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## Panopti-Moms

Melissa Murray\*

It is obvious that, in all these instances, the more constantly the persons to be inspected are under the eyes of the persons who should inspect them, the more perfectly will the purpose of the establishment have been attained. Ideal perfection, if that were the object, would require that each person should actually be in that predicament, during every instant of time. This being impossible, the next thing to be wished for is, that, at every instant, seeing reason to believe as much, and not being able to satisfy himself to the contrary, he should conceive himself to be so.

Jeremy Bentham, *The Panopticon*.<sup>1</sup>

### INTRODUCTION

In 1787, in a series of letters written to his father, Jeremy Bentham articulated a new model for cost-effective prison construction and administration: The Panopticon.<sup>2</sup> A circular edifice with a cylindrical tower at its center, the Panopticon allowed prison officials to observe all of the prisoners without the prisoners being able to tell whether they were being watched.<sup>3</sup>

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1. See Jeremy Bentham, *Panopticon*, in THE PANOPTICON WRITINGS 29, 45 (Miran Božovič ed., 1995) (1787) (emphasis in the original).

2. *Id.* at 25–95 (describing elaborate design for circular, windowed prison in which inmates would always be visible to guards in order to evoke constant sense of surveillance).

3. *Id.*

Critically, the fact that the watchmen could not be seen did not diminish the prisoners' sense of near-constant surveillance. "[T]he major effect of the Panopticon" was "to induce in the inmate a state of conscious and permanent visibility" that rendered the actual exercise of state power "unnecessary."<sup>4</sup> In this way, the Panopticon's structure facilitated a crucial aspect of the carceral experience: the internalization of discipline. Though the prisoners could not discern the actual presence of their watchmen, the Panopticon normalized and embedded the experience of state-imposed discipline and surveillance so that the prisoners *always* felt watched and, more importantly, behaved as though they were being watched.<sup>5</sup> The prisoners internalized the disciplining presence of the state and adopted the disciplined identity the state imposed upon them.<sup>6</sup>

The Panopticon's shadow looms large in Camille Gear Rich's *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law*.<sup>7</sup> There, Rich identifies the role that criminal child molestation statutes play in shaping the way that men provide intimate care to children. Specifically, Rich argues that child molestation laws are enforced and interpreted in ways that reconstitute the traditional gender norms that surround caregiving. Focusing on criminal cases involving male caregivers who provide intimate care to a child (bathing, diapering, toileting, etc.), Rich demonstrates the way in which legal decision makers (judges, social workers, law enforcement officials) often rely on gendered intuitions about caregiving to determine whether the male caregiver's conduct constitutes a sexual injury within the purview of the child molestation statute.

Rich argues that the enforcement of child molestation laws has profound consequences for caregiving and caregivers. First, as Rich astutely observes, though they are understood as criminal laws, child molestation statutes effectively function as parenting laws, shaping the normative understanding of motherhood and fatherhood.<sup>8</sup> Second, these laws (and their gendered interpretation and enforcement) *regulate* the way in which men provide care, "incentiviz[ing] all men to internalize the law's sexual suspicion"<sup>9</sup> and discouraging them from taking on intimate care responsibilities.<sup>10</sup> Finally, by making clear that these intimate care tasks are the exclusive province of mothers, these laws and their gendered enforcement impose a "tax[] [on]

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4. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 201 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

5. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 52 (2012) (discussing the Panopticon and observing that "[it] normalized and embedded the experience of state-imposed discipline and surveillance so that even when the prisoners were not being watched, they continued to behave as though they were").

6. *Id.* at 27.

7. 101 CALIF. L. REV. 609 (2013).

8. *Id.* at 620 ("[C]hild molestation law is parenting law. . . . [C]hild molestation statutes currently are being used to power a particular interpretive project for parenting standards, one that . . . ends up maintaining conservative, traditional gender-specific parenting roles.").

9. *Id.* at 617.

10. *Id.*

fathers who engage in mothering activities”<sup>11</sup> and have a “disproportionate effect[]” on “socially vulnerable” fathers who do not have a female co-parent to whom they may delegate these intimate care responsibilities.<sup>12</sup>

Rich’s account of the enforcement and operation of child molestation laws, and their effects on caregiving and caregivers, recalls Bentham’s Panopticon. Like the Panopticon, child molestation laws cultivate a sense of the state’s omnipresence—even within the (ostensibly) private confines of the family. Those who perform intimate caregiving tasks do so with the knowledge that their actions may be scrutinized against the backdrop of these laws and judged for telltale signs of sexual malfeasance. But importantly, the laws’ effects go beyond simply instilling in caregivers a sense of constant surveillance. Child molestation laws are interpreted and enforced along gendered lines, making clear to would-be caregivers that these sorts of intimate care tasks are the exclusive province of women. Put differently, just as the Panopticon prompted inmates to regulate their own behavior by adopting the disciplined identity favored by the state, the child molestation laws prompt men to regulate their own behavior by avoiding intimate caregiving tasks and ceding quotidian childcare tasks to women. In so doing, these laws further entrench gendered caregiving norms.

