

Children at Risk: The Sexual Exploitation of Female Children after Divorce

Robin Fretwell Wilson

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CHILDREN AT RISK: THE SEXUAL EXPLOITATION OF FEMALE CHILDREN AFTER DIVORCE

Robin Fretwell Wilson†

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The continuing growth of nontraditional families in the United States presents unique problems for family law courts. Concerns regarding the welfare of children in nontraditional families loom larger in light of considerable evidence demonstrating that a female child, after her parents divorce, faces a significantly elevated risk of being sexually abused by either a parent, a parent’s partner, or a person outside of the home.

In this Article, Professor Robin Fretwell Wilson addresses whether the law can effectively mitigate the risk of child sexual abuse by considering it in custody determinations. After dispelling common misconceptions about the nature of sexual abuse, Professor Wilson marshals overwhelming empirical

evidence—more than seventy social science studies—showing a connection between family disruption and child sexual abuse of girls. Professor Wilson argues that family law deals inadequately with this disturbing phenomenon because courts in custody proceedings generally neglect to address the increased statistical probability of sexual abuse after divorce. She then maps out three possible routes to prevention of sexual abuse by using custody determinations to increase parental awareness and encourage parents to take affirmative steps to mitigate the risk to their daughters.

Professor Wilson recognizes that acting in anticipation of risks—rather than after demonstrated conduct—is not without controversy. She examines, therefore, whether tailoring prevention efforts to children at divorce will stigmatize single parents, discourage remarriage or encourage non-custodial parents to later fabricate charges of abuse. Professor Wilson concludes that integrating the increased risk of child sexual abuse in custody proceedings is ultimately a commonsense way to address a pervasive problem. More broadly, Professor Wilson contends that judicial decision makers can intelligently address the challenges facing fractured families only if guided by substantial evidence of how these families function.

INTRODUCTION

As the American family continues to morph into a variety of non-traditional forms, we cling to the assumption that every family functions like the traditional nuclear family. Empirical research reveals, however, that it is naively optimistic to assume that single-parent households and blended families are fungible with traditional ones. Far from a Kodak moment, the snapshot that social scientists provide of nontraditional families is one of crisis.¹

This Article examines one specific crisis that many nontraditional families face: the significantly elevated risk that a female child will be sexually abused after the dissolution of her parents' marriage. The sexual abuse of female children is used as a test case for whether the law can and should act in anticipation of known risks to children in nontraditional families. This Article focuses on child sexual abuse, not only for its traumatizing damage to children, but also because the

¹ For instance, a growing body of literature documents the negative impact of divorce upon children, including a dramatic economic decline, myriad behavioral problems, poorer performance in school, diminished earning capacity, and an increased probability of divorce as an adult. See, e.g., DIANE FASSEL, *GROWING UP DIVORCED: A ROAD TO HEALING FOR ADULT CHILDREN OF DIVORCE* *passim* (1991); JUDITH S. WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000); BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 153-81 (1997); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 25-37 (1990). Significantly, some scholars argue that poverty and related ills following divorce are not inherent in single-parent families, but rather result from the lack of adequate financial support after divorce. Cf., e.g., NANCY E. DOWD, *IN DEFENSE OF SINGLE-PARENT FAMILIES* 55-77 (1997) (deconstructing the "single parent" stigma and examining how "[f]amily law, employment law, and welfare interact to impoverish single parents").

sheer volume of studies and the consistency of findings make the risk undeniable. Child sexual abuse is perhaps the clearest instance in which decision makers have the certitude to act preemptively in order to mitigate a proven hazard to children.

Most individuals envision child molesters as strangers in trenchcoats.² In reality, however, the threat to our children of sexual abuse often exists elsewhere. Many girls will live with their mothers after divorce, placing them at risk of molestation by the mother's partner or someone outside the family.³ Other girls will live with their father, placing them at risk of sexual abuse by him or someone that he brings into the household.⁴ Because divorce magnifies a girl's sexual vulnerability,⁵ the law has the opportunity to address this risk proactively in child custody determinations, rather than reacting to abuse, as it now does.

Understandably, many divorcing parents do not take precautions against this risk to their daughters—most are simply unaware that their divorce may increase their daughters' sexual vulnerability.⁶ Nevertheless, numerous studies firmly establish that girls living without one of their natural parents are at greater risk for sexual abuse, both from family members and those outside the family.⁷ For instance, the only national survey in the United States examining predictors of child sexual assault discovered higher rates of abuse among women who reported living for some period during childhood without one of their biological parents.⁸ Similarly, a review of forty-two publications

² See ELLEN GRAY, *UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEXUAL ABUSE I* (1993) (underscoring the serious psychic costs of admitting that molestation occurs "not only at the hands of strangers," but by parents who "use children sexually to feed their own compulsions"); see also *infra* Part I.A.1 (discrediting the myth that child molesters are always lecherous strangers).

³ See *infra* Part I.A.2(a) (discussing more than thirty studies finding that stepdaughters are at greater risk of sexual abuse than daughters raised in intact families and concomitantly that stepfathers represent a greater proportion of abusers than their incidence in the general population would suggest).

⁴ See *infra* Part I.A.2(b) (reviewing eight studies documenting the greater incidence of molestation in single-father households and families in which the mother is absent for some period of time).

⁵ See David Finkelhor, *Epidemiological Factors in the Clinical Identification of Child Sexual Abuse*, 17 *CHILD ABUSE & NEGLECT* 67, 68 (1993); see also *infra* Part I.A.2 (detailing more than forty studies finding that parents' divorce markedly increases the risk of a daughter being sexually abused).

⁶ Cf. Beverly B. Lovett, *Child Sexual Abuse: The Female Victim's Relationship with Her Nonoffending Mother*, 19 *CHILD ABUSE & NEGLECT* 729, 730 (1995) (pointing out that "even when the signs of abuse are more obvious, many women find it most difficult to think that their husband, boyfriend, or other trusted person could actually be a sexual offender").

⁷ See *infra* Part I.A.2 (discussing literature reviews and studies concluding that disruption of the traditional family structure is a consistent risk marker of child sexual abuse).

⁸ David Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 *CHILD ABUSE & NEGLECT* 19, 24-25 & 25 tbl.7 (1990) (finding that separation from a natural parent for a major portion of one's child-

observed that "[t]he majority of children who were sexually abused . . . appeared to have come from single[-parent] or reconstituted families."⁹

Researchers have attempted to discern reasons for a daughter's increased sexual vulnerability after divorce.¹⁰ Using statistical tools to unravel the effect of multiple variables, sociologists have found that the factor most decisive to a girl's increased sexual vulnerability was living in a household with adult males after her parents' separation. This increased risk held true whether that male was the natural father or someone brought into the family by the child's mother. These girls "were more than [seven] times more likely to be abused"¹¹ than children living only with females and, perhaps most startling, over half of these girls were subject to sexual abuse by either the natural father or another male in the household.¹² In a classic "lose-lose" scenario, it appears that a girl's vulnerability to sexual exploitation escalates whether she lives with her mother *or* her father after divorce.

In part, the correlation between divorce and sexual victimization is not surprising. Sociologists have long recognized the risk to girls in stepfamilies.¹³ Studies of girls who grew up in stepfather households

hood was a risk factor for sexual victimization in a telephone survey of 2626 adult men and women conducted by the *Los Angeles Times*.

⁹ Joseph H. Beitchman et al., *A Review of the Short-Term Effects of Child Sexual Abuse*, 15 CHILD ABUSE & NEGLECT 537, 550 (1991).

¹⁰ Child sexual abuse most commonly involves adult males victimizing young girls. For example, one national study found that two-thirds of child abuse victims were girls, and 93% of their abusers were men. Lois Timnick, *22% in Survey Were Child Abuse Victims*, L.A. TIMES, Aug. 25, 1985, at 1 (describing *Los Angeles Times* survey); see also DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 338 (2000) (observing that "[m]en are more likely than women to be abusers [and that] girls are at higher risk of sexual abuse" than boys); Hilda Parker & Seymour Parker, *Father-Daughter Sexual Abuse: An Emerging Perspective*, 56 AM. J. ORTHOPSYCHIATRY 531, 533 (1986) ("[P]erpetrators are overwhelmingly male, while victims are mainly female."); cf. Edward D. Farber et al., *The Sexual Abuse of Children: A Comparison of Male and Female Victims*, 13 J. CLINICAL CHILD PSYCHOL. 294, 296 (1984) (reporting that 92% of male and female child abuse victims were maltreated by a man).

This is not to imply that boys do not suffer sexual abuse. See generally William C. Holmes & Gail B. Slap, *Sexual Abuse of Boys: Definition, Prevalence, Correlates, Sequelae, and Management*, 280 JAMA 1855 (1998) (discussing the prevalence of "male sexual abuse"). Neither am I suggesting that women do not sexually exploit children. See *id.* at 1857 (noting studies indicating that, while perpetrators are predominantly male, women, especially "adolescent-aged baby-sitters," also sexually abuse children). Nevertheless, because this Article concentrates on the risk of molestation to children in disrupted households, a risk posed almost exclusively to female children by men, this Article will use the feminine to refer to the victim and the masculine to refer to the perpetrator.

¹¹ Rebecca M. Bolen, *Predicting Risk to Be Sexually Abused: A Comparison of Logistic Regression to Event History Analysis*, 3 CHILD MALTREATMENT 157, 167 (1998).

¹² See *id.* at 164 (finding that 53% of respondents living with a male in a separated or divorced household reported molestation). Multiple studies of women separated from one of their natural parents during childhood report that roughly half experienced sexual abuse as a child. See *infra* Part I.A.2.

¹³ See Finkelhor, *supra* note 5, at 68.

consistently find an elevated risk of sexual abuse, with multiple studies finding that roughly half of stepdaughters report sexual abuse by their stepfather or another adult.¹⁴ Research findings also confirm that stepfathers represent a greater proportion of abusers than their incidence in the general population would predict.¹⁵

Daughters living in their father's custody are equally at risk. A national survey of sexual abuse risk factors found "markedly higher risk" for girls following their parents' divorce, "particularly when living alone with [their] father."¹⁶ In that study, 50% of female children residing only with their father reported sexual abuse by someone, although not necessarily their father.¹⁷ Similarly, studies of households in which a mother is absent due to hospitalization, death, or mental illness, also report significantly elevated rates of sexual abuse.¹⁸ These studies of fractured families differ in their estimates of the percentage of girls molested during childhood.¹⁹ However, regardless of whether the precise number is 50% or even half of that, the rate is staggering and suggests that girls are at much greater risk after divorce than previously imagined.

Despite these studies, the idea that so many girls in fractured families report childhood sexual abuse strains credulity. Nevertheless, with more than seventy representative²⁰ social science studies confirming the link between divorce and molestation, there is little doubt that the risk is indeed real.²¹ As difficult as it is to accept, a girl's sexual vulnerability skyrockets after divorce, with no indication that this risk will subside. As marriages continue to collapse at an extraordinary rate and the number of single-parent and remarried households soars,²² the number of girls put at risk can only increase.

¹⁴ See *infra* notes 61-67 and accompanying text.

¹⁵ See *infra* notes 68-72 and accompanying text.

¹⁶ Finkelhor et al., *supra* note 8, at 24-25 & 25 tbl.7.

¹⁷ *Id.* at 25 tbl.7.

¹⁸ See Jillian Fleming et al., *A Study of Potential Risk Factors for Sexual Abuse in Childhood*, 21 CHILD ABUSE & NEGLECT 49, 55-56 (1997) (noting that "having a mother who was mentally ill" and "lacking any emotional support network" were, *inter alia*, "significant predictors of sexual abuse"); *infra* Part I.A.2(b) (discussing the increased risk of sexual abuse for girls living with their fathers after divorce).

¹⁹ Compare Finkelhor et al., *supra* note 8, at 25 tbl.7 (reporting that 35% of girls living in mother-only households were sexually victimized during childhood), with Christopher Bagley & Richard Ramsay, *Sexual Abuse in Childhood: Psychosocial Outcomes and Implications for Social Work Practice*, in SOCIAL WORK PRACTICE IN SEXUAL PROBLEMS 33, 37 & 38-39 tbl.1 (James Gripton & Mary Valentich eds., 1986) (reporting that 53% of women separated from a parent during childhood reported child sexual abuse).

²⁰ See *infra* Part I.A.2.

²¹ See *infra* Part I.A.

²² See *infra* Part I.C (discussing demographic changes placing an increasing number of girls at risk for sexual abuse).

The law has failed to grasp the extent to which girls in disrupted families are at risk of sexual abuse. In the custody arena, judges base their decisions primarily on the past and present conduct of each parent.²³ Consequently, courts examine whether a parent has molested, or is molesting, his or her daughter before awarding custody to that parent.²⁴ However, courts generally fail to consider the equally important question: could a daughter be molested after her parents part, either by them or by someone who enters her life after divorce? This failure on the part of courts highlights a glaring inadequacy in the law: a nearly universal absence of approaches designed to prevent, as opposed to remedy, a known repercussion of parental separation, sexual abuse.

Because the risk of molestation in fractured families is omnipresent yet overlooked, the goal of this Article is to explore ways in which child custody determinations can begin to acknowledge and respond to this risk. More fundamentally, because state courts and legislatures cannot take adequate measures to safeguard children until they comprehend and recognize the danger, this Article documents the sexual vulnerability of young girls in disrupted households. This Article focuses exclusively on females²⁵ as the targets of child sexual abuse because dissolution of the parental relationship does not appear to alter appreciably the risk of abuse for boys.²⁶

²³ See *infra* notes 190-92, 236 and accompanying text.

²⁴ Cf., e.g., Lynn Hecht Schafran, *Adjudicating Allegations of Child Sexual Abuse when Custody Is in Dispute*, 81 JUDICATURE 30, 30 (1997) (discussing guidelines to help judges evaluate allegations of child sexual abuse in custody proceedings).

²⁵ The sexual exploitation of boys and of girls are very different phenomena, each with distinct risk factors, immediate impact, and long-term sequelae. See, e.g., Holmes & Slap, *supra* note 10, at 1856-59 (evaluating these features with respect to male sexual abuse). Boys are more likely to be abused by persons from outside the family, such as strangers, teachers, and friends. See William R. Lenderking et al., *Childhood Sexual Abuse Among Homosexual Men: Prevalence and Association with Unsafe Sex*, 12 J. GEN. INTERNAL MED. 250, 251 (1997) (reporting that 62.9% of boys studied were abused extrafamilially). In contrast, girls experience intrafamilial abuse more often. See Oliver C.S. Tzeng & Helmut J. Schwarzin, *Gender and Race Differences in Child Sexual Abuse Correlates*, 14 INT'L J. INTERCULTURAL REL. 135, 147 (1990) (finding in an examination of substantiated sexual abuse cases that female children were four times more susceptible to abuse from caretakers than male children).

²⁶ Finkelhor et al., *supra* note 8, at 25 ("It would seem that almost any long-term disruption of the natural parent situation is risky for girls *but not so for boys*." (emphasis added)); cf. Judith Herman & Lisa Hirschman, *Families at Risk for Father-Daughter Incest*, 138 AM. J. PSYCHIATRY 967, 969 (1981) (reporting that in families in which mothers were absent due to illness or disability, "fathers commonly began by singling out the oldest daughter" and would "move[] on to the younger sisters" but that "[b]rothers were not molested"). It is not my intention, however, to suggest that the needs and experiences of boys should be overlooked. Each gender faces specific risks of sexual victimization and may require different interventions. Jean Giles-Sims, *Current Knowledge About Child Abuse in Stepfamilies*, 26 MARRIAGE & FAM. REV. 215, 227 (1997). Nevertheless, because the risk to boys comes primarily from outside the family, addressing it in custody determinations would do little to mitigate it.

Part I of this Article begins by sketching the dimensions of child sexual abuse, how vulnerability to such abuse escalates after divorce, and the effect of molestation on young girls. Part I also analyzes demographic shifts now placing an increasing number of girls at risk of sexual exploitation.

Part II describes a bedrock strategy for curbing threats to public health, which is to identify "high risk" groups and then tailor prevention efforts to them. This Part argues that given the relationship between marital break-up and a girl's sexual vulnerability, a logical approach to addressing this threat to public health would incorporate prevention efforts into custody determinations. Part II finally examines various child custody standards and the hurdles they erect to considering this risk.

Part III explores possible reasons why courts may be reluctant to integrate the risk of sexual victimization into custody determinations. For instance, courts may feel that considering this risk would unjustly punish innocent parents for the wrongdoing of a few individuals, or influence and possibly decide custody on the basis of a generalized factor rather than on demonstrated parental conduct. Part III then argues that despite these potential objections, consideration of this risk accords with the primary objective in determining custody, protecting the child's welfare.

Next, Part III maps out three concrete approaches for addressing a girl's sexual vulnerability during the custody proceeding by raising parental awareness of the risk of molestation and encouraging parents to take greater precautions against potential sexual abuse. These approaches range from merely asking each parent whether they are willing to adopt a precautionary measure to shield their daughter from possible sexual abuse to actually awarding custody on the condition that the parent take specific steps to shield her from such abuse. Part III then briefly examines two vehicles available to parents or courts: school-based prevention programs and parenting classes designed to educate caretakers about the signs of sexual abuse. Finally, Part III outlines a scheme of legislative reform that would institutionalize consideration of this risk. It is important to note that Part III does not advocate limiting the availability of divorce because encouraging distressed couples to remain together may not be an effective solution.²⁷

²⁷ See *infra* Part IV.C (noting that marital conflict and violence are important predictors of abuse in intact families). Some may see the emphasis on risk to girls after divorce as an indictment of fractured and blended families for their form (i.e., whether they have two parents) and consequently as an attempt to force families back into a traditional nuclear mold. As noted below, children may also be molested in two-parent nuclear families. See *infra* note 52 and accompanying text. Thus, it would be myopic to assume that mere restoration of the two-biological-parent family would suffice to eradicate the risk of sexual abuse to girls. Cf. Janet Z. Giele, *Decline of the Family: Conservative, Liberal, and*

Also, Part III does not argue for a presumption in favor of fathers over mothers, or vice-versa, given the equally significant risks girls face in both custodial situations.²⁸

This Article suggests that legislatures and state courts can more fully address the substantial risks of sexual abuse to girls by making the possibility of sexual abuse an explicit component of child custody determinations. Nevertheless, Part IV recognizes that even the most well-intentioned efforts to protect children may result in counterproductive intrusions into family life. This Part considers, for example, whether efforts to prevent sexual abuse of children after divorce will stigmatize single-parent and remarried families. Similarly, this Part considers whether the state should involve itself in private matters such as how to best protect a child from sexual abuse. Part IV also takes a critical look at whether a noncustodial parent would be encouraged to fabricate charges of abuse to vent unresolved anger or obtain an edge in subsequent legal proceedings.

Finally, the Article concludes that taking proactive steps to prevent sexual abuse in fractured families represents a common-sense, scientifically-grounded response to a real, but frequently ignored problem. More broadly, the Article maintains that decision makers can begin to respond intelligently to the crises facing fractured families only if informed about how these families function.

I

CHILD SEXUAL ABUSE IN THE AFTERMATH OF DIVORCE

A. Scope of the Problem

1. *Risk of Child Sexual Abuse for All Children*

The bare facts are distressing: children suffer higher rates of sexual victimization than adults,²⁹ and between one and three million

Feminist Views, in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 89, 109 (David Popenoe et al. eds., 1996) (surveying different approaches to dealing with other negative repercussions of divorce and lauding feminists for, among other things, refusing to "turn back to the past"). This Article suggests that policymakers study the challenges unique to each family constellation in order to respond intelligently to such challenges. Comparisons in family functioning provide a natural starting point for such tailored responses, but should not be interpreted as an idealization or denigration of one family form over another.

²⁸ See *infra* Part I.A.2(a), (b) (examining studies that found that girls were at high risk of molestation in both father-only households and in households in which the mother remarries or cohabitates).

²⁹ David Finkelhor et al., *Victimization Prevention Programs for Children: A Follow-Up*, 85 AM. J. PUB. HEALTH 1684, 1684 (1995) (citations omitted). On a more positive note, the incidence of all forms of child maltreatment, including physical, sexual, and emotional abuse, declined in 1998 for the fifth year in a row to "12.9 per 1,000 children, the lowest record in more than 10 years." *HHS Reports New Child Abuse and Neglect Statistics*, HHS NEWS (U.S. Dep't of Health & Human Servs., Wash., D.C.) Apr. 10, 2000, at <http://www.acf.gov/>

cases occur each year.³⁰ Although estimates of the number of women sexually abused as children differ³¹ depending on how investigators define sexual assault and obtain study data,³² it is clear that sexual abuse is common, underreported, and underrecognized.³³ Child sex-

news/april.htm (last visited Aug. 25, 2000). Although federal agencies in the United States have compiled national data on child abuse since 1976 using reports to state child protective services agencies, "[m]ost of the findings from these national data are not analyzed by the type of maltreatment . . ." John M. Leventhal, *Epidemiology of Sexual Abuse of Children: Old Problems, New Directions*, 22 CHILD ABUSE & NEGLECT 481, 484 (1998). Consequently, "important issues about sexual abuse," including the relationship of perpetrators to victims, "are not available" from national compilations. *Id.*

³⁰ GRAY, *supra* note 2, at 5. While the magnitude of the problem is unthinkable and, for that reason, may seem specious, it becomes more credible when one considers that most child molesters are serial offenders. As Leslie Tutty notes, "[t]he average molester of girl children will molest 62.4 victims in his career, whereas the average molester of boys offended 30.6 victims." Leslie M. Tutty, *Preventing Child Sexual Abuse: A Review of Current Research and Theory*, in CHILD MALTREATMENT: EXPANDING OUR CONCEPT OF HEALING 259, 262 (Michael Rothery & Gary Cameron eds., 1990).

³¹ In twenty studies performed in the United States and Canada between 1980 and 1994, prevalence rates of sexual abuse for women ranged from 2% to 62%. Harriet L. MacMillan et al., *Prevalence of Child Physical and Sexual Abuse in the Community: Results from the Ontario Health Supplement*, 278 JAMA 131, 134 (1997). Notwithstanding this divergence, most sociologists agree that "[a] rough expectation that at least one in four girls" will experience abuse is warranted. Finkelhor, *supra* note 5, at 67. Significantly, actual rates of child sexual assault may be higher than studies suggest; substantiated reports of abuse, on which many studies rely, "represent but a small tip of the iceberg." Parker & Parker, *supra* note 10, at 532 (internal quotation marks omitted); *see also* Leventhal, *supra* note 29, at 489 (noting that sexual abuse is "underreported"); Timnick, *supra* note 10, at 1 (noting that only 3% of child abuse victims in one national study reported the incident to the police or other public agency). Similarly, victims in community surveys underreport "due to forgetting (particularly in those abused prior to 5 or 6 years of age) and to an unwillingness to acknowledge abuse (particularly in incestuous sexual abuse)." P.E. Mullen et al., *The Long-Term Impact of the Physical, Emotional, and Sexual Abuse of Children: A Community Study*, 20 CHILD ABUSE & NEGLECT 7, 17 (1996) (citation omitted).

³² Definitions of sexual abuse that investigators use vary widely. Holmes & Slap, *supra* note 10, at 1856. For instance, studies differ as to what ages constitute childhood, some using fourteen as a cutoff age, while others use sixteen or eighteen. *See id.* Similarly, some studies require an element of coercion or perceived coercion, while others do not. *See id.* Studies also vary in their treatment of age differentials between perpetrator and victim, frequently using a five-year difference. *See id.* & tbl.2. Age differentials are critical to ensuring that studies do not label sex play between fifteen- and seventeen-year-old peers as child sexual assault. *Cf. id.* (noting that in the "graded" age differential method, "[f]or a victim aged [thirteen] to [sixteen] years, a perpetrator had to be at least [ten] years older"). Collection methods (e.g., telephone versus in-person interviews), response rates, and the types of questions used may also influence prevalence rates. *Cf.* Angela Browne & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 PSYCHOL. BULL. 66, 75-76 (1986) (suggesting "some basic methodological improvements" that "would greatly benefit" the study of child sexual abuse); Nancy D. Vogeltanz et al., *Prevalence and Risk Factors for Childhood Sexual Abuse in Women: National Survey Findings*, 23 CHILD ABUSE & NEGLECT 579, 580 (1999) (noting that different collection methods will yield different results). These variations may explain, in part, apparent inconsistencies in findings. *See* Browne & Finkelhor, *supra*, at 75-76.

