2013

Sexual Orientation of Fatherhood

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THE SEXUAL ORIENTATION OF FATHERHOOD

Dara E. Purvis

2013 MICH. ST. L. REV. 983

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INTRODUCTION

The last forty years have seen a dynamic and ongoing shift in the shape of American families. The stereotypical traditional family, headed by a married, heterosexual couple, financially supported by a breadwinner husband, and supported in the home by a homemaker wife and mother, now makes up fewer than one in five families.1 There are many ways in which the social pattern has shifted away from this template. Much of the change has been away from the breadwinner/homemaker pairing completely, either because the family is headed by single or divorced parents instead of a heterosexual married couple or because a majority of mothers now work full or part-time.2

A reversal of the previous norm—breadwinner and homemaker, but with the genders switched—is much less common. The 2008 Census found 5.1 million stay-at-home mothers, but only 158,000 stay-at-home fathers.3 A 2012 count found a significantly higher number of such fathers—189,000—but even the higher total is less than 4% of stay-at-home parents.4

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3. See Beth A. Burkstrand-Reid, “Trophy Husbands” & “Opt-Out” Moms, 34 SEATTLE U. L. REV. 663, 668 (2011). Burkstrand-Reid points out, however, that the number of stay-at-home parents is not defined clearly, making attempts to count numbers of stay-at-home parents imprecise at best. Id. at 666-68.

The majority of such fathers are partnered with a woman. Some number of stay-at-home fathers, however, are part of a same-sex couple—and as the count of same-sex marriages and parents increases, so too will stay-at-home dads partnered with a breadwinner dad.

Such families obviously broaden societal understandings of what makes a family. A first-level contradiction is to the stereotypes of gays and lesbians as uninterested in raising children. Stay-at-home gay fathers, however, also counter stereotypes about men and fathers more generally because they challenge assumptions about gender roles as well as sexual orientation.

Deborah Widiss has pointed out that same-sex marriages offer new understanding of how gender norms affect household bargaining, as gendered economic and social pressures affect any different-sex couple’s decision as to breadwinning versus homemaking. Women are viewed as more natural caregivers than men. Even in the same occupation, women are almost always paid less than men. A woman’s decision that she be the spouse to stay home as primary caretaker of children, therefore, might be her autonomous choice, but it could also be based on a comparison of her wages with the cost of childcare or an assumption that she would do a better job as parent due to her gender.

Similarly, previous evaluations of the parenting skills of gay men generally took place in comparison to heterosexual parents. Legislatures debated the fitness of gay parents in the abstract when considering whether to allow homosexuals to adopt, and judges assessed whether a father dating another man post-divorce from a woman should have custody or visitation rights with his biological children, but in such contexts, the alternative presented was heterosexual parenting, either by the hypothetical alternative

8. See U.S. BUREAU OF LABOR STATISTICS, BLS SPOTLIGHT ON STATISTICS: WOMEN AT WORK 7 (2011), available at http://www.bls.gov/spotlight/2011/women/pdf/women_bls_spotlight.pdf; see also June Carbone & Naomi Cahn, *The End of Men or the Rebirth of Class?*, 93 B.U. L. REV. 871, 876-77 (2013) (discussing, *inter alia*, a study showing that gender pay gap among physicians cannot be explained by further distinctions within the profession such as “specialty choice, practice setting, work hours, [or] other characteristics”). The gender pay gap seems to increase along with wages: although some studies find women earning equal or even higher salaries than male counterparts in low-paying service industries, in general the more educational qualifications a woman secures, the less she earns when compared to her male peers. See Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 975-76 (2011).
9. See *infra* Part III.
adoptive parents or a biological mother challenging her ex-husband for custody. Decisions against a gay prospective father might have been about gender in part, but explanations focused explicitly upon sexual orientation.

Today, however, as barriers to nontraditional parenthood fall and recognition of same-sex marriage expands, it is likely that family courts will be faced with custody battles between two men. In such cases, sexual orientation's power has been removed in that there is no heterosexual alternative to either potential custodial parent. How will courts assess such disputes? And if a male couple has chosen to have one breadwinner and one homemaker parent, to what extent might such parents affect stereotypes of gay relationships? Will gay stay-at-home fathers change societal perceptions of fathers more generally?

In this Article, I examine how same-sex fathers affect the perception of heterosexual caretaking fathers—and by extension, could affect the perception of heterosexual non-caretaking mothers. I conclude that gay stay-at-home fathers offer a provocative opportunity to broaden societal views of men and caregiving more generally, and argue that greater recognition of parents who counteract gender stereotypes—even where the recognition might arguably lessen women’s rights in family law—ultimately helps women as well as children and nontraditional parents. Part I discusses fathers, particularly stay-at-home fathers, the practical problems fathers face combining work and caregiving responsibilities, and the conceptual difficulties they find in being recognized as caregivers. Part II outlines masculinities theory as it applies to fathers and the “feminine” work of caregiving. Part III explores how gay stay-at-home fathers, by breaking more than one rule of masculinity at the same time, may push the boundaries of masculinity to encompass caregiving work performed by fathers of all sexual orientations.

I. FATHERS

Although counts of stay-at-home parents of either gender are imprecise, it seems clear that the small numbers of stay-at-home fathers are growing. The most recent census data found that in the last decade the proportion of at-home fathers has nearly doubled, “from 1.6% to 3.4% of all stay-at-home parents.”


11. See infra Part III.

Even the larger number remains a tiny proportion of an already-small group of American families. But there is evidence that working fathers are taking on more caregiving responsibilities than before. For example, in 2011, about one-third of fathers whose spouse held a job outside the home reported providing regular care to their children. Additionally, 2.5 million men reported in the 2011 Census that they were single fathers.

