in response to the “affection-as-sex” paradigm, *Ulvand* and *Weigand*, taken together, suggest an emerging countervailing model of parenting that requires open and overt physical affection in a heterosexual marital model. This standard, however, cannot be achieved by lesbian and gay nonmarital parents.

Cases penalizing displays of affection by sexually nonconforming parents, as well as those cases penalizing those who fail to comport with traditional, gendered marital norms, underscore the importance of such conduct in marriage and in marriage-based norms of parenting. The sexualization of nonmarital parents’ affectional displays contrasts markedly with conventional support for such demonstrations among the married. For example, modern marriage guides frequently advise marital partners to show and discuss their affection for one another.²¹⁴ And while the failure to show affection to one’s spouse has not necessarily served as a basis for divorce,²¹⁵ the warmth presumably underlying such displays has been perceived as integral to the paradigm of “companionate marriage” that emerged during the 19th century and early decades of the 20th century.²¹⁶

f. Seeking Inspiration

Although it is not necessarily a celebrated feature of married life, married parents’ engagement with pornography is legally invisible, functioning as

213. *Weigand v. Houghton*, 730 So. 2d 581, 586 (Miss. 1999).

214. See, e.g., JOHN M. GOTTMAN, JULIE SCHWARTZ & JOAN DECLAIRE, 10 LESSONS TO TRANSFORM YOUR MARRIAGE 114 (2006) (“Our research has shown that feelings of fondness and admiration are the perfect antidotes to contempt. When couples make a full, conscious effort to notice things they like about each other’s personalities and character, and to express that fondness out loud, their relationships typically improve.”); BARTON GOLDSMITH, EMOTIONAL FITNESS FOR COUPLES 47 (2005) (“In relationships, touching each other is one of the most powerful forms of communication. Touch heals and promotes emotional sustenance.”); JOHN M. GOTTMAN & JOAN DECLAIRE, THE RELATIONSHIP CURE 229-32 (2001) (listing specific actions couples should take to promote better emotional connections, including hugging, kissing, holding hands, kissing upon parting, and kissing upon reuniting).

215. *Azorr v. Azorr*, 403 P.2d 777, 777-78 (Or. 1965) (holding that husband’s “fail[ure] to show [his wife] any love or affection . . . cannot be properly characterized as cruel and inhuman treatment or personal indignities rendering life burdensome.”).

216. Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1021 (2000) (citing NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 156-59 (1987)). See also Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2144 (1996) (describing “vision of companionate marriage” characterized by “affect link[ing] household members, not authority”).

sexually neutral and failing to raise questions about parental fitness.²¹⁷ Parental encounters with pornography have tended to take on significance as a measure of parental fitness, only with regard to those who stray from gendered, marriage-based norms of parental sexuality.

Older cases demonstrate how courts, even while formally requiring a showing of harm to children's best interests, viewed participation in the creation of pornographic pictures, even those merely for personal enjoyment, as critical in custodial evaluations. For example, in the 1971 case of *Marchand v. Marchand*, the court expressed deep concern about the fact that, on one occasion, a divorced mother and her male partner had taken Polaroid snapshots of each other nude and performing certain sex acts.²¹⁸ The appellate court, in awarding custody of the children to the father, focused in particular on the "picture taking episode," which "demonstrate[d] a complete disregard for accepted moral standards."²¹⁹

Recent cases demonstrate the extent to which sexually nonconforming parents still face scrutiny of actions that bear more sexual salience outside of the traditional marriage model. For example, in recent cases, gay fathers have faced particular scrutiny for consuming pornography. In the 2009 case *Mongerson v. Mongerson*, a gay father with visitation challenged a visitation restriction permitting him weekly visitation with his children on the condition that he refrain from "expos[ing] the children to his homosexual partners and friends."²²⁰ The former wife argued that the visitation restriction was justified because one of the children had found a gay pornographic magazine in the father's home and because the father had engaged in extramarital affairs with men during their marriage.²²¹ While the father successfully defeated the visitation restriction,²²² *Mongerson* highlights the extent to which parents who

217. While contemporary marriage guides differ on the acceptability of pornography consumption within marriage, any concerns raised focus on the impact of pornography on the marital relationship, not on any children raised by married parents. Compare SHERRY AMATENSTEIN, THE COMPLETE MARRIAGE COUNSELOR 41 (2010) ("Liking porn isn't necessarily the end of Western civilization or even the institution of marriage. The husband's fondness for erotica becomes problematic if it hampers, or turns into a substitute for, a connection with his wife. He's definitely crossing the line if he's venturing into cybersex territory."); and PAUL COLEMAN, THE 30 SECRETS OF HAPPILY MARRIED COUPLES 99 (2006) (advising married couples to avoid certain types of pornography but "[p]urchase a sophisticated video on improving your love life . . . tastefully made [and] designed to show couples, very explicitly, new or imaginative ways to enhance their sex life."); with R. ALBERT MOHLER JR., DESIRE & DECEIT: THE REAL COST OF THE NEW SEXUAL TOLERANCE? 32 (2008) (arguing that "[p]ornography represents one of the most insidious attacks upon the sanctity of marriage and the goodness of sex within the one-flesh relationship."); and BARBARA WILSON, KISS ME AGAIN: RESTORING LOST INTIMACY IN MARRIAGE 79 (2009) (comparing the use of pornography in a marriage to acts of adultery by permitting other people, through visual images, to be involved in a couple's sexual relationship).