³³ *See* Browne & Finkelhor, *supra* note 32, at 75 (suggesting that "sexual abuse is so stigmatizing that only the most serious cases are discovered"). Significantly, victims may recharacterize an abusive event as normal in order to protect themselves from self-blame.

ual assault takes many forms, including vaginal intercourse, anal intercourse, fondling, oro-genital contact, romantic kissing, inserting objects in a child's vagina or anus, and digital penetration.³⁴ Although some academic debate persists, researchers are beginning to conclude that sexual abuse may include noncontact offenses, such as exhibitionism, masturbation in the child's presence, or taking pornographic photographs of her.³⁵

Nearly three-fourths of sexual abuse victims experience some form of physical contact, with a significant fraction experiencing vaginal or anal intercourse.³⁶ If the definition of sexual abuse is limited to acts involving physical contact, approximately 20% of female children experience a serious, unwanted sexual assault (ranging from manual interference with their genital area to completed intercourse) prior to their eighteenth birthdays,³⁷ resulting in marked corrosive effects on their mental health and development.³⁸

Children across the sociodemographic spectrum appear to be at risk for sexual abuse. While the composite picture of a molested child in early research was a young, unmarried, African-American female of a lower socioeconomic background,³⁹ "growing evidence [demon-

See Allan R. De Jong et al., *Epidemiologic Variations in Childhood Sexual Abuse*, 7 CHILD ABUSE & NEGLECT 155, 160 (1983).

³⁴ 2 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 16.02, at 161 (1993); see Holmes & Slap, *supra* note 10, at 1857.

³⁵ Holmes & Slap, *supra* note 10, at 1856 (reporting that of 166 studies reviewed, 83% defined child sexual assault to include both contact and noncontact abuse); see also GRAY, *supra* note 2, at 90 (finding in a comprehensive examination of criminal cases that nontouching offenses were the second most prevalent of four general categories of abusive behavior); 2 HARALAMBIE, *supra* note 34, § 16.01, at 161 (including both contact and noncontact offenses in the definition of sexual abuse).

Defining child abuse is "fraught with difficulties"; more restrictive definitions reasonably warrant criticism for excluding unpleasant and even criminal acts, implying that such acts are not abusive. Mullen et al., *supra* note 31, at 8. For example, definitions of sexual assault that require physical contact preclude potentially traumatic experiences, such as exhibitionism or sexual requests. See Holmes & Slap, *supra* note 10, at 1856 tbl.2. On the other hand, broad definitions of sexual abuse that include seemingly nonexploitive behavior, such as uncoerced sex play between peers, tend to encompass large segments of the community without providing a clear nexus between actual abuse and long-term negative effects. See Mullen et al., *supra* note 31, at 8.

³⁶ Vogeltanz et al., *supra* note 32, at 583 (reporting that approximately one in five abused women experienced vaginal or anal intercourse during childhood); see also GRAY, *supra* note 2, at 88-89 (reporting alleged intercourse in 25.1% of criminal cases in eight jurisdictions). As noted in this Article, daughters in fractured families are at a significantly higher risk of abuse involving penetration. See *infra* note 108 and accompanying text.

³⁷ See David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 FUTURE CHILD. 31, 37 (1994).

³⁸ See *infra* Part I.B.

³⁹ See, e.g., Gail Elizabeth Wyatt, *The Sexual Abuse of Afro-American and White-American Women in Childhood*, 9 CHILD ABUSE & NEGLECT 507, 507 (1985). A related stereotype is that sexual abuse "occurs frequently among isolated backwoods families, such as in the hollows of Appalachia or the rural reaches of Maine." DAVID FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 110 (1979).

strates] that the prevalence of sexual abuse is no higher among [African Americans] than among the white population."⁴⁰ Indeed, five community surveys "conducted independently in diverse locations, consistently show similar prevalence rates for [African Americans] and whites."⁴¹ Similarly, research invalidates the entrenched view that child molestation is more common in lower socioeconomic classes.⁴² Just as the stereotype of a molested child diverges from reality, ingrained beliefs about child molesters also miss the mark. The predominant image of the child molester is that of a stranger in a trench coat loitering near an elementary school playground.⁴³ This Article will demonstrate, however, that it is not faceless strangers who violate a significant number of female victims, but their fathers and men in long-term relationships with their mothers.

2. *Risk of Sexual Abuse for Daughters Escalates Following Divorce*

Although not linked to general demographic factors such as race or socioeconomic class, sexual abuse does not randomly occur throughout the child population.⁴⁴ Rather, it occurs more often in single-parent or reconstituted families.

⁴⁰ Stefanie Doyle Peters et al., *Prevalence*, in A SOURCEBOOK ON CHILD SEXUAL ABUSE 15, 29 (David Finkelhor ed., 1986).

⁴¹ *Id.* (citations omitted); see also Vogelanz et al., *supra* note 32, at 580 ("[D]emographic characteristics such as . . . ethnicity were not consistently and strongly associated with [child sexual abuse] risk.").

⁴² See David M. Fergusson et al., *Childhood Sexual Abuse and Psychiatric Disorder in Young Adulthood: I. Prevalence of Sexual Abuse and Factors Associated with Sexual Abuse*, 34 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1355, 1359 (1996); Parker & Parker, *supra* note 10, at 532; Vogelanz et al., *supra* note 32, at 580. The view that sexual abuse is class related results from the overrepresentation of poorer families in reported cases of sexual abuse. Carol S. Larson et al., *Sexual Abuse of Children: Recommendations and Analysis*, 4 FUTURE CHILD, 4, 11 (1994). However, in retrospective surveys "economically disadvantaged people report little or no more sexual abuse than others." *Id.*

Sociologists explain the discrepancy between reported cases and retrospective studies by noting that "[p]oor and disorganized families . . . lack the resources to preserve secrecy [and thus] are heavily overrepresented." Herman & Hirschman, *supra* note 26, at 967. In addition, "identifying professionals feel more comfortable and confident labeling abuse among disadvantaged families, which tend to fit prevailing stereotypes about where abuse occurs." Finkelhor, *supra* note 5, at 68.

⁴³ 2 HARALAMBIE, *supra* note 34, § 16.01, at 161. It is a myth that most children are molested by strangers. See FINKELHOR, *supra* note 39, at 73 (debunking the notion that "[c]hild molesters [are] sexually frustrated old men who loiter[] in public parks or outside of schoolyards in hopes of luring naive youngsters into their clutches with offers of candy or money" (citations omitted)); GRAY, *supra* note 2, at 1 (explaining that society has just now begun to accept the possibility that sexual abuse occurs, "not only at the hands of strangers," but "extensively"); Bagley & Ramsay, *supra* note 19, at 33 (concluding that the "earlier view that sexual exploitation in family contexts was . . . rare . . . has been disproven by long-term follow-up work" (citations omitted)).

⁴⁴ Researchers have used three research designs to explore risk factors for child sexual abuse: (1) cross-sectional surveys of adolescents or adults that ask about childhood problems such as child sexual abuse and compare children with a history of abuse to those without; (2) case-control studies comparing adolescents or adults with a history of child

Numerous studies have reported that young girls living without one of their natural parents are at greater risk of sexual abuse, both from family members and those outside the family.⁴⁵ For example, in

sexual abuse (identified, for example, in a mental health program) with a nonabused control group to isolate exposure factors associated with sexual abuse; and (3) longitudinal studies of cohorts of children followed prospectively from birth to the age of majority, at which time researchers obtain retrospective reports of childhood sexual abuse and examine prospectively-assessed risk factors. See Leventhal, *supra* note 29, at 486, 488-89.

Only a few longitudinal studies of risk factors for sexual abuse have been conducted to date. *Id.* at 488. Consequently, this Article relies heavily on cross-sectional surveys and case-control studies. While investigators recognize the need for longitudinal studies examining risk, it is unlikely that many longitudinal studies will be forthcoming:

This work will not be easy. Ethical questions regarding the voluntary enrollment of children in studies that might result in the criminal prosecution of the parent and removal of the child touch at the most sensitive tenets of human research. No investigator wants to be associated with a process that appears, to even a minimal extent, to resemble the Tuskegee syphilis study wherein investigators stood aside while a disease was allowed to destroy the health and life of the subjects.

Desmond K. Runyan, *Prevalence, Risk, Sensitivity, and Specificity: A Commentary on the Epidemiology of Child Sexual Abuse and the Development of a Research Agenda*, 22 CHILD ABUSE & NEGLECT 493, 497 (1998). In addition, long-term studies require substantial financial support, for which available funding is inadequate. See Leventhal, *supra* note 29, at 488, 489.

⁴⁵ E.g., CHRISTOPHER BAGLEY & KATHLEEN KING, CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 90 (1990) ("It is not typical for sexual abuse to occur independently of other aspects of family dysfunction. It occurs with greater frequency in homes disrupted by parental absence or separation . . ."); FINKELHOR, *supra* note 39, at 135, 120-21 (concluding that sexual victimization is related to "family disruption" (citation omitted)); Pamela C. Alexander, *Application of Attachment Theory to the Study of Sexual Abuse*, 60 J. CONSULTING & CLINICAL PSYCHOL. 185, 185 (1992) ("[C]ertain family characteristics are the most significant predictors for increased risk for all kinds of child sexual abuse[, including] absence of a biological parent."); Bagley & Ramsay, *supra* note 19, at 42 (stating that molestation "occurs with greater frequency in homes which are disrupted by the child's separation from one or both parents," but cautioning that "sexual abuse is not[,] in statistical terms, a direct function of the family variables"); Jocelyn Brown et al., *A Longitudinal Analysis of Risk Factors for Child Maltreatment: Findings of a 17-Year Prospective Study of Officially Recorded and Self-Reported Child Abuse and Neglect*, 22 CHILD ABUSE & NEGLECT 1065, 1074 (1998) (finding in a study of 644 families in upstate New York surveyed on four occasions between 1975 and 1992 that disruption in a child's relationship with her biological parents increases her risk of sexual abuse); Ann W. Burgess et al., *Abused to Abuser: Antecedents of Socially Deviant Behaviors*, 144 AM. J. PSYCHIATRY 1431, 1433 (1987) (finding in follow-up studies of two groups of adolescents who had been involved in sex rings as children, that 70% of adolescents who participated in the sex rings for more than one year were from single-parent families, compared to 47% of the adolescents who were involved for less than a year); David M. Fergusson et al., *Childhood Sexual Abuse, Adolescent Sexual Behaviors and Sexual Revictimization*, 21 CHILD ABUSE & NEGLECT 789, 797 (1997) (finding in a longitudinal study of 520 New Zealand-born children that "young women who reported [child sexual abuse] were more likely [than nonabused children] to have experienced at least one change of parents before the age of [fifteen]"); Finkelhor, *supra* note 37, at 48 ("In many studies . . . children who lived for extended periods of time apart from one parent have been found to bear elevated risks for [sexual] abuse."); Finkelhor, *supra* note 5, at 68 (concluding that "[i]n general, children who are living without one or both of their natural parents are at greater risk for abuse"); Giles-Sims, *supra* note 26, at 218 (noting that the "sexual abuse literature is more consistent . . . in finding that children not living with both natural parents run higher risks of child sexual abuse both from family members and others, but the exact magnitude of reported risk varies across studies"); Parker & Parker, *supra* note 10, at

one of the few longitudinal studies of a general population, David Fergusson and his colleagues followed 1265 children from birth until the age of sixteen.⁴⁶ They found that 66.5% of the victims of sexual abuse came from families that “experience[d] at least one change of parents before age 15,” compared to 33.5% of children who did not experience abuse.⁴⁷ Similarly, the only national survey in the United States to examine risk factors for child sexual assault⁴⁸ found higher rates of abuse among women who reported living for some period without one of their biological parents.⁴⁹ At least a dozen other studies confirm that sexual victimization occurs more often in disrupted families.⁵⁰ Those studies estimating the incidence of abuse find that

532 (“Reconstituted families, stepparent and broken families, with mother’s male companions in the home, seem to be vulnerable.”); Anne E. Stern et al., *Self Esteem, Depression, Behaviour and Family Functioning in Sexually Abused Children*, 36 J. CHILD PSYCHOL. & PSYCHIATRY & ALLIED DISCIPLINES 1077, 1080 & 1081 tbl.1 (1995) (finding in a comparison of eighty-four sexually abused children and their families to nonabused controls that the abused group had more marital breakdown and change of parent than the nonabused group).

⁴⁶ Fergusson et al., *supra* note 42, at 1356 (following a cohort of children born in Christchurch, New Zealand in 1977 and asking them at age eighteen to provide retrospective reports of molestation experiences during childhood).

⁴⁷ *Id.* at 1359 tbl.2. Fergusson reports, moreover, that 60% of children who experienced intercourse as a part of the abuse experience had been exposed to parental divorce or separation. *Id.* However, in a regression analysis, investigators found that five factors—gender, marital conflict, parental attachment, paternal overprotection, and parental alcoholism—were predictive of reported abuse. *Id.* at 1360 & 1360 tbl.3.

⁴⁸ See Vogeltanz et al., *supra* note 32, at 583.

⁴⁹ See Finkelhor et al., *supra* note 8, at 24 (finding in national survey of 2626 adult men and women that separation from a natural parent for a major portion of one’s childhood is a risk factor for sexual victimization).

⁵⁰ *E.g.*, BAGLEY & KING, *supra* note 45, at 90-91 (concluding from multiple studies that “long-term separation from a biological parent” was “strongly associated with sexual abuse in childhood”); VINCENT DE FRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS: FINAL REPORT 50 (1969) (finding in a study of 250 sexual abuse cases that in 60% of the families, the children’s natural father or natural mother was not in the home—“an extraordinary high incidence of broken homes”); DIANA E. H. RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN 103, 104 tbl.8-1 (1986) (revealing that “women who were reared by both of their biological or adoptive parents were the least likely to be incestuously abused”); S. KIRSON WEINBERG, INCEST BEHAVIOR 49 (1955) (finding in a study of 203 incest cases in the State of Illinois that 40.3% of the fathers were widowed or separated from their wives at the start of incestuous relationships with their daughters); Raymond M. Bergner et al., *Finkelhor’s Risk Factor Checklist: A Cross-Validation Study*, 18 CHILD ABUSE & NEGLECT 331, 334 (1994) (finding that “separation from mother during some period” discriminated between abused and nonabused subjects in a study of 411 female college students); Bolen, *supra* note 11, at 164 (finding in a multivariate analysis of Diane Russell’s survey data on 933 adult women in the San Francisco area that “[r]espondents living with both natural parents prior to the age of fourteen had the lowest rates of abuse”); David Finkelhor & Larry Baron, *High-Risk Children, in A SOURCEBOOK ON CHILD SEXUAL ABUSE*, *supra* note 40, at 60, 73, 79 (noting the “impressive number of studies with positive findings on the question of parental absence” and concluding that “[t]he strongest and most consistent associations across the studies concerned the parents of abused children,” and that “[g]irls who are victimized are . . . more likely to have lived without their natural fathers”); Finkelhor et al., *supra* note 8, at 25 (concluding that

as many as half the girls in fractured families report sexual abuse as a child.⁵¹

Researchers have attempted to discern factors that correlate with greater risk for sexual victimization after the nuclear family dissolves.⁵² Sociologist Patricia Bolen used statistical tools to distinguish the effect of living without both natural parents from other aspects of household composition.⁵³ She found that "when other variables were held constant, children living with males in the household after separation were 3.4 times more likely to be sexually abused than were

"almost any long-term disruption of the natural parent situation is risky for girls"); Kenneth J. Gruber & Robert J. Jones, *Identifying Determinants of Risk of Sexual Victimization of Youth: A Multivariate Approach*, 7 CHILD ABUSE & NEGLECT 17, 21 tbl.2 (1983) (discovering in a sample of delinquent adolescent females in Western North Carolina that victims of child sexual assault were less likely to be living with both natural parents—15% of the abused children lived with both natural parents while 52% of nonabused children did so); Marcellina Mian et al., *Review of 125 Children 6 Years of Age and Under Who Were Sexually Abused*, 10 CHILD ABUSE & NEGLECT 223, 227 (1986) (finding that 67% of the victims of intrafamilial abuse came from families in which parents had separated or divorced, compared to 27% of the children abused by perpetrators outside of the family); Mullen et al., *supra* note 31, at 8-9, 18 (reporting, in a study of 2250 randomly selected adult women in New Zealand, that sexual, physical, and emotional abuse "occurred more often in those from disturbed and disrupted home backgrounds"); Vogeltanz et al., *supra* note 32, at 586 (finding, after using statistical analysis to unravel the effects of multiple risk factors, that not living with both biological parents by age sixteen ranked among those factors "significantly associated with increased risk of [child sexual abuse]"); Patricia Y. Miller, *Blaming the Victim of Child Molestation: An Empirical Analysis* (1976) (unpublished Ph.D. dissertation, Northwestern University) (on file with author) (discovering that biological father's absence "directly influence[d] molestation" and constituted the "variable [with] the largest direct effect on . . . victimization"); cf. Kristin Anderson Moore et al., *Nonvoluntary Sexual Activity Among Adolescents*, 21 FAM. PLAN. PERSP. 110, 113 tbl.3 (1989) (ascertaining in a study of white female adolescents that having parents who are "separated, divorced or never-married" doubles the likelihood of sexual abuse, although the association was not significant when other factors were controlled). *But see* ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP'T OF HEALTH & HUMAN SERVS., THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 5-19 tbl.5-3, 5-26 tbl.5-4 (1996) (failing to find, in a 1993 congressionally-mandated study of 5600 professionals in 842 agencies serving forty-two counties, a significant difference in rates of molestation for children in single-parent families and their counterparts living with both parents, whether analyzed under an actual harm standard or an endangerment standard).

⁵¹ *E.g.*, FINKELHOR, *supra* note 39, at 125 (discovering that 58% of the girls who at some time before the age of sixteen had lived without their mothers had been sexually victimized, three times the rate for the whole sample, making these girls "highly vulnerable to sexual victimization"); Bagley & Ramsay, *supra* note 19, at 37 & 38-39 tbl.1 (reporting that 53% of women separated from a parent during childhood reported child sexual abuse).

⁵² Clearly, however, an intact family does not immunize a child from sexual exploitation. *E.g.*, Finkelhor, *supra* note 5, at 68 ("[T]he presence of both natural parents is certainly not an indicator of low risk in any absolute sense."); Mullen et al., *supra* note 31, at 18 (conceding that "[i]ntact families do not guarantee stability"). Other parental problems—including conflicted parent-child relationships, parental substance or alcohol abuse, and emotional instability—are also associated with elevated risks for molestation. *E.g.*, Ferguson et al., *supra* note 42, at 1360; Vogeltanz et al., *supra* note 32, at 580.

⁵³ *See* Bolen, *supra* note 11 (performing multivariate analyses of data from Diane Russell's survey of 933 adult women in the San Francisco area).

those living with both natural parents," but that when compared to children living with only females after separation, children living with males in their household after separation "were more than 7 times more likely to be abused."⁵⁴ Girls living with males in the household after separation are not only at a markedly higher risk for sexual abuse, but that risk is substantial: Bolen found that 53% were sexually abused.⁵⁵

Bolen's findings suggest that the heightened risk to girls does not result from marital dissolution itself, but "[i]nstead, living with a male in the household after separation, even if that male was the natural father, appeared to be the more important predictor."⁵⁶ As Bolen observes, "for children living with a male in the household, rates of abuse appeared to be better explained by (a) living with a stepfather or (b) being separated from one's natural mother."⁵⁷

As the next two subparts will illustrate, household composition following divorce plays a crucial role in determining a girl's vulnerability to sexual victimization. For instance, two seminal studies estimated that a girl living with her mother in a "blended"⁵⁸ family was between two and seven times more likely to be molested before the age of eighteen than a girl residing in a nuclear family.⁵⁹ Details of the risk for daughters in their father's custody are no less stark: they also are at a markedly higher risk of being sexually victimized, with half the girls according to one national survey experiencing sexual abuse.⁶⁰

a. *Risk of Sexual Abuse for Daughters in Their Mother's Custody*

Virtually all studies of child sexual abuse report that girls living with stepfathers are at high risk,⁶¹ leading one sociologist to conclude that the presence of a stepfather is "[t]he family feature whose risk has been most dramatically demonstrated."⁶² This dim appraisal reflects

⁵⁴ *Id.* at 167.

⁵⁵ *See id.* at 164.

⁵⁶ *Id.* at 167.

⁵⁷ *Id.* at 166.

⁵⁸ By a "blended" or "reconstituted" family, I refer to children living in households with a natural parent and the parent's partner, whether the two are married or cohabiting. As a result of rapid changes in family structure and composition, family law "is unfortunately afflicted with significant semantical problems, described . . . as a 'frightful lack of linguistic uniformity.'" *Taylor v. Taylor*, 508 A.2d 964, 966 (Md. 1986) (quoting David J. Miller, *Joint Custody*, 13 *FAM. L.Q.* 345, 376 (1979)).

⁵⁹ *See infra* note 66 and accompanying text.

⁶⁰ *See Finkelhor et al., supra* note 8, at 25 & tbl.7.

⁶¹ Parker & Parker, *supra* note 10, at 541.

⁶² Finkelhor, *supra* note 5, at 68.

an emerging consensus that disagrees about details but not essentials.⁶³

In one long-term study, researchers found that New Zealand children reporting childhood sexual abuse were more likely to live with a stepparent before the age of fifteen.⁶⁴ Of those children experiencing intercourse, nearly half (45.4%) were raised in a stepparent household.⁶⁵ Similarly, Diana Russell found in a community survey of 933 women in San Francisco that one in six stepdaughters growing up with a stepfather was sexually abused, making these girls over seven times more likely to be sexually victimized than girls living with both biological parents.⁶⁶ Indeed, of forty risk factors tested for association with child sexual abuse in an early study, the presence of a stepfather

⁶³ *E.g.*, FINKELHOR, *supra* note 39, at 122 (observing that "the addition of a stepfather to a girl's family causes her vulnerability to skyrocket"); Alexander, *supra* note 45, at 185 ("[C]ertain family characteristics are the most significant predictors for increased risk for all kinds of child sexual abuse[, including] the presence of a stepfather."); Beitchman et al., *supra* note 9, at 550 (observing in a review of forty-two separate publications that "[t]he majority of children who were sexually abused . . . appeared to have come from single or reconstituted families"); Brown et al., *supra* note 45, at 1074 (finding in a longitudinal study of 644 families in upstate New York between 1975 and 1992 that disruption of relationships with biological parents and living in the presence of a stepfather increased a girl's risk of sexual abuse); Fergusson et al., *supra* note 45, at 797 (finding in a longitudinal study of 520 New Zealand born young women that child sexual abuse was associated with living with a stepparent before the age of fifteen); Finkelhor & Baron, *supra* note 50, at 79 ("The strongest and most consistent associations across the studies concerned the parents of abused children. . . . Girls who lived with stepfathers were also at increased risk for abuse."); Giles-Sims, *supra* note 26, at 227 ("In summary, most studies of child abuse in stepfamilies indicate higher risks to children, particularly for sexual abuse of girls."); Gruber & Jones, *supra* note 50, at 21 (finding in a study of forty-two youths that 40% of sexually assaulted children lived "with either a step or foster father"); Leventhal, *supra* note 29, at 488 ("Studies have indicated that . . . girls living with step-fathers are at an increased risk compared to girls living with biological fathers . . ."); *cf.* Margaret F. Brinig & F.H. Buckley, *Parental Rights and the Ugly Duckling*, 1 J.L. & FAM. STUD. 41, 53 (1999) ("Abused children are significantly more likely to be girls (because, with stepparents, much of the abuse tends to be sexual) . . ."). *But see, e.g.*, Bergner et al., *supra* note 50, at 334 (failing to find a link between sexual abuse and the presence of a stepfather).