Society has often viewed such fathers with skepticism at best. Even in the context of a progressive decision, at least one Supreme Court Justice apparently reacted with similar shock. In the 1975 case *Weinberger v. Wiesenfeld*, the Supreme Court heard a challenge to federal law giving additional benefits to widows, but not widowers, who were caring for minor children. The case, brought by then-ACLU attorney Ruth Bader Ginsburg, was decided without dissent in favor of the widower father in a decision written by Justice Brennan. When Brennan circulated his draft opinion, Justice Blackmun marked his copy with editorial commentary about caregiving fathers such as the plaintiff with question marks and exclamation points. At one point in the draft, Brennan noted, “Here, Stephen Wiesenfeld was not given the opportunity to show, as may well have been the case, that... had his wife lived, she would have remained at work while he took over care of the child.” Blackmun wrote in the margin, in apparent disbelief, “‘WOW!’”

The stark shock at the concept of a caregiving father is largely gone today, but fathers still face practical difficulties in combining caregiving and traditional breadwinner roles. Fathers who try to combine work and caregiving responsibilities face significant problems taking time off from work. A recent article by Stephanie Bornstein outlined various unsuccessful claims brought by men under employment laws such as the Family Medical Leave
Act who faced termination or other adverse employment actions in response to requests for time off. The claimants commonly allege that supervisors told them that as men, they should not be responsible for their children:

The examples abound: An airline maintenance parts foreman who sought intermittent FMLA leave to care for his newborn was told to let his wife take care of the baby because he “ha[d] a shop to run.” A police officer who had taken FMLA leave for the births of his three children was passed over for promotions given to lower-ranking officers multiple times; supervisors had repeatedly derided him in front of his peers, including one who said, “Congratulations for taking the most time off for having a baby and not actually having the baby.” An accountant who asked for FMLA leave for the birth of his child was told he could not take leave if his employer was “really busy” and that he did not have the same rights to leave as his female colleagues. When an equipment operator’s wife, step-daughter, and infant son all developed serious medical conditions and the operator requested FMLA leave, a supervisor asked why the mother or “real father” of his step-daughter could not take care of her—she had brain cancer. And when a lumber company manager trainee requested FMLA to care for his sick father, his supervisor warned the trainee he would be “cutting his own throat” if he took the leave; when the trainee did, he was fired.

Although such examples are particularly dramatic, societal expectations about who provides caregiving strongly affect assumptions about which employees will or should take leave from work. The Supreme Court recognized the power of such expectations in *Nevada Department of Human Resources v. Hibbs*, noting that “[s]tereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave.” Even if an employer might not formally deny male employees leave, expectations have strong soft force. For example, in a recent survey, although a substantial number of fathers reported using flexible working hours to some extent, the authors noted that a significant proportion said they made such arrangements informally. The authors speculated that one explanation might be that men were discouraged by “corporate cultures” from using formal flexible work arrangements, and so men felt pressured to use either informal arrangements or none at all.

While policies and regulations regarding general caregiving leave are gender-neutral, paternity and maternity leave are not. Men rarely have the

21. See Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 Hastings L.J. 1297, 1300, 1323-25 (2012) (arguing that unsuccessful claims brought under the FMLA and similar leave laws are also claims of sex discrimination and, thus, also violate Title VII).
22. *Id.* at 1323-24 (footnotes omitted).
25. *See id.*
same leave available to them as women upon the birth or adoption of children—one 2001 study found that only 10 to 15% of law firms and Fortune 1000 companies offered the same parental leave to mothers and fathers.\textsuperscript{26} Obviously a woman who has just given birth needs leave not only for child-care, but also for her own medical recovery—but the medical complications of pregnancy and delivery do not explain why maternity and paternity leave are still different if a child is adopted, nor the extremely short amounts of time available to new fathers. Perhaps taking a cue from the widespread assumption that men do not need paternity leave, new fathers return to work very quickly. A recent study by the Boston College Center for Work and Family found that fathers took very little time off of work after the birth of a child: a mere 5% took more than two weeks off and 1% more than four weeks.\textsuperscript{27}

Difficulties in combining employment and caregiving responsibilities may actually push some men into becoming stay-at-home fathers instead of working parents. In an incisive analysis of news coverage of stay-at-home fathers, Beth Burkstrand-Reid points out that family-unfriendly policies may push men out of the workforce, as only one parent can be the "ideal worker" who never needs time off to provide caregiving.\textsuperscript{28}

Such difficulties keeping employment may combine forces with existing blows to fathers’ income. It is clear that economic downturns are associated with an increase in the number of male caregivers. During the economic recession of the late 1980s, census data showed a significant increase in the number of fathers taking care of preschool-age children, but by 1993, as the recession abated, the numbers decreased to previous levels.\textsuperscript{29} The current recession has had an even stronger effect, in part because workers in traditionally male occupations have suffered greater numbers of layoffs than workers in traditionally female service jobs.\textsuperscript{30} In a sharp contrast to previous patterns, 40% of American households derive the majority of their financial support from income earned from a female.\textsuperscript{31} The relative economic strength

\textsuperscript{26} Kessler, \textit{supra} note 5, at 45-46 (citing \textsc{Deborah L. Rhode}, \textsc{Am. Bar Ass’n}, \textsc{Balanced Lives: Changing the Culture of Legal Practice} 18 (2001), available at http://womenlaw.stanford.edu/pdf/balanced.lives.pdf).

\textsuperscript{27} Harrington, Van Deusen & Fraone, \textit{supra} note 12, at 6.

\textsuperscript{28} Burkstrand-Reid, \textit{supra} note 3, at 673.