218. *Marchand v. Marchand*, 246 So. 2d 216, 217 (La. Ct. App. 1971). The issue came to light because the father found evidence of the snapshots in a wastebasket in the mother's bedroom when he was at her house picking his children up. *Id.*

219. *Id.*

220. *Mongerson v. Mongerson*, 678 S.E.2d 891, 894 (Ga. 2009).

221. BALL, *supra* note 10, (manuscript at 12-13).

222. *Mongerson*, 678 S.E.2d at 894-95.

depart from gendered marital norms of sexuality risk ongoing scrutiny of conduct that is otherwise mundane in the married parent context. As Lambda Legal Defense and Education Fund pointed out, in an amicus brief on Eric Mongerson's behalf, the restriction under which he parented was the equivalent of a "complete prohibition around all heterosexual people if a child inadvertently found his or her father's *Playboy* magazine."²²³ Given the dichotomization of parental sexuality, such a restriction is unimaginable.

2. *Maternal Sexual Fealty Redux*

In discussing the dynamics of sexual neutrality and salience across the marital divide, I do not mean to suggest that heterosexual mothers and lesbian and gay parents have experienced the law of custody and visitation in identical ways. Indeed, there are meaningful and obvious differences in the ways these parents' sexualities encounter the law in this context and beyond. My goal, in this discussion, has been to explore the link between the historical and contemporary treatment of heterosexual mothers and lesbian and gay parents based on traditional marriage.

Viewed together and across time, these various parents' experiences reflect the extent to which the law has privileged as sexually neutral exercises of parental sexuality that comport with the ideal of mothers who are sexually loyal to their husbands. This paradigm has rendered sexually salient at least three types of sexuality: parental sexuality outside of marriage, parental sexuality outside of heterosexuality, and heterosexual maternal sexuality outside of marriage.

The departures of lesbian and gay parents' sexuality from the norm of maternal sexual fealty are fairly straightforward. Lesbian and gay parents do not exercise sexuality in accordance with this gendered, marriage-based norm.

Moreover, at a deeper level, the relationship between lesbian and gay parents and gendered norms of parenting reflect conceptual connections between critiques of heterosexism and sexism. The historical relationship between the women's movement and the gay rights movement in this country reflect commitment to the idea that sexism and heterosexism were both part of a system of patriarchy.²²⁴ Moreover, the sex discrimination argument in favor of same-sex marriage²²⁵ finds some purchase in the theoretical view that

223. Brief for Lambda Legal Defense and Education Fund & Children of Lesbians and Gays Everywhere as Amici Curiae Supporting Appellant at 7, *Mongerson v. Mongerson*, 678 S.E.2d 891 (Ga. 2009) (No. S09F0132).

224. See POLIKOFF, *supra* note 3, at 47-48 (2008).

225. See Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 MINN. L. REV. 897, 952 (2010) (describing the "sex discrimination" argument for same-sex marriage insofar as "sex distinctions [in marriage law] amount to disparate treatment on the basis of sex").

heterosexism and sexism are sibling offspring of gendered conceptions of marriage.

Regarding the sexual salience of heterosexual mothers pursuing sexuality outside of marriage, a key question is whether the law has aimed to target such mothers, or whether these mothers just happen to be the ones positioned to receive the law's scrutiny. To put the question a little differently, is the norm of maternal sexual fealty really about women or is it just about those who happen to stand in these women's place?

Given that mothers have tended to face intense social and legal pressure to function as primary caregivers in opposite-sex marriages,²²⁶ it is particularly difficult to disentangle gendered cause from gendered effect. Feminist scholars, however, have long argued that social and legal views of mothers and their sexuality substantively differ from those pertaining to fathers.²²⁷ For example, Jane Murphy has written persuasively of traditional gender-based differences in judicial demeanor toward mothers' boyfriends as opposed to fathers' girlfriends.²²⁸ Moreover, case law up to the 1990s suggests gender-based differences in legal treatment of nonmarital or extramarital parental sexuality.²²⁹

226. See Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. (forthcoming 2012) (manuscript on file with author) (examining in detail social norms and legal structures that encourage marital partners to specialize in male breadwinner and female caregiver roles).

227. See, e.g., Bartlett, *supra* note 10, at 881 (noting how some appellate courts have found sexual discrimination in rulings where "mothers who cohabit[ated] outside of marriage . . . [were] penalized in ways fathers who cohabit[ated] outside of marriage [were] not"); Iglesias, *supra* note 10, at 980-81 (arguing "custody laws [have] become the vehicle through which state intervention is available to enforce maternal deference to paternal prerogatives and compliance with judicial norms of female sexual morality"); Becker, *Judicial Discretion*, *supra* note 10, at 651 (discussing a judicial bias against maternal sexuality outside of marriage); Becker, *Maternal Feelings*, *supra* note 10, at 175-77 (discussing a bias against maternal sexuality); Sack, *supra* note 10, at 303 (arguing "[f]or the purpose of determining parental fitness, it seems that judicially defined 'sexual misconduct' is treated as wholly irrelevant when perpetrated by a man, but entirely relevant (and often sufficient 'proof' of unfitness) when committed by a woman"). See also Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 788-89 (1988) (detailing "double standard of sexual morality" under which "men were expected to be sexually active before marriage and on occasion to engage in casual extra-marital sex," while "[w]omen were ordinarily denied such freedom and were subjected to harsh social penalties if they exerted sexual independence," such as being "labeled 'immoral' and ineligible for the respectable roles of wife and mother").