⁶⁴ Fergusson et al., *supra* note 42, at 1359 tbl.2 (reporting results of a longitudinal study of 1265 children born in Christchurch, New Zealand, who were studied from birth until the age of eighteen).

⁶⁵ *See id.* at 1358 tbl.1, 1359 tbl.2.

⁶⁶ *See* RUSSELL, *supra* note 50, at 234, 255 (reporting that 2% of respondents reared by biological fathers were sexually abused, while "at least [17%] of the women in our sample who were reared by a stepfather were sexually abused by him before the age of fourteen"); *cf.* David Finkelhor, *Risk Factors in the Sexual Victimization of Children*, 4 CHILD ABUSE & NEGLECT 265, 269 (1980) (finding in a study of college undergraduates that "a stepfather was five times more likely to sexually victimize his stepdaughter than was a genetic father"); Parker & Parker, *supra* note 10, at 541 (finding risk of abuse associated with stepfather status to be almost twice as high as for natural fathers). Significantly, the risk of sexual assault by father-substitutes "who are around for short[] lengths of time . . . may be considerably higher." RUSSELL, *supra* note 50, at 268.

"remained the strongest correlate of victimization, even when all other variables were statistically controlled."⁶⁷

Likewise, the evidence is legion that stepfathers represent a greater portion of abusers than their incidence in the general population, suggesting that they are more likely to abuse their daughters than biological fathers.⁶⁸ For instance, in their study of children mo-

⁶⁷ DAVID FINKELHOR, *CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH* 25 (1984). Rebecca Bolen's research on multiple risk factors corroborates findings of heightened risk. See Bolen, *supra* note 11, at 167 ("[C]hildren living with males in the household after separation [of their parents] were more than [seven] times more likely to be [sexually] abused [than] children living with only females after separation."). In hard numbers, "over half of these children were sexually abused." *Id.* at 163.

⁶⁸ *E.g.*, GRAY, *supra* note 2, at 84 (cataloguing studies that "have found stepfathers to be the most prevalent abusers of all," but also noting studies that question such a finding); SEDLAK & BROADHURST, *supra* note 50, at 6-5, 6-6 tbl.6-2 (reporting in a 1993 congressionally-mandated study of 5600 professionals in 842 agencies serving forty-two counties that one-fourth (25%) of sexually abused boys and girls were victimized by a parent substitute—defined to include in-home adoptive parents and stepparents, as well as parents' paramours—while slightly more than one-fourth (29%) were sexually abused by a birth parent, but emphasizing that no statistical tests were conducted to determine whether these differences are significant); U.S. DEP'T OF HEALTH & HUMAN SERVS., *STUDY FINDINGS: NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT* 31 tbl.5-5 (1981) (finding in a stratified random sample of child protective services agencies in twenty-six counties within ten states that stepfathers were involved in 30% of the reported sexual abuse cases, compared to biological fathers, who were involved in 28% of the cases); Hendrika B. Cantwell, *Sexual Abuse of Children in Denver, 1979: Reviewed with Implications for Pediatric Intervention and Possible Prevention*, 5 *CHILD ABUSE & NEGLECT* 75, 77 tbl.1 (1981) (finding in a study of 226 substantiated cases of child sexual abuse in Denver, Colorado during 1979 that 27.5% of children were sexually victimized by a surrogate father, compared to 26.5% who were abused by their natural father); Russell P. Dobash et al., *Child Sexual Abusers: Recognition and Response*, in *CHILD ABUSE AND CHILD ABUSERS: PROTECTION AND PREVENTION* 113, 114-15, 124 fig. 6.6, 126 (Lorraine Waterhouse ed., 1993) (finding in a study of fifty-three known perpetrators of child sexual abuse in Scotland that 12.59% of child victims lived with their mother and her colabitant at the time of abuse, while 21.16% lived with their mother and stepfather, leading the authors to conclude that "children living with step-fathers and male cohabittees appear to be much more at risk of sexual abuse than children living with both their natural parents"); Michael Gordon & Susan J. Creighton, *Natal and Non-natal Fathers as Sexual Abusers in the United Kingdom: A Comparative Analysis*, 50 *J. MARRIAGE & FAM.* 99, 100, 101, 104 (1988) (finding in a review of data collected by the National Society for the Prevention of Cruelty to Children that "[n]on-natal fathers were disproportionately represented among perpetrators"); Gruber & Jones, *supra* note 50, at 21-22 (finding in a study of delinquent adolescent females that living with a stepfather or foster father "significantly discriminated the victim and nonvictim groups," with 85% of sexual abuse victims coming from single or stepparent families compared to 47% of psychiatric controls); Patricia J. Mrazek et al., *Sexual Abuse of Children in the United Kingdom*, 7 *CHILD ABUSE & NEGLECT* 147, 150 (1983) (noting in a survey of 1599 family doctors, police surgeons, pediatricians, and child psychiatrists in the United Kingdom that "[w]ithin the family, the natural father was most likely (48%) to be the perpetrator, with stepparents the next most common (28%)"); Parker & Parker, *supra* note 10, at 533 (noting an "agreement in the literature [that] . . . stepfathers or other father-surrogates are overrepresented among abusers"); Robert Pierce & Lois Hauck Pierce, *The Sexually Abused Child: A Comparison of Male and Female Victims*, 9 *CHILD ABUSE & NEGLECT* 191, 192-93, 194 tbl.2 (1985) (ascertaining from a review of 180 substantiated cases of sexual abuse reported to a child abuse hotline between 1976 and 1979 that 41% of the perpetrators against girls were the child's natural father, while 23% were the child's stepfather); Diana E. H. Russell,

lest by caretakers, Leslie Margolin and John Craft posited that stepfathers should account for 10.6% of all father abuse "[b]ased on the percent of children cared for by nonbiologically related fathers."⁶⁹ In fact, "they accounted for [41%] of all sexual abuse, or almost [four] times what would be expected based on the percent of children cared for by nonbiologically related fathers."⁷⁰ In more than one study, stepfathers actually outnumbered natural fathers as abusers, a telling result given the disproportionately greater number of biological fathers in the United States.⁷¹ Christopher Bagley and Kathleen King

The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children, 7 CHILD ABUSE & NEGLECT 133, 140 (1983) (discussing data that "confirms the widespread belief that stepfathers are more likely to abuse their daughters than biological fathers"); Edward Sagarin, *Incest: Problems of Definition and Frequency*, 13 J. SEX RES. 126, 133-34 (1977) (concluding from a study of seventy-five cases of heterosexual incest in which thirty-two cases involved stepfathers and thirty-four involved biological fathers that "it appears that the likelihood of a stepfather-stepdaughter relationship is far greater than [a] father-daughter [relationship]" because the "number of households in which there is a stepfather and stepdaughter is surely many times lesser than those in which there is a father and daughter"); cf. BAGLEY & KING, *supra* note 45, at 75 (observing that "the presence of a biologically unrelated adult male, such as a stepfather in the child's household, puts [a female child] at considerable risk"); MARY DE YOUNG, THE SEXUAL VICTIMIZATION OF CHILDREN 3, 16 (1982) (finding in a study of eighty incest victims that 39% of the incest offenders were stepfathers, leading the author to conclude "that the introduction of a stepfather into a family does increase the possibility that the stepdaughter will become a victim of incest"); HERBERT MAISCH, INCEST 97 tbl.1 (Colin Bearne trans., 1973) (finding in a study of seventy-eight cases of incest to come before German courts that 44% involved father and daughter, while 41% involved stepfather and stepdaughter); PANEL ON RESEARCH ON CHILD ABUSE & NEGLECT, NAT'L RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT 127 (1993) ("Family structure has been implicated in child sexual abuse in that stepfathers are more likely perpetrators than are biological fathers, and children who have had a stepfather are at greater risk of abuse."); Mark D. Everson et al., *Maternal Support Following Disclosure of Incest*, 59 AM. J. ORTHOPSYCHIATRY 197, 198, 199 (1989) (noting in a sample of eighty-eight children recruited from eleven county social services agencies in North Carolina over a twenty-eight-month period to study the effects of maternal support that 30% of the perpetrators were biological fathers, 41% were stepfathers, and 17% were mothers' boyfriends); Elizabeth A. Sirles & Pamela J. Franke, *Factors Influencing Mothers' Reactions to Intrafamily Sexual Abuse*, 13 CHILD ABUSE & NEGLECT 131, 133 & tbl.1 (1989) (finding in a maternal support study of 193 incest victims receiving counseling services in St. Louis, Missouri, that sixty-four children were molested by their father, with an equal number abused by a stepfather or a mother's live-in partner). *But see* Jean Giles-Sims & David Finkelhor, *Child Abuse in Stepfamilies*, 33 FAM. REL. 407, 408-09 (1984) (finding that stepfathers outnumbered natural fathers among abusers, but disputing whether stepfathers are significantly overrepresented among child abusers).

⁶⁹ Leslie Margolin & John L. Craft, *Child Sexual Abuse by Caretakers*, 38 FAM. REL. 450, 452 (1989).

⁷⁰ *Id.*

⁷¹ *E.g.*, DE FRANCIS, *supra* note 50, at 69 (finding in a study of 250 sexual abuse cases that the natural father committed the offense in 13% of the cases, whereas in 14% of cases the offense was committed by a stepfather or by the man with whom the child's mother was living); GRAY, *supra* note 2, at 85 fig.4.10 (noting in a study of all cases of molestation filed in eight jurisdictions that 23.2% of accused perpetrators were stepfathers and boyfriends, while biological fathers accounted for 13.4%); Giles-Sims & Finkelhor, *supra* note 63, at 408 tbl.1 (reporting that 30% of abusers in study were stepfathers, outnumbering natural father abusers, who constituted 28% of the abusers).

estimate that "as many as one in four stepfathers may sexually abuse the female children to whom they have access."⁷²

Significantly, the risk of sexual exploitation for stepdaughters is not limited to abuse by a stepfather, but also extends to victimization outside the family.⁷³ For example, stepdaughters are five times more likely to be abused by a friend of their parents than are girls in nuclear families.⁷⁴ Because the risk of sexual abuse is cumulative, one researcher found that "[v]irtually *half* the girls with stepfathers were victimized by someone."⁷⁵

⁷² BAGLEY & KING, *supra* note 45, at 75-76.

⁷³ FINKELHOR, *supra* note 67, at 25 (observing that "[s]tepdaughters are even more vulnerable than these comparisons might suggest" because "[g]irls with stepfathers are also more likely than other girls to be victimized by other men"); FINKELHOR, *supra* note 39, at 149 (stating that girls with stepfathers "are also more vulnerable to victimization by persons from outside the family"); Finkelhor, *supra* note 5, at 68 (emphasizing that the greater risk of abuse for children separated from a natural parent applies both to abuse by family members and those outside the family). *But see* RUSSELL, *supra* note 50, at 105 (failing to find that girls with stepfathers are significantly more likely to be victimized by nonrelatives than other girls). A girl may also be sexually abused by her brother. Jane M. Rudd & Sharon D. Herzberger, *Brother-Sister Incest—Father-Daughter Incest: A Comparison of Characteristics and Consequences*, 23 CHILD ABUSE & NEGLECT 915, 924 (1999) (noting in a study of women who were sexually abused by brothers, that "parental care was lacking as a result of the unavailability or deaths of fathers in the families").

⁷⁴ FINKELHOR, *supra* note 67, at 25; *see also* FINKELHOR, *supra* note 39, at 130 (noting that stepfathers "are associated with sexual victimization, not just because they themselves take advantage of a girl, but because they increase the likelihood of a nonfamily member also doing so").

This increased risk of abuse for girls by family friends is puzzling. Perhaps remarriage increases traffic in the blended household, exposing girls to more potential predators. *See id.* at 123 ("Stepfathers (and stepbrothers) may bring into the family a coterie of friends and acquaintances who are not so protective toward a stepdaughter (or stepsister) as they might be toward the real daughter (or sister). . ."); *cf.* WALLERSTEIN ET AL., *supra* note 1, at xxix (observing that "[t]he divorced family has an entirely new cast of characters and relationships featuring stepparents and stepsiblings, second marriages and second divorces, and often a series of live-in lovers").

Alternatively, "[t]he problem may . . . be one of supervision. Instead of increased supervision, the entrance of a new father into a household may take up the mother's time and energy and actually mean less supervision of the child than previously." FINKELHOR, *supra* note 39, at 124. For many mothers, divorce also necessitates working outside the home to support their family, diminishing the opportunity to supervise their children. *See* WALLERSTEIN ET AL., *supra* note 1, at xxix (recognizing that "[i]t's not that parents love their children less or worry less about them [after divorce, but rather that] they are fully engaged in rebuilding their own lives—economically, socially and sexually").

⁷⁵ FINKELHOR, *supra* note 67, at 25; *see also* BAGLEY & KING, *supra* note 45, at 91 (citing study finding that girls separated from one parent "were also at risk for sexual victimization by more than one adult" (citation omitted)). Perhaps not unexpectedly, stepfamilies with girls have more adjustment problems than those with boys. *See, e.g.*, Samuel Vuchinich et al., *Parent-Child Interaction and Gender Differences in Early Adolescents' Adaptation to Stepfamilies*, 27 DEVELOPMENTAL PSYCHOL. 618, 623-24 (1991). It may be that the adjustment problems for girls partly explains their greater risk of sexual abuse in stepfamilies, or conversely, that girls being victimized predictably have trouble adjusting. *See* Giles-Sims, *supra* note 26, at 227.

While "the addition of a stepfather to a girl's family causes her vulnerability to skyrocket,"⁷⁶ it is overly simplistic to assume that the mother's remarriage or cohabitation is a necessary predicate to victimization. As Bagley and King note, a girl's long-term separation from her father—a risk factor "strongly associated" with childhood victimization—is sometimes, *but not always*, followed by the introduction of unrelated males into the household.⁷⁷ A *Los Angeles Times* survey reinforces the conclusion that a child's risk begins at the marital separation, rather than at remarriage or cohabitation. Although "the transition from a single mother alone to a single mother with stepfather increase[d] the risk," girls residing solely with their mothers "showed markedly higher risk" than children living in a nuclear family.⁷⁸ This baseline risk probably results in part from the child's exposure to men that her mother is actively dating.⁷⁹

It is tempting to dismiss the data on abuse in stepparent households as a product of selective reporting or prosecution.⁸⁰ After all, if the public attaches "special seriousness" to sexual contact between a daughter and parent, this perception alone could account for why these cases "most often com[e] to public and professional attention."⁸¹ Nevertheless, studies on child sexual abuse have withstood such criticisms. Data on the percent of (a) substantiated charges and (b) charges resulting in convictions or guilty pleas show "no difference between intrafamilial and extrafamilial cases."⁸² Moreover, the

⁷⁶ FINKELHOR, *supra* note 39, at 122.

⁷⁷ BAGLEY & KING, *supra* note 45, at 91 (reporting results of several research studies).

⁷⁸ Finkelhor et al., *supra* note 8, at 24, 25, 25 tbl.7 (reporting that 35% of the girls living in mother-only households were victimized, compared with approximately 40% of the girls living in blended households, leading the researchers to conclude that "girls show markedly higher risk under all family circumstances except that of living with two natural parents"); Mullen et al., *supra* note 31, at 14 ("Abuse was reported more frequently in those who grew up in families . . . with solo parents." (emphasis added)). A 1995 poll by the Gallup Organization of 1000 parents lends credence to the notion of heightened risk in mother-only households: single mothers reported an annual rate of child sexual abuse for boys and girls of 32 per 1000 children, compared to a sexual abuse rate of 11 per 1000 children in two-parent households. See GALLUP ORG., DISCIPLINING CHILDREN IN AMERICA: A GALLUP POLL REPORT 16 (1995).

⁷⁹ FINKELHOR, *supra* note 67, at 25-26 ("[A] mother who is courting may bring sexually opportunistic men into the home who may have little compunction about sexually exploiting the daughter if the chance arises.").

⁸⁰ See, e.g., GRAY, *supra* note 2, at 84 (noting that some ascribe the prevalence rates to "study design and interagency referral patterns"); BRENDA J. VANDER MEY & RONALD L. NEFF, INCEST AS CHILD ABUSE: RESEARCH AND APPLICATIONS 49-50 (1986) (questioning stepfather abuse data because of disproportionate representation of lower class families in reports to authorities).

⁸¹ FINKELHOR, *supra* note 67, at 116, 118.

⁸² See Donald G. Fischer & Wendy L. McDonald, *Characteristics of Intrafamilial and Extrafamilial Child Sexual Abuse*, 22 CHILD ABUSE & NEGLECT 915, 923 (1998) (failing to find any difference between the disposition of intrafamilial and extrafamilial cases in terms of (1) substantiation; (2) charges; (3) admission of guilt; (4) guilty plea entered; or (5)

frequency with which stepfathers are identified as perpetrators in Gallup-style community surveys of randomly selected adults confirms that this abuse is not an artifact of unrepresentative study populations.⁸³ Instead, scholars praise these studies for their meticulous design.⁸⁴ Finally, although there are legitimate questions about the validity of child sexual abuse reports that have surfaced during a therapeutic relationship,⁸⁵ multiple studies documenting heightened risk after divorce surveyed persons not necessarily receiving mental health services.⁸⁶ More fundamentally, the consistency of findings across numerous studies, conducted independently, in different ways and analyzing different populations, gives credence to this elevated risk of sexual abuse for girls, whatever its precise magnitude.⁸⁷

b. *Risk of Sexual Abuse for Daughters in Their Father's Custody*

Although research on the sexual victimization of children in their father's custody remains comparatively new, initial findings raise equally grave concerns about father-only households. One survey found a "markedly higher risk" for girls following divorce, "particularly when living alone with [their] father."⁸⁸ In that study, 50% of female children residing solely with their fathers reported sexual abuse by an adult.⁸⁹ Similarly, a 1995 poll of parents about child maltreatment found an annual rate of child sexual abuse for boys and girls in single-father households equal to forty-six victims per thou-

convictions"). Fischer and McDonald did find significantly longer jail sentences for intrafamilial offenders. *Id.* at 923-24.

⁸³ See, e.g., Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. CAL. INTERDISC. L.J. 631, 643 (1994) (noting that convenience samples of clinical populations raise questions about the degree to which a study population is representative of the general population).

⁸⁴ For instance, Diana Russell's seminal study of 933 women in San Francisco has been lauded as "one of the largest and most meticulous studies." David Finkelhor, *The Sexual Abuse of Children: Current Research Reviewed*, 17 PSYCHIATRIC ANNALS 233, 233 (1987); accord Bolen, *supra* note 11, at 159-60 (quoting Finkelhor, *supra*, at 233).

⁸⁵ See, e.g., ABRAMS & RAMSEY, *supra* note 10, at 348 (noting that "[t]he scientific community remains divided on whether memories can truly be repressed and, if so, whether repressed memories are likely to be accurate in actions alleging childhood sexual abuse"); Robert Timothy Reagan, *Scientific Consensus on Memory Repression and Recovery*, 51 RUTGERS L. REV. 275 (1999) (examining the considerable scientific controversy surrounding the recovery of repressed memories and concluding that the memory repression principle lacks a scientific foundation strong enough to warrant admission of expert testimony on memory repression).

⁸⁶ See, e.g., RUSSELL, *supra* note 50, at 233-35; Finkelhor et al., *supra* note 8, at 24-25, 25 tbl.7.

⁸⁷ See *supra* notes 45, 50, 63 and accompanying text.

⁸⁸ Finkelhor et al., *supra* note 8, at 24-25, 25 tbl.7. But see Margolin & Craft, *supra* note 69, at 452 (reporting that children living with a biological father who acted as the child's caretaker "were substantially underrepresented in terms of observed frequency of sexual abuse").

⁸⁹ See Finkelhor et al., *supra* note 8, at 25 tbl.7.

sand children.⁹⁰ In comparison, parents in two-parent households reported a rate of eleven victims per thousand children.⁹¹

Unfortunately, there are relatively few additional studies on father-only households since custody laws favored maternal custody until recently.⁹² However, studies of households in which mothers were absent during a girl's childhood offer an important glimpse into the extent of risk for girls after divorce. For example, researchers have compared girls who lived without their mother before the age of sixteen to those who remained with their mothers throughout childhood. The sexual vulnerability of the estranged girls was nearly 200% greater than that of other girls, leading one researcher to conclude that "missing a *mother* is the most damaging kind of disruption."⁹³

This pattern of a girl's heightened vulnerability in mother-absent households is repeated in multiple studies.⁹⁴ In their investigation of father-daughter incest, Judith Herman and Lisa Hirschman found that risk of incest was particularly acute in families in which mothers were absent from the home due to hospitalization or other reasons.⁹⁵ Research by Jillian Fleming and her colleagues on mother-absent households underscores the importance of a mother's presence in

⁹⁰ GALLUP ORG., *supra* note 78, at 16 (reporting results of poll of 1000 parents); *see also* Runyan, *supra* note 44, at 495 (observing that "[a]n obvious area of research is to sort out the additional risk [for male and female children of] being victimized in single parent households and *why the rate is higher in male-headed households*" (emphasis added)).

⁹¹ GALLUP ORG., *supra* note 78, at 16.

⁹² For example, Russell's seminal study of incest captures data only on women raised by (1) both biological or adoptive parents, (2) biological mothers only, (3) stepfathers and biological mothers, (4) both biological grandparents, and (5) others. *See* RUSSELL, *supra* note 50, at 104 tbl.8-1. The absence of "raised by father only" and "raised by father and stepmother" categories surely reflects the fact that courts awarded few men custody of their children upon divorce during the 1950s and 1960s, when the majority of participants in Russell's study grew up. *Id.* at 29 tbl.2-3 (giving birthdates of study participants, with the majority reaching the age of eighteen prior to 1976). Studies of mother-absent households, however, shed vital light on the risk to girls living with their fathers after divorce.

⁹³ FINKELHOR, *supra* note 39, at 121.

⁹⁴ *See, e.g.,* RUSSELL, *supra* note 50, at 363 (enumerating studies that have "shown that many mothers of incest victims are sick, absent, or in powerless or abusive situations themselves"); Alexander, *supra* note 45, at 185 (citing research demonstrating that maternal unavailability is among the "most significant predictors for increased risk for all kinds of sexual abuse"); Michael Gordon, *The Family Environment of Sexual Abuse: Comparison of Natal and Stepfather Abuse*, 13 CHILD ABUSE & NEGLECT 121, 128 (1989) (noting that "a girl whose mother is absent or passive is more vulnerable to abuse than a girl whose mother is present and active"); Mullen et al., *supra* note 31, at 18 (concluding that "having a close and confiding relationship with the mother seemed to confer a degree of protection").

⁹⁵ *See* Herman & Hirschman, *supra* note 26, at 968. Herman and Hirschman found that "[m]others in the incestuous families were more often described as ill or disabled and were more often absent for some period of time." *Id.* Specifically, "[f]ifty percent of the women in the incest group but only [15%] of the comparison group reported that their mothers had been seriously ill" *Id.* With regard to maternal absence, 38% of the women in the incest group reported separation from their mothers for some period of time during childhood, while none of the comparison group had been estranged from their mothers. *Id.*

protecting her daughter from sexual abuse.⁹⁶ The Fleming study found that “[f]or women abused by someone outside of the family, the significant predictors [included] . . . mother’s death[] and having an alcoholic mother.”⁹⁷ The authors speculate that a birth mother’s absence, in the form of her death or mental illness, “may place the child at risk of neglect that involves a lack of supervision.”⁹⁸

Given the importance of a birth mother’s presence in mitigating a child’s risk of sexual abuse, one might suspect that the remarriage of a girl’s father also would diminish her risk of sexual victimization. Indeed

[u]nlike the case with stepfathers, when motherless girls then acquired a stepmother, their likelihood of victimization dropped. They were still much more likely than usual to have a victimizing experience, but the presence of a stepmother reduced the vulnerability somewhat, suggesting that the presence of a mother, even a stepmother, acts as protection.⁹⁹

As the next subpart demonstrates, regardless of whether a child lives with her mother or her father after divorce, when abuse occurs, the severity, duration, use of force, and resulting trauma surpass the “norm” for child sexual abuse.