\textsuperscript{29} See Kessler, \textit{supra} note 5, at 46 (citing \textsc{Lynne M. Casper}, \textsc{U.S. Census Bureau, My Daddy Takes Care of Me! Fathers As Care Providers} (1997), available at http://www.census.gov/prod/3/97pubs/p70-59.pdf).


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of American women factors into families’ decisions as to caregiving: in a qualitative survey of stay-at-home fathers, nearly half of the sample answered a question as to why they became the at-home caregiver by explaining that their wives earned a significantly higher salary.32

Private employers or supervisors unwittingly reinforcing stereotypes about fathers’ caregiving responsibilities may pressure fathers to choose between caregiving full-time and being a model employee with no caregiving responsibilities. But governmental reinforcement of the same stereotypes has a much more dramatic effect, such as if a judge deciding custody similarly assumes that fathers provide for children through income rather than care.

An early and extreme example of how such stereotypes work explicitly is provided by a 1998 custody case in Florida. The case, Young v. Hector, has entertainingly colorful facts: at the time of their marriage, the husband worked as an architect and the wife as an attorney.33 The husband’s architecture work was initially very successful until the recession of the late 1980s hit, and in 1989 the family (now with two daughters) moved to Florida, where the mother began a well-paid job at a law firm.34 While the mother’s income continued to climb, reaching over $300,000 per year, the father’s employment prospects crashed and burned.35 Not only did he fail to secure employment as an architect, but he also abandoned traditional work entirely and spent significant periods of time “pursuing buried gold in New Mexico on a treasure hunt.”36

After the mother told the father that she wanted a divorce, however, the father stopped leaving on extended treasure-hunting expeditions and took on significant parenting duties.37 As the court acknowledged, he “started and led one of the children’s Brownie troop, coached one of the children’s soccer team, regularly volunteered at the children’s school, and [took] the children to doctor and dentist appointments.”38

Both parents fought over physical custody of the children and alternated victories at trial. The mother received primary custody before the trial court,39 the father successfully argued on appeal that he had been the primary caretaker of the children and should receive custody,40 and the mother secured a rehearing en banc reversing the appellate court’s judgment and

32. See Rochlen et al., supra note 12, at 198.
34. Id.
35. Id. at 1154-55.
36. Id. at 1160.
37. Id. at 1161.
38. Id. at 1155.
39. Id. at 1156.
40. Id. at 1157-58.
reinstating the initial trial court decision. The full custody decision and subsequent appeals are complex, dealing with complicating factors such as the amount of childcare provided by a nanny, long-term patterns of care between the two parents, and reports by a guardian ad litem as to the emotional volatility of the father.

It is obvious, in other words, that the ultimate resolution of the case is likely correct. But even if the result is right, some of the trial court’s reasoning was problematic. In an exchange about the nanny’s responsibilities, the judge asked the father, “Maybe I’m missing something. Why don’t you get a job[?]” Similarly, the mother’s attorney criticized the father in briefs filed before the court for choosing to do nothing “economically productive.” It is hard to defend the economic choices of a father who sought buried gold in the deserts of New Mexico, but at the same time, as the dissent pointed out, “It is extremely unlikely that any circuit judge in Florida would have asked the same question of the mother of young children whose husband was then earning a substantial annual income.” Surely assistance from babysitters or nannies does not mean that a stay-at-home parent is not the primary caregiver of a child and is a mere economic drain on the family.

Similarly, a 1998 North Dakota custody case pitted a female Air Force officer against a stay-at-home father. Both parents were found to be fit, although again the decision was complicated by difficult facts, including the mother’s treatment for alcohol abuse and the father’s failure to pay child support for, or to maintain a relationship with, a child from a previous marriage. One factor the trial court considered—albeit not as a dispositive one—was whether the father served as primary caretaker of the child. The court found that the stay-at-home father was not a primary caretaker, because the mother could engage in significant co-parenting “[o]n her days off, and in the evenings.” Again, although the ultimate disposition of the case may well have been correct, it is difficult to imagine a judge finding that a stay-at-home mother was not the primary caretaker of her child be-

41. Id. at 1158.
42. Id. at 1161-63.
43. Id. at 1161.
45. Young, 740 So. 2d at 1176-77 (Nesbitt, J., dissenting).
46. See id. at 1178.
48. Id. at 582.
49. Id. at 583.
50. Id.
cause the breadwinner father could co-parent on the weekends and evenings.

It is worth noting that, contrary to the preceding analysis, modern custody reforms are often criticized for overstating the significance of relatively minor caregiving acts by working dads. The bar for paternal involvement is so low, in other words, that reading the occasional bedtime story is treated as a significant, even an exceptional, achievement in fathering duties. But these conflicting effects speak to the same stereotype: that mothers are the caregivers and fathers provide income. Both dismissal and overenthusiastic praise of the caregiving father indicate a "man bites dog" quality to the father who tucks his child in at night.

This unease with the picture of a caretaker dad may explain inconsistencies in fathers’ rhetoric and action. Fathers themselves exhibit conflicting attitudes towards caregiving: they claim to want more parental responsibilities, yet rarely follow through. As Michael Selmi summarized in the context of parental leave, “if there is anything universal in worldwide patterns relating to parental leave, it is that men proclaim a much greater desire for leave than they appear willing to take.”

Custody requests are similarly inconsistent: in surveys asking divorcing fathers what they would like as a custody arrangement, about one-third of the fathers say they want sole custody, and another third say they would like joint custody with the mother. But only 12% of divorcing fathers actually ask for sole custody, and only 6% ask for joint custody. One explanation of the conflicting desires and behavior of fathers can be drawn from masculinities studies, to which the next Part turns.