228. Murphy, *Legal Images of Motherhood*, *supra* note 10, at 699.

229. See, e.g., *Puzzouli v. Puzzouli*, No. CA 89-310, 1990 WL 32446, at *1 (Ark. Ct. App. Mar. 21, 1990) (awarding custody to father who had live-in girlfriend on condition of marriage and stating that child would benefit from "living in a home with his father, stepmother and stepbrother rather than simply his mother" because he would "be with a parent or stepparent rather than at a day care center") (quoting trial court); *Simmons v. Simmons*, 576 P.2d 589, 591-93 (Kan. 1978) (granting custody to father although both mother and father had engaged in extramarital relationships, based on father's subsequent marriage as supporting a more stable environment for the children); *Flourmoy v. Flourmoy*, 392 So. 2d 1096, 1098 (La. Ct. App. 1980) (granting custody to father although both mother and father had engaged in extramarital relationships, based on finding that father's relationship was more "discreet" than mother's relationship); *Ford v. Ford*, 419 S.E.2d 415, 417 (Va. Ct. App. 1992) (affirming father's joint custody despite his involvement in an adulterous relationship prior to final divorce decree and subsequent cohabitation with girlfriend).

Such differences may be explained, in part, by gender-based expectations about mothering and fathering as well as related norms about how childcare labor should be divided between men and women. As Murphy observed, based on case law in the 1990s, “[t]he court often views a mother’s new boyfriend suspiciously, perceiving him as a possible danger to the children or as a distraction for the mother . . . [whereas] a court may view a father’s new girlfriend as bringing stability to his life and as a source of child care.”²³⁰

Although custody cases concerning heterosexual mothers’ sexuality are much less common today than they were up to the 1990s, the norm of maternal sexual fealty has continuing relevance today. I discuss some ways this norm persists in the context of the “neutering harms” I identify in the next section.

C. Neutering Harms

The dichotomization of parental sexuality across the marital divide has produced two types of “neutered parents”: the first are those parents who have historically been perceived as sexually salient; the second are those who have been treated as sexually neutral.

Parents who have departed from marriage-based, gendered norms of parental sexuality have been “neutered” in the sense that the law has, historically, sought to regulate them into a metaphorical state of sexual incapacity and disempowerment,²³¹ insofar as some parents are forced to circumscribe those aspects of their lives that directly or indirectly bear on sexuality. Given the profound stakes in custody and visitation cases—parents’ access to their children—this regulation has resulted for many in fear, isolation, and loneliness.²³²

The neutering of sexually salient parents reinforces the marital, gendered norms at the core of the prevailing parental sexuality framework. Judges’ continued accession to parental sexuality norms rooted in marriage further entrench the privileged status of marriage in law and society as a principle means of allocating support for intimacy and caregiving.²³³

Moreover, even under a view of sexuality as distinct from intimacy,²³⁴ the law’s treatment of some parents as sexually salient and others as sexually

230. Murphy, *Legal Images of Motherhood*, *supra* note 10, at 766.

231. For discussion of definitions of “neutered,” *see supra* Part I.

232. Eric Mongerson, who successfully defeated his ex-wife’s challenge to his visitation rights based, in part, on his possession of a gay pornographic magazine, lived an isolated life, not introducing his children to his partner, and continually being afraid that his limited visitation would be restricted even further. BALL, *supra* note 10, (manuscript at 12). Mongerson told the Associated Press, “I was always afraid of the ‘What if?’ I felt isolated, alone. [My ex-wife] could go get friends, have them watch the kids, but I could never because I was gay.” *Id.* *See also* Maxwell & Donner, *supra* note 9 (discussing psychological harms resulting from “judicially-imposed closets” in custody and visitation cases involving lesbian and gay parents).

233. *See* FINEMAN, *supra* note 15, at 230-31.

234. *See* Rosenbury & Rothman, *supra* note 17.

neutral perpetuates a marriage- and gender-based “sexual double standard” that continues to inform constitutional jurisprudence regarding sexuality.²³⁵ If, as Kim Shayo Buchanan argues, the U.S. Supreme Court applies a “sex discount” in evaluating the constitutionality of gendered state regulation of the consequences of “illicit sex” (sex outside of marriage) that it does not apply when examining similarly gendered regulation “framed as limiting participation in education, the workplace, or civic life,”²³⁶ then the designation of some parents as “sexually salient” may produce negative consequences for sexually nonconforming non-parents as well.

Although the frequency of cases about divorced mothers’ sexuality has waned in recent years, the dichotomized approach to parental sexuality continues to inform law and policy. For example, the state’s specific interest in channeling mothers into particular types of sexuality persists in the legal regulation of poor, single mothers of color in the welfare system. Describing the surveillance experienced by these mothers, Michele Estrin Gilman argues that the state’s unwillingness to extend the same privacy norms afforded to other families flows from a view of single mothers as “deviant and dangerous for rejecting patriarchal sexual affiliation as the sole definition of family.”²³⁷

The failure to comport with a norm of having sex with a husband casts these mothers into the “public” space, deserving of scrutiny and investigation.²³⁸ The state’s unwillingness to confer privacy to single mothers on welfare is but one example of the continuing relevance of archetypal notions of maternal sexuality.

While married parents held up as standard bearers for sexual neutrality enjoy social and legal approbation, they also experience “neutering.” These parents are literally “neutered” in the archaic sense of the term, insofar as they stand “neutral”²³⁹ as compared to the sexually salient. The specific harm they

235. Kim Shayo Buchanan has argued:

The sexual double standard has been under sustained cultural challenge since at least the mid-twentieth century. Nonetheless, “the view that unchastity, in the sense of sexual relations before marriage or outside of marriage, is for a man, if an offense, none the less mild and pardonable one, but for a woman a matter of utmost gravity” remains far more vigorous and mainstream today than the now discredited notion that it is immoral for married mothers to work outside the home. Traditionally, legal rules governing sexual behavior, marriage, and divorce have enforced a heteronormative sexual double standard.

Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149, 1170-71 (2010) (quoting Keith Thomas, *The Double Standard*, 20 J. HIST. IDEAS 195 (1959)). See also LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 258, 272 (2006) (critiquing view of women as “sexual gatekeepers”).

236. *Id.* at 1149.

237. Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L.F. 25, 41 (2008). Single mothers on welfare have long experienced invasions of privacy aimed at rooting out inappropriate sexuality. These included “midnight raids” in the 1960s to enforce “man in the house rules” by “catch[ing] men sleeping in the homes of women receiving welfare.” Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 649 (2009).

238. *Id.*

239. For discussion of definitions of “neutered,” see *supra* Part I.

experience, however, is much like the metaphorical disempowerment and sexual incapacity visited upon their unmarried counterparts.

The concept of “sexual neutrality” proceeds from the assumption that it is possible and desirable for parents to conduct their parenting in a manner entirely devoid of sexuality. If parental sexuality comes through in the ordinary routines of daily life, as judicial indicia focused on the sexually salient seem to suggest, then, as a practical matter, “sexual neutrality” should not be easily achieved. The mere fact of parents and children living in together in close proximity would suggest some risk of “exposure.”

But the law has failed to apply the same scrutiny to married parents, assuming that they pass the sexual neutrality test. The seeming difficulty of parenting without the indications of sexuality deemed critical for the unmarried highlights marital bias in the standard for sexual neutrality. Cloaked in the expectation that their sex is reproductive and, thus, benign, the full range of married parents’ sexuality—ranging from the actual to the aspirational—goes ignored.

The legal invisibility of married parental sexuality in parenting evaluations impoverishes social and legal conceptions of parental sexuality. A standard of parenting disaggregated from sexuality thus endures unexamined. This has significant, potential effects on the development of a robust, intersectional understanding of parental sexuality of any sort—marital or nonmarital.

For example, an unquestioned sexual neutrality normalizes gaps between the actual and aspirational sexual lives of parents. Indeed, social scientists have collected evidence of married parent “bed death,” or declines in sexual frequency arising from parenthood.²⁴⁰ The ideal that parenting can and should be performed far from sexuality may reinforce parents’ sense that diminished sexual fulfillment is a necessary feature of successful parental life.

The persistence of a norm of sexual neutrality may also shape children’s expectations about proper parenting. For example, a psychological study of college students indicated that children routinely underestimated the amount of sexual activity of their parents.²⁴¹ Even more interestingly, the students in the study reported anxiety and depression when asked to estimate their parents’ level of sexual activity.²⁴²

240. Vaughn Call, Susan Sprecher & Pepper Schwartz, *The Incidence and Frequency of Marital Sex in a National Sample*, J. MARRIAGE & FAM. 639, 641 (1995). According to Call, Sprecher, and Schwartz, “Pregnancy and parenthood may also decrease opportunities for sex The birth of a child greatly alters the marital relationship through shifts in emphasis on spousal roles to intense investments in paternal and maternal roles. The intense care required by infants and young children increases fatigue, reduces the time couples can spend alone together, and decreases situations conducive to sexual activity. Some research shows that children, particularly young children, have a depressing effect on sexual intercourse frequency.” *Id.* (citations omitted).

241. See Annette M. Zeiss, *Expectations for the Effects of Aging on Sexuality in Parents and Average Married Couples*, 18 J. SEX. RES. 47, 53 (1982).

242. *Id.*

Children's expectations may dovetail with recently observed tendencies among certain segments of American society to engage in "intensive parenting."²⁴³ Sexual neutrality may bolster the expectation that good parenting requires wholesale self-denial.

Mothers, in particular, face intense social pressure to parent in accordance with a variety of often-competing norms.²⁴⁴ With the law of marriage channeling reproductive sex into marriage,²⁴⁵ sexual neutrality leaves little room for a conception of mothers' sexual agency that exists apart from to child-bearing and rearing. Indeed, the harsh condemnation of writer Ayelet Waldman for her 2005 New York Times essay in which she confessed to loving her husband (novelist Michael Chabon) more than her four children²⁴⁶ prompted her to write her book titled *Bad Mother: A Chronicle of Maternal Crimes, Minor Calamities, and Occasional Moments of Grace*. In it, Waldman details her personal history as a mother and reflects on social norms about mothering.²⁴⁷ Waldman's example suggests that mothers who embrace sexuality frankly—even in today's world of no-fault divorce and greater acceptance of nonmarital sexuality—suffer harsh social censure for departing from ideals of good motherhood. Relatedly, Sue Miller's book, *The Good Mother*, which was made into a major feature film, resonated in popular culture for the way the story embodies the clash between ideals of motherhood and ideals of sexuality.²⁴⁸

IV. DICHOTOMIES IN FLUX

To the extent that the categories of parents' sexual salience and neutrality have been forged in and through the institution of marriage, current shifts in family law and policy raise questions about the fluidity of sexual neutrality and sexual salience, as traditionally constructed. In other words, to what extent will parents whose sexuality was once treated as salient become perceived as

243. See, e.g., Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221 (2011) (critiquing the use of law to enforce the popular practice of intensive parenting).