3. *Daughters in Fractured Families Experience Sexual Abuse of Singular Destructiveness*

Not only does child sexual abuse occur with greater frequency in fractured or blended families, but abuse by fathers and father-substitutes¹⁰⁰ share a striking similarity.¹⁰¹ Abuse by fathers and stepfathers

⁹⁶ See Fleming et al., *supra* note 18, at 50 (enumerating factors possibly associated with childhood sexual abuse, including “living apart from their mother at some time during their childhood”).

⁹⁷ *Id.* at 55.

⁹⁸ *Id.* at 56; see also *supra* note 74 (speculating that lack of supervision may explain the increased risk of abuse following a divorce).

⁹⁹ FINKELHOR, *supra* note 39, at 125. Stepmothers also molest children, although the percentage of stepmother-abusers is small. Cf. Margolin & Craft, *supra* note 69, at 452 (observing that stepmothers committed 9% of all sexual abuse by mother-caretakers, or almost three times more than their representation in the population of mother-caretakers).

¹⁰⁰ The terms stepfather and father-substitute are used interchangeably in this Article. They refer to any biologically-unrelated male in a relationship with the victim’s mother, including stepfathers, cohabitants, and boyfriends, as well as stepfathers who have adopted their stepchildren.

¹⁰¹ Important differences do exist between fathers and stepfathers as abusers. For instance, the *Third National Incidence Study of Child Abuse and Neglect*, conducted in 1993, found that 61% of children who were sexually maltreated by their natural parents suffered fatal or serious injuries, compared to 19% of children sexually abused by other parent figures. SEDLAK & BROADHURST, *supra* note 50, at tbl.6-2. As a result of such differences, social scientists have devoted entire articles to determining whether abuse by fathers or by stepfathers is more severe. See, e.g., Joseph H. Beitchman et al., *A Review of the Long-Term*

occurs with greater frequency than abuse by other male relatives and nonrelatives. For instance, in a survey of 775 incest survivors in Great Britain, Jane Ussher and Christopher Dewberry discovered that 54.2% of fathers and stepfathers abused their daughters more than fifty times, while only one-third of other family members abused their children at this rate.¹⁰² Rates of abuse by perpetrators outside the family trailed significantly, with only 11.9% abusing children as often as fathers and father-substitutes.¹⁰³ Abuse by fathers and father-substitutes also lasts significantly longer than abuse by others.¹⁰⁴

Sexual abuse that occurs more often and over a longer time frame impacts a child to a greater degree.¹⁰⁵ For instance, a follow-up study of adolescents involved in sex rings found that those abused for more than one year were more likely to exhibit symptoms or identify with the abuser.¹⁰⁶

The degree of invasion they experience exacerbates the trauma for girls in fractured families.¹⁰⁷ Abuse by fathers and stepfathers more often involves penetration than abuse by others.¹⁰⁸ Even when abuse by a father or stepfather stops short of penetration, it is considerably more likely to include physical contact than abuse by others.¹⁰⁹

Effects of Child Sexual Abuse, 16 CHILD ABUSE & NEGLECT 101, 112 (1992) (noting studies showing that "stepfathers are more likely to use force or threats of force than are fathers"); Giles-Sims & Finkelhor, *supra* note 68; Gordon & Creighton, *supra* note 68; Patricia Phelan, *The Process of Incest: Biologic Father and Stepfather Families*, 10 CHILD ABUSE & NEGLECT 531 (1986). While researchers may disagree over which parent is entitled to this distinction, as this Part demonstrates, abuse by biological fathers and stepfathers as a group outstrips the "norm" for abuse by perpetrators in general. See *infra* notes 103-21.

¹⁰² Jane M. Ussher & Christopher Dewberry, *The Nature and Long-Term Effects of Childhood Sexual Abuse: A Survey of Adult Women Survivors in Britain*, 34 BRIT. J. CLINICAL PSYCHOL. 177, 181 (1995).

¹⁰³ *Id.*; see also RUSSELL, *supra* note 50, at 231-32 (finding that 38% of fathers and stepfathers abused their daughters eleven times or more, compared with only 12% of other perpetrators).

¹⁰⁴ Ussher & Dewberry, *supra* note 102, at 181 & tbl.1 (reporting an average of 6.93 years for abuse by a father-figure, compared to 4.78 and 2.64 years for abuse by other family and nonfamily abusers).

¹⁰⁵ Cf. Beitchman et al., *supra* note 9, at 552 ("The frequency and duration of sexual abuse is associated with more severe outcome.").

¹⁰⁶ Ann Wolbert Burgess et al., *Response Patterns in Children and Adolescents Exploited Through Sex Rings and Pornography*, 141 AM. J. PSYCHIATRY 656, 661 (1984).

¹⁰⁷ Beitchman et al., *supra* note 9, at 549.

¹⁰⁸ See Ussher & Dewberry, *supra* note 102, at 180. Research on the behavior patterns of child molesters suggests that fondling gradually progresses to masturbation and efforts at penetration when there is greater access to the child over time, as with daughters. See W.D. Erickson et al., *Behavior Patterns of Child Molesters*, 17 ARCHIVES SEXUAL BEHAV. 77, 84 (1988).

¹⁰⁹ Diana Russell's findings on the severity of incestuous abuse are perhaps the most clear cut. She distinguished "very severe sexual abuse" ("completed and attempted vaginal, oral, anal intercourse, cunnilingus, forced and unforced") from other less serious forms and found that 34% of the abuse by fathers and stepfathers involved these serious violations, compared with 22% for all abusers together. RUSSELL, *supra* note 50, at 226 tbl.15-9; accord Ussher & Dewberry, *supra* note 102, at 180-81 (noting a "significant relation

Sexual abuse involving a high degree of physical violation is more traumatic, as research confirms.¹¹⁰ More invasive abuse leads to poorer adjustment in adulthood, victims' perceptions of lasting harm, and poorer mental health functioning as an adult.¹¹¹

Similarly, fathers and stepfathers are more likely to use force or threats of violence than other intrafamilial abusers.¹¹² It is not clear whether the prolonged duration of father and stepfather abuse permits violence to escalate,¹¹³ or whether the victims eventually become better able to protect themselves, making force an essential component of exploitation. However, force is one of the few variables consistently associated with poorer outcomes.¹¹⁴ In one study, force influenced a victim's negative reactions more than any other variable.¹¹⁵

Measured in terms of frequency, duration, invasiveness, and force, fathers and father-substitutes subject their victims to abuse of singular destructiveness.¹¹⁶ It is not surprising, therefore, that abuse by fathers and father-substitutes results in pronounced trauma for its victims.¹¹⁷ This heightened trauma may stem from the greater viola-

between identity of abuser and type of abuse . . . with father[s] and stepfather[s] most likely to have contact").

¹¹⁰ See generally Beitchman et al., *supra* note 101, at 113 (citing studies indicating an association between type of abuse sustained and trauma).

¹¹¹ Cf. *id.* (noting that "[f]eelings of anxiety, fear, and a sense of trauma would more likely result from those victims of forceful abuse," and that "[o]ne must also consider that force or the threat of force may interact with sexual abuse to produce effects (e.g., . . . suicidality) that are unique to this combination and that are rare in the presence of either experience alone").

¹¹² See RUSSELL, *supra* note 50, at 232 (finding that fathers were more likely than other relatives to use physical force); Ussher & Dewberry, *supra* note 102, at 181-82 (demonstrating greater use of violence or threats of violence to prevent disclosure). But see JUDITH LEWIS HERMAN & LISA HIRSCHMAN, *FATHER-DAUGHTER INCEST* 27 (1981) (noting that incestuous parents infrequently used force since it "is rarely necessary").

¹¹³ See Lana Stermac et al., *Violence Among Child Molesters*, 26 J. SEX RES. 450, 457-58 (1989).

¹¹⁴ See Beitchman et al., *supra* note 101, at 112 (reviewing evidence that force and violence are consistently associated with more severe outcomes).

¹¹⁵ FINKELHOR, *supra* note 39, at 104.

¹¹⁶ See *supra* notes 104, 106, 108, 112 and accompanying text.

¹¹⁷ E.g., FINKELHOR, *supra* note 39, at 101, 102 tbl.7-3 (finding that women victimized by their father or stepfather reported mean trauma scores of 4.8 and 4.5 respectively, while those victimized by a brother or uncle had mean trauma scores of 3.2 and 4.0 respectively); Christine Adams-Tucker, *Proximate Effects of Sexual Abuse in Childhood: A Report on 28 Children*, 139 AM. J. PSYCHIATRY 1252, 1253 (1982) (finding that children who had been abused by their fathers were the most disturbed); Judith Herman et al., *Long-Term Effects of Incestuous Abuse in Childhood*, 143 AM. J. PSYCHIATRY 1293, 1295 (1986) ("Experiences of sexual abuse by a father or a stepfather were by far the most likely to be described as having severe and long-lasting effects."). But cf. Browne & Finkelhor, *supra* note 32, at 73 (acknowledging that studies of women victimized by fathers or father-substitutes, as opposed to other perpetrators, consistently report greater trauma to the victims, but noting one study in which the association did not reach statistical significance). Additionally, the increased trauma to daughters may stem from the early onset of abuse. See Beitchman et al., *supra*

tion and loss of trust accompanying abuse by a parent.¹¹⁸

Despite the startling consonance between father and stepfather abuse, some commentators discount abuse by the latter as less serious than father-daughter incest "[b]ecause of the unique character" of father-abuse.¹¹⁹ As Judith Lewis Hermann and Lisa Hirschman explain, however, the sense of violation and betrayal is just as great for the child abused by her stepfather: "From the psychological point of view, it does not matter if the father and child are blood relatives. What matters is the relationship that exists by virtue of the adult's parental power and the child's dependency."¹²⁰ Daughters and stepdaughters face equally severe consequences from disclosure, including open conflict between the child's parents, a lack of emotional support, a mother's unwillingness to believe abuse has occurred, and family break-up.¹²¹

Just as the link between divorce and child molestation is genuine, there is little doubt about the destructive effect on girls of sexual abuse.

B. Impact of Child Sexual Abuse on Victims

Society cannot afford to ignore the vulnerability of girls in fractured families given the substantial impact of childhood abuse on their lives. In the ensuing aftermath of sexual abuse, children may experience posttraumatic stress disorder, anger, aggressive behavior, poor self-image, depression, suicidal ideation, anxiety disorders, anti-social personality disorders, paranoia, and dissociation.¹²² In addition, academic and behavioral problems are prevalent among sexually abused school-age children.¹²³

note 101, at 110 ("[Y]ounger children are more likely than older children to be abused by a father or stepfather, which has been reported to result in greater trauma than abuse by other perpetrators.")

¹¹⁸ Beitchman et al., *supra* note 101, at 111.

¹¹⁹ Louise Thornton, *Preface* to *I NEVER TOLD ANYONE: WRITINGS BY WOMEN SURVIVORS OF CHILD SEXUAL ABUSE* 15, 21 (Ellen Bass & Louise Thornton eds., 1983).

¹²⁰ HERMAN & HIRSCHMAN, *supra* note 112, at 70.

¹²¹ Beitchman et al., *supra* note 101, at 111.

¹²² See Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 *PSYCHOL. BULL.* 164, 166 tbl.1 (1993). See generally Beitchman et al., *supra* note 101 (evaluating studies of the long-term effects of child sexual abuse on victims); Beitchman et al., *supra* note 9 (evaluating studies of the short-term effects of child sexual abuse on victims); Browne & Finkelhor, *supra* note 32, at 66-72 (evaluating studies of the effects of child sexual abuse on victims). Until recently, the short-term effects of child sexual abuse received scant attention, even though, like adult ordeals such as rape, sexual assault during childhood is a traumatic event, whether its impact lasts one year or ten. Browne & Finkelhor, *supra* note 32, at 76.

¹²³ See Kendall-Tackett et al., *supra* note 122, at 167.

Although some symptoms of sexual abuse may be short-lived, others become ingrained, altering even a child's physiology.¹²⁴ For instance, researchers have detected elevated hormone levels in some sexually abused girls, together with evidence that puberty began as much as a year earlier for these girls.¹²⁵ Such effects underscore the profound and sweeping impact that sexual abuse may have on a child.¹²⁶

While many effects of abuse materialize shortly after its occurrence, others are "sleeper" effects—that is, results that lie dormant during childhood but surface with dramatic consequences during adulthood.¹²⁷ For the incest survivor, adulthood often carries with it fear of men, phobic anxiety, and problems with anger.¹²⁸ Travelling in tandem with anxiety and fear is depression: over the course of their lifetimes, 21.9% of women molested as children will experience major depression, while only 5.5% of nonabused women will do so.¹²⁹ As a final injustice, these women are also significantly more likely to experience thoughts of self-harm and lower self-esteem.¹³⁰

One particularly troubling result of sexual victimization is its association with later abuse. Forty-nine percent of sexually abused women in one study became the victim of battering in an adult relationship, a rate nearly three times that of the control group.¹³¹

It is unclear why sexual abuse as a child begets victimization as an adult. It is possible that sexual abuse erodes a victim's self-esteem, making her a conspicuous target for sexually predatory men.¹³² Alter-

¹²⁴ See *id.* at 173.

¹²⁵ *Id.*

¹²⁶ Importantly, a third of sexually abused children have no apparent symptoms. See *id.* As many as half of molestation victims fail to display overtly even the most characteristic symptom, "sexualized" behavior, which includes excessive masturbation "and compulsive talk, play, and fantasy with sexual content." *Id.* This makes it imperative to avert the sexual exploitation of children in fractured families, rather than relying on society's ability to ferret out abuse as it occurs.

¹²⁷ See Beitchman et al., *supra* note 101, at 102.

¹²⁸ See *id.* at 105-06; *Childhood Abuse Ups Risk for Adult Mental Illness*, REUTERS HEALTH NEWS, at http://www.ama-assn.org/insight/gen_hlth/med_news/tmp-news/071410f.htm (last visited July 16, 1999) (reporting in a study of 639 families followed from 1979 until 1993, that "[v]ictims of childhood . . . sexual abuse were more than [four] times as likely as those who had not been abused or neglected to have personality disorders during early adulthood," including "antisocial, borderline, dependent, depressive, narcissistic, paranoid, and passive-aggressive personality disorders" (internal quotation marks omitted)).

¹²⁹ Judith A. Stein et al., *Long-Term Psychological Sequelae of Child Sexual Abuse: The Los Angeles Epidemiologic Catchment Area Study*, in *LASTING EFFECTS OF CHILD SEXUAL ABUSE* 135, 143 tbl.8.4 (Gail Elizabeth Wyatt & Gloria Johnson Powell eds., 1988).

¹³⁰ See Beitchman et al., *supra* note 101, at 107.

¹³¹ *Id.* at 108 (noting that "the majority of studies . . . report an increased risk of revictimization among those sexually abused as children").

¹³² *Id.* (explaining that "a sense of worthlessness and self-blame" may lead victims "to expose themselves to men who revictimize them, and thus confirm their low opinion of themselves").

natively, revictimization may occur because abused children are forced out of their families and into risky situations.¹³³ Whatever its source, sexual exploitation can take on a life of its own, beginning a cycle of victimization that persists well after the original perpetrator is gone.

The profound impact of sexual abuse on children is undeniable. Unfortunately, as a result of demographic changes, a burgeoning number of children grow up in fractured families.

C. Demographic Shifts Placing More Female Children at Risk

Dramatic changes in family composition lie at the heart of the heightened risk of sexual assault facing young girls today. Together, the twin forces of family break-up and family nonformation drive the increasing number of children living in single-parent and blended families.

It is now common knowledge that approximately half of marriages end in divorce.¹³⁴ In a phenomenon aptly labeled "conjugal succession,"¹³⁵ 66% of divorced women and 75% of divorced men will remarry.¹³⁶ Further, approximately 60% of remarried couples dissolve their unions,¹³⁷ with each successive marriage more divorce-prone than the previous one.¹³⁸ Remarriages now are so common that nearly "one-third of all currently-married people have been married at least once before."¹³⁹

¹³³ Cf. Mimi H. Silbert & Ayala M. Pines, *Sexual Child Abuse as an Antecedent to Prostitution*, 5 CHILD ABUSE & NEGLECT 407, 409 (1981) (finding that 60% of subjects in a study of former and current prostitutes had been sexually abused prior to age sixteen).

¹³⁴ E. Mavis Hetherington et al., *What Matters? What Does Not?, Five Perspectives on the Association Between Marital Transitions and Children's Adjustment*, 53 AM. PSYCHOL. 167, 167 (1998); see WALLERSTEIN ET AL., *supra* note 1, at 295 (noting that 45% of first marriages end in divorce). Importantly, divorce rates in America have experienced a twenty-year decline, "the most sustained decline since the government began collecting such data in 1860." Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 1 (2000).

¹³⁵ Frank F. Furstenberg, Jr. & Christine Winquist Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. MARRIAGE & FAM. 893, 893 (1985).

¹³⁶ Hetherington et al., *supra* note 134, at 167.

¹³⁷ Marilyn Ihinger-Tallman & Kay Pasley, *Stepfamilies in 1984 and Today—A Scholarly Perspective*, 26 MARRIAGE & FAM. REV. 19, 24 (1997); see also Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29 *passim* (2000) (noting that children born into second marriages will experience a higher rate of marital disruption than children born into first marriages and that children born into cohabitating unions experience the highest rate of marriage disruption).

¹³⁸ Alan Booth & John N. Edwards, *Starting Over: Why Remarriages Are More Unstable*, 13 J. FAM. ISSUES 179, 192 (1992) (documenting the increasing divorce-proneness of higher order marriages).

¹³⁹ Ihinger-Tallman & Pasley, *supra* note 137, at 24.

At the center of this cycle of family formation and dissolution are 7.2 million children.¹⁴⁰ Stepfamilies have become so common that nearly one in three married couple households is a stepfamily.¹⁴¹ In 1990, according to the U.S. Census Bureau, stepchildren made up 20% of all children in married couple families.¹⁴² By the year 2000, more Americans will be living in stepfamilies than in nuclear families.¹⁴³

Along with family break-up, family nonformation is a potent source of exposure to high-risk households.¹⁴⁴ As of 1995, a child in a single-parent living arrangement was nearly as likely to be living with a parent who had never married as with a divorced parent.¹⁴⁵ In 1997, the most recent year for which there is data, the percentage of nonmarital children¹⁴⁶ stood at 25.8% for whites and 69.1% for

¹⁴⁰ ARTHUR J. NORTON & LOUISA F. MILLER, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, MARRIAGE, DIVORCE AND REMARRIAGE IN THE 1990s at 12 tbl.N (1992) (reporting that 6,643,000 children under eighteen lived with a biological mother and stepfather, while 608,000 children lived with a stepmother and biological father); see also TERRY LUGALIA, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HOUSEHOLDS, FAMILIES AND CHILDREN: A 30-YEAR PERSPECTIVE 38 (1992) (estimating that 16% of children living in two-parent households lived with a stepparent).

¹⁴¹ Laura W. Morgan, *Stepparents' and Cohabitants' Rights to Custody and Visitation*, in 1999 WILEY FAMILY LAW UPDATE 249, § 8.01, at 251 (Eric Pierson ed., 1999) (calculating that 29% of all married-couple households were stepfamilies). Significantly, the Census Bureau defines "stepparent" exclusively by marital relationship. *Id.* Because this definition does not encompass cohabitation without marriage, it underestimates the number of girls living in blended families. See *id.*

¹⁴² *Id.*

¹⁴³ Beverly Bliss, *Step Families*, at <http://parenthood.library.wisc.edu/pub/parent/Bliss/Bliss.html> (visited Aug. 25, 2000). Significantly, Census Bureau statistics look at household composition at a single point in time: the time of sampling. This "slice in time" method may materially underestimate the number of children impacted by the sequential process of marriage, divorce, and remarriage. Cf. Paul C. Glick, *Remarried Families, Stepfamilies, and Stepchildren: A Brief Demographic Profile*, 38 FAM. REL. 24, 26 (1989) (examining different approaches for generating statistics about the incidence of stepfamilies and noting that a "cross-sectional" approach is the "customary way to proceed"). Some researchers have utilized different models to better approximate the fluid character of family relations over time. See, e.g., James H. Bray et al., *Family Process and Organization During Early Remarriage: A Preliminary Analysis*, in 4 ADVANCES FAM. INTERVENTION, ASSESSMENT & THEORY 253, 254 (1987) (utilizing a life cycle model to account for this sequential process). In fact, demographers predict that one in three children will be in a stepfamily before reaching the age of eighteen. See Glick, *supra*, at 26.

¹⁴⁴ LARRY L. BUMPASS, THE DECLINING SIGNIFICANCE OF MARRIAGE: CHANGING FAMILY LIFE IN THE UNITED STATES 8 (Ctr. for Demography & Ecology, Univ. of Wis.-Madison, Nat'l Survey of Families & Households, Working Paper No. 66, 1994), available at <http://www.ssc.wisc.edu/cde/nsfhw/pt/home.htm> (last visited Mar. 22, 2000) (noting that a third of all stepfamilies followed nonmarital birth rather than marital disruption, and two-thirds were begun by cohabitation rather than by marriage).

¹⁴⁵ See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HOW WE'RE CHANGING: DEMOGRAPHIC STATE OF THE NATION: 1997, at 1 (1997); Ellman, *supra* note 134, at 41.

¹⁴⁶ Historically, a child born out of wedlock has been labelled a "bastard," "illegitimate," or "spurious." Recognizing that the child is not responsible for her parents' decisions, most commentators now prefer the nonpejorative term "nonmarital" child.

blacks.¹⁴⁷

Cohabitation plays a pivotal role in the number of nonmarital children. Demographers estimate that 30% of all children will spend some time in a cohabiting household with a natural parent, usually their mother, and that parent's partner.¹⁴⁸ It is instructive that "[c]ohabitation [is] a short-lived status."¹⁴⁹ Children who reside in cohabiting households undergo "multiple family transitions" before reaching the age of eighteen,¹⁵⁰ as their natural parent moves into and out of successive relationships.¹⁵¹ Thus, fully three-quarters of children born into cohabiting unions will see their parents' union break up before age sixteen.¹⁵² Moreover, they will spend a quarter of their childhood with a single parent, a quarter with a cohabiting parent, and less than half with married parents.¹⁵³

In sum, mounting divorce rates, soaring nonmarital births, and the ubiquity of cohabitation combine to create a profoundly negative consequence for young girls: the prospect of sexual exploitation.¹⁵⁴

Katheryn Katz & Maris Warfman, *Custody Disputes Between Parents*, in 2 CHILD CUSTODY & VISITATION: LAW AND PRACTICE 10-1, § 10.05[1], at 10-78 (Sandra Morgan Little cons., 2000).

¹⁴⁷ See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 79 no.99 (119th ed. 1999). Importantly, not all children living in households classified by the Census Bureau as "mother-only" have an absent biological father or biological mother. See BUMPASS, *supra* note 144, at 12. Instead these children frequently live in cohabitating households in which both biological parents are present. See *id.* The Census Bureau's archaic, marriage-based definitions of "family" fail to account for such cohabitations, resulting in misleading classifications. *Id.* at 12-13, 14.

¹⁴⁸ LARRY L. BUMPASS ET AL., THE CHANGING CHARACTER OF STEPFAMILIES: IMPLICATIONS OF COHABITATION AND NONMARITAL CHILDBEARING 7 (Ctr. for Demography & Ecology, Univ. of Wis.-Madison, Nat'l Survey of Families & Households, Working Paper No. 63, 1994), available at <http://www.ssc.wisc.edu/cde/nsfhwf/home.htm> (visited Mar. 21, 2000). The authors estimate that one-fourth of white children will spend time in a stepfamily, and one-third of white mothers and more than one-half of black mothers will live in a household with their children and a father-substitute. *Id.* An increasing number of adults have cast off binding marital relationships. As of 1995, about half of the population under age forty had lived with an unmarried partner. See LARRY L. BUMPASS & JAMES A. SWEET, COHABITATION, MARRIAGE AND UNION STABILITY: PRELIMINARY FINDING FROM NSFH2, at 8 (Ctr. for Demography & Ecology, Univ. of Wis.-Madison, Nat'l Survey of Families & Households, Working Paper No. 65, 1995), available at <http://www.ssc.wisc.edu/cde/nsfhwf/home.htm> (visited Mar. 22, 2000).