II. MASCULINITIES

Masculinities theory posits that gender is largely socially constructed and examines the dominant norms of what it means to be masculine. The


54. Id. (citing Maccoby & Mnookin, supra note 53, at 99-100).

field initially grew out of feminist examinations of power and was first situ-
ated in sociology, but has since expanded both to focus less on power dy-
namics between men and women and into other fields such as the law. 56

Masculinities can inform exploration of any legal field, but is particu-
larly informative in the realm of family law. 57 Nancy Dowd, for example,
has conducted groundbreaking work examining legal conceptions of father-
hood, explaining that masculinities add "a consideration of the barriers men
face with respect to fatherhood as social/cultural and economic." 58

One of the central contributions of masculinities is that part of the
hegemonic power of masculinity is in telling men what they should not do:
chiefly, don't be a woman, and don't be gay. 59 Dowd expands this, particu-
larly the admonition to not act like a woman, into more specific rules about
what fathers should be.60 Fathers should be breadwinners. 61 Fathers avoid
feminine activities, which includes caregiving. 62 Fathers (and men gener-
ally) believe in hierarchy rather than collaboration, so fathers do not share
equally with mothers in the duties and labor of parenthood. 63

Some further explanation of these rules helpfully delineates the "prob-
lem" of stay-at-home dads. First, fathers are breadwinners. Work in the
marketplace is a key component of masculinity, not just because it is in con-
trast to the domestic sphere of the home, but also because many other mas-
culinity rules (particularly establishing that men are constantly in competi-
tion with one another for a better hierarchical place) are constructed at
work. 64

A man's worth as a father is as a provider. David Blankenhorn, a po-
litically conservative family theorist and advocate, posits the model of the
"Good Family Man," who is a family man because he financially supports
his wife and mother to his children.65 A man's success is assessed by his
income or other material gains through his economic work, rather than ful-

56. See id. at 208.
57. See generally MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH
(Frank Rudy Cooper & Ann C. McGinley eds., 2012).
59. Id. at 208-09.
60. See Nancy Dowd, Fatherhood and Equality: Reconfiguring Masculinities, 45
61. Id. at 1050.
62. Id.
63. See id.
64. See Ann C. McGinley, Work, Caregiving, and Masculinities, 34 SEATTLE U. L.
REV. 703, 708 (2011).
65. See Linda J. Lacey, As American as Parenthood and Apple Pie: Neutered Moth-
(reviewing MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY
AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); DAVID BLANKENHORN, FATHERLESS
AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995)).
filling caregiving duties. As Frank Rudy Cooper explains, being a breadwinner for one's family fulfills the competitive nature of masculinity:

The indicia of manhood—money, power, women, and so on—are scarce resources; you can always have more, and they gain their value from the fact that other men are denied them. To resolve one's anxiety over masculine esteem, then, men compete to outdo other men in collecting indicia of manhood.

A loving wife who takes care of the (ideally large) home you provide for her, who drives your children to soccer practice in the oversized SUV you bought her, is visible, tangible proof of your success as a masculine head of household.

Furthermore, the economic role of breadwinner conveniently precludes any domestic caregiving labor. Where mothers must consider topics such as work-life balance and how they will fulfill both their work and domestic duties, the primary responsibility of a breadwinning father is to double down his commitments at work in order to be a better provider for his increased number of dependents. As outlined above, fathers who devote time and energy to domestic duties are “losing” in marketplace competition, as they are (or are perceived as) less committed to their work responsibilities. The father who voluntarily chooses to engage in caregiving is thus going above and beyond in a way that helps to explain the occasional overemphasis on relatively small duties performed by fathers.

Second, men define themselves by not doing things that are feminine—whatever those things may be. As Michael Kimmel evocatively summarized, “As young men we are constantly riding those gender boundaries, checking the fences we have constructed on the perimeter, making sure that nothing even remotely feminine might show through.” What actions count as “feminine” need not conform with reality, yet almost immediately after birth little boys begin classifying what is appropriately masculine and what is inappropriately feminine. In a hilariously telling anecdote in her book Delusions of Gender, Cordelia Fine relates the comments of a married

66. See Joan Williams, From Difference to Dominance to Domesticity: Care As Work, Gender As Tradition, 76 CHI.-KENT L. REV. 1441, 1445 (2001); see also Nancy Levit, Feminism for Men: Legal Ideology and the Construction of Maleness, 43 UCLA L. REV. 1037, 1073 (1996).


68. Dowd, supra note 60, at 1058.


70. See Dowd, supra note 60, at 1061.

pair of psychologists who tried raising their children Jeremy and Emily in as gender-neutral a manner as possible.\(^7\) Other children intervened:

"[O]ur son Jeremy, then age four, . . . decided to wear barrettes to nursery school. Several times that day, another little boy told Jeremy that he, Jeremy, must be a girl because 'only girls wear barrettes.' After trying to explain to this child that 'wearing barrettes doesn't matter' and that 'being a boy means having a penis and testicles,' Jeremy finally pulled down his pants as a way of making his point more convincingly. The other child was not impressed. He simply said, 'Everybody has a penis; only girls wear barrettes.'"\(^7\)

Of course, once such children reach adulthood, for them, taking care of children is one of the clearest examples of women's work.\(^7\) The presumption that childcare was women's work arose from stereotypes about women's nature as more suited to domestic labor. An early scheme of custody decisions known as the tender years doctrine asserted that, at least for young children, a mother's love and nurturing was more important and beneficial than any care a father might provide.\(^7\) A Wisconsin court in the 1920s explained the presumption in poetic language:

For a boy of . . . tender years nothing can be an adequate substitute for mother love—for that constant ministration required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love. She alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental, and the law should recognize it unless offset by undesirable traits in the mother.\(^7\)