244. See Sanger, *supra* note 10 (listing the many cultural demands placed on mothers as a group).

245. See discussion of reproductive sex, *supra* Part III.A.

246. See Ayelet Waldman, *Truly, Madly, Guiltily*, N.Y. TIMES, Mar. 27, 2005, § 9 at 11; see also Belinda Luscombe, *Ayelet Waldman: Bad Mother*, TIME, May 8, 2009, <http://www.time.com/time/arts/article/0,8599,1896848,00.html> (featuring interview with Ayelet Waldman, who confided, "I couldn't believe how many people hated me."); Allison Roberts, *Ambivalent About Motherhood*, CHI. TRIB., Feb. 15, 2006, http://articles.chicagotribune.com/2006-02-15/features/0602150218_1_mommy-track-ayelet-waldman-mother (discussing disapproving reception of Waldman on The Oprah Winfrey Show).

247. AYELET WALDMAN, *BAD MOTHER: A CHRONICLE OF MATERNAL CRIMES, MINOR CALAMITIES, AND OCCASIONAL MOMENTS OF GRACE* (2009).

248. SUE MILLER, *THE GOOD MOTHER* (1986).

neutral or vice versa? And are there situations in which these categories collide, or even collapse?

In this section, I explore four areas in which traditional concepts of parental sexual neutrality and sexual salience may have relevance in the future. These are same-sex married parents, cohabiting parent couples, polygamist parents, and nonconjugal parents. I aim in this section to raise questions rather than forecast how concepts of sexual neutrality and salience might interact with each of these scenarios. These contexts suggest fruitful areas of future inquiry because they each challenge, in different ways, traditional norms of marriage-based parenting.

An important distinction between the parents in these four contexts and the parents in the divorce and post-divorce custody and visitation cases discussed in Parts II and III is that the parents whose sexuality is in issue in the divorce cases are treated legally as single parents. This may be the case even though the divorced or divorcing parent's new partner functions as a parent in many respects. Indeed, as discussed in Part III, the dichotomization of parental sexuality, and the rendering of sexually nonconforming parents as sexually salient, have discouraged new partners' participation in parenting.²⁴⁹ For example, regulations like visitation restrictions enforce the sexual isolation of custodial parents and those exercising visitation. By doing so, sexual neutrality and salience play a role in constructing the category of "single parent." This category of single (or unmarried) parent, in turn, acts as the counterpoint to the category of "married parent," each reflecting a side in the parental sexuality dichotomy.

To the extent that the divorced and divorcing parents in the opposite-sex marriage context are single parents, then same-sex married parents, cohabiting parents, and polygamous parents may be expected to register as more neutral than the heterosexual and lesbian mothers and gay fathers who have traditionally been constructed as sexually salient. The non-single status of parents, however, may not necessarily predict the sexual valence of parents across these contexts. A more likely indication is how closely these parents hew to a marital model of parental sexuality.

A. Neutralizing Salience: Same-Sex Married Parents

The increased acceptance and availability of same-sex marriage suggests that same-sex married parenthood will also become more common than it is today. Today, a substantial number of children in this country are raised by

249. See *J.B.F. v. J.M.F.*, 730 So. 2d 1197, 1197 (Ala. Civ. App. 1998) (affirming visitation restriction against homosexual mother that forbade exposing the child to non-relatives, other than the general public); *Carrico v. Blevins*, 402 S.E.2d 235, 237 (Va. Ct. App. 1991) (upholding visitation restriction against heterosexual mother that forbade children from staying overnight while cohabitating partner was present).

same-sex parents.²⁵⁰ Indeed, the increased legal recognition of same-sex couples as parents has been a significant argument in favor of conferring marriage rights to same-sex couples.²⁵¹ The increased opportunity for same-sex married parenthood demands inquiry into how legal perceptions of the sexuality of lesbian and gay parents has shifted or may shift in the future.

One possibility is that lesbian and gay parents, once treated as sexually salient, will be perceived as sexually neutral, at least when parenting in the context of marriage. The critique of the mainstreaming of lesbian and gay sexualities through marriage²⁵² suggests that same-sex married parenthood may come to be treated as sexually neutral, in a manner similar to that experienced by opposite-sex married parents.

It is important to consider, however, whether and how the type (or possibilities) of parental sex factor into interpretations of parental sexual neutrality or salience. It would seem that same-sex married parents' actual or potential sexuality must be reconciled with norms of parental sexuality favoring reproductive sex channeled into marriage. In other words, can same-sex married parents enjoy the same kind of neutrality that opposite-sex married parents experience if the sex contemplated by same-sex orientation is not inherently reproductive? The answer would seem to depend on how much of sexual neutrality proceeds from marriage and how much from repronormativity.

Any construction of same-sex married parents as sexually neutral would be experienced relative to some other parents, perceived to be sexually salient. The relationship between sexual salience and sexual neutrality discussed above is a dynamic one. The seeming neutrality of married parents reinforces the apparent salience of unmarried parents and vice versa. If same-sex married parents come to be viewed as sexually neutral, one concern is that this will occur at the expense of unmarried parents—both straight and gay.²⁵³ Skeptics

250. THE WILLIAMS INSTITUTE, CENSUS SNAPSHOT 2 (2007) ("As of 2005, an estimated 270,313 of U.S. children are living in households headed by same-sex couples.").

251. See, e.g., *Lewis v. Harris*, 908 A.2d 196, 213 (N.J. 2006) (noting the court's recognition of same-sex parental rights to reinforce its holding that same-sex couples must be afforded the same benefits and privileges as provided by marriage). See also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003) (noting how the court has "responded supportively to 'the changing realities of the American family,' and has moved vigorously to strengthen the modern family in its variations" to reinforce its holding that excluding same-sex couples from marriage violated equal protection).