¹⁴⁹ Bumpass & Lu, *supra* note 137, at 33.

¹⁵⁰ BUMPASS ET AL., *supra* note 148, at 12.

¹⁵¹ See *id.* at 12-13; Bumpass & Lu, *supra* note 137, at 33.

¹⁵² Larry Bumpass & Hsien-Hen Lu, Trends in Cohabitation and Implications for Children's Family Contexts in the U.S. 18 (Jan. 1999) (unpublished manuscript, on file with author); see also U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ECON. & STATISTICS ADMIN., STATISTICAL ABSTRACT OF THE UNITED STATES 59 no.65 (118th ed. 1998) (reporting that 59.1% of all women aged thirty-five to thirty-nine have had one husband or cohabiting partner, 21.6% have had two, 8.6% have had three, and 3.6% have had four or more).

¹⁵³ Bumpass & Lu, *supra* note 137, at 38.

¹⁵⁴ Admittedly, using custody determinations as a vehicle to mitigate the heightened risk of sexual abuse after parental separation largely neglects the risk to the child whose

D. Summary of Findings on Risk

Before continuing, it may be helpful to distill the following essentials from this lengthy recitation of sociological and demographic studies:

Girls in fractured families face a significantly elevated risk of sexual abuse, which begins at the marital break-up;

Girls residing with their mothers after divorce, as well as those living with their father, face this heightened risk;

Sexual victimization leaves children with some deeply etched and enduring scars; and

Given the rate at which marriages continue to implode, the number of girls exposed to the risk of sexual abuse will only escalate.

The next Part argues that using custody determinations as a vehicle to raise parental awareness of the risk of sexual abuse and to encourage parents to shield their daughters from this threat may mitigate the risk of sexual abuse following divorce.

II

THE CASE FOR A LEGAL RESPONSE

A. Proactively Responding to the Risk of Sexual Abuse Following Divorce

Clearly, the findings on sexual abuse in fractured families raise serious concerns about the protective capacities of at least some single-parent and blended families.¹⁵⁵ A bedrock strategy for curbing threats to public health, like child sexual abuse, is to identify high risk groups and then to tailor prevention efforts to them.¹⁵⁶ Because ter-

parents never married. With nonmarital children, there is no ready opportunity, such as a divorce proceeding, to address this heightened risk of sexual exploitation. JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 5.02, at 107 (reprint ed. 1999) (discussing historical preclusion of unwed father's custody of a nonmarital child, but noting circumstances in which an unwed putative father might be awarded custody today). It should not be decisive, however, that this approach does not encompass every child placed at risk. If society is to curb child sexual abuse, it must not make the perfect the enemy of the good. Instead, society should root out sexual abuse where it is most prevalent and easily attacked.

¹⁵⁵ See Giles-Sims, *supra* note 26, at 218, 227.

¹⁵⁶ See Ronald Bayer et al., *Trades, AIDS, and the Public's Health: The Limits of Economic Analysis*, 83 GEO. L.J. 79, 82 (1994) (book review) ("[P]ublic health efforts view the prevailing conditions that produce illness or preventable death as targets of intervention."); Bergner et al., *supra* note 50, at 332 (noting that research to establish risk factors for child sexual abuse is essential to targeting "preventive efforts . . . at those most at risk"); Rene Bowser & Lawrence O. Gostin, *Managed Care and the Health of a Nation*, 72 S. CAL. L. REV. 1209, 1244 (1999) (charting the historical development of public health programs "targeted at specific populations"); Fleming et al., *supra* note 18, at 50 (observing that "[t]he study of risk factors of [child sexual abuse] is essential to understanding those factors that may be common to children who are sexually abused and ultimately to providing clues and directions for prevention and intervention efforts"); Margolin & Craft, *supra*

mination of the marital relationship magnifies a child's risk of victimization, a logical step would be to tie prevention efforts to custody determinations.¹⁵⁷

Integrating sexual abuse risk assessment into custody proceedings has several principal advantages. First, it provides parents a structured opportunity to learn about a preventable consequence of severing their marriage relationship, enabling them to be more vigilant after divorce.¹⁵⁸ Of course, parents can seek this knowledge and preparation for divorce without the assistance of the state. However, they are often unaware of this risk because of the misguided belief that "child sexual abuse [is] a problem which threatens only the very poor and is committed by the conspicuously disturbed."¹⁵⁹

Second, integrating this risk of sexual abuse into custody adjudications would better ensure the well-being of the most fragile participant in the marital break-up: the child. Plainly, if divorcing parents were more aware of the prevalence of abuse, they might be less likely to put their daughters at risk.¹⁶⁰ As Part III discusses more fully, in

note 69, at 454 (noting that efforts to prevent physical abuse "have long been associated with the strategy of identifying 'high risk' groups [such as] teenage mothers, single mothers, [and] economically deprived parents"); Mark H. Moore, *Public Health and Criminal Justice Approaches to Prevention*, 19 CRIME & JUST. 237, 244-45 (1995) (noting the use in a public health approach of risk factor exploration and risk group identification not "primarily to understand the phenomenon for its own sake but instead as a way of identifying plausibly important targets of intervention").

Any custody-based approach should work in tandem with extant public health strategies for eradicating child sexual abuse. As Professor Fidler noted with respect to international public health efforts, "legal energy alone is not sufficient to establish footholds on the mountains of problems now confronting the health of humankind." David P. Fidler, *International Law and Global Public Health*, 48 U. KAN. L. REV. 1, 3 (1999).

¹⁵⁷ Finkelhor suggested a parallel strategy for minimizing the risk to stepdaughters in 1984. He suggested that couples who were remarrying be alerted to their daughter's increased vulnerability to child sexual abuse. Margolin & Craft, *supra* note 69, at 454.

¹⁵⁸ Cf. Giles-Sims, *supra* note 26, at 227 (asserting that the higher risks of sexual abuse to children in stepfamilies warrant family education and opportunities for intervention); Hattie Ruttenberg, *The Limited Promise of Public Health Methodologies to Prevent Youth Violence*, 103 YALE L.J. 1885, 1903-04 (1994) (noting that recent public health strategies "have successfully altered the behavior of individuals in the contexts of drunken driving, driving without a seat belt, and cigarette smoking" by altering the "rational actor's" appreciation of the "actual costs" associated with a behavior and thus their "cost-benefit analysis regarding the behavior in question").

The value of education extends beyond the couples seeking a divorce. See, e.g., Lawrence O. Gostin & James G. Hodge, Jr., *The Public Health Improvement Process in Alaska: Toward a Model Public Health Law*, 17 ALASKA L. REV. 77, 79 (2000) (observing that "[l]aws can also establish norms for healthy behavior and create the social conditions in which people can be healthy"). As Professors Siegel and Doner aptly note, "[u]ltimately, . . . public health is in the business of creating or facilitating social change." MICHAEL SIEGEL & LYNNE DONER, *MARKETING PUBLIC HEALTH: STRATEGIES TO PROMOTE SOCIAL CHANGE* 22 (1998).

¹⁵⁹ Margolin & Craft, *supra* note 69, at 455 (noting that "most parents" share this view).

¹⁶⁰ See, e.g., RUSSELL, *supra* note 50, at 371 (speculating that "if nonabusive fathers . . . were more aware of the prevalence of uncle-niece incest as well as [other abuse], they

addition to raising awareness, an expanded custody determination may encourage parents to take positive steps to improve their parenting skills. Together, awareness and improved parenting could reduce the conditions that place girls at risk for sexual abuse following divorce.¹⁶¹

Several aspects of child sexual abuse in fractured families give special urgency to averting abuse before it occurs. Disquieting as it is, "the more severe cases [are] the ones most likely to remain secret."¹⁶² Nonreporting is particularly prevalent with intrafamilial abuse.¹⁶³ For obvious reasons, families resist the painful process of disclosing and reporting their own sexual abuse.¹⁶⁴ A lack of witnesses to the abuse undoubtedly contributes to this resistance.¹⁶⁵

For these reasons, it is essential that parents avoid putting their daughters in exposed situations. Although "[a]ll families would bene-

would be less likely to put their daughters at risk," for example, by leaving them in the care of another adult male).

¹⁶¹ See, e.g., Fleming et al., *supra* note 18, at 56 (noting that "[a]ppropriate and timely interventions may . . . reduce the risk of abuse . . . [as well as its] impact").

An expanded custody determination would also "re-emphasiz[e] for the benefit of potential abusers that such behavior is damaging and wrong." FINKELHOR, *supra* note 39, at 152. It is essential, however, not to exaggerate the possibility of dissuading child molesters from victimizing children. As Professor Rutenberg notes, "While public health methodologies offer a means of altering the behavior of actors with imperfect information, public health's capacity to alter the behavior of actors with perfect information is limited." Rutenberg, *supra* note 158, at 1904. Presumably child molesters understand that their actions harm children.

¹⁶² RUSSELL, *supra* note 50, at 373. Russell reports that in 72% of the cases in which mothers were unaware of the abuse, more severe abuse had occurred. *Id.* at 372. In contrast, three-quarters of the cases in which nonabusing mothers knew of the abuse involved less severe abuse. *Id.*

Douglas Besharov warns that "[d]espite . . . progress, large numbers of obviously endangered children are still not reported to authorities." Douglas J. Besharov, *Responding to Child Sexual Abuse: The Need for a Balanced Approach*, 4 FUTURE CHILD 135, 138 (1994). He estimates that "[in 1986,] [p]rofessionals did not report almost [30%] of the sexually abused children they saw," which translates into "30,000 sexually abused children [who] went unreported." *Id.* at 139. Importantly, Besharov extrapolates from the aggregate number of cases brought to professional attention and reported in the first study of National Incidence and Prevalence of Child Abuse and Neglect in order to arrive at his estimate. See *id.* at 139 & n.14. One should not assume, however, that only 30,000 of the one- to three million cases of child sexual abuse go unreported each year.

¹⁶³ See, e.g., Fischer & McDonald, *supra* note 82, at 926 (reporting that a greater proportion of victims of intrafamilial abuse (17.7%) did not disclose the abuse, compared to 10.9% of the victims of extrafamilial abuse); Mian et al., *supra* note 50, at 226 tbl.5 (noting, for children ages five and six, that the rate of purposeful disclosure decreased significantly when the perpetrator was intrafamilial).

¹⁶⁴ Fischer & McDonald, *supra* note 82, at 926 (finding "more family resistance to disclosure for intrafamilial than for extrafamilial cases," with 10% of intrafamilial families reporting resistance to disclosure, while 3% of extrafamilial families reported such resistance). Fischer and McDonald also report that when intrafamilial abuse is disclosed, it followed a delay in reporting to the police. *Id.*

¹⁶⁵ See *id.* (discovering that witnesses were present for 30% of extrafamilial cases, but for only 17% of intrafamilial cases).

fit from raising awareness and commitment to children,¹⁶⁶ dissolution of the marital relationship provides a convenient vehicle for assisting parents to better protect their children following divorce: the custody determination.¹⁶⁷ As Part III explains, initial custody decisions are the logical juncture at which to address the risk of child sexual abuse,¹⁶⁸ although current custody standards complicate consideration of a girl's sexual vulnerability.¹⁶⁹

B. Custody Determinations Today

Although the picture of sexual abuse in fractured families is complex, the fact remains that the risk escalates at divorce. Because divorce heightens this risk, custody determinations provide an important opportunity to insulate female children from abuse. The following discussion briefly surveys various child custody standards and demonstrates how they complicate judicial consideration of this risk. Part III then outlines three approaches to responding to this risk through custody determinations.

¹⁶⁶ Giles-Sims, *supra* note 26, at 227.

¹⁶⁷ Of course, there are other ways to respond to this risk than using custody determinations. For instance, courts could take into account the risk of abuse when deciding to terminate parental relationships. *See, e.g.,* Brinig & Buckley, *supra* note 63, at 43. Alternatively, child protection agencies could ascribe more weight to risk factors, such as the presence of a stepparent, and preferentially investigate reports of child abuse in these homes. *See, e.g.,* Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1238 (1997) (suggesting that a weighted approach would better protect children). Unlike the proactive response explored here, however, both approaches respond to abuse *after* it occurs.

¹⁶⁸ Some will find the emphasis on the timing of the risk to girls after divorce as misplaced, arguing instead that prevention efforts should be tailored to more meaningful indicators of risk, such as family functioning (for example, whether a parent after divorce is supervising his or her child, among other things). While it is surely true that the actual functioning of single-parent and blended families after divorce accounts for the increased risk to girls, it is also true that for many families the change in functioning is precipitated by a change in form—that is, from a two-parent family to a single-parent or blended family. More importantly, however, it is during this change in family form—divorce—that courts and society have an opportunity to encourage parents to better protect their daughters.

¹⁶⁹ As Professor Gostin points out, public health interventions require justification because they intrude on individual rights and incur economic costs. *See* Lawrence O. Gostin, *Public Health Law in a New Century—Part III: Public Health Regulation: A Systematic Evaluation*, 283 JAMA 3118, 3118 (2000). He argues that coercive interventions should be undertaken only if public health officials can demonstrate (1) a significant risk based on scientific measures; (2) the intervention's effectiveness by showing a reasonable fit between means and ends; (3) that economic costs are reasonable; (4) that human rights burdens are reasonable; and (5) that benefits, costs and burdens are fairly distributed. *Id.* at 3118-22. Part I of this Article establishes a significant risk, while Part III suggests that there is a reasonable fit between custody determinations and the risk. Part IV considers the costs of this proposal—whether benefits and burdens will disproportionately impact certain families, and whether the burdens are reasonable.

In the absence of a statutory or judicial presumption in favor of a particular custodial arrangement,¹⁷⁰ the best interest of the child is the overriding concern in any proceeding involving children.¹⁷¹ In contests between two natural parents, courts first analyze the fitness of each parent, and then the custody arrangement that is in the child's best interest.¹⁷² Absent extraordinary circumstances, courts presume that each parent is fit and collapse the two inquiries, leaving only the child's welfare as the touchstone.¹⁷³

In determining a child's best interests, judges in many states are guided by nothing more concrete than the desire to protect "the safety, happiness, physical, mental and moral welfare of the child."¹⁷⁴ In other states, courts must consider a list of statutory factors in determining the best interests of the child.¹⁷⁵

While custody proceedings vary across states, they share sufficient similarity to permit a few generalizations. First, it is well established that courts possess the discretion to consider all factors relevant to a child's well-being.¹⁷⁶ Courts have repeatedly stressed that factors enumerated by judicial decision or statute are nonexclusive and that judges should consider all factors relevant to the child's well-being,¹⁷⁷ giving judges "acres of room to roam."¹⁷⁸

The factors courts most commonly use to determine custody include the following: the wishes of the parents and the child (if she possesses sufficient maturity to express a preference); the child's interaction with her parents, as well as with other persons who may signifi-

¹⁷⁰ See, e.g., N.H. REV. STAT. ANN. § 458:17(II) (1992) (establishing a presumption favoring joint custody); *Garska v. McCoy*, 278 S.E.2d 357, 362-63 (W. Va. 1981) (establishing presumption in favor of primary caretaker).

¹⁷¹ *Faries v. Faries*, 607 So. 2d 1204, 1209 (Miss. 1992) ("[T]he polestar consideration in matters of child custody is the best interest and welfare of the child."); Katz & Warfman, *supra* note 146, § 10.01[2][b], at 10-8 to 10-9. Forty-nine states and the District of Columbia subscribe to the best interest standard. Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 14 (1997).

¹⁷² Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1058-59 (1991).

¹⁷³ *Id.* at 1058 n.100.

¹⁷⁴ *Beck v. Beck*, 432 A.2d 63, 71 (N.J. 1981) (quoting *Fantony v. Fantony*, 122 A.2d 593, 598 (N.J. 1956)). In an early articulation of the best interest standard, Justice Cardozo explained that a judge "acts as *parens patriae* to do what is best for the interest of the child," and that "[h]e is to put himself in the position of a wise, affectionate, and careful parent, and make provision for the child accordingly." *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925) (internal quotation marks omitted).

¹⁷⁵ See 1 JEFF ATKINSON, *MODERN CHILD CUSTODY PRACTICE* § 4.01, at 218-19 (1986).

¹⁷⁶ See, e.g., MICH. COMP. LAWS ANN. § 722.23(d) (West Supp. 2000) (authorizing courts to consider "[a]ny other factor considered by the court to be relevant to a particular child custody dispute").

¹⁷⁷ See, e.g., *In re Marriage of Converse*, 826 P.2d 937, 939 (Mont. 1992) (concluding that the seven statutory factors are nonexclusive).

¹⁷⁸ Carl E. Schneider, *The Tension Between Rules and Discretion in Family Law: A Report and Reflection*, 27 FAM. L.Q. 229, 229 (1993).

cantly affect her best interests; the child's adjustment to home, school, and community; the mental and physical health of the parties; and the stability of the child's home environment.¹⁷⁹ In addition, nearly every state considers domestic violence when awarding custody of children.¹⁸⁰ Many of these statutes expressly define domestic violence to include abuse directed at the child, such as sexual abuse.¹⁸¹ Even in the absence of statutory authority, however, courts will consider evidence regarding allegations of past or present sexual, emotional, or physical abuse of the child.¹⁸²

Despite these commonalities, state custody statutes differ in important ways. Of particular import is the latitude that judges have in making custody decisions. While many states give a court discretion to consider any factor it deems relevant,¹⁸³ other states constrict the scope of consideration, permitting courts to consider only those factors directly relevant to the child's welfare.¹⁸⁴ Similarly, some statutes limit consideration to the child's interaction with potential custodians.¹⁸⁵ While necessary to prevent judges from considering conduct unrelated to the child or her relationships,¹⁸⁶ these formulas restrict

¹⁷⁹ UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 282 (1998); *see also* Katz & Warfman, *supra* note 146, § 10.06[2], [b][i], at 10-100 to 10-102 (noting how influential the UMDA factors have been to state custody statutes).

¹⁸⁰ *See* Lois Schwaeber, *Domestic Violence: The Special Challenge in Custody and Visitation Dispute Resolution*, 10 DIVORCE LITIG. 141, 145 (1998) (noting that almost all states had enacted legislation (i) providing for a statutory rebuttable presumption against the perpetrator of domestic violence being awarded custody or (ii) directing courts to consider domestic violence as a factor in determining the best interests of a child).

¹⁸¹ *See, e.g.*, ALASKA STAT. § 25.24.150(c)(7) (Michie 1998) (directing the court to consider "any evidence of . . . child abuse, or child neglect in the proposed custodial household").

¹⁸² Katz & Warfman, *supra* note 146, § 10.12[3], at 10-225; *see also, e.g.*, *Lenderman v. Lenderman*, 588 S.W.2d 707, 708-09 (Ark. Ct. App. 1979) (finding that allegations of parent's sexual abuse of child, if substantiated, are relevant considerations in a custody dispute).

¹⁸³ *See, e.g.*, MICH. COMP. LAWS ANN. § 722.23(l) (West Supp. 2000).

¹⁸⁴ *See* ALASKA STAT. § 25.24.150(d) (Michie 1998) (providing that "[i]n awarding custody the court may consider only those facts that directly affect the well-being of the child").

¹⁸⁵ *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 282 (1998) (directing that "[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child"). Although only nine states have enacted the *Uniform Marriage and Divorce Act* in its entirety (Arizona, Colorado, Delaware, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington), a number of state statutes closely resemble section 402. *See* Katz & Warfman, *supra* note 146, § 10.06[2][b][i], at 10-100 to 10-101 & n.14.

¹⁸⁶ *Cf., e.g.*, Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 864-65 (1985) (arguing that judicial discretion in this area allows homophobia to taint custody determinations).

judicial consideration to those factors exerting a *present* impact on a child.¹⁸⁷

Courts frequently invoke the present impact requirement in suits in which one parent challenges custody by the other based on the latter's nonmarital sexual conduct.¹⁸⁸ Thus, if a parent's sexual relationship was circumspect or unknown to the child, a contesting parent would have difficulty demonstrating a present impact on the child's relationship with the sexually involved parent.¹⁸⁹

Many custody statutes that integrate domestic violence mirror the emphasis on a present impact by limiting judicial consideration to violence that is occurring or has occurred. Pennsylvania, for instance, requires a court making an award of custody to consider "each parent and adult household member's *present and past* violent or abusive conduct," including the sexual abuse of children.¹⁹⁰ In California, a court awarding custody must consider any history of abuse by a parent against the child or other parent.¹⁹¹ Other states require corroboration of the abuse before it is taken into account, restricting considera-

¹⁸⁷ See, e.g., *Borchgrevink v. Borchgrevink*, 941 P.2d 132, 141 (Alaska 1997) (upholding award to mother of legal and physical custody of children, stating that "[t]he trial court did not impermissibly punish [the father] for past domestic violence, but appropriately considered [the father's] proven past domestic violence and his current behavior in the context of the *present impact* on the children and their relationships with their parents" (emphasis added)).

¹⁸⁸ See, e.g., *Inscoc v. Inscoc*, 700 N.E.2d 70, 81 (Ohio Ct. App. 1997) (noting that Ohio courts should only consider parental nonmarital sexual conduct if it is having a present adverse impact on the child, and holding that custodial father's open cohabitation with homosexual partner "has no relevance to the allocation of parental rights and responsibilities in the absence of proof that the parent's conduct has adversely affected the child"); HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 19-4, at 803 (2d ed. 1988) (noting that "[p]arental conduct raising questions of sexual morality has produced more custody litigation than any other types of conduct").

¹⁸⁹ UNIF. MARRIAGE & DIVORCE ACT § 402 cmt., 9A U.L.A. 282 (1998) (noting that the standard restricting judicial consideration to conduct of a proposed custodian which affects that person's relationship to the child could seldom be met if the child were unaware of the parent's behavior); *Ford v. Ford*, 419 S.E.2d 415, 417-18 (Va. Ct. App. 1992) (demanding, in modification proceeding based on custodial parent's cohabitation, that non-custodial parent show evidence that sexual misconduct occurred in the child's physical presence and was directly linked to a present showing that the child was harmed by such behavior); Cahn, *supra* note 172, at 1060, 1060-82 (noting that "[b]ecause the focus under the best interest of the child standard is on how parental actions affect the child, parental behavior that is unknown to the child or committed outside of the child's presence is theoretically irrelevant," but arguing that domestic violence is detrimental to children and should be considered); Katz & Warfman, *supra* note 146, § 10.12[2][b], at 10-211 ("Generally, the sexual conduct of a parent is irrelevant unless it is shown to have a direct, adverse effect on the child.").

¹⁹⁰ 23 PA. CONS. STAT. ANN. § 5303(a)(3) (West Supp. 2000) (emphasis added); see also COLO. REV. STAT. § 14-10-124 (1.5)(a)(IX) (1999) (directing courts to consider whether a party has been a perpetrator of child abuse or neglect if supported by credible evidence).

¹⁹¹ CAL. FAM. CODE § 3011(b)(1)-(3) (West Supp. 2000).

tion to present or past conduct.¹⁹²

Two concerns underpin this conscious reticence to look forward. First, it might encourage parents to spy on one another after the divorce.¹⁹³ Second, in the era of no-fault divorce, consideration of parental fault appears inappropriate in custody decisions absent an adverse impact on the child.¹⁹⁴

It seems fair to conclude, however, that custody determinations in many states—although putatively concerned with predicting the future—take the past and present conduct of potential custodians as their essential guide. Thus, family courts ask whether one parent has molested, or is molesting, little Jane before awarding custody, but they fail to ask the equally important question: will little Jane be molested after her parents separate, either by the parent awarded custody or someone who enters her life after divorce? This failure on the part of courts highlights a glaring inadequacy in the law: a nearly universal absence of proactive measures designed to prevent a child's potential sexual exploitation.