Although the tender years doctrine and accompanying explicit gender prejudgment has thankfully faded into obscurity, the power of the stereotype remains.\(^7\) And the stereotype is self-fulfilling. As Naomi Cahn points out, although caregiving "[m]other-work is not necessarily a fundamental part of every woman's identity," it is now understood as women's work, and women are pressured or drawn into it.\(^7\) As women are expected by default to perform childcare, men are similarly expected not to—and the cognitive dissonance of behaving counter to those roles makes men uncomfortable.\(^7\)

\(^7\) See Dowd, supra note 55, at 239.
\(^7\) Jenkins v. Jenkins, 181 N.W. 826, 827 (Wis. 1921).
\(^7\) See, e.g., Mezey & Pillard, supra note 1, at 286 ("[T]here is still considerable cultural and material resistance to direct caregiving and domestic work by men.").
\(^7\) See Mezey & Pillard, supra note 1, at 288-89.
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This discomfort leads not only to resistance to performing "women's work," but also denial even if it occurs. For example, Joan Williams has written about blue-collar men who refused to explain an absence from work to their bosses if the absence was due to childcare responsibilities, even though the refusal to explain their absences meant the men were subject to discipline or even termination.\(^{80}\)

As one stay-at-home father explained to the *New York Times*, taking on women's work is a near-death blow to masculinity.\(^{81}\) As he put it, "It takes one's manhood, chews it up, spits it out and does it again . . . . You really need a strong marriage and confidence. I don't have a lot of friends who could do this."\(^{82}\)

How do such rare specimens cope? And what about a man who is laid off, or watches his salary shrink as his wife's grows, such that economic pressures push him towards women's work? One coping strategy is to masculinize the care work, bridging the dissonance between gender and caregiving work.

Ann McGinley has written about how men cope with feelings of inferiority "by engaging in hypermasculine performances."\(^{83}\) In the employment contexts McGinley studies, such performances are triggered by things like being confronted with a man with much greater economic power, and responses take the form of disparaging the masculinity of men of a higher economic class.\(^{84}\) In the home, men feel similarly powerless, as they are constantly responding to the needs or desires of children, their wives,\(^{85}\) and because they are "failing" at the contest of acquiring material possessions.

In response, men compensate by performing hypermasculine versions of childcare. Beth Burkstrand-Reid has chronicled how at least some stay-at-home fathers "either consciously or subconsciously adapt their behavior in ways that preserve their masculinity while caregiving."\(^{86}\) Some of the masculinization of childcare can be perceived in how the strengths of fathers, as opposed to mothers, are described: one scholar asserted that fathers "provide instrumental leadership," instill discipline in and "'absorb[] hostili-
ty’ from [their] children” whereas mothers provide unconditional love and “more expressive . . . and nurturing childrearing.”

Another form of masculinization is how stay-at-home fathers characterize their own rough and tumble parenting. A Wall Street Journal article from January 2013 describes “a new model of at-home fatherhood that puts a distinctly masculine stamp on child-rearing.” Such fathers “jettison daily routines” and “let[ ] their children take more risks on the playground.”

Studies indicate fathers are more comfortable with active play rather than nurturing work.

Fathers also seek camaraderie with other fathers. One reason is that as an anomaly, stay-at-home fathers lack the social support of stay-at-home mothers. Media aimed at the stay-at-home mother, or the mothers’ group organized at the playground or through a nursery, is a familiar concept. Including men in that group is not, meaning that cultural transgression is compounded by social isolation. Stay-at-home mothers may in fact be the most hostile group towards stay-at-home fathers—one study interviewing stay-at-home fathers found that most reported general positive support of their roles, but that the most negative responses were expressed on playgrounds by mothers.

The authors of the study speculated that the unfriendly response “may be related to the direct confrontation of two extremes in gender roles: [stay-at-home fathers] who represent nontraditional male roles and stay-at-home-mothers who represent traditional female roles.”

In response, some stay-at-home fathers seek fellowship with each other and, in combining forces, may compound the hypermasculine performances. The Wall Street Journal mentioned a dads’ group in the Raleigh-Durham area that holds meetings at a shooting range. A New York Times story describes another dads’ group that holds a “boys’ night out” once a month in local bars. Surely no one can begrudge a group of stay-at-home parents a social life, but it is striking how the meetings are characterized as, in the words of the Times reporter, “a fraternity sort of thing.”

88. Shellenbarger, supra note 4, at D1.
89. Id.
90. Dowd, supra note 60, at 1063-64.
91. See Mezey & Pillard, supra note 1, at 293-94.
92. See id.
93. Rochlen et al., supra note 12, at 203.
94. Id.
95. Shellenbarger, supra note 4, at D2.
96. Medina, supra note 81, at B7.
97. Id.
Stay-at-home fathers, in other words, are compensating for counter-gendered behavior with hyper-gendered performance. Their hypermasculine version of parenting is a form of in-group "passing," in the words of Angela Onwuachi-Willig: with their masculinity possibly weakened by their caregiving work, stay-at-home fathers increase other microperformances of masculinity.

Gay stay-at-home fathers face multiple blows to their masculinity. If gay stay-at-home fathers are added to the equation, how do their experiences differ? Since they are breaking two rules of masculinity at once—don’t be a woman and don’t be gay—do they doubly "fail" gender performance? The next Part turns to the compounded anti-masculinity of caregiving homosexual fathers.