252. See Katherine Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006) (raising concern that same-sex marriage movement will affirm normative importance of marriage and distract from valuable efforts to explore other relationship options); WARNER, *supra* note 41, at 119 ("As long as people marry, the state will regulate the sexual lives of those who do not. It will refuse to recognize the validity of intimate relations—including cohabitating partnerships—between unmarried people or to grant them the same rights as those enjoyed by married couples . . .").

253. See POLIKOFF, *supra* note 3, at 7 (arguing that the use of marriage as a dividing line for benefits is detrimental and that "people in any relationship other than marriage suffer, sometimes to a level of economic and emotional devastation").

of the marriage equality movement have argued that the marriage movement threatens to reinforce the primacy of marriage as an institutional organizing principle of family law and life.²⁵⁴

The same critique may be leveled against the potentially privileged status of married parental sexuality. Assuming the non-reproductive sexuality of same-sex married parents is accepted as sexually neutral because it occurs in the context of marriage, then the sexuality of those who parent outside of marriage is rendered all the more salient.

The neutralization of some lesbian and gay parents through marriage still results in a variety of harms, from a sexual standpoint. The inclusion of same-sex married parents in the category of sexual neutrality leaves intact an ideal of parenthood divided from sexuality that parents encounter on a daily basis. Moreover, the harms encountered by those deemed sexually salient—those outside of marriage—would likely persist. The harms of a marriage-based dichotomization would likely arise unless marriage as an institution ceases to operate as the privileged organizing principle of family life and intimacy.²⁵⁵

B. Becoming Salient: Cohabiting Parents

An increasing number of children have been born over the last forty years to mothers who are not married.²⁵⁶ Studies are also showing that an increasing number of children born to unmarried mothers are actually born to cohabiting, heterosexual couples.²⁵⁷ This section briefly considers the traditional dichotomization of parental sexuality in the context of these heterosexual cohabiting parents.

254. See Kim, *Skeptical Marriage Equality*, *supra* note 11, at 42-47 (detailing feminist and gay rights scholars' critiques of marriage's privileged status).

255. For a discussion of possible shifts in the marriage-dominated legal and social landscape toward a more pluralistic model, see generally *id.*

256. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL VITAL STATICS REPORT, BIRTHS: FINAL DATA FOR 2008 1 (2010) (stating that "the percentage of births to unmarried women increased to 40.6 percent"); *id.* at 7 ("From 2002 through 2007, nonmarital births rose 26 percent . . . [with] unmarried births [in] 2008 r[ising] to 1,726,566 . . . a record high for the nation."); NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES 118 (2010) ("Nonmarital births have risen to approximately 40 percent of all births."); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, FERTILITY, FAMILY PLANNING, AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 8 (2005) (stating that, by 2001, "about 22 percent of all women 15-44 years of age have had a premarital birth with roughly equal percentages of women who have had a birth and never been married and those who had a birth before marriage").

257. See U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: FAMILY GROUPS (2007-2010) (charting a steady increase in "unmarried parent couples"—defined as couples having "at least one joint never married child under 18 years old"—from 1,474,000 to 1,765,000 households); CAHN & CARBONE, *supra* note 256, at 118 (stating that about 40 percent of nonmarital births are to cohabitating couples); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, FERTILITY, FAMILY PLANNING, AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 50 (2005) (charting a steady increase in all women, 17-44 years of age, who have ever given birth to their first child while cohabitating with the father: before 1985 - 9.2 percent of women; 1990-1996 - 13.4 percent of women; 1997-2001 - 15.8 percent of women).

Cohabiting heterosexual parent couples may be viewed on one hand as less sexually salient than unmarried parents. Susan Frelich Appleton has observed that “family law takes as its paradigm the couple or the pair.”²⁵⁸ One might assume that cohabiting parents exercise their sexuality principally within the confines of their coupled relationship. To the extent that the sexual neutrality of married parents has resulted from their “coupled” status, cohabiting parents may be viewed as relatively more sexually neutral than unmarried parents not in a cohabiting relationship.

On the other hand, the greater availability of same-sex marriage, while it opens the opportunity for increased sexual neutrality for lesbian and gay parents, could reinforce the sexual salience of cohabiting parents, both gay and straight. Although cohabiting parents enjoy the social privilege of being coupled, they may continue to face the marital norm for parental sexuality.

Indeed, recent critiques of same-sex marriage’s effect on norms of parentage suggest a “new illegitimacy” emerging in family law and policy. With the emergence of same-sex marriage, some courts seem to have pulled away from the trend in recognizing functional parenthood and have opted, instead, for legal status-based approaches to determining parentage, such as marriage and civil unions.²⁵⁹

This delegitimization of the children of unmarried lesbian and gay parents could suggest the persistence of sexually salient views of parents in nonmarital relationships—whether gay or straight. As same-sex marriage becomes more prevalent, it is worth inquiring into possible differences in judicial views of same-sex married parents’ sexuality and that of nonmarital parents. This could help frame discussion about the sexual neutrality and salience of all cohabiting parents.

Although the sexual conduct of cohabiting heterosexual parents might conform to the repronormative and heterosexual ideal of traditional marriage, it obviously falls outside of the traditionally neutralizing confines of marriage. This prompts questions of whether and how cohabiting heterosexual parents might be viewed as sexually neutral in ways similar to married parents. If the persistence of marriage norms in notions of functional equivalence is any indication,²⁶⁰ it is possible that cohabiting parents will face the pressure to conform with marital norms in daily life to neutralize the salience of their sexuality. In *Braschi v. Stahl Associates*, the court’s inquiry into the “reality of

258. Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 11 (2008) [hereinafter Appleton, *Parents by the Numbers*].