In all, *Innocence Interrupted* is a remarkable article, notable in its ambition and courage. As Rich observes, “[i]t is the rare legal scholar in the current cultural environment that dares question the scope and trajectory of child molestation law.”<sup>13</sup> This is putting it mildly. Challenging—indeed, merely questioning—these laws, which have arisen in the context of a moral panic about children, abuse, and the (apparent) proliferation of sex offenders, is the third rail of scholarship relating to children and the law.<sup>14</sup> Not only does Rich bravely take on the subject, she does so responsibly and sensitively. She does not dispute the challenges of sussing out child abuse and exploitation, nor does she minimize the distinct harms to children that such abuse poses (especially where the offender is a family member or primary caregiver).<sup>15</sup> Instead, Rich offers an original and nuanced critique of these laws and their unintended and unappreciated consequences.

Her nuance is reflected in the title’s double meaning. “Innocence Interrupted” refers both to the child’s innocence, which is disrupted by abuse, and to our own innocent faith in child molestation laws that we believe will protect our children without adverse effects. But as Rich reminds us, there is a price to pay for our peace of mind. It is unclear whether these laws, which focus on parents and other primary caregivers, actually target those most likely

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11. *Id.* at 619.

12. *Id.* at 616–17.

13. *Id.* at 619.

14. JAMES R. KINCAID, *EROTIC INNOCENCE: THE CULTURE OF CHILD MOLESTING* 7–8, 12 (1998).

15. Rich, *supra* note 7, at 620–21.

to engage in child sexual abuse.<sup>16</sup> Moreover, these laws may further entrench extant gender norms that make intimate care the province of mothers, thereby frustrating opportunities to craft gender-neutral caregiving norms and expectations.<sup>17</sup>

*Innocence Interrupted* challenges us to fundamentally change our understanding of the interaction between legal regulation, gender norms, and the provision of intimate care. In this brief Response, I take up Rich's call to action by expanding the scope of her critique of child molestation laws. As the Article's subtitle suggests, Rich principally addresses child sexual molestation laws' effects on men. Although she acknowledges that child sexual molestation laws disincentivize male caregiving, further burdening women caregivers, a more robust depiction of the laws' effects on women are beyond the primary scope of the Article.

In this Response, I elaborate Rich's insights, making clear that while child molestation laws function as a Panopticon for male caregivers, their panoptic force is not limited to men. Child molestation laws cultivate and impose caregiving norms upon women caregivers as well, instilling in them a sense of near-constant surveillance, limiting their autonomy, and facilitating the internalization of gendered norms regarding caregiving and extra-domestic activities like paid work. These caregiving norms transcend law and become embedded in daily life, creating a culture of motherhood in which mothers are rigorously scrutinized and, in turn, rigorously scrutinize themselves and others. I label this phenomenon the "Panopti-mom" and contend that although it is exogenous to law, it is the product of legal norms like those that are the subject of Rich's intervention.

## I.

### MAKING INTIMATE CARE WOMEN'S WORK

In advancing my claim that child molestation statutes are interpreted in ways that penalize men and women alike, I focus on *In re Julia B.*<sup>18</sup> and *In re R.A.*,<sup>19</sup> two of the cases that Rich discusses to great effect in her Article.

In *Julia B.*, a four-year-old girl complained that during her evening bath, her mother's fiancé "pushed his finger or fingers inside [her] vagina,"<sup>20</sup> hurting her. The fiancé admitted bathing the child without a washcloth but denied any penetration.<sup>21</sup> After hearing all of the evidence, the trial court concluded that

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16. *Id.* at 621–22.

17. *Id.* at 632.

18. No. A125775, 2010 WL 2620806 (Cal. Ct. App. June 30, 2010).

19. 403 N.W.2d 357 (Neb. 1987), *overruled on other grounds by* State v. Jacob, 494 N.W.2d 109, 118 (Neb. 1993).

20. *In re Julia B.*, 2010 WL 2620806, at \*1.

21. *Id.* at \*2.

the fiancé had sexually abused the child.<sup>22</sup> An intermediate appellate court affirmed the decision.<sup>23</sup>

Rich relies on *Julia B.* to show how “subjective sexual privacy complaints and . . . social norms analysis are influenced by gender norms in the parental intimate care cases.”<sup>24</sup> The act of washing a child without a washcloth takes on a more sinister cast because it is a man, rather than a woman, doing the washing. As Rich aptly notes, there is little discussion of the fact that “on occasion mothers clean children in ways that require some so-called ‘penetration’ of a child’s body.”<sup>25</sup> Instead, the court is preoccupied by the perceived incongruity of a man performing a task that, in its view, is more appropriately discharged by the child’s mother. As Rich’s compelling deconstruction of *Julia B.* makes clear, child molestation laws are interpreted and administered with traditional gender roles firmly in mind. In this way, child molestation laws discourage—and indeed, punish—male caregiving. But *Julia B.*’s facts suggest that there is more to say about the impact of child molestation statutes on those who set the standard for intimate care: mothers.