III. GAY STAY-AT-HOME FATHERS

Although the strength of legal and social prejudice against gay parents has weakened significantly, it still has continued vitality depending upon the state in which a given family resides, and particularly if children are adopted from another country. Although same-sex parents (as well as single parents) now have avenues to parenthood such as artificial insemination, surrogacy, and adoption, there are still legal restrictions, procedural hurdles, and a surprising lack of clarity in some areas of the law.
ties are compounded in states with no legal recognition of same-sex relationships, cutting off other avenues into parentage such as second-parent adoption of a stepchild.\textsuperscript{104}

The concept of homosexuals raising children has long been controversial. Opponents to gays or lesbians raising children proffered a laundry list of potential harms: gay parents might somehow transmit or teach homosexuality to their children,\textsuperscript{105} children would be better raised in a stable home led by two married parents,\textsuperscript{106} or children would suffer from homophobia leveled against their parents.\textsuperscript{107}

Some of the concerns are magnified as to gay fathers.\textsuperscript{108} Courts sometimes held a particularly prurient interest in the sexual practices of gay men, as in a 1998 North Carolina custody case in which the judge made findings of fact that the father and his male partner “both testified that they engaged in oral sex, in that [the partner] would about once a week place his mouth on the penis of the Defendant. The Defendant would also place his mouth on the penis of [his partner].”\textsuperscript{109} One is hard-pressed to imagine a judge making similarly explicit findings of fact regarding a heterosexual parent’s sex life.

One reason for the seeming fascination with the sexual activity of gay fathers is that male sexuality is seen as a potential danger to children. A recent blog post by a (heterosexual) stay-at-home father in Pennsylvania described his experience being barred from attending a mothers’ group after the mothers voted “not to allow dads because the risk was too great that a dad might be a predator.”\textsuperscript{110} Fathers have occasionally been charged with child molestation for actions that are routine in the course of caregiving to a young child, such as giving a bath or assisting young children with going to the bathroom.\textsuperscript{111} Gay fathers are particularly maligned as potential child

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\textsuperscript{105} See generally Clifford J. Rosky, Fear of the Queer Child, 61 BUFF. L. REV. 607 (2013).
\textsuperscript{110} Chris Routly, I'm a Stay-at-Home Dad: How We Make It Work Socially and Financially, XOJANE (June 12, 2012, 2:00 PM), http://www.xojane.com/family/im-stay-home-dad-how-we-make-it-work-socially-and-financially.
\end{flushright}
molesters. Lynn Wardle, perhaps the leading voice against gay parents, has described the risk of molestation by a partner of a gay parent as "the elephant in the room when lesbigay parenting issues are discussed." Sexual activity between gay men and children is also raised by some critics as a potential source of HIV infection of children.

Wardle also conflates molestation and the risk of "transmitting" homosexuality, claiming that a "large and disproportionate number of homosexual men and women . . . report having been sexually molested as children or adolescents." Clifford Rosky has labeled this "the seduction fear—the claim that children can be initiated into queerness by engaging in homosexual activity with adults." This fear has justified greater concern surrounding any display of affection between gay parents, either because it is viewed as prematurely exposing children to sexual activity or because it normalizes homosexual behavior. The seduction fear has also been expanded to include not only affecting a child's sexual orientation, but also a child's gender identity more broadly, such as "appropriate" gender role behavior.

Gay fathers are often also painted as dishonest or untrustworthy. E. Gary Spitko notes that this perception may be the result of the first generation of gay or bisexual fathers who became fathers through marriages to women, then divorced and entered into a relationship with a man. As Spitko explains, "Such circumstances would tend to reinforce an existing negative gay male identity as unfaithful and untrustworthy, unsuited for long-term intimacy, self-absorbed, and hyper-sexual."

But what about the more recent generations of gay fathers? Interestingly, in some states same-sex male couples today take a form that looks

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112. See Clifford J. Rosky, Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia, 20 YALE J.L. & FEMINISM 257, 286-94 (2009); see also Strasser, supra note 106, at 863-64; Wishard, supra note 107, at 411.


114. See Rosky, supra note 112, at 279.


116. Rosky, supra note 105, at 620; see also Wishard, supra note 107, at 411-13.

117. Strasser, supra note 106, at 867-69 (discussing attempts to draw line between appropriate displays of affection and inappropriate sexual activity in front of children).


119. Spitko, supra note 10, at 198.

120. Id. at 198-99.
more traditional, more conservative than different-sex couples. One recent analysis of census data found that 26% of same-sex male couples chose to have one father stay home as a full-time caregiver. That figure was higher than the percentage of same-sex female couples with a stay-at-home mother, perhaps unsurprisingly since data indicates that female couples tend to split household labor more evenly. Perhaps more surprising was that same-sex male couples have a stay-at-home parent at slightly higher rates than do married heterosexual couples with children (and as noted above, those stay-at-home parents are overwhelmingly wives).

Such fathers present an intriguing question of the clash between gender and caregiving parental work. How do stay-at-home fathers in same-sex relationships compare to stay-at-home fathers in different-sex relationships? Do they react to the perceived feminized role with hypermasculine microperformances? Or do they reject such gender-normative behavior, and thus undermine the perception of caregiving as women’s work?

One method of comparison might be to examine custody cases, as there are a few reasons to believe judges might more strongly credit caregiving work performed by gay or bisexual men. First, to the extent that a judge holds stereotypes that gay men are more feminine than heterosexual men, a small silver lining of the stereotype might be that such a judge would expect a gay father’s care to be more caring and more natural, similar to the assumptions that credit a mother’s care as better than a father’s. Second, if one reason that fathers arguably suffer in custody disputes is because the judge assumes that the mother is always the “real” caregiver, as in the case of the Air Force officer mother whose ability to care on days off and evenings was cited by the judge to show that the stay-at-home father was not the primary caretaker, then two fathers fighting for custody eliminates the power of that assumption.