259. See, e.g., Debra H. v. Janice R. (2010), 930 N.E.2d 184 (N.Y. 2010) (holding that lesbian co-parent was second legal parent of child because women had entered into civil union during pregnancy, rather than because she had functioned as child’s parent). For discussion of the “new illegitimacy” trend illustrated by this case, see Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER & SOC. POL’Y & L. (forthcoming 2012) (manuscript on file with author).

260. Case, *supra* note 8, at 1164-65.

daily life” included an examination of the same-sex couples’ finances, interactions with the outside world, and legal and benefits arrangements, to determine whether the couple deserved legal entitlement under New York City’s rent control laws.²⁶¹ In effect, the court examined how closely the couple hewed to marital norms.

If *Braschi* is any guide, then one possibility is that increasingly prevalent heterosexual cohabiting parent couples will face continued pressures to conform with marital norms to be perceived as sexually neutral. In the context of caregiving, one relevant marital norm might be the specialization of one marital partner in market work and another in childcare work.²⁶² To the extent that cohabiting parent couples “act” married, this functional equivalence may pass through to assessments of parental sexuality. Conversely, the failure to comply with marital norms of daily life, such as those indicated in *Braschi*, may result in continued penalties for nonmarital parental sexuality. Such penalties would include the perception that cohabiting parent couples are sexually salient as compared to married parents or as compared to cohabiting parents who perform their union in more conventionally marriage-like ways.

Historically, the term “cohabitation” has described heterosexual, sexually involved couples living together without being married.²⁶³ If same-sex marriages become more prevalent, the concept of cohabiting same-sex parent couples will likely emerge more forcefully. The social and legal significance of unmarried same-sex couples parents’ sexuality likely depends, in large part, on the relative status of marriage as compared to other forms of family and intimacy.

C. Conflating Neutrality and Salience: Polygamous Parents

The increased visibility of polygamy through recent media and legal accounts suggests another context in which to consider sexual neutrality and salience.²⁶⁴ The constitutional challenge recently brought by reality television polygamist Kody Brown and his four wives prompts inquiry into whether the construction of married parents’ sexuality as neutral and that of unmarried parents as salient is predicated on the fact of legal marriage or on a dyadic model of parentage.²⁶⁵

261. 543 N.E.2d 49, 53-54 (N.Y. 1989).

262. For a discussion of this gender-based marital norm in opposite-sex marriage and the possibilities for transformation of this norm in same-sex marriage, see generally Widiss, *supra* note 226.

263. See Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 311-14 (2000).

264. See *Sister Wives* (Puddle Monkey Productions & Figure 8 Films 2010); *Big Love* (Anima Sola Productions & Playtone Productions 2006-2011); Complaint, Brown v. Herbert, No. 2:11-cv-00652-CW (D. Utah July 13, 2011), [hereinafter Complaint, Brown v. Herbert].

265. Complaint, Brown v. Herbert, *supra* note 264.

Although past custody cases involving polygamous parents observe that the practice of polygamy alone is insufficient to deny custody,²⁶⁶ norms of sexual neutrality and salience can potentially influence assessments of children's best interests.

Kody Brown is legally married to only one of his wives, but he and his wives have expressed a belief that they are all spiritually married.²⁶⁷ The *Brown* case calls for future discussion about whether prevailing standards concerning parental sexuality are based on the number of parents a child has. This discussion would further recent scholarly discourse on numerosity norms in the law of parentage.²⁶⁸ If one parent has been traditionally deemed too few when evaluating parents from a sexual standpoint, is three too many? The concepts of sexual salience and neutrality offer a framework in which to evaluate the legal and social treatment of polygamous parents through the prism of sexuality.

D. Eschewing Neutrality and Salience: Platonic Parents

Finally, an alternative model of parenting that departs from the marriage-based model is one based in nonconjugal connection. Such proposals aim to disaggregate parenting and sexual relationships.²⁶⁹ Jessica Feinberg has argued that the adoption system should allow two individuals in a close, but non-sexual friendship to adopt a child together.²⁷⁰ Angela Mae Kupenda has argued that the law should more robustly permit adoption within African American communities by adults connected through bonds other than marriage, such as close friendship or kinship.²⁷¹ Kupenda's model draws on a tradition in

266. *Sanderson v. Tryon*, 739 P.2d 623, 627 (Utah 1987).

267. Complaint, *Brown v. Herbert*, *supra* note 264.

268. Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47 (2007) (critiquing prevailing doctrine's enforcement of rule that child not have more than two legal parents and advocating legal recognition of existing practices of "community parenting"); Appleton, *Parents By the Numbers*, *supra* note 258, at 14 (discussing a "rule of two" or norm of "bi-parentage" in prevailing legal views of the appropriate number of parents for a child).

269. Jessica R. Feinberg, *Friends as Co-Parents*, 43 U.S.F. L. REV. 799 (2009); Angela Mae Kupenda, *Two Parents Are Better than None: Whether Two Single, African American Adults—Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703 (1996).