Although Rich focuses on the criminal charges filed against the fiancé, it is worth noting that the fiancé was not the only person on trial in *Julia B.* The washing incident also prompted the state to charge the mother with failure to protect her child from past and future sexual abuse.<sup>26</sup> As with the charges pending against the fiancé, the trial court credited the charges against the mother. According to the court, “it was not reasonable for [the] mother to have her live-in boyfriend bathe her four-year-old girl.”<sup>27</sup> Furthermore, the mother’s “continuing disbelief” that her fiancé could have sexually abused her child cemented the court’s view that she would fail to protect her children from future sexual abuse.<sup>28</sup>

Indeed, the charges against the mother gesture toward the unasked questions that haunt the court’s consideration of the fiancé’s conduct: Why was the fiancé alone with the child? Where was the mother when all of this happened? Why wasn’t *she* the one bathing her daughter? Why had she entrusted a male who was not a relative to perform such an intimate task? What kind of mother would do such a thing?

As the record reflects, the mother was absent from the home during bath time because she was attending “school at night after working all day.”<sup>29</sup> Her busy schedule meant that she was often away from the home and unavailable to perform these intimate care duties. Consequently, she routinely delegated daily

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22. *Id.* at \*3–4.

23. *Id.* at \*9.

24. Rich, *supra* note 7, at 645–46.

25. *Id.* at 646.

26. See *In re Julia B.*, 2010 WL 2620806, at \*8.

27. *Id.* at \*7.

28. *Id.* at \*8.

29. *Id.* at \*3.

caregiving tasks to her fiancé. Viewed through this lens, the charges filed against the mother were not merely efforts to mitigate the prospect of future sexual abuse; they were a way of calling the mother to account for her past decisions regarding her children—specifically, her decisions to delegate the intimate act of bathing her daughter to her fiancé *and* to abdicate her maternal role in order to pursue her career and educational goals.

Thus, while Rich is certainly correct that child molestation statutes impede and frustrate “men who dare to mother,”<sup>30</sup> *Julia B.* suggests that these statutes impede and frustrate *anyone* who violates extant gender norms regarding caregiving. In this way, the laws do more than reflect an anxiety about mothering men. They implicitly recognize that when a man assumes a feminine role in the household, it is usually because a woman has abdicated her prescribed role as a caregiver (whether permanently or temporarily). Accordingly, the anxiety underpinning these laws is not solely about gender-bending men who provide intimate care, but also about gender-bending women who have stepped out of the traditional, feminine caregiving role to do something else. In this way, the child molestation statutes suggest a more generalized hostility to gender role disruption.

In discussing the *Julia B.* court’s disposition of the case, Rich is clear to note that the decision “permanently re-established” traditional gender roles in the household.<sup>31</sup> This is certainly correct, but the observation warrants further elaboration, especially regarding the sanctions imposed by the *Julia B.* court. Though the court credited the charges against the fiancé and the mother, ultimately, the children were not removed from the mother’s care.<sup>32</sup> Instead, the court subjected the family to ongoing, periodic, and sometimes spontaneous state supervision and monitoring.<sup>33</sup>

The imposition of ongoing state monitoring is critical to understanding *how* the court “permanently re-established”<sup>34</sup> traditional gender norms in this once-gender-bending household. And again, the Panopticon metaphor is instructive. As in the Panopticon, state officials were not always watching, but those subject to the state’s gaze always acted as though they were being watched.

For the *Julia B.* family, the specter of state oversight likely played a critical role in reestablishing traditional gendered caregiving norms within the household. In order to ensure that the mother retained primary custody of her daughters, the fiancé vowed to “never bathe the girls again.”<sup>35</sup> Likewise, the mother promised “she would not let [the fiancé] back into the home [to live] if

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30. Rich, *supra* note 7, at 656.

31. *Id.* at 647.

32. *See In re Julia B.*, 2010 WL 2620806, at \*4.

33. *Id.* at \*7.

34. Rich, *supra* note 7, at 647.

35. *See In re Julia B.*, 2010 WL 2620806, at \*3.

that were necessary for her to have her children.”<sup>36</sup> No longer able to rely upon her fiancé, and wary of the state’s continuing surveillance of her family, it seems likely that the mother resumed her role as the primary provider of intimate care to her children.<sup>37</sup>

Doing so inevitably entailed costs—costs in terms of her ability to share the burdens of caregiving *and* in terms of her own autonomy. The fiancé’s departure from the household no doubt strained the couple’s relationship. How could they continue their relationship and have gotten married (as they planned) when his presence in the house invited such intense state scrutiny?