Some evidence of the first reason can be seen in recent custody cases between a gay or bisexual father and the mother. In a 2007 Virginia case, a judge approvingly cites the father’s actions taking leave from work or asking to work from home in order to spend time with his children during visits and the activities (hiking, biking, trips to museums) that he organizes with his children (albeit while still praising the father for being “discreet in the presence of the children about his romantic relationship” with another

122. See Kessler, supra note 5, at 40 & n.214.
123. Deborah Widiss has speculated that the legal regulation of marriage encourages specialization of couples into breadwinning and caregiving work, which may be compounded by societal expectations of spouses fitting into gender normative roles of husband and wife even if the spouses’ genders do not match. See Widiss, supra note 6, at 770-71.
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man). A Delaware case from 2006 noted that the father had been the primary caretaker of his child, described him as a "very loving" parent, and cited achievements by the child such as perfect attendance at school. In an Oregon case from 2003, a court even noted that a previously substandard father substantially improved his parenting after entering into a relationship with an older man who was himself a more responsible father. After perhaps learning from the example of his new partner, the father turned his parenting practices around into what the court described as "exemplary," becoming an active parent at home and in his daughters' schools, and acting "appropriately warm and affectionate with them."

Due to the low numbers of cases, however, it is not possible to conduct any quantitative study of custody proceedings. Clifford Rosky has conducted exhaustive work into parenting by gay and lesbian parents, and has created an appendix of every custody and visitation case involving a gay, lesbian, or bisexual parent and a heterosexual parent from 1950 through 2007. He found only fifty-seven cases involving a gay father and heterosexual mother. Only thirteen of these had occurred since 2000. Although there are a few examples of custody suits between two mothers, I have been unable to find even a single example of a custody fight between two men.

That said, it is only a matter of time, given greater relationship recognition of same-sex couples and the growing numbers of gay parents, before

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128. Id. at 1159-60.
129. Rosky notes that his research builds on the work of Kimberley Richman. Rosky, supra note 112, at 349 (citing KIMBERLY D. RICHMAN, COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW 179-87 (2009)).
130. See id. at 349-55.
131. Id. at 350-51.
132. Id. at 351.
133. See, e.g., Hunter v. Rose, 975 N.E.2d 857 (Mass. 2012); Miller-Jenkins v. Miller-Jenkins, 661 S.E.2d 822 (2008). Because people in same-sex relationships lack the automatic status of married heterosexual birth parents, some cases with custody at the root are framed as challenges to the right of a former partner to claim parental status. See, e.g., Usitalo v. Landon, 829 N.W.2d 359 (Mich. App. 2012) (evaluating a woman's adoption of her former partner's biological child in the context of custody proceedings); In re T.P.S., 978 N.E.2d 1070 (Ill. App. 2012) (addressing a petition brought by a former same-sex partner seeking establishment of legal-parent status and custody of the children born to her former partner through artificial insemination); Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010) (deciding a custody fight between biological mother and former same-sex partner asserting something akin to de facto parental status).
such custody suits are heard. When they are, what impact could they have on social expectations?

Reactions might roughly be grouped into three scenarios. The first two would result in no change to current rules of masculinity. Option one is that the "problem," at least from the point of view of hegemonic masculinity, with a stay-at-home father is his gender nonconformity. Any caregiving man is doing something wrong, and other men will appropriately judge him, thereby guarding the borders of what men can and should do.\footnote{134. See David S. Cohen, Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity, 33 HARV. J.L. & GENDER 509, 550 (2010).}

For several reasons, however, the power of norms of gender nonconformity as to caregiving is weakening. Surveys have long reported that men claim they would be happy to exchange some income for more time with their families,\footnote{135. Selmi, supra note 52, at 711 n.12.} but men now seem increasingly willing to explicitly acknowledge that they want to exchange feminine characteristics of care for the masculine competition. Nancy Dowd identifies the growth of the "new father," a man who is not only more involved in parenting work, but also seeks to divide labor and parental status equally with the mother.\footnote{136. Dowd, supra note 60, at 1052.}

In one recent study, nearly three-quarters of the men surveyed said that they were "comfortable with a primary self-identification as ‘caring.’"\footnote{137. Mezey & Pillard, supra note 1, at 285 (citing KRISTIN ROWE-FINKBEINER, THE F WORD: FEMINISM IN JEOPARDY: WOMEN, POLITICS, AND THE FUTURE 101 (2004)).} There are promising signs, therefore, that more men are willing to provide at least some hands-on care for their children without feeling that their masculinity as fathers is under attack.

A second option, however, might be that the lasting "problem" with stay-at-home gay fathers is their sexual orientation—that perhaps today's father may tuck his children in at night, but he still proves his masculinity by sharing his bed with a woman. Another explanation might be that, although "don't be a woman" and "don't be gay" can be split into two separate rules of masculinity, society disapproves of homosexuality because homosexual relationships transgress gender lines. The two rules, therefore, are actually one. In an influential article, Sylvia Law made this argument in 1988, asserting that social condemnation of homosexuality is a "reaction to the violation of gender norms."\footnote{138. HARRINGTON, VAN DEUSEN & FRAONE, supra note 12, at 4.} She used the example of differential punishments for the same act— sodomy—depending on whether the people engaged in it are of the same or different genders to argue that "homosexu-
ality is censured because it violates the prescriptions of gender role expectations.140

Again, however, societal perceptions and stereotypes have changed significantly since Law's original analysis. In 1988, as Law describes in her article, "seventy percent of Americans believed that sexual relations between members of the same sex were always wrong, even when the two people love one another."141 Law wrote only two years after the Supreme Court upheld a criminal prohibition of sodomy against constitutional challenge.142 Since then, not only has the Court undergone a sea change regarding homosexual relationships,143 but public opinion has also shifted towards tolerance and acceptance of homosexuality. Recent Pew Research Center surveys have found that 51% of Americans support same-sex marriage, 67% support legal recognition of same-sex relationships that grant most of the same rights as marriage,144 and a majority of survey participants held a favorable view of gays and lesbians.145