III

INTEGRATING THE RISK OF SEXUAL EXPLOITATION INTO CUSTODY DETERMINATIONS

Custody proceedings provide an important opportunity to respond to the sexual vulnerability of girls after divorce. In a nutshell, courts can raise parental awareness of a girl's sexual vulnerability by inquiring into her parents' willingness to take greater precautions against molestation or even making such precautions a condition of custody.¹⁹⁵

¹⁹² See, e.g., NEV. REV. STAT. ANN. 125.480(4)-(6) (Michie 1998) (directing courts to consider the likelihood of future injury, but only if the court determines by clear and convincing evidence, after an evidentiary hearing, that a parent seeking custody has engaged in domestic violence); OKLA. STAT. ANN. tit. 10, § 21.1(D) (West 1998) (requiring clear and convincing evidence of ongoing domestic violence before the presumption against custody by the perpetrator operates); TEX. FAM. CODE ANN. § 153.004(b) (Vernon Supp. 2000) (prohibiting the award of joint custody "if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child"); *Brown v. Brown*, 867 P.2d 477, 479 (Okla. Ct. App. 1993) (finding that evidence of one or two isolated instances of domestic violence, together with verbal threats against wife because of wife's alleged lack of infidelity, did not constitute "ongoing domestic abuse" for purposes of custody statute).

¹⁹³ See Katz & Warfman, *supra* note 146, § 10.12[2][b], at 10-213.

¹⁹⁴ See CLARK, *supra* note 188, § 19.4, at 802-03 (approving of "contemporary decisions that custody should not be granted or withheld as a reward or a punishment for conduct which a court finds worthy of praise or blame").

¹⁹⁵ Importantly, this Article does not advocate a presumption in favor of fathers over mothers, or vice-versa. Since significant risks exist on both sides of the custody equation, using this risk as a tool for determining which parent receives custody seems misplaced. Instead, the approaches outlined in Part III would only indirectly affect who receives cus-

Although heavily steeped in past and present conduct, custody determinations are, at bottom, educated guesses at the future and therefore should take available social science data into account. This Article argues first that the law is sufficiently malleable to look forward as well as backward and then suggests how to embed concerns about sexual abuse into custody determinations.

A. Consideration of a Child's Sexual Vulnerability After Divorce Under Existing Custody Formulations

As noted above, courts in many states have discretion to consider any factor they deem relevant to a particular custody dispute.¹⁹⁶ Many courts, in fact, expressly consider harms that are reasonably likely to occur, rather than confining the inquiry to proven harm.¹⁹⁷ Under this standard, a court apprised of the risk of child sexual abuse in fractured families could take it into account—for instance, by giving preference to a parent who would take concrete steps to shield his or her daughter from the risk of abuse.¹⁹⁸

Other states constrict the scope of consideration to those factors that have a present impact on the child.¹⁹⁹ It is not immediately clear how a child's sexual vulnerability after divorce will fare under a present impact test. Plainly, this risk—although tangible and quantifiable—is removed. No one has any idea precisely when it will occur, if it occurs at all, and the best data suggest that many, if not a majority, of girls after divorce will *not* be victimized.²⁰⁰

Nonetheless, a child's risk of sexual exploitation satisfies even a rigorous present impact standard. First and foremost, one may conceive of the risk of sexual abuse itself as a present manifestation of harm, as it has been in other legal contexts.²⁰¹ In fact, courts do this in the custody realm when they consider interparental violence in

tody. For example, courts may decide against parents who seem unwilling to take concrete steps to shield their daughters from this threat. See *infra* Part III.C.1.

¹⁹⁶ See, e.g., MICH. STAT. ANN. § 722.23(1) (West Supp. 2000).

¹⁹⁷ See, e.g., *Schenk v. Schenk*, 564 N.E.2d 973, 976-78 (Ind. Ct. App. 1991) (affirming modification of custody order granting custody to father over custodial mother's objections that it was "premature," when mother announced she intended to marry and resume a business partnership with a man convicted of molesting her two oldest daughters).

¹⁹⁸ See *infra* Part III.C for a fuller explanation of how a court could respond to this risk when structuring the custodial situation after divorce.

¹⁹⁹ See *supra* Part II.B.

²⁰⁰ See, e.g., *supra* notes 16, 19 and accompanying text.

²⁰¹ See, e.g., *Mauro v. Raynark Indus.*, 561 A.2d 257, 260-63 (N.J. 1989) (holding that a plaintiff who will suffer enhanced risk of disease as a result of exposure to a toxic chemical, such as asbestos, may recover damages for enhanced risk of disease upon showing that contraction of disease is probable, and may recover medical-surveillance damages irrespective of the likelihood that he or she will ultimately develop the disease); DAN B. DOBBS, *THE LAW OF TORTS* § 179, at 440-41 (2000) (noting that, in limited circumstances, tort plaintiffs may recover for increased risk of future harm and surveillance damages).

households in which a child is not battered *and* never witnesses the domestic violence. There, in the absence of immediate physical or emotional injury to the child, courts presume a nexus between such behavior and the child's well-being based on reports that children in abusive households are twice as likely to suffer physical abuse as are other children and are at increased risk to become batterers themselves.²⁰²

Notably, the risk of sexual exploitation is no more remote than other risks integrated into custody determinations. For instance, relying on studies documenting the adverse effects of passive smoke, courts have cited environmental tobacco smoke as a factor supporting the denial of custody.²⁰³ Similarly, if a custodial parent enters into a relationship with a convicted sex offender, courts may transfer custody to the noncustodial parent.²⁰⁴ Presumably the risk of recidivism, rather than present injury, drives such a decision. While these analogies are not perfect, they do demonstrate that present injury is not an absolute requirement before taking account of particular risks.

²⁰² See, e.g., ARK. CODE ANN. § 9-13-101(c) (Michie 1999) (providing that courts must consider evidence of domestic violence even if the child was not injured and regardless of whether or not the child witnessed the abuse); cf. Schwaeber, *supra* note 180, at 142 ("[R]esearchers reported that children were affected by the violence regardless of whether the children themselves were abused, accidentally injured during the abuse, or had witnessed the violence.").

Prior to recent judicial and statutory reform, the present impact requirement hobbled consideration of domestic violence in custody proceedings. See Cahn, *supra* note 172, at 1097 ("A narrow focus on actions that directly affect the child prevents courts from considering abuse between parents unless it is directed at a child."); Schwaeber, *supra* note 180, at 144 ("Prior to the 1990s, absent a showing that the child was a direct or accidental victim of the domestic violence, most courts did not consider domestic violence in determining custody and/or visitation issues."). As a result of legislative reforms, almost all states and the District of Columbia have enacted legislation providing for either (i) a statutory rebuttable presumption against custody awards to the perpetrator of domestic violence or (ii) consideration of domestic violence by courts when determining the child's best interests. *Id.*

²⁰³ See Harriet Dinegar Milks, Annotation, *Smoking as Factor in Child Custody and Visitation Cases*, 36 A.L.R.5th 377, § 2[a], at 385 (1996). For example, a 1990 medical study concluded that a nonsmoking child exposed to twenty-five "smoker years"—arrived at by multiplying the number of years in a residence by the number of smokers in the household—is twice as likely to develop lung cancer as an un-exposed individual. Dwight T. Janerich et al., *Lung Cancer and Exposure to Tobacco Smoke in the Household*, 323 NEW ENG. J. MED. 632, 634 (1990).

Plainly, some risks are too remote to warrant consideration in a custody proceeding. See, e.g., Claudia G. Catalano, Annotation, *Child Custody and Visitation Rights of Person Infected with AIDS*, 86 A.L.R.4th 211, § 3, at 216-18 (1991) (discussing court decisions refusing to deny custody to a parent infected with HIV since the virus is not transmitted through casual household contact).

²⁰⁴ Cf., e.g., Bettin v. Bettin, 404 N.W.2d 807 (Minn. Ct. App. 1987) (affirming trial court's order transferring custody of child to the father after considering as one factor that the mother's boyfriend had been convicted of assault and charged with sexual misconduct).

Clearly, prediction of future harm is difficult, if not impossible, in some instances.²⁰⁵ To reduce erroneous decisions and curb false allegations, courts sometimes require credible evidence of the risk to a child, such as evidence of past spousal abuse or environmental tobacco smoke.²⁰⁶ Superficially, the risk of sexual abuse in fractured households lacks a similar factual predicate, considering the multiplicity of its sources.²⁰⁷ However, this initial conception of the risk overlooks the fact that a child's sexual vulnerability arises, not from conduct that requires verification, but from the ashes of the nuclear family. If sexual exploitation is conceived as a risk to the child who is *not presently living with both biological parents*, the divorce itself supplies the needed evidence.²⁰⁸ In other words, there is an elevated risk of sexual abuse for every female child after divorce.

B. Reasons Courts May Be Reluctant to Integrate the Risk of Sexual Abuse into Custody Decisions

Courts may resist taking into account a girl's sexual vulnerability after divorce for many reasons. Among these are the seeming contingency of the risk, the perceived inability to address it in any meaningful way, and the fact that the risk does not arise from specific parental behavior. Nevertheless, the first two concerns fundamentally misappreciate the nature of child sexual abuse, while the third would impoverish custody determinations, hobbling the state's ability to protect children.

1. *The Risk of Sexual Abuse Seems Contingent*

Courts may resist taking into account risks they believe are contingent on a future event that may or may not happen. In *Marriage of Walter*,²⁰⁹ for example, the court deleted from the dissolution decree a condition prohibiting the mother from cohabiting with "a man not

²⁰⁵ See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 230 (suggesting that our inability to make predictions impedes the formulation of rules); *infra* note 237 and accompanying text (discussing the predictive ability of courts).

²⁰⁶ See, e.g., TEX. FAM. CODE ANN. § 153.004(b) (Vernon Supp. 2000) (prohibiting the award of joint custody "if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child").

²⁰⁷ See *supra* Part I.A.2(a)-(b) (noting the risk to daughters following divorce from fathers, father-substitutes, family intimates, and persons outside the household).

²⁰⁸ This is not to argue, however, that the availability of divorce should be restricted. As discussed more fully *infra* Part IV.C, it is unclear whether forcing distressed couples to remain together will reduce the possibility of sexual abuse. This Article only suggests that as a result of the link between marital dissolution and subsequent risk, courts can be sure that the risk is a real one, permitting them to act on the basis of this risk.

²⁰⁹ 557 P.2d 57 (Or. Ct. App. 1976).

her husband."²¹⁰ The court pointed out that when and if there was cohabitation, it would make its decision as to the children's best interests in the light of the actual, rather than the speculative, situation.²¹¹

Because a girl's risk escalates further when her custodial parent cohabits or remarries, the contingent nature of the abuse may lead judges to discount it at the time of divorce. As noted above, however, the risk of sexual abuse does not hinge simply on the custodial parent's formation of a compound household.²¹² In certain father-only households, the risk comes directly from a child's father.²¹³ Further, a child living with either her mother or her father is at significantly elevated risk for abuse, even before the custodial parent enters into a long-term relationship.²¹⁴ Courts, however, may be reluctant to integrate this risk into custody determinations because of a related concern: courts generally lack sufficient information to make accurate predictions about future custodial arrangements.

2. *The Perceived Inability to Address the Risk of Sexual Abuse in a Meaningful Way*

Predicting the future is dicey business. Courts are asked to make predictions about a child's future based on past events that may bear little relationship to the future circumstances of a now disintegrated family.²¹⁵ In addition, courts often do not know enough about the parties' past relationship to make sound predictions about a future custodial situation.²¹⁶ Compounding this difficulty is the general lack of consensus concerning the social values that should guide trial court judges in making custody decisions.²¹⁷ This lack of instruction and inability to chart the future places heavy burdens on the judiciary, en-

²¹⁰ *Id.* at 57.

²¹¹ *Id.*

²¹² *See supra* note 78 and accompanying text.

²¹³ *See supra* note 95 and accompanying text.

²¹⁴ *See supra* notes 45-51 and accompanying text.

²¹⁵ Katz & Warfman, *supra* note 146, § 10.01[2][b], at 10-10; *see* Mnookin, *supra* note 205, at 251-52; *see also* WALTER WADLINGTON ET AL., CASES AND MATERIALS ON CHILDREN IN THE LEGAL SYSTEM 649 (1983) (characterizing the best interests test as amorphous); Katz & Warfman, *supra* note 146, § 10.06[2][a], at 10-98 to 10-99 (describing the standard as unpredictable). Despite these criticisms, the best interests standard endures as the guiding principle for custody decisions, if only because critics have yet to formulate a suitable replacement. *See, e.g.*, CLARK, *supra* note 188, § 19.1, at 788 n.22 (deriding "the least detrimental alternative" advanced by Goldstein, Freud, and Solnit as "not exactly . . . world-shaking"). Moreover, as Professor Cahn notes, "even the alternative standards such as the primary caretaker . . . are justified by reference to it." Cahn, *supra* note 171, at 14.

²¹⁶ *Cf.* Mnookin, *supra* note 205, at 257 (noting that judges "lack information about even the most rudimentary aspects of a child's life with his parents").

²¹⁷ *See id.* at 230. Of course, the best interests standard itself expresses certain social values, such as social concern for the child. *See id.* at 291.

courages costly, painful litigation by parents, and arguably fosters placements that do not actually safeguard a child's well-being.²¹⁸

This sense of humility about the predictive capacities of courts led scholars to reject early research on the effects of divorce as a basis for formulating custody arrangements. Hence, Professor Homer Clark cautioned in his treatise that psychological studies of the impact of divorce upon children "do not generally seem to provide reliable data on which to base legal principles."²¹⁹ For instance, it is unclear whether a child raised by a parent of the same sex will be better adjusted than a child raised by a parent of the opposite sex.²²⁰

Although judges lack the oracular ability to forecast accurately a child's development,²²¹ it is possible to predict with considerable certainty that a child's sexual vulnerability will soar when her parents part. The soundest research suggests that as many as half the girls living with their fathers after divorce are molested by someone,²²² with equally gloomy prospects for girls living with their mothers.²²³ Judges can use the data on sexual exploitation after divorce to encourage parents to take proactive steps to shield their daughters from this threat.

Moreover, unlike other issues over which the public remains firmly divided—such as whether mothers or fathers are better suited to child-rearing²²⁴—there is substantial public agreement that child sexual abuse should be avoided.²²⁵ Neither are we uncertain about whether sexual abuse, when it results, is harmful to the child. Unlike stigma, embarrassment, teasing, and other nebulous "harms,"²²⁶ ex-

²¹⁸ David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 479 (1984).

²¹⁹ CLARK, *supra* note 188, § 19.1, at 788.

²²⁰ Cf. ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 85-86 (1988) (reviewing evidence suggesting that children who live with their same-sex parent tend to be better adjusted than children who live with their opposite-sex parent).

²²¹ See Mnookin, *supra* note 205, at 258-60.

²²² See *supra* note 89 and accompanying text.

²²³ See *supra* Part I.A.2(a).

²²⁴ Compare Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 25 (1990) (arguing for a return to the maternal preference in custody determinations because men and women are neither similarly situated biologically, nor in terms of social reality), with Leon J. Yarrow, *Maternal Deprivation: Toward an Empirical and Conceptual Re-evaluation*, 58 PSYCHOL. BULL. 459, 474 (1961) (reviewing critically the empirical literature on maternal separation and concluding that "a substantial portion of the children in each study did not show severe reactions to separation").

²²⁵ Cf. DOUGLAS J. BESHAROV, COMBATING CHILD ABUSE: GUIDELINES FOR COOPERATION BETWEEN LAW ENFORCEMENT AND CHILD PROTECTIVE SERVICES, at v (1990) ("Across the nation there is a growing recognition that law enforcement agencies must play a crucial role in protecting abused and neglected children.").

²²⁶ Cf. Julie Shapiro, *Custody and Conduct: How The Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 645 (1996) (arguing, in the context of custody determinations involving gay and lesbian parents, that the use of stigmatization and other ill-defined harms permits courts to "effectively circumvent [] the protections offered by the nexus

tensive research underscores the corrosive effect of molestation on a child throughout her life.²²⁷

In fact, acting on the basis of expected consequences is neither radical nor unprecedented. For instance, a court may negatively view a parent's alcohol use based on the supposition, accurate or not, that imbibing alcohol will impair his or her ability to parent.²²⁸ In this regard, predictions drawn from empirical studies may be preferable to intuited results, since research introduces a higher degree of rigor.

Concededly, the evidence of heightened risk of abuse after divorce reflects the risk to girls as a class, but does not permit the identification of the particular child for whom this risk will materialize.²²⁹ Thus, these studies demonstrate that the sexual vulnerability of all girls will soar after divorce, but do not say anything about the risk to a specific child. But this is also the case with respect to decisions made in individual custody determinations based on a judge's experiential observations about risk to a class of children. Thus, a judge may draw on countless experiences of harm that befell a child living with alcoholic parents to conclude that a specific child, Irene, for whom an alcoholic parent seeks custody, is likely to be harmed. In this instance, the judge extrapolates from experiential data about the risk of living in such an environment to conclude that Irene is at risk. Drawing inferences of risk to specific children after divorce from social science studies documenting the risk to girls *as a class* is no less legitimate.²³⁰

Lastly, while it may be legitimate to resist using social science evidence to tilt custody determinations in favor of one parent or the other,²³¹ the research on sexual abuse steers us to a much less Draco-

test," which limits consideration of a parent's conduct to those acts having a nexus to the child's welfare).

²²⁷ See *supra* Part I.B.

²²⁸ See Katz & Warfman, *supra* note 146, § 10.11[2][e], at 10-200 to 10-203 (noting the effect of parental alcohol use on custody determinations, even in the absence of evidence that such behavior has a detrimental impact on the child).

²²⁹ Cf. *supra* notes 5, 8, 12, 16-19 and accompanying text (discussing generally the risk to daughters after divorce).

²³⁰ Compare Ramsey & Kelly, *supra* note 83, at 632 (contending that social science research can make a valuable contribution to family law), with Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 Wis. L. Rev. 107, 108 (arguing that social science data is susceptible to misuse by legal policymakers and authors who are unfamiliar with social science material and may give the findings undue weight, or may draw unwarranted generalizations from limited research findings).

²³¹ Considerable debate persists over whether social science can provide definitive answers about which parent should receive custody. Compare, e.g., Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 894 (arguing on the basis of research findings for a rebuttable presumption that homosexual parenting is not in a child's best interests), with Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (disputing whether research supports a finding of harm to children reared by homosexual parents).

nian outcome: encouraging parents to take proactive steps to avoid a disquieting, but very real, result of marital dissolution, the sexual abuse of their daughter.

A final concern, however, may deter courts from integrating this risk into custody determinations: the risk arises from a generalized threat rather than from the potential custodian's specific behavior or characteristics. The next subpart considers how this feature of the risk of post-divorce child sexual abuse affects its integration into custody determinations.

3. *The Risk of Sexual Abuse Does Not Involve Parental Conduct*

Acknowledging a risk that is not based on the characteristics or behavior of the would-be custodian in a custody proceeding will strike some as an extension of current law. As the following discussion concludes, however, consideration of this generalized risk accords with the movement in custody decisions away from parental fitness, is explicitly contemplated by judicial and statutory factors defining a child's best interests, and effects the intent of the best interests test—to protect the child's welfare.

Considering matters other than parental actions is consistent with the shift in custody disputes away from bright line rules awarding custody according to notions of parental rights to an overriding concern for the child's welfare. More than fifty years ago, Justice Jackson observed that “[c]ustody is viewed not with the idea of adjudicating rights *in the children*, as if they were chattels, but rather with the idea of making the best disposition possible for the welfare of the children.”²³²

This emphasis on the child's welfare indicates that her needs “may take precedence over the parents' rights or demands of fair procedure.”²³³ The court, in fact, “acts as *parens patriae* with broad authority to do *whatever* the child's best interests require[.]”²³⁴ Generally, in a contest between two parents, the court evaluates the relative merits of each to determine who is “best.”²³⁵ In this enter-

²³² *May v. Anderson*, 345 U.S. 528, 541 (1953) (Jackson, J., dissenting).

²³³ Katz & Warfman, *supra* note 146, § 10.01[2][b], at 10-9; cf. CLARK, *supra* note 188, § 14.4, at 541-42 (discussing the practice of interviewing children whose custody is at issue in the judge's chambers).

²³⁴ Katz & Warfman, *supra* note 146, § 10.01[2][b], at 10-10.1 (emphasis added).

²³⁵ *Id.* § 10.01[2][b], at 10-11 (noting that judges in custody contests between two parents “try to determine the relative capability of two individuals to serve the child's best interest”). Even in contests between parents, certain characteristics may disqualify a parent as the custodian by rendering that parent unfit. See, e.g., Shapiro, *supra* note 226, at 645 (discussing homosexuality as one such basis).

prise, the past and present conduct of each parent figures prominently.²³⁶

The focus on past and present conduct, however, obscures the fact that determining a child's best interests is, at core, an exercise in predicting the future.²³⁷ Courts rely heavily on past and present actions precisely because they usually lack any other basis to forecast the future. This does not mean, however, that courts cannot consider matters other than parental conduct that may shape a child's future circumstances. Indeed, those statutes listing factors for judicial consideration do not focus narrowly on parental actions alone. Rather, they encompass a range of matters that have nothing to do with a parent's actions, such as the parent's wishes, the child's wishes, or the child's performance in school.²³⁸

A fierce debate over parental conduct now pervades family law, with some arguing that courts should consider certain conduct, such as a custodian's homosexual relationships, only if a tight linkage to the child's welfare is demonstrated, while others urge the *per se* disqualification of a homosexual parent from obtaining custody.²³⁹ Although an important debate, it should not be confused with the question presented here: namely, whether a court may structure the custodial situation in response to factors that have nothing to do with parental actions. The law explicitly permits this result.

Nonetheless, some will recoil from the prospect that a court, in structuring the custodial situation, might consider matters that do not concern parental conduct and are, in some sense, beyond the control of either parent. However, insisting that the best interests test has no space for a child's sexual vulnerability after divorce hobbles the state's ability to protect children. As Professor June Carbone observes, "the best interests principle is, although sometimes weaker, never stronger

²³⁶ See, e.g., 23 PA. CONS. STAT. ANN. § 5303 (West Supp. 2000) (explicitly directing courts to consider the fitness of parents in custody decisions, including their present and past violent conduct, criminal charges against them, and criminal convictions); Katz & Warfinan, *supra* note 146, § 10.06[2][b][v] (noting judicial consideration of sexual misconduct).

²³⁷ See Mnookin, *supra* note 205, at 251 (explaining that custody decisions require "an individualized prediction: with whom will this child be better off in years to come?"); cf. CLARK, *supra* note 188, § 19.1, at 787 ("[T]here is a greater than usual element of prediction required in custody cases, although it is easy to over-emphasize this source of difficulty.").

²³⁸ See, e.g., MICH. COMP. LAWS ANN. § 722.23(h) (West 1993) (directing courts to consider, among other factors, the home, school, and community record of the child).

²³⁹ See Shapiro, *supra* note 226, at 633-34 (discussing the "nexus test" and the "per se rule"). Compare Wardle, *supra* note 231, at 894 (arguing for a rebuttable presumption that parenting by homosexuals in ongoing relationships is not in a child's best interests), with Bell & Pea, *supra* note 231 (contending that because children raised by gays and lesbians are not harmed by the parents' sexual orientation, courts should evaluate the parenting ability of gays and lesbians individually).

than the theoretical framework that underlies it."²⁴⁰ When that framework excludes values relevant to children, then the standard loses its utility "for determining how best to serve the child."²⁴¹

While a court may consider a child's sexual vulnerability in custody determinations, how this consideration would play out remains unclear. Risk exists on both sides of the custody equation for girls. If consideration of this risk does not tilt a custody determination in favor of either parent, the question remains how it should affect the custody award.

As Part II noted, custody adjudications do not decide only which parent "wins," but determine the custody arrangement that is in a child's best interests.²⁴² Because the threat of molestation bears on a girl's welfare, it is appropriate for courts to consider it in the custody process.²⁴³ The next subpart explores three concrete approaches for utilizing custody proceedings to raise parental awareness of this risk and to encourage parents to take palpable precautions to avert the possibility of abuse.