Moreover, it is unlikely that this mother would ever entrust the intimate care of her daughters to her fiancé or any other man—or even any other adult—in the future. To be on the safe side, she likely would assume the responsibility for daily caregiving herself. And in order to do so, she might abandon her educational and career ambitions, forgoing evening classes and other educational pursuits in order to be available for her children. Like the inmates in the Panopticon, the mother might feel obliged to regulate her behavior, adopting the disciplined gendered identity thrust upon her by the state.

Similar concerns attend *In re R.A.*<sup>38</sup> There, the state charged a biological father with neglect based on sexual abuse allegations stemming from a bathing incident involving his three-year-old daughter.<sup>39</sup> The child’s six-year-old brother alleged that he had seen his father insert his finger into his sister’s vagina during a bath.<sup>40</sup> The three-year-old confirmed her brother’s report, complaining that her father had digitally penetrated her during her bath.<sup>41</sup> Critically, the child’s mother testified that, because the child suffered from frequent vaginal infections, the father “had been instructed as to appropriate bathing techniques.”<sup>42</sup>

In the Article, Rich offers an insightful and compelling analysis of the role that gendered caregiving norms play in structuring the court’s disposition of child abuse allegations.<sup>43</sup> As she explains, “a mother’s caregiving practices are treated as the default ideal, the backdrop against which father’s actions are measured.”<sup>44</sup> Indeed, she posits that the court is especially attentive to the “mother’s effort to train the father about proper bathing practices” because it

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36. *Id.*

37. Though she may have served as the principal caregiver, the mother might have relied on a network of caregivers—such as grandparents and other extended family—as many parents do. See Melissa Murray, *The Networked Family*, 94 VA. L. REV. 385, 387 (2008). In fact, the trial record suggests that, prior to the incident, the girls’ maternal grandmother at least occasionally aided the mother. See *In re Julia B.*, 2010 WL 2620806, at \*2.

38. 403 N.W.2d 357 (Neb. 1987).

39. *Id.* at 360.

40. *Id.*

41. *Id.*

42. *Id.*

43. Rich, *supra* note 7, at 647–49 (discussing *In re R.A.*).

44. *Id.* at 648.

makes clear this feminine standard and shows “that the father has been given notice about the proper scope of touch in bathing his female child.”<sup>45</sup>

Again, Rich’s account of how child abuse cases provide ample grounds for the reinstatement of traditional gender roles is pitch perfect. But in focusing on fathers, we overlook the full extent of this gender role enforcement and entrenchment. Critically, in *In re R.A.*, the court called the mother to testify against the father.<sup>46</sup> At the time of the allegations, the couple had been separated for two years, and the children spent every other weekend in their father’s custody.<sup>47</sup> The record reflects that the mother testified “over objection.”<sup>48</sup>

It is worth thinking about what it meant for this mother to testify against her estranged husband and co-parent. It likely was a difficult decision—one that required her to weigh her concerns for her children against her interests in maintaining an amicable relationship with her estranged husband (whether for purposes of marital reconciliation or simply to facilitate co-parenting in the event of divorce). By having the mother testify against her estranged husband, the court, in effect, prompted her to prioritize her relationship with her children over her relationship with her husband and co-parent.

Though the mother’s testimony is merely a blip in a much larger trial record, it is deeply meaningful for the social and legal construction of motherhood, which many scholars have noted requires mothers to be selfless, self-sacrificing, and unswervingly devoted to their children’s needs.<sup>49</sup> The body of child custody jurisprudence is instructive on this point. In custody disputes, courts frequently credit mothers for subordinating their own desires (whether for better employment, personal and sexual satisfaction, or educational

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45. *Id.*

46. 403 N.W.2d at 360.

47. *Id.*

48. *Id.* It is unclear whether the objection was her own or the father’s invocation of a spousal privilege.

49. See, e.g., Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 566–67 (2012) (“Mothers instinctually are supposed to know how to raise children and raise them well. Mothers are envisioned as selfless and self-sacrificing.”); Susan Frelich Appleton, *Toward a “Culturally Cliterate” Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 302 (2008) (“Even if mothers long for sexual pleasure, their role stereotypically calls for self-sacrifice.”); Adrien Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257, 258 (1999) (“Although each of us has our own idea of what it means to mother, the law constructs its own image of the ideal mother. The law rewards the self-sacrificing, nurturing, married, white, solvent, stay-at-home, monogamous, heterosexual, female mother.”); Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990, 2075 (1995) (“The sacrificing mother is a powerful totem. Deep in Western consciousness lives the Biblical mother—do we even remember her name—who would relinquish her child to another rather than see it killed. This ultimate sacrifice led King Solomon to determine that this mother must be the true mother of the child for only a true mother would make such a sacrifice.”); Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487, 511 (1992) (suggesting that a good mother is “self-sacrificing and nurturing”).