270. Feinberg, *supra* note 269, at 802.

271. Kupenda, *supra* note 269. Kupenda's work resonates with other calls for greater legal protection of kinship-based families and friendship. See Sacha M. Coupet, *Neither Dyad Nor Triad: Children's Relationship Interests Within Kinship Caregiving Families*, 41 U. MICH. J.L. REFORM 77 (2007) (arguing that a rights-based framework insufficiently protects children's relationship interests in kinship caregiving families); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007) (arguing that law's maintenance of division between "family" and "friendship" frustrates the goal of gender equality). Although it lies beyond the scope of this Article, a future important area of inquiry is how the social and legal construction of parental sexuality interacts with nonparent caregiving. A departure point for this discussion would be Melissa Murray's work on the "networked family," in which she identifies and theorizes families' "private infrastructure[s] of care" that include nonparental

African-American families of “extended family or shared parenting,” in which multiple adults share the role of parent.²⁷² This approach would allow unmarried adults to enjoy the fulfillment of parenting and help remove African-American children from the foster care system.²⁷³

The platonic parenting model has failed to take hold because of the continued assumption that sexual relationships between adults are relevant to parenting. The 2007 case *Adoption of Garrett* suggests this norm at work.²⁷⁴ In *Garrett*, the court denied an adoption petition filed by a biological mother and her brother, refusing to extend the recognition of nontraditional families that had previously been afforded to unmarried heterosexual couples and same-sex couples in the context of adoption, although the biological father had consented.²⁷⁵

Even though sibling relationships might endure over conjugal ones, the court refused to recognize the mother and her brother as parents to the child.²⁷⁶ According to the court, in each of these instances in which courts had recognized nontraditional families, the couple seeking adoption were “the functional equivalent of the traditional husband-wife relationship.”²⁷⁷ *Garrett* suggests a variety of assumptions about parenting by two adults—that it is usually done by two adults who are having sex, that it should be done by two adults who are having sex, and if two adults are parenting together, then they must be having sex. What’s most fascinating about *Garrett* is that these assumptions turn what very well may have been an entirely nonsexual relationship into a sexual one by virtue of the parenting relationship.

Garrett, and the model of nonconjugal parenting it suggests, challenges the traditional dichotomization of parental sexuality by seeming entirely to sidestep sexuality. Platonic parents force us to consider to what extent parenting is constructed fundamentally as an exercise in sexuality. Does the law fail to recognize platonic parents in any sort of meaningful way precisely because these parents’ relationship is fundamental nonsexual? Indeed, the fault-based divorce regime’s focus on mothers’ adherence to particular gender-based sexuality dictates suggests that good parenting involved some kind of sexuality.²⁷⁸

caregivers. Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 388 (2008).

272. Kupenda, *supra* note 271, at 712.

273. *Id.* at 706, 708-09.

274. *Adoption of Garrett*, 841 N.Y.S.2d 731, 732 (Sur. Ct. 2007).

275. *Id.*

276. *Id.* at 733.

277. *Id.* at 732.

278. See discussion *supra* Part II.A.

CONCLUSION: THOUGHTS ON A MORE UNIFIED VISION OF PARENTAL
SEXUALITY

The marriage-based dichotomy of sexual neutrality and sexual salience produces a variety of harms. Although parental evaluations in the custody and visitation contexts no longer view sexual orientation and conduct as determinative factors, formally speaking, these norms continue to shape social and legal understandings of sexual conduct and harm. Because evaluations of parental sexuality under the nexus standard have generally and historically occurred in the context of heterosexual mothers and lesbian and gay parents, the nexus standard, as applied, projects the message that the sexuality of sexually nonconforming parents requires special scrutiny.

Identifying the dichotomized treatment of parental sexuality is critical to better applications of modern law on parental sexuality in the context of custody and visitation. Even though judges are instructed to identify harm and the ALI advises to focus only on conduct (rather than orientation), the dichotomized treatment of parental sexuality highlights how difficult it is to determine what “conduct” even is. The distinction between conduct and the context in which that conduct arises is blurry at best. As I have discussed, the lives of those who depart sexually register legally as pervasively sexual, and are thus more prone to be viewed as conducted in a sexual manner. A greater expanse of life, indeed even the most mundane aspects of life, look like sexual conduct for the sexually salient.

Family law must address this slippage between conduct and context. Requiring a showing of harm as a result of sexual conduct or of sexual orientation leaves in place relative biases about parental conduct and comportment rooted in the dichotomized treatment of parental sexuality. These thoughts are admittedly preliminary, as this Article’s main contribution lies in theorizing the treatment of parental sexuality even in an era of modern reform. I suggest, however, that one way of addressing this problem would be for the ALI to provide clearer instruction of what constitutes sexual conduct for purposes of child placement decisions. Certainly any standards for what constitutes “conduct” should account for the gendered, marital, and sexual orientation-based biases that inhere in the legal constructions of sexual salience and sexual neutrality. For example, the ALI would be wise to acknowledge the historically biased assumption that conduct is sexual among the sexually nonconforming. Accordingly, conduct that would not be viewed as sexual in a marital context should not be assumed to be sexual by virtue of its occurrence in the life of a sexually nonconforming individual.

By exploring and articulating the legal relationship between sexuality and norms of parenting, I hope for more nuanced understandings of parental sexuality to produce better legal and social results for parents, children, and

families overall. This deeper insight is critical to more attentive resolutions of custody and visitation disputes. At stake more broadly, however, is also an effort to formulate a model for parenting that more robustly integrates meaningful adult-directed sexuality within a context of successful parenting.

This theory of the law's dichotomized approach to parental sexuality also assists in charting future areas of discussion in areas of family law and policy that raise questions about parental sexuality. With family law and life changing dramatically, the concepts of sexual neutrality and sexual salience can inform and shape dialogue about how best to achieve the goals of equality and pluralism in family law.

To the extent that society continues to choose to discourage the introduction of nonmarital partners into the home of parents, this discussion of parental sexuality invites deeper consideration of the forces that drive so-called single parents to develop relationships with third parties. To the extent these forces are social and economic, one possibility is to revisit our system's privatization of family support through marriage and explore further options for a more robust state role in enabling families to thrive. I leave this discussion for another day.