C. Three Concrete Approaches to Responding to a Girl's Sexual Vulnerability After Divorce

Three practical approaches for incorporating consideration of the risk of increased sexual vulnerability into custody decisions warrant consideration, and they are ranked here in order of increasing intrusiveness. First, courts could consider the willingness and ability of each parent to adopt a preventive measure designed to shield their daughter from sexual abuse²⁴⁴—for instance, to enroll a child in a school-based prevention program or to take a parenting class about red flags for abuse.²⁴⁵ Second, a court could provide legal authority to the noncustodial parent to shield his or her daughter from sexual abuse.²⁴⁶ Third, courts, in their final decrees, could condition custody on the custodial parent's taking measures that shield the child from sexual abuse.²⁴⁷ The next three subparts explore the limitations and advantages of each approach. A brief discussion of two preventive

²⁴⁰ June Carbone, *Child Custody and the Best Interests of Children—A Review of From Father's Property to Children's Rights: The History of Child Custody in the United States*, 29 FAM. L.Q. 721, 723 (1995) (book review).

²⁴¹ Cahn, *supra* note 171, at 56 (making a similar point about a "theoretical framework . . . based on numerous values that are irrelevant to the child herself").

²⁴² See *supra* Part II.B.

²⁴³ See *supra* Part I.B.

²⁴⁴ See *infra* Part III.C.1.

²⁴⁵ See *infra* Part III.D.

²⁴⁶ See *infra* Part III.C.2.

²⁴⁷ See *infra* Part III.C.3.

measures that may be used to shield a child from sexual exploitation, school-based prevention programs and parenting classes, follows.²⁴⁸

1. *Willingness of a Custodial Parent to Shield a Daughter from Abuse*

Under the least intrusive approach, a court, in awarding custody, could simply consider the willingness of each potential custodian to adopt some measure to shield their daughter from sexual exploitation, such as enrolling her in a school-based prevention program or taking parenting classes themselves.²⁴⁹ Two aspects of this approach deserve consideration: whether courts would end up strong-arming would-be custodians into acceding to a precautionary measure, and whether a parent awarded custody on this basis would actually take such precautions.²⁵⁰

Judicial blackmail is a real possibility. Certainly, reasonable minds can differ over the merits of preventive measures, such as parenting classes or school-based prevention programs.²⁵¹ A parent could conclude in good faith that the risk of exploitation is too remote to warrant precautionary measures, or that such measures are too intrusive, time-consuming, or expensive. Under a "willingness" approach, a parent with misgivings could face a Hobson's choice: to remain silent or to express his or her concerns at the risk that the court awards custody to the other parent. Plainly, this quandary smacks of coercion.

Nevertheless, courts consider the willingness of parents to do all sorts of things: to "allow and promote a good relationship between the child and the other parent,"²⁵² "to ensure that a child has frequent and continuing contact with both parents,"²⁵³ and to work together to

²⁴⁸ See *infra* Part III.D.

²⁴⁹ For the reasons developed in Part III.E, courts should routinely apply any approach outlined here. Routine application would avoid the inequity that could result if courts applied precautionary measures exclusively to poor, minority families on the basis of prevailing stereotypes about incestuous families. Concomitantly, routine application would better protect children in middle- and upper-class families.

²⁵⁰ The voluntariness of this approach may promote its success. See Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 94-95 (1999) (observing that "most successful health interventions depend on the voluntary compliance of their targets" and concluding that "compliance without enforcement is essential to public health" given the plethora of public health laws and recommendations (internal quotation marks omitted)).

²⁵¹ As with all three approaches, whether a preventive measure would do any good in reducing abuse remains an important consideration. See *infra* Part III.D (discussing both the positive and negative results of these programs).

²⁵² Katz & Warfman, *supra* note 146, § 10.06[2][b][iv], at 10-108.

²⁵³ *Id.*

make a joint custody arrangement successful.²⁵⁴ With each one of these, the parent faces a Solomonic judgment.²⁵⁵ The state puts the parent to this test because it has concluded that the substantive result, continuing contact between parent and child or parental cooperation, promotes the best interests of the child.²⁵⁶

Whether parents will hold up their end of the bargain, either by taking parenting classes or enrolling their daughters in school-based prevention programs, also deserves careful consideration. There are good reasons to believe that parents may neglect to follow through with these precautions after receiving custody. Parents often are unable to focus on their child's needs at the time of divorce. Further, despite literature suggesting otherwise,²⁵⁷ parents trust in their own ability to identify sexual abuse.²⁵⁸ In a recent survey of a rural population, 71% of all respondents believed that parents would likely know if their child had been sexually abused,²⁵⁹ even though one study of severe abuse indicated that nearly three-fourths of nonoffending parents never suspected misconduct.²⁶⁰ Likewise, 72% of survey respondents believed that sexually abused children would most likely display behavioral changes, and that these alterations would alert them to abuse.²⁶¹ Again, this misplaced confidence is not justified by the behavior of sexually abused children. As noted in Part I, a third of

²⁵⁴ Jay Folberg & Maureen McKnight, *Joint Custody*, in 2 CHILD CUSTODY & VISITATION: LAW AND PRACTICE, *supra* note 146, 13-1, § 13.06[1], at 13-38.

²⁵⁵ See Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 5-7 (1987) (noting that in King Solomon's biblical judgment the crucial piece of evidence in awarding a child to one woman rather than another was their behavior in the dispute itself, and observing that in modern custody determinations "[t]he more forcefully a parent presses a custody claim, the more he proves himself unfit for custody").

²⁵⁶ Many statutes are unapologetic about encouraging parental cooperation, creating what amounts to a "friendly parent" inducement. See Folberg & McKnight, *supra* note 254, § 13.05[8][c], at 13-34.

²⁵⁷ Parental misperceptions about the risk of sexual abuse is hardly surprising. Adults generally are not accurate when judging uncertainty or predicting probabilistic events, leading them to underestimate the likelihood of bad things happening to them. Janis E. Jacobs et al., *Children's Perceptions of the Risk of Sexual Abuse*, 19 CHILD ABUSE & NEGLECT 1443, 1444 (1995); see also PETER BENNETT & SIR KENNETH CALMAN, RISK COMMUNICATION AND PUBLIC HEALTH, at v (1999) (suggesting that public responses to risk frequently are out of proportion to scientific estimates and may lead to "virtual indifference").

²⁵⁸ *Id.*

²⁵⁹ James F. Calvert, Jr. & Michelle Munsie-Benson, *Public Opinion and Knowledge About Childhood Sexual Abuse in a Rural Community*, 23 CHILD ABUSE & NEGLECT 671, 679 (1999).

²⁶⁰ RUSSELL, *supra* note 50, at 372.

²⁶¹ Calvert & Munsie-Benson, *supra* note 259, at 679. Compounding these fallacies, parents typically fear that a stranger will molest their child. See Tutty, *supra* note 30, at 260. However, as noted above, victimization by a stranger is "the least likely scenario." *Id.*; see *supra* notes 2, 43 and accompanying text. These misconceptions by the public may explain why relatively few parents discuss personal safety with their children. See Sandy K. Wurtele et al., *A Comparison of Teachers vs. Parents as Instructors of a Personal Safety Program for Preschoolers*, 16 CHILD ABUSE & NEGLECT 127, 128 (1992).

sexually abused children have no apparent symptoms.²⁶² The disconnect between public convictions and the reality of abuse may warrant more directive approaches to abuse prevention.

2. *Mobilizing the Noncustodial Parent as an Effective Monitor*

Generally, absent an emergency, a noncustodial parent may not interfere with parenting decisions of the custodial parent.²⁶³ Thus, a noncustodial parent concerned about the heightened risk of abuse arguably would lack legal authority to enroll his or her daughter in a school-based prevention program.²⁶⁴

Given the powerful tug that parents feel to act in the interests of their child, awarding sole custody misses a critical opportunity to empower the noncustodial parent to shield his or her child from the threat of molestation. To capitalize on this inclination, a court need only award joint custody,²⁶⁵ now an option in more than half the juris-

²⁶² See *supra* note 126.

²⁶³ See, e.g., Katz & Warfman, *supra* note 146, § 10.03[3][b][i], at 10-36. Custody has two components: physical custody and legal custody. Physical custody simply means "the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent." *Id.* § 10.03[3][b][ii], at 10-38 (quoting *Taylor v. Taylor*, 508 A.2d 964, 967 (Md. 1986)). In contrast, legal custody carries with it the power to make significant decisions about a child's life and welfare, including education, medical care, religious training and other matters important to a child's well-being. *Id.* § 10.03[3][b][i], at 10-36.

Generally, a parent given sole custody possesses both physical custody of the child, as well as decision-making authority. See *id.* § 10.03[3][c][ii], at 10-38 to 10-39. The noncustodial parent retains a "residuum of authority" to make necessary day-to-day decisions concerning the child's welfare, such as emergency medical or surgical decisions for the child. *Id.* § 10.03[3][b][i], at 10-31.

²⁶⁴ See generally Ruby B. Weeks, Annotation, *Noncustodial Parent's Rights as Respects Education of Child*, 36 A.L.R.3d 1093, 1095-96, 1098-1101, 1103-4 (1971) (noting that the award of custody ordinarily carries with it the corresponding privilege and right to determine all educational questions for the custodial child, including choice of schools, determination of curriculum, language of instruction, and selection of summer camps, but pointing out cases in which judicial decrees grant specific decision-making authority to the noncustodial parent); Barbara S. Seng, Note, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1310 (1984) (concluding from exhaustive litigation that courts almost uniformly uphold the custodial parent's right to make decisions regarding the child's education and religious training over the objections of the noncustodial parent).

²⁶⁵ Although there are many varieties of joint custody awards, "[t]he essence of joint legal custody . . . is joint control over the child." Katz & Warfman, *supra* note 146, § 10.03[3][c][vi], at 10-44. Thus, in certain jurisdictions, the parties may share decision-making authority over the child with primary physical custody in one party. *Id.* Admittedly, a focus simply on legal authority oversimplifies somewhat. As a practical matter, enrolling a child in a prevention program—at least when it is conducted outside the school system—may cut into the custodial parent's stipulated time with the child. To the extent the court or a parent is considering such extra-curricular precautions, the court may also need to make some stipulation regarding time.

dictions in the United States.²⁶⁶ Alternatively, courts could preserve the noncustodial parent's authority to consent to preventive education for his or her daughter by awarding sole physical custody to the better day-in-and-day-out caretaker, while giving both parents decision-making power over the child.²⁶⁷ Courts typically use this approach when one parent has religious beliefs that prohibit certain medical care, but is otherwise the more qualified custodian.²⁶⁸

Giving legal authority to the noncustodial parent has two principal advantages. First, it empowers the noncustodial parent to protect his or her child directly, rather than coercing the custodial parent to do so through protective orders. Accordingly, granting legal authority to the noncustodial parent should not strain "long standing and highly cherished traditional views about family autonomy and its concomitant, parental authority."²⁶⁹ Second, granting such authority does not permit a single factor, such as the need to shield girls from molestation, to dominate the custody award. Instead, an approach granting legal authority to the noncustodial parent would continue to award physical custody to the parent better able to meet the child's daily needs.²⁷⁰

Notwithstanding the strengths of this approach, its effectiveness hinges on two essential preconditions, *neither of which may be present*. First, the noncustodial parent must believe that a risk exists. Second, after divorce, that parent must sustain an interest in the daughter's welfare and maintain contact with her.

²⁶⁶ See Folberg & McKnight, *supra* note 254, § 13.01[1], at 13-7 (discussing statutory authority for joint custody awards). Some states declare, as a matter of public policy, that joint custody is in the best interests of the child. See *id.* § 13.05[1], at 13-19 & app. 13.05, at 13-89 to 13-99 (citing, among others, California, New Mexico, Oregon, and Michigan).

²⁶⁷ See *Johnson v. Johnson*, 564 P.2d 71 (Alaska 1977) (rejecting the trial court's reliance on the doctrine of tender years, but otherwise approving of trial court's award of physical custody to mother with joint legal custody to both parents so that the father could consent to medical care since the mother was a Jehovah's Witness). Technically this arrangement is "sole custody" by the mother. See Katz & Warfman, *supra* note 146, § 10.03[3][c][ii], at 10-39 ("Even in a sole custody award, however, the court may give one parent power to make the major decisions and the other physical care and custody of the children.").

²⁶⁸ See Katz & Warfman, *supra* note 146, § 10.03[3][c][ii], at 10-39; see also, e.g., *Curran v. Bosze*, 566 N.E.2d 1319, 1331 (Ill. 1990) (observing that a mother, as sole custodian, "may determine the child[ren]'s upbringing, including but not limited to, [the] education, health care and religious training, unless the court . . . finds . . . that the absence of a specific limitation of the custodian's authority would clearly be contrary to the best interest of the child[ren]" (alterations in the original) (internal quotation marks omitted)).

²⁶⁹ John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 352 (1998).

²⁷⁰ See, e.g., *Osier v. Osier*, 410 A.2d 1027, 1031 (Me. 1980) (concluding that, if parent's religious practice risks harm to child, a court should seek alternative remedies to protect the child other than denying custody).

Unfortunately, it is not clear that most parents appreciate the risk of sexual abuse from within the family, as society continues to labor under a "stranger-in-a-trenchcoat" image of molestation perpetuated by Megan's law, sex offender notification statutes, and other child abuse reforms directed at random acts by strangers.²⁷¹ Without fundamental shifts in society's perceptions of sexual abuse, noncustodial parents may unwittingly fail to protect their children adequately.²⁷²

The outlook for continuing contact between the child and noncustodial parent is equally dim, at least for fathers. More than 80% of all children reside with their mothers following divorce.²⁷³ It is difficult to overstate the extent to which the relationships between these children and their noncustodial fathers are disrupted following a divorce. More than 20% of children see their noncustodial fathers only a few times a year, or not at all.²⁷⁴ Ten years after divorce, almost two-thirds of noncustodial fathers have no contact with their children.²⁷⁵ Significantly, fathers are more likely to maintain contact when they feel they have some influence over decisions affecting their children, including the decision to employ preventive measures to mitigate the threat of sexual abuse.²⁷⁶ As the risk of sexual exploitation makes clear, the problem of the absentee father extends well beyond the disappearance of an important role model.²⁷⁷ Harried single mothers are rarely in a position to scrutinize their daughters vigilantly for tell-tale signs of abuse.²⁷⁸ To the extent that the noncustodial father is

²⁷¹ See 2 HARALAMBIE, *supra* note 34, § 16.01, at 161.

²⁷² To understand fully the link between marital dissolution and sexual exploitation, parents need appropriate education. As Part III.D.2 notes, parenting classes are one approach to shielding children from molestation.

²⁷³ Hetherington et al., *supra* note 134, at 175. Hetherington points out, however, that "father-headed families have tripled since 1974, making them the fastest growing family type in the United States." *Id.* at 176.

²⁷⁴ *Id.* at 172; cf. CHRISTINE WINQUIST NORD & NICHOLAS ZILL, OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, DEP'T OF HEALTH & HUMAN SERVS., 1 NON-CUSTODIAL PARENTS' PARTICIPATION IN THEIR CHILDREN'S LIVES: EVIDENCE FROM THE SURVEY OF INCOME AND PROGRAM PARTICIPATION (1996) at <http://fatherhood.hhs.gov/SIPP/noncuspl.htm> (last visited Aug. 25, 2000) (reporting that 31.7% of nonresident fathers had not visited their children in the past year, although 23.8% of nonresident fathers saw their children once a week or more). Importantly, the custodial mother may influence the degree of paternal involvement by acting as a "gatekeeper" between the noncustodial father and the child; "[w]hen conflict, resentment, and anger are high, the 'gate' may be closed, and fathers may be discouraged or shut out." Hetherington et al., *supra* note 134, at 172. When a custodial mother is interfering with contact between father and child, a court may use a range of enforcement methods. See generally CLARK, *supra* note 188, § 19.10, at 847-49 (noting enforcement methods available to courts in custody cases).

²⁷⁵ FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 35-36 (1991).

²⁷⁶ See Hetherington et al., *supra* note 134, at 172.

²⁷⁷ See *supra* Part I.A.2(a).

²⁷⁸ See *supra* note 74 and accompanying text.

absent or frustrated in his efforts to maintain a relationship with his children, he is also unable to identify and prevent abuse.²⁷⁹

Noncustodial mothers differ in the degree of their involvement with their children following divorce. Loss of contact between a child and her noncustodial mother is rare after divorce, in part because noncustodial mothers structure their living arrangements to facilitate visits with their children.²⁸⁰ Moreover, upon remarriage, mothers are less likely to diminish contact with or fade from their children's lives.²⁸¹ The mother-child relationship differs qualitatively as well: noncustodial mothers remain more actively involved in the child's life after divorce and, of particular importance here, are more effective in controlling and monitoring children's behavior than noncustodial fathers.²⁸² Children talk more with noncustodial mothers about their problems and activities than with noncustodial fathers.²⁸³ Concomitantly, noncustodial mothers have more influence over their children's development, especially that of daughters.²⁸⁴

One final dimension of encouraging this noncustodial monitoring deserves consideration—the possibility that divorcing spouses might use the expanded legal authority in combat with each other. Arming a noncustodial parent with greater authority creates an opportunity to use that power for ulterior motives, such as spite. Thus, a bitter parent could use his or her legal authority to undermine a new relationship of the other parent, by taking the daughter to abuse counseling even in the absence of signs of sexual abuse.²⁸⁵ Even absent malicious intent of this kind, joint decision-making authority may still exacerbate acrimony between divorcing spouses. Nonetheless, awards of joint custody always raise the specter of manipulation and

²⁷⁹ Of course, educating noncustodial fathers about the risk of sexual abuse may encourage them to maintain consistent contact with their daughters. Moreover, a custody decree could *require* a noncustodial father to have frequent contact with his child. See, e.g., CLARK, *supra* note 188, § 149.4, at 814.

²⁸⁰ See Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of Law: On Dividing the Child*, 92 MICH. L. REV. 1808, 1822-23 (1994) (book review) (noting that six months after separation only 3% of families demonstrated no significant relationship between mother and child, with this number rising to 7% after three and half years); cf. NORD & ZILL, *supra* note 274, at 33 (reporting that 35% of nonresident mothers saw their children once a week or more, but that 16% had not visited their children in the past year); Hetherington et al., *supra* note 134, at 172 (finding that noncustodial mothers "maintain approximately twice as much contact with their children as noncustodial fathers").

²⁸¹ Hetherington et al., *supra* note 134, at 172.

²⁸² *Id.* at 176 (noting, however, that noncustodial mothers are less effective monitors than custodial mothers).

²⁸³ *Id.* at 176-77.

²⁸⁴ *Id.* at 177.

²⁸⁵ Importantly, judges should exempt from this approach any victims of domestic violence since expanded legal authority could provide a batterer an opportunity to further control a battered parent. Cf., e.g., CAHN, *supra* note 172, at 1067 (arguing that joint custody gives a batterer additional power over an abused spouse).

gamesmanship. As with joint custody generally, courts should award the shared decision-making authority outlined here only when couples demonstrate an ability to cooperate.²⁸⁶

In the end, confidence in this approach reduces to a single inquiry: will the noncustodial parent continue to be an effective presence in his or her daughter's life and act responsibly to shield her from the threat of sexual abuse?²⁸⁷

3. *Conditional Custody Awards*

A third possibility for incorporating risk of sexual abuse into custody determinations is for courts to require parents to take precautions to minimize their child's sexual vulnerability. Unlike the willingness approach, which relies on parents themselves to take precautions, a court under this approach would direct parents to act. A court could make this directive in its final custody decree or in a protective order. Alternatively, for those states that require shared parenting plans, a court could make it an explicit feature of the final plan.

Courts have used conditions on custody to shield children from threats to their health from environmental factors in the custodial household. Thus, for instance, a New York trial court, using its "inherent power in matrimonial matters to issue orders safeguarding the health and safety of . . . the children," issued an order restricting a custodial parent from smoking in close proximity to her children and confining her smoking at home to a ground floor television room.²⁸⁸ Courts have also used conditional custody awards to shield children from threats to their moral upbringing. For instance, courts have upheld temporary custody orders prohibiting a child from overnight stays in a parent's home in order to insulate the child from the parent's extramarital sexual relationship.²⁸⁹

²⁸⁶ See, e.g., *Beck v. Beck*, 432 A.2d 63, 71-72 (N.J. 1981) (noting the need for a minimal level of parental cooperation in a joint custody arrangement).

²⁸⁷ It is conceivable that a noncustodial parent, educated about this risk, may fabricate allegations of abuse either to vent unresolved anger or receive an advantage in a later legal proceeding. This possibility is discussed more extensively in Part IV.E below. Without minimizing problems posed by postdissolution litigation, it is important to note that, under the noncustodial monitoring approach, a vengeful parent is hampered in his or her effort to vent rage or garner later advantage by fabricating charges. First, when a court awards joint physical and legal custody, the most likely bases for relitigation—decision-making authority and time with the child—are removed. Second, manufacturing charges of sexual abuse is itself risky. See *infra* note 401.

²⁸⁸ *Roofeh v. Roofeh*, 525 N.Y.S.2d 765, 769 (Sup. Ct. 1988); see also *De Beni Souza v. Kallweit*, 16 Fam. L. Rptr. (BNA) 1496 (Cal. Super. Ct. 1990) (prohibiting smoking at home in the children's presence).

²⁸⁹ See Diane M. Allen, Annotation, *Propriety of Provision of Custody or Visitation Order Designed to Insulate Child from Parent's Extramarital Sexual Relationships*, 40 A.L.R. 4th § 2[a], at 812, 815 (1985) (noting courts' efforts to structure custody and visitation arrangements

Using a similar approach to address the present problem, courts could simply direct the custodial parent (or if joint custody were awarded, both parents) to actively take measures designed to prevent a child's potential victimization.²⁹⁰ The next subpart discusses two possible measures for preventing abuse.

This more coercive approach raises a core consideration: is it necessary to force protective measures on the custodial parent? That is, can parents not be trusted to do this without state interference? It is difficult to argue that the natural inclination of parents to protect their child might not suffice to prevent sexual abuse. Nevertheless, there is good reason to believe that, absent an inducement, the custodial parent may not be sufficiently vigilant.

The risk of sexual abuse to a child comes in part from the parent's partner. It is likely that a parent beginning a new relationship, however well intentioned, will see his or her new partner through rose-colored glasses:²⁹¹ "even when the signs of abuse are more obvious, many [parents] find it most difficult to think that their [spouse, lover], or other trusted person could actually be a sexual offender, or even that sexual abuse could occur in their family."²⁹²

Perpetrators are not only aware of this, but actively attempt to drive a wedge between parent and daughter to evade discovery.²⁹³ Thus, the molester may ensure the secrecy of his or her behavior by undermining the child's belief in her parent's "capacity to help by saying such things as, 'if you tell, your mother [or father] will have a

to insulate children from a parent's extramarital sexual relationships, but cautioning that such conduct will warrant conditions on custody or visitation only if the parent's conduct is directly detrimental to the child's well-being).

²⁹⁰ Admittedly, the analogy between the heightened risk of sexual abuse and environmental hazards present in the household is not perfect. Sexual abuse is a generalized, as opposed to a particularized risk, and it occurs at unspecified times, if at all.

²⁹¹ Cf., e.g., Sirles & Franke, *supra* note 68, at 132 ("A basic trust exists within families that assumes sexual abuse will not occur. Therefore, mothers are rarely sensitized to be on the alert for abuse.").

²⁹² Lovett, *supra* note 6, at 730. Economic conflicts of interest may play a significant role as well. Psychologist Kathleen Faller compared the responses of nonoffending mothers to disclosures of abuse when the perpetrator was "(1) the biological father married to—and living with—the mother; (2) the stepfather or live-in lover; and (3) the father who was not living with the mother because of separation or divorce." RUSSELL, *supra* note 50, at 364 (discussing Faller's study). Faller concluded that mothers were less likely to protect their daughters when the abuser lived in the home. *Id.*; see also Everson et al., *supra* note 68, at 201 (finding in a study of maternal support that "mothers were most supportive and protective of their children when the offender was an ex-spouse and least supportive when the perpetrator was a current boyfriend"); cf. Sirles & Franke, *supra* note 68, at 132 (observing that a "mother hearing of her child's sexual abuse for the first time has much to lose and little to gain by believing the child").