fulfillment) to their responsibilities for their children.<sup>50</sup> And as often, women are rebuked when they fail to align their behavior with this model of self-abnegating motherhood.<sup>51</sup>

## II.

### CREATING A CULTURE OF (GOOD) MOTHERHOOD

This trope of selfless, sacrificing mothers is not only present in law; it echoes throughout our culture.<sup>52</sup> Consider Sue Miller's novel *The Good Mother*,<sup>53</sup> where a divorced mother begins an intensely sexual relationship with an artist. The mother's idyll comes to a crashing halt when her ex-husband alleges that the boyfriend has molested the daughter.<sup>54</sup> The allegations lead to criminal charges and a custodial dispute in which the mother is called to account for her decision to prioritize her own satisfaction and fulfillment over her maternal obligations to her daughter.<sup>55</sup>

50. See *Thompson v. Thompson*, 974 S.W.2d 494, 496 (Ark. Ct. App. 1998) (noting with approval that the mother quit her job to be able to care for her child during working hours); *Roehrdanz v. Roehrdanz*, 410 N.W.2d 359, 361 (Minn. Ct. App. 1987) (crediting mother because "she took her job . . . only on the condition . . . that her children would always come before work; as a result, her job did not interfere with her duties as a mother"); *Dana A. v. Martin B.* 898 N.Y.S.2d 677, 678 (App. Div. 2010) (crediting mother's "willingness to put the child's interests ahead of her own"); *In re Marriage of Spurgeon*, 849 P.2d 1132, 1134–35 (Or. Ct. App. 1993) (noting approvingly that the mother had a demanding job but had "adjusted her work obligations" to eliminate the need to travel and to allow her to work from home); *Garska v. McCoy*, 278 S.E.2d 357, 364 (W. Va. 1981) (praising the mother for going to "extraordinary lengths" to provide for her child, as well as her "willingness to sacrifice").

51. See, e.g., *Prost v. Greene*, 652 A.2d 621, 625 (D.C. 1995), *aff'd following remand*, 675 A.2d 471 (D.C. 1996) (stripping mother of custody because "her devotion to her job and/or her personal pursuits often takes precedence over her family"); *Ireland v. Smith*, 542 N.W.2d 344 (Mich. Ct. App. 1995), *aff'd as modified*, 547 N.W.2d 686 (Mich. 1996) (stripping mother of custody of daughter after mother enrolled child in daycare so that mother could attend the University of Michigan); *Parris v. Parris*, 460 S.E.2d 571, 573 (S.C. 1995) (stripping "career oriented" mother of custody because of her "aggressive [and] competitive" career as a real estate agent); *Jarrett v. Jarrett*, 400 N.E.2d 421 (Ill. 1979) (finding mother's open cohabitation to be grounds for losing custody, despite no showing of harm to children); *Newsome v. Newsome*, 256 S.E.2d 849, 853 (N.C. 1979) (awarding custody to father and his parents even though gay mother is found to be "a loving mother who cares for and is interested in the well-being of [her child]"); *Gustaves v. Gustaves*, 57 P.3d 775, 781–82 (Idaho 2002) (citing the mother's adulterous relationship as evidence of her "immaturity" and thus grounds for giving custody to the father); *Gianvito v. Gianvito*, 975 A.2d 1164, 1169 (Pa. Super. Ct. 2009) (noting that the mother was a "fit and loving parent" but "made decisions based upon fulfilling her own personal and professional needs before considering the best means to suit Child's developmental needs"); *Hoover (Letourneau) v. Hoover*, 764 A.2d 1192, 1194 (Vt. 2000) (criticizing a mother who did not completely sacrifice her interests for her children but rather "blended her perception of her own interests with those of the children, describing the children's best interests as coextensive with and dependent on her personal happiness"); see also Robert L. Gottsfield, *Custody Litigation: Private Lives, Public Issues*, 6 FAM. ADVOC. 36 (1984); Nora Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647 (1977); *Mom Takes in Lover, Loses Custody; Lawyer Vows Appeal to High Court*, NAT'L L.J., Jan. 7, 1980, at 3.

52. See generally, CARIN RUBENSTEIN, *THE SACRIFICIAL MOTHER: ESCAPING THE TRAP OF SELF-DENIAL* (1998) (discussing the associations between maternity and selflessness).

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

54. *Id.* at 256–65.

55. *Id.*

It is easy to dismiss *The Good Mother's* depiction of the conflict between the fulfillment of personal desires and maternal obligations as simply good fiction. Yet, author Ayelet Waldman's experience at the center of a media firestorm makes clear that the prioritization of maternity over self-interest goes beyond novels and stories. It is at the very heart of our maternalist culture.