This is not to say that there is no prejudice against gay men or that sexual orientation is irrelevant to assessments of masculinity. A substantial proportion, albeit a slight minority, of Americans still believe that homosexuality is a sin.146 Furthermore, conceptions of masculinity are subject to intersectional complications that mean that different groups of gay men—African-Americans or working-class men, for example—are viewed as stronger transgressions against rules of masculinity.147 But at the very least,

140. Id. at 188-96. Interestingly, a parallel argument was utilized to argue that prohibitions of same-sex marriage were a sex-based classification and, thus, subject to heightened constitutional scrutiny. See Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. REV. 197, 218-19 (1994).
141. Law, supra note 139, at 193 (citing Kenneth L. Nyberg & Jon P. Alston, Analysis of Public Attitudes Toward Homosexual Behavior, 2 J. HOMOSEXUALITY 99, 101 (1977)).
146. In Gay Marriage Debate, supra note 144.
147. See, e.g., Frank Rudy Cooper, Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy, 39 U.C. DAVIS L. REV. 853, 859-70, 874-88, 898-99 (2006) (describing the ways in which heterosexual black men are incentivized to avoid being perceived as gay to maintain their place above black women and gay black men); Devon W. Carbado, Black Rights, Gay Rights, Civil Rights, 47 UCLA L. REV. 1467 (2000).
the picture is more complicated than saying that gay stay-at-home fathers are not viewed as fathers because they aren’t viewed as masculine.

It is possible, therefore, that a third option of how gay stay-at-home fathers are viewed is as a wholly new phenomenon that reflects on stay-at-home fathers, fatherhood, and even masculinity more generally. Courts may assume that mothers should be caregivers, but if there is no mother in the family, the gender stereotype loses all power. Furthermore, to the extent that heterosexual stay-at-home fathers feel a need to reassert their masculinity through hypermasculine performance, gay stay-at-home fathers may not feel the same masculinizing demand. Therefore, gay stay-at-home fathers begin to break the link between caretaking and femininity.148

Some of this dissolution can be seen in media characterizations of gay stay-at-home fathers. For example, a New York Times story on gay stay-at-home fathers quoted one such dad saying that he was willing to sacrifice his previous career, because “‘if I were working, I’d miss that moment when [my daughter] was just getting up from her nap, grabbing and holding on to me.’”149 The father did not reassert his masculinity by going to a shooting range with his child, but instead made the kind of direct, emotional statement that would typically be associated with a mother. Another father, a former engineer, explained, “‘I didn’t want any help. In those first few years, I didn’t even get baby sitters. I thought, ‘That’s my job.’”150

The last decade of litigation aimed at securing same-sex marriage in various states has also contributed to a changing narrative about gay fathers. Legal activist organizations carefully present plaintiffs in marriage lawsuits as relatable and sympathetic.151 Part of presenting same-sex couples as sympathetic is in stressing their family commitments. Lambda Legal’s “Meet the Couples” webpage introducing plaintiffs in an Illinois lawsuit presents Robert and Brian, fathers to three adorable children showcased in a photograph with the two men, and explains that they “wish to marry to secure their children’s future.”152 Brandon and Kevin, another pair on the same website, explain that

[b]efore they adopted their son they celebrated a commitment ceremony to signal to their family and friends that their child was entering a loving and stable family.

148. See Widiss, supra note 6, at 770.
149. Bellafante, supra note 121, at A12.
150. Id.
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After they adopted Garrett, Kevin requested time off from work to which administrators replied, "but you're the man—why are you asking for so much time off?"153

Gay stay-at-home fathers are thus engaged in what Laura Kessler has called transgressive caregiving:

[M]ajoritarian conceptions of care, gender roles, and racial and sexual hierarchies can be disrupted when care is practiced outside of traditional contexts. Transgressive care practices thus bring into relief the constructed status of traditional care practices and norms, the family, and the law itself. Stated another way, when previously incongruent identities are juxtaposed—for example, lesbian mother, married gay man, black housewife—opportunities are opened up for disrupting discursive systems that construct and oppress.154

Gay stay-at-home fathers thus juxtapose not only sexual orientation and family commitment, but also caregiving and masculinity. In doing so, they change perceptions not only of sexual orientation, but also of masculinity and fatherhood for dads of all sexualities.

CONCLUSION

Furthering a de-linking of caregiving and masculinity would have beneficial effects for all fathers. As Nancy Dowd has explained, a "shift in manhood is needed, in order for father care to be an integral, embraced part of masculinities."155 Dowd focuses on allowing men to be vulnerable,156 which is not the type of cultural change that gay stay-at-home fathers might create, but merely opening the spectrum of appropriate or acceptable masculine work in the home could have a significant effect on the responsibilities taken on by fathers. Given that the White House has for the past thirteen years promoted a Presidential Fatherhood Initiative (to mixed success at best), the prospect of making thousands of American men feel more comfortable changing diapers should be an attractive reason to consider how narratives about gay stay-at-home fathers positively affect perceptions of fatherhood generally.157

A broadening perspective of masculinity, moreover, would also help women. Women have been viewed as having somewhat more flexibility to resist gender norms by taking on masculine roles,158 although there is no question that such women often face resistance, particularly in family law arenas such as custody battles.159 Furthermore, even mothers working out-

153. Id.
155. Dowd, supra note 60, at 1075.
156. Id.
158. See Garcia, supra note 20, at 11.
159. See, e.g., Ronner, supra note 75.
side the home still face a disproportionate share of childcare and other homekeeping responsibilities, in part because men may feel reluctant to perform work characterized as feminine. Weakened gender stereotypes in general, removing both masculine and feminine labels from homework and paid work, will thus benefit all families. By abandoning rigid preconceptions about gender, gender roles, and gendered parental roles, we bring our society another step closer to the equal protection of the laws that was promised a century and a half ago.