In a 2005 essay in the *New York Times*,<sup>56</sup> Waldman outed herself as a woman who had failed to make “the erotic transition a good mother is supposed to make”—she was a mother “incapable of placing her children at the center of her passionate universe.”<sup>57</sup> Indeed, “[i]f a good mother is one who loves her child more than anyone else in the world,” then she was not a good mother.<sup>58</sup> In fact, she was “a bad mother”—one who happily prioritized her relationship with her partner over her children.<sup>59</sup>

The public outcry to Waldman's admission was swift and accusatory.<sup>60</sup> She *was* a bad mother—selfish and self-serving, rather than devoted and self-sacrificing (as mothers should be).<sup>61</sup> The fact that Waldman's husband, Pulitzer Prize-winning novelist Michael Chabon, also placed their relationship first in his hierarchy of needs went unremarked upon.<sup>62</sup>

56. Ayelet Waldman, *Truly, Madly, Guiltily*, N.Y. TIMES, Mar. 27, 2005, at I11.

57. *Id.*

58. *Id.*

59. *Id.* Waldman elaborated on her maternal transgressions in a collection of essays entitled *Bad Mother*. AYELET WALDMAN, *BAD MOTHER: A CHRONICLE OF MATERNAL CRIMES, MINOR CALAMITIES, AND OCCASIONAL MOMENTS OF GRACE* (2010).

60. Waldman received an “onslaught” of email messages—most of which were “scary.” Later, when preparing for an appearance on *The Oprah Winfrey Show*, she heard “a kind of shrieking” in the background. When she inquired about the sounds, a producer informed her that it was “the studio audience awaiting its chance to rip, tear and shred [her onstage].” “Most of [the audience of women] hate you,” the producer confided blithely. Bob Thompson, ‘*Bad Mother's*’ Day, WASH. POST, May 5, 2009, at C01.

61. More recently, Yahoo CEO Marissa Mayer made headlines when she announced that, upon giving birth to her first child, she would take an abbreviated maternity leave and quickly return to work. See Elissa Gootman & Catherine Saint Louis, *Maternity Leave? It's More Like a Pause*, N.Y. TIMES, July 22, 2012, at ST1. The media attention that Mayer drew differed in tone from that which Waldman experienced, but not necessarily in substance. Though few claimed that motherhood should trump work (and indeed, the spectacular success Mayer had enjoyed in the corporate world), many seemed discomfited by the degree to which Mayer relished her work. She was widely chided for setting a poor example for other working mothers and, perhaps inadvertently, cultivating a workplace culture in which work demands were expected to trump family demands. This point was further developed a few months later when Mayer ignited (yet) another media frenzy by ending Yahoo's flexible worktime and telecommuting programs. See Claire Cain Miller & Nicole Perlroth, *Yahoo Says New Policy Is Meant to Raise Morale*, N.Y. TIMES, Mar. 6, 2013, at B1. Commentators argued that such policies were especially valuable to working mothers, allowing them to more easily balance the demands of work and family. *Id.*

62. The likely reason why Michael Chabon's devotion to his wife has gone unremarked upon is the wildly different expectations that exist for mothers and fathers. See Thompson, *supra* note 60 (“Why hasn't Waldman—or anyone else, for that matter—written a book called ‘Bad Father’? Why don't more men join the multitudes of women who agonize about parenting issues? Because there's a double standard, of course.”). Indeed, Waldman herself acknowledges that men are held to a much lower standard and thus are dubbed good fathers simply for “show[ing] up.” *Id.* Indeed, another well-known author, Michael Lewis, admitted that he did not immediately bond with his children. A blogger for the website *Jezebel* tartly observed that while Lewis was the “bad father to Ayelet Waldman's *Bad*

As Rich's analysis makes clear, the child molestation statutes and the cases interpreting them underwrite a particular vision of modern fatherhood—one that positions fathers as removed from the quotidian responsibilities of intimate care. However, when considered in tandem with *Julia B.* and *In re R.A.*, Waldman's bad mother and Miller's *The Good Mother* all gesture toward an equally important point.

If the fear of sexual abuse allegations discourages fathers from assuming a more equal share of childcare responsibilities, conscripting them into a retrograde vision of detached fatherhood, the costs go beyond the obvious impact on men. Even as child molestation laws and their interpretation put forth a normative account of fatherhood, they also construct a very specific account of motherhood—one in which women are not only charged with the bulk of intimate caregiving (and men are not), but are expected to prioritize their responsibilities as mothers above their relationships with other adults as well as their goals and aspirations for themselves.

This brings us back full circle to the Panopticon. Panopticism's internalization of discipline is not confined to the prison. Twentieth century French philosopher Michel Foucault invoked the Panopticon as a means of theorizing the modern operation of state power.<sup>63</sup> On this account, medicine, education, the workplace, and indeed, law itself, all function as modern-day Panopticons, normalizing particular modes of behavior and cultivating the performance of this normalized behavior among the citizenry.<sup>64</sup>

Foucault's account of Panopticism informs *Innocence Interrupted*,<sup>65</sup> and it is easy to see why. The child molestation statutes, and courts' interpretations of them, all speak to the law's role in normalizing gendered caregiving and cultivating conformance with those gendered scripts. *Innocence Interrupted* rightly views the child molestation statutes as male Panopticons, forcing men to regulate and align their behavior to accord with a norm of distanced fathering. But this is only half of the story. The Panopticon that these laws construct operates with force for men and women alike.

### III.

#### INSIDE THE PANOPTI-MOM

It is worth remembering that, at bottom, the Panopticon was a prison created for the purpose of reforming criminals and miscreants. With this in mind, it is easy to see how the Panopticon created by the operation of child molestation laws helps to reform the caregiving practices of those ensnared in

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*Mother*," his admission had not inspired "nearly the flak [that Waldman's] did." Anna North, *Michael Lewis Says Dads Suck at Chores, Emotional Attachment*, JEZEBEL (June 3, 2009, 1:00 PM), <http://jezebel.com/5277209/michael-lewis-says-dads-suck-at-chores-emotional-attachment>.

63. MICHEL FOUCAULT, *supra* note 4, at 201.

64. See Murray, *Marriage as Punishment*, *supra* note 5, at 52 (discussing Foucauldian Panopticism).

65. Rich, *supra* note 7, at 672–73.

the web of the criminal justice and child welfare systems. But is there a similar structure that works to compel conformance with accepted caregiving norms for those families who are not involved in the child welfare or criminal justice system?

As Rich makes clear, law is a potent force in articulating and enforcing the norms of the domestic sphere. But it is not the only force. Ayelet Waldman's experience is instructive on this point. Upon publishing her incendiary essay in the *New York Times*, Waldman received countless (derogatory) responses—most of them from other women.<sup>66</sup> As her correspondents made clear, Waldman had failed to internalize the norms of contemporary motherhood. She did not love her children enough. She loved her husband *too much*. She was not selfless and self-abnegating. She was utterly and irredeemably selfish.

Unlike the situations detailed in *Innocence Interrupted*, Waldman's essay did not attract legal intervention. Though many of her critics threatened to inform child welfare services,<sup>67</sup> state officials did not step forward to charge her with neglecting her children. Michael Chabon was never compelled to testify as to his wife's maternal transgressions. Nevertheless, Waldman's admission that she routinely defied the legal and social construction of motherhood by prioritizing her own needs above her relationship with, and the needs of, her children prompted other mothers—her fellow inhabitants of the intimate sphere—to publicly indict her and demand correction. Waldman did not fall victim to the Panopticon. Instead, her maternal transgressions were subjected to the disciplinary force of what I call “the Panopti-mom”—an echo chamber in which mothers are constantly subject to the gaze and judgment of other mothers.

And Waldman is not the only mother to fall victim to the harsh scrutiny of “the Panopti-mom.” Popular websites like UrbanBaby<sup>68</sup> and Babble<sup>69</sup> are replete with cyber-lashings, where mothers rebuke other mothers for failing to observe some standard (real or imagined) of maternal care. And even when there is no forthcoming rebuke, the force of the Panopti-mom persists. Feeling the omnipresent scrutiny of others, we reflexively police and monitor our own maternal conduct and pass judgment on the conduct of others. We are watched, but we are also watchers.

Consider my own story. As a working mother, I have insisted that my working husband assume his share of the childcare tasks. One of his jobs is to pack lunches. While chaperoning a preschool field trip, I, along with several other mothers, began unpacking the children's lunches and arranging them on a picnic blanket. Each bag was a veritable cornucopia of healthy and

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66. Thompson, *supra* note 60.

67. *See id.* (“People were telling me that they were going to report me to the Department of Social Services, that my children should be taken away . . .”).

68. URBANBABY, <http://www.urbanbaby.com> (last visited June 12, 2013).

69. BABBLE, <http://www.babble.com> (last visited June 12, 2013).

painstakingly assembled foods. Hand-rolled sushi. Sandwiches thoughtfully cut into animal shapes. Exotic fruits cut into bite-sized pieces. And then I opened the lunch my husband had hastily assembled that morning before rushing off to work. A quivering slab of pale pink lunchmeat peeked out from between two squishy slices of white bread. Rapidly-oxidizing apple slices and a crumbling granola bar complemented the meal. All eyes swung in my direction. “Did you make that yourself?” asked one mother. Another arched an eyebrow, “Is that *white* bread?” My face burning, I frantically tried to explain myself (and my husband). The looks became even more incredulous. “You let *your husband* do lunch?”

My moment of shame in the Panopti-mom corresponds to many of the themes Rich surfaces in *Innocence Interrupted*. In that moment, I felt the full force of my fellow mothers’ judgment. In that moment, I—like Waldman and the mother in *Julia B.*—was indicted as a bad mother. I did not make my child clever, nutritious lunches. I outsourced lunch-making to my husband, who had failed to perform this delegated duty in the exacting manner of a mother. I “let” my husband “do” a task that was clearly demarcated as mine—and mine alone.

But their judgment was not just about my decision to foist a maternal duty on my husband. Also at issue were my motives for delegating this duty in the first place. My husband made lunch because we were both working parents and I wanted—indeed, *needed*—a more equal division of this kind of “home work.”<sup>70</sup> With this in mind, the judgment directed my way was not simply about an uninspired lunch or an ill-conceived delegation of maternal duties. Whether conscious or not, the other women’s judgment was, at least in part, about my decision to share these tasks with my husband so that I too could participate meaningfully in the workforce.<sup>71</sup> It was about my decision to abdicate a role that society—and law—assigns to women so that I might assume a role traditionally associated with men.

Obviously, not all mothers will be subjected to the Panopticon of child molestation laws. But at some point, we all find ourselves subjected to the scrutiny of the Panopti-mom, where mothers set maternal standards and scrutinize each other for deviations from those standards. It goes without saying that the force of child molestation laws is far more crushing than the scrutiny of other mothers—and I do not want to minimize the trauma that families experience in the child welfare system. But regardless of the difference in

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70. I am not the only working mother to insist on a more equal distribution of household and childcare labor. Upon receiving (yet another) call from her son’s school, future Supreme Court Justice Ruth Bader Ginsburg instructed the headmistress to alternate future calls between herself and her husband. Stephanie Francis Ward, *Family Ties*, ABA JOURNAL (Oct. 1, 2010), [http://www.abajournal.com/magazine/article/family\\_ties1](http://www.abajournal.com/magazine/article/family_ties1).

71. In her recent book *Lean In*, Facebook COO Sheryl Sandberg advised women to insist upon a more equal distribution of childcare and home responsibilities with their partners. SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 108 (2013). Though Sandberg’s advice is laudable (if frustratingly naïve), the phenomenon of the Panopti-mom helps explain why the egalitarian family structure she imagines has been elusive for so many women.

severity, it would be a mistake to view the Panopticon as unrelated to the Panopti-mom and vice versa.

The kind of regulation that occurs within the Panopti-mom is exogenous to law. But make no mistake—law plays a role in fostering this kind of extra-legal regulation.<sup>72</sup> The maternal norms of self-sacrifice and all-encompassing concern for one's children that Waldman's critics and my fellow chaperones were responding to are cultivated by law—the child molestation laws that Rich critiques and the myriad other laws that make clear what is expected of mothers (and unexpected of fathers). And just as those legal norms result in the burdening of women with an outsized share of care duties, informal policing, like that which occurs in the Panopti-mom, can have the same effect.<sup>73</sup>

### CONCLUSION

Roughly a generation after Bentham articulated the Panopticon concept, John Stuart Mill penned *The Subjection of Women*.<sup>74</sup> Deemed radical and immoral by contemporaries,<sup>75</sup> the essay challenged the prevailing orthodoxy that women and men were inherently different and naturally suited to their separate spheres. If this were the case, Mill reasoned, why was all of society organized around the effort to compel men and women to stay within these prescribed spheres?<sup>76</sup>

Nearly three centuries after *The Subjection of Women*, Camille Gear Rich reveals that even as we have progressed as a society, intuitions about men and women's natural spheres persist. Though Rich focuses on a narrow swath of criminal laws, she makes clear that the force of these laws goes beyond simply identifying and punishing sexual abuse of children. Her trenchant and illuminating account of these laws reminds us that although we have formally dismantled the separate spheres, vestigial aspects of this ideology endure. These laws are no longer couched in the language of gender subordination, but instead are framed in terms of rational concerns for children and their welfare. Nevertheless, Rich alerts us to the gendered enforcement and interpretation of these laws. And in so doing, she reminds us that this sort of *sub rosa* subordination, as much as more obvious forms of gender subordination, may retard the development of human capabilities and frustrate our aspirations for a more egalitarian family structure and society.

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72. Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* 21, 55–56 (Austin Sarat & Thomas R. Kearns eds., 1993) (arguing that it is a mistake to view the study of law as distinct from culture, or vice versa, as the two have a dialogic relationship whereby normative ideas about everyday life shape the law and the law in turn shapes these norms in everyday life).

73. Recall my fellow chaperones' incredulity at the fact that I "let [my] husband do lunch." The fear of such scrutiny—and the knowledge that my (dear) husband will never make the kind of lunches that earn the maternal stamp of approval—might drive a less hardy mother to throw in the towel and start rolling sushi herself.

74. JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (1869).

75. KATE MILLETT, *SEXUAL POLITICS* 92 (1970) (discussing contemporary reactions to Mill).

76. See MILL, *supra* note 74, at 32–33.