²⁹³ See Lesley Laing & Amanda Kamsler, *Putting an End to Secrecy: Therapy with Mothers and Children Following Disclosure of Child Sexual Assault*, in IDEAS FOR THERAPY WITH SEXUAL ABUSE 159, 167 (Michael Durrant & Cheryl White eds., 1990).

breakdown."²⁹⁴ By exploiting a child's urge to protect a parent whom she loves, the offender separates her from a potential source of support.²⁹⁵

Compounding the secrecy of the abuse, some parents appear to be cognitively unable to identify sexually exploitive men²⁹⁶ because they are incest survivors themselves.²⁹⁷ One study of sexually abused children found that 60% have mothers who were victimized themselves, compared to only 3% of mothers in the study's control group.²⁹⁸ Although a history of sexual abuse is particularly common for mothers of molested children, studies also report that significantly high proportions of victims' fathers are incest survivors.²⁹⁹

Sociologists, struggling with the question of why victimization in one generation reproduces itself in the next, have formed two theories. First, they surmise that the "corrosive effect" of molestation on self-esteem renders abused parents easy prey for sexually abusive men.³⁰⁰ Alternatively, a parent's sexual abuse as a child may lead to an impaired ability to identify untrustworthy people, creating an opportunity for the victimization of their children.³⁰¹ No matter what the explanation, data about nonoffending parents confirm that in the most severe cases nearly three-fourths of nonoffending parents never suspected.³⁰² Acknowledging this lack of awareness in the nonoffend-

²⁹⁴ Lovett, *supra* note 6, at 730. Eighty-seven percent of the victims in that study reported that the offender threatened them. *Id.* at 734.

²⁹⁵ *Id.* at 730. As Lucy Berliner and Jon Conte note, the perpetrator convinces the child that her "silence physically or emotionally protects the parent[.]" Lucy Berliner & Jon R. Conte, *The Process of Victimization: The Victims' Perspective*, 14 CHILD ABUSE & NEGLECT 29, 38 (1990).

²⁹⁶ See BAGLEY & KING, *supra* note 45, at 168 (arguing that the "naive optimism" of mothers who were sexually abused as children, together with their "subordination to male dominance," result in an "emotional and cognitive framework" that impedes the recognition of their child's abuse).

²⁹⁷ Cf. Beitchman et al., *supra* note 9, at 550 (reviewing studies facing a correlation between being sexually abused and having a parent who had been sexually abused as a child).

²⁹⁸ Huguette Sansonnet-Hayden et al., *Sexual Abuse and Psychopathology in Hospitalized Adolescents*, 26 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 753, 754-55 (1987); see also William N. Friedrich & Redmond A. Reams, *Course of Psychological Symptoms in Sexually Abused Young Children*, 24 PSYCHOTHERAPY 160, 166 (1987) (finding in a case study of sexually abused preschoolers that five of eight mothers (63%) had been sexually abused as children).

²⁹⁹ Holly Smith & Edie Israel, *Sibling Incest: A Study of the Dynamics of 25 Cases*, 11 CHILD ABUSE & NEGLECT 101, 104 (1987) (reporting in a study of sibling incest that 72% of the families in which incest occurred, a parent had been sexually abused as a child).

³⁰⁰ Beitchman et al., *supra* note 101, at 108 (discussing revictimization).

³⁰¹ *Id.*; see also Lovett, *supra* note 6, at 730 (observing that mothers of abused children frequently "are coping with their own history of sexual trauma, which can interfere with their awareness and response to their child's abuse").

³⁰² See RUSSELL, *supra* note 50, at 372 (finding that in "[seventy-two] percent of the cases in which [victims reported] that their mothers did *not* know about [the abuse] more severe abuse . . . occurred"). Ironically, most parents believe that they would know if their

ing parent is not meant to place blame. Rather, it is to observe that relying solely on a parent's natural inclination to protect his or her child may not suffice.

To justify coercive state intervention in the parent-child relationship, however, the intervention's efficacy must be reasonably established. As the following Part notes, under each custody-based approach charted above, courts have available two practical methods for addressing the risk to girls in fractured families.

D. Two Precautionary Measures Available to Courts

The question of how best to protect a child from sexual abuse is particularly thorny. Although any preventive measure would be solely within the court's discretion, it is important to note that two off-the-rack approaches for reducing sexual abuse are available.

The first approach, school-based prevention programs, attempts to empower a child to protect herself from sexual abuse after divorce.³⁰³ The second approach, parenting classes that educate caretakers about red-flags of abuse, tries to increase scrutiny of children in fractured families, and by doing so, to augment the diminished incest taboo in these households.³⁰⁴ For reasons canvassed below, neither measure alone will prevent injury, and neither is without limitations.

1. School-Based Prevention Programs

Although widespread,³⁰⁵ victimization prevention programs offered without cost to middle school children have had mixed results.³⁰⁶ While these programs have not reduced the rate of injury or completed victimization—two crucial measures of a prevention effort's efficacy—they have significantly increased the likelihood of dis-

child were being sexually abused. See, e.g., Calvert & Munsie-Benson, *supra* note 259, at 679 (noting that 71% of the survey's respondents believed that "parents would likely know that their child had been sexually abused").

³⁰³ Larson et al., *supra* note 42, at 23.

³⁰⁴ *Id.* at 24; cf. Gordon, *supra* note 94, at 128 (discussing environments that encourage fathers to disregard the incest taboo).

³⁰⁵ In a study of 126 prevention programs around the country, Jeanne Kohl reported that these programs serve several thousand students yearly, are conducted locally with the assistance of state funding, and follow a prescribed curriculum. Jeanne Kohl, *School-Based Child Sexual Abuse Prevention Programs*, 8 J. FAM. VIOLENCE 137, 137, 145 (1993). Most of these programs teach children about basic personal safety, inappropriate kinds of touching, how to resist sexual abuse, and the importance of self-esteem and establishing support systems. *Id.*

³⁰⁶ Compare Finkelhor et al., *supra* note 29, at 1688 (reporting tangible improvement in participants' ability to handle abusive situations, but finding no reduction of completed victimization or injury), with Jan Rispens et al., *Prevention of Child Sexual Abuse Victimization: A Meta-Analysis of School Programs*, 21 CHILD ABUSE & NEGLECT 975, 981 (1997) (concluding that "[c]hildren do learn sexual abuse concepts and acquire the self-protection skills that are taught in sexual abuse victimization prevention programs").

closure.³⁰⁷ These programs have also enabled children to feel “more efficacious in dealing with victimizations” and to experience significantly less self-blame,³⁰⁸ both positive outcomes. As one researcher notes, “a sense of having had some control in the face of threats is one of the most important moderators of trauma and predictors of recovery.”³⁰⁹

However, school-based prevention programs may also produce negative results. Researchers in one study noted a disturbing, although statistically insignificant, trend in children who have been educated by these programs: they suffer injuries during sexual victimization, “apparently because they were more likely to fight back.”³¹⁰ This finding confirms educators’ lingering doubts about whether training can materially reduce a child’s actual risk of victimization.³¹¹ As one commentator explains, “[c]hildren are vulnerable to victimization partly because they are relatively small and weak and are exposed to many larger, older, and more potentially aggressive individuals, factors that education cannot change.”³¹²

Additionally, two practical problems limit the usefulness of these programs in reducing the risk of sexual abuse to daughters after divorce. First, the timing of the program is crucial. If a girl’s parents divorce when she is young, sexual abuse education during middle school may simply come too late. The rapid escalation of abuse once it begins,³¹³ combined with the fact that fathers and stepfathers tend to abuse younger children,³¹⁴ underscores the need for sexual abuse education immediately after divorce.

³⁰⁷ Finkelhor et al., *supra* note 29, at 1688. Disclosure itself is an important form of prevention, for it may lead to “support that can prevent some of the psychological effects of victimization.” *Id.* Disclosure “may also ultimately provide additional protection for [children currently being abused] or protect other children from victimization.” *Id.* Furthermore, encouraging disclosure early in the abuse experience may mitigate the long-term impact on the child “since children are known to be more seriously affected by abuse the longer it takes place.” Berliner & Conte, *supra* note 295, at 38 (citation omitted).

³⁰⁸ Finkelhor et al., *supra* note 29, at 1688 (noting that victimized children “felt that what they had done had helped protect them, kept them from getting injured, or kept the experience from being worse,” but noting that, in the case of sexual victimizations, the programs’ reduction of “self-blame” were not significant).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ In a study of over 150 Michigan cases, researcher Kathleen Faller found that in half of the cases of sexual abuse by a stepfather or father-substitute, the sexual abuse “began quite soon after the relationship with the mother [began].” RUSSELL, *supra* note 50, at 258. “‘In such cases,’ Faller observes, ‘one often finds the perpetrators simultaneously courting mother and daughter.’” *Id.* (quoting Kathleen C. Faller, *Sexual Abuse by Caretakers* 15 (1984) (unpublished manuscript)).

³¹⁴ Beitchman et al., *supra* note 101, at 110 (“[Y]ounger children are more likely than older children to be abused by a father or stepfather.” (citations omitted)).

Second, school-based prevention programs broadly address the risk of sexual abuse for children in the general population, rather than narrowly focusing on the discrete risk to girls after divorce. Thus, these programs teach children to distinguish “good touching” from bad and encourage children to report problematic conduct.³¹⁵ These programs do not, however, tailor warnings to the particular circumstances facing each child.³¹⁶

For these reasons, victim-oriented strategies are, and may remain, relatively ineffective methods for preventing sexual exploitation in the first place.³¹⁷ To reduce actual levels of victimization, programs may need to target parents, a subject to which this Article now turns.³¹⁸

2. *Parenting Classes*

Most parents have had little education about child sexual abuse or, for that matter, the consequences of divorce for their children. By fostering compassion and an atmosphere of openness between parent and child, parenting education may increase the likelihood that sexual abuse victims will come forward.³¹⁹ Enlightening parents about the reasons for abuse may also mitigate the long-term impact of abuse when it occurs. The degree of parental support and the child’s perception of her mother’s response to the abuse are important factors in averting the victim’s depression in adulthood.³²⁰

³¹⁵ 2 HARALAMBIE, *supra* note 34, § 16.03, at 168.

³¹⁶ Conceivably, however, girls in single-parent and blended households could be cautioned about the most likely perpetrators, their fathers and stepfathers. While explicit warnings may give an added measure of protection, they are not costless. Girls already face tremendous adjustment problems after divorce. *See* Giles-Sims, *supra* note 26, at 227. If programs did counsel a girl to question physical contact with her custodial father or stepfather, her resulting vigilance might erect a barrier to forming a bonded, dependent relationship, thus harming her in the long term. Additionally, pointed warnings might tear the already weak fabric of relationships in fractured families, in which “ties of loyalty and belonging [are] unclear.” FINKELHOR, *supra* note 39, at 206. Such explicit programs arguably would harm girls by identifying loved ones as persons to fear.

³¹⁷ Finkelhor et al., *supra* note 29, at 1688.

³¹⁸ *See id.* at 1689 (noting that policymakers should consider more comprehensive prevention approaches, such as targeting parents for prevention education).

³¹⁹ *Cf.* 2 HARALAMBIE, *supra* note 34, § 16.03, at 168 (noting that a general climate of openness toward child sexual abuse in the mental health and social science professions has encouraged more victims to come forward).

³²⁰ Beitchman et al., *supra* note 101, at 107; *see also* Everson et al., *supra* note 68, at 205 (finding in a study of eighty-eight children that maternal support was more strongly “predictive of the child’s initial psychological functioning than were the type or length of the abuse or the perpetrator’s [identity]”).

Parental education may also improve detection of abuse when it occurs. As Elizabeth Sirles and Pamela Franke found, the proportion of nonoffending mothers who believe a child’s report of abuse drops off significantly when the offender is a stepfather or live-in partner (55.6%) than when the offender is a biological father (85.9%). Sirles & Franke, *supra* note 68, at 134. The authors speculate that because “more intense difficulties may exist [in blended families] between children and substitute parents, a [nonoffending] mother might attribute [the child’s allegation] to a poor relationship between the victim

A recent trend in family law is for courts to provide education programs to separating and divorcing families, although these programs miss a critical opportunity to address sexual abuse following divorce. Forty-five states now mandate or authorize courts to require parents to attend an educational program about divorce as part of the dissolution proceeding, a figure that has more than quadrupled since 1994.³²¹ Typically, these programs attempt to prevent parental conflict, a leading cause of postdivorce litigation.³²² They specifically seek to minimize nonpayment of child support, visitation disputes, lack of contact by the noncustodial parent, and the poor adjustment children often make following divorce.³²³ Parent education programs represent a preventive approach to problems stemming from divorce-oriented conflicts, providing parents with the education necessary to engage in behavior that will be beneficial for their children.³²⁴

Parents report a high degree of satisfaction with these programs, crediting the programs with sensitizing them to their children's needs and promoting successful visitation.³²⁵ Some studies have found that participants are more willing to seek other family services, suggesting that these programs give parents "'permission' to ask for help."³²⁶

Two principal disadvantages of court-based parenting classes are content and cost. Most programs focus on the postdivorce needs of children and the negative consequences of parental conflict, with secondary attention given to parental adjustment, parenting issues, and coparenting.³²⁷ Although some states have developed program variants for violent and high-conflict families,³²⁸ only a single state, Flor-

and offender and consider it as retaliation." *Id.* at 137. To the extent that parental education programs raise awareness of a child's sexual vulnerability following divorce, nonoffending parents may give greater credence to allegations of abuse.

³²¹ Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Education*, 37 *FAM. & CONCILIATION CTS. REV.* 219, 219 (1999) (noting that the number of counties and independent cities with court-affiliated parental education has tripled, and that the number of states enacting legislation mandating or authorizing attendance at parent education programs has quadrupled); Andrew Schepard, Editorial Notes, *An Issue of FCCR "Firsts"*, 37 *FAM. & CONCILIATION CTS. REV.* 3, 6 (1999) (noting that since 1994 court-affiliated parent education programs in U.S. counties and independent cities have grown 180%).

³²² Nancy Thoennes & Jessica Pearson, *Parent Education in the Domestic Relations Court: A Multisite Assessment*, 37 *FAM. & CONCILIATION CTS. REV.* 195, 195-96 (1999).

³²³ *Id.*

³²⁴ See Peter Salein, *Education for Divorcing Parents: A New Direction for Family Courts*, 23 *HOFSTRA L. REV.* 837, 838 (1995).

³²⁵ Clement, *supra* note 321, at 196.

³²⁶ *Id.* at 197 (noting, however, that litigation patterns for program veterans mirror those of parents who did not complete a program).

³²⁷ Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 *FAM. L.Q.* 617, 622 (1999).

³²⁸ See, e.g., *DEL. CODE ANN.* tit. 13, § 1507(h) (1999) (requiring couples with a history of domestic violence to attend a special education program that provides information about "domestic violence, its prevention and its effect upon children").

ida, requires that education programs include information regarding spousal and child abuse.³²⁹ Even Florida, however, permits program vendors to determine what information about child abuse should be communicated,³³⁰ thus failing to give the vendors explicit instructions to address the sexual vulnerability of girls following divorce.

A second drawback of court-based parenting programs is cost. The typical divorce counseling class costs thirty dollars.³³¹ Because families often experience a dramatic economic decline after divorce, the cost of a parenting class may impose an undue financial hardship on divorcing parents.³³² Further, costly parenting classes simply may not be viable without compulsory participation.³³³

On balance, however, court-based parenting programs offer an existing framework for raising awareness of the heightened risk of sexual abuse for girls at its inception—parental separation and divorce. As the next subpart observes, an important legislative complement to this custody-based approach is for legislatures to tailor custody adjudications to address the sexual vulnerability of girls after divorce.

E. Legislative Initiatives³³⁴

Although existing custody statutes permit consideration of sexual exploitation as a possible result of divorce, they do not require it.³³⁵ Therefore, an important counterpart to the proposal outlined in this

³²⁹ See FLA. STAT. ANN. § 39.0015(4) (West Supp. 2000).

³³⁰ See *id.*; Personal Communication with Traci Patterson, Florida Supreme Court Analyst (Mar. 22, 2000).

³³¹ Pearson, *supra* note 327, at 622.

³³² See, e.g., DAPHNE SPAIN & SUZANNE M. BIANCHI, BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN 165 (1996) (stating that “[p]ersons living in mother-child families have over twice the poverty rate as those living in married-couple or father-child families”); Ross Finnie, *Women, Men, and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data*, 30 CAN. REV. SOC. & ANTHROPOLOGY 205, 206 (1993) (reporting that the income-to-needs ratio for women drops just over 40% in the first year of divorce, followed by a moderate rise in subsequent years); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641, 644 (1988) (showing a decline in economic status of about one-third for women and children after divorce); Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 528 (1996) (noting one study of women in Los Angeles which estimated that women’s standard of living declined 73% after divorce); see also, e.g., DOWD, *supra* note 1, at 49 (observing that single-father families tend to fall below two-parent families in economic status). Notably, most states provide fee waivers for indigent parties. See Clement, *supra* note 321, at 222.

³³³ See generally Clement, *supra* note 321, at 220 (discussing statewide mandatory attendance programs).

³³⁴ The discussion in this subpart draws significantly from a set of reforms proposed by Professor Cahn to integrate concerns about domestic violence into traditional child custody decisions. See generally Cahn, *supra* note 172, at 1087-94.

³³⁵ See *supra* Part II.B.

Article is a set of legislative reforms designed to acknowledge the sexual vulnerability of children in fractured families.³³⁶

In order to institutionalize consideration of sexual abuse, a state could require all judges in custody determinations to explicitly consider the risk of molestation after divorce. Indeed, there are good reasons to do so, because most courts left to their own devices are likely to overlook or minimize the risk of sexual abuse, or to address this risk exclusively in stereotypical, but fundamentally inaccurate, contexts.

First, the risk of sexual exploitation is unlikely to capture a court's attention absent statutory direction. As a threshold matter, the risk itself is inherently unbelievable since it is difficult to imagine that parents would seek sexual gratification by exploiting their own children.³³⁷ Compounding this incredulity is the lack of widespread recognition of the link between molestation and divorce. Consequently, a court is unlikely to consider a child's heightened risk of exploitation *sua sponte*, and neither will a child's parents, equally unenlightened about this risk, direct the court's attention to it.³³⁸

Second, those judges who labor under a "stranger-in-a-trenchcoat" stereotype³³⁹ of sexual exploitation may fail to appreciate fully the risk to girls in the aftermath of divorce. As a result, even if judges consider the risk, they may not sufficiently protect girls with preventive measures or other protective orders, opting instead to simply put each parent on notice of the heightened risk.

Third, and perhaps most problematic, judges may rely on their own stereotypes and beliefs about the victims of child sexual abuse and their families. Poor and disorganized families already predominate among reported cases of abuse because they "lack the resources to preserve secrecy" that wealthier families enjoy.³⁴⁰ Without statutory guidance, judges will likely mold their consideration of a

³³⁶ Although legislation would be beneficial, it is not necessary in many states. For example, with only local court rules as the basis of authority, courts in eighteen states require certain divorcing parents to attend parenting classes before they enter any final order. Clement, *supra* note 321, at 221 (noting that this power depends on the extent of the judiciary's "inherent power" granted in the state constitution (internal quotation marks omitted)).

³³⁷ See Katheryn D. Katz, *Allegations of Abuse in Child Custody and Visitation Proceedings*, in 4 CHILD CUSTODY & VISITATION: LAW AND PRACTICE, *supra* note 146, 31-1, § 31.01[1], at 31-7 to 31-8 (noting that "society is too ready to disbelieve a claim of abuse because it cuts against the idealized notion of 'family'").

³³⁸ Even those parents who appreciate this risk may not bring the issue to the court's attention. As potential custodians, parents suffer from a conflict of interest: any discussion of this risk may, for example, lead to limitations on parental prerogatives to forego a school-based prevention program.

³³⁹ See 2 HARALAMBIE, *supra* note 34, § 16.01, at 161.

³⁴⁰ Herman & Hirschman, *supra* note 26, at 967.

child's sexual vulnerability to prevailing stereotypes, perpetuating this discriminatory treatment of the poor.³⁴¹

Equally troubling, judges acting on misconceptions regarding which children are molested (i.e., lower-class rather than upper-class children, and black rather than white) may fail to make judgments in a child's best interest. More specifically, judges may not adequately protect children in middle- and upper-class families in which abuse is more likely to evade detection.³⁴² Even if there is no systematic bias, without clear guidance a child's sexual vulnerability after divorce may also become a "random factor," examined by some judges but dismissed by others.³⁴³ Finally, courts may not act with a single voice; instead, they might adopt piecemeal guidelines to deal with this emerging social reality.³⁴⁴ It is critical, therefore, to set ground rules to avoid these inequitable results. Bounding the exercise of discretion would ensure equal protection from the risk of molestation for rich, poor, white, and minority children alike.

Even though it is important for family courts to use discretion in tailoring precautions to individual cases, legislatures may also want to indicate how the risk of sexual abuse should affect the custody decision. Thus, statutes could require judges to find clear and convincing evidence that a noncoercive approach, such as inquiring into the custodian's willingness to take preventive measures, is appropriate. In cases in which the better caretaker indicates an unwillingness to respond to this risk, statutes could require judges to award joint custody or make certain precautions a condition of custody.

States should also consider training judges to understand the sociological and psychological dimensions of child sexual abuse. This issue is imbued with entrenched beliefs that make it difficult for the system to reform itself. It is a tall order to ask the legal system to accept the terrifying possibility that marital dissolution will hasten a child's abuse and to act to prevent that abuse before it occurs. Judges

³⁴¹ Cf., e.g., GRAY, *supra* note 2, at 82 (concluding that "there is reason to believe that racial bias was operating in determining whose cases crossed the threshold into the criminal justice system for child sexual abuse").

³⁴² As emphasized in a manual on child sexual abuse published by the National Clearinghouse on Child Abuse and Neglect Information, "[p]rofessionals need to be aware that they may react differently to cases involving middle to upper class individuals and cases involving the poor. . . . [Specifically,] professionals may have more difficulty believing abuse of a middle class person because the accused is 'like us.'" Kathleen Coulborn Faller, NAT'L CTR. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SEXUAL ABUSE: INTERVENTION AND TREATMENT ISSUES (1993), at <http://www.calib.com/nccanch/pubs/usermanuals/sexabuse/Field.htm#status> (last visited June 7, 2000).

³⁴³ See Cahn, *supra* note 172, at 1088 (making this observation about domestic violence as a factor in custody proceedings).

³⁴⁴ Cf. Katz & Warfman, *supra* note 146, § 10.05[I], at 10-78 (noting a similar lack of statutory guidance regarding the rights of unmarried mothers and fathers).

should accept that the risk of sexual exploitation escalates after divorce, and then they should draft orders that respond to this risk. In the crush of work facing family courts today, we simply cannot expect judges to do this without educating them.

Legislatures could further establish and fund parenting classes and school-based prevention programs to raise awareness of child sexual abuse. It is important not only to endorse preventive education, but to fund it as well. Presently, however, most court-affiliated parental education programs are funded through participant fees.³⁴⁵ These statutes also typically fail to define acceptable program curricula or standards.³⁴⁶ At a minimum, those states now conditioning divorce on completion of a parenting class should critically evaluate the content of those courses in light of the real, but often overlooked, risk of sexual abuse to girls. Finally, states could develop and fund programs for children themselves, to be completed prior to the entry of any judicial decree.³⁴⁷ Unlike school-based prevention programs, these programs could be tailored to the particular risks facing children after divorce.³⁴⁸

In short, without this legislative guidance, judges may engage in a free-form assessment of the risk of postdivorce sexual abuse, with results that would vary from case to case. As Professor David Chambers observed more than a decade ago, if "judges are applying the wrong values, it is in large part because legislatures have failed to convey a collective social judgment about the right values."³⁴⁹ The purpose of these proposed reforms is to improve the law's conceptualization of child sexual abuse and to support measures designed to prevent sexual abuse. As attitudes expressed by the law change, behavior will follow suit.³⁵⁰ Legislators should not hesitate to marshal the expressive power of law on behalf of children.

³⁴⁵ Margie J. Geasler & Karen R. Blaisure, *1998 Nationwide Survey of Court-Connected Divorce Education Programs*, 37 FAM. & CONCILIATION CTS. REV. 36, 49 (1999).

³⁴⁶ See Clement, *supra* note 321, at 222.

³⁴⁷ Geasler & Blaisure, *supra* note 345, at 61 (suggesting a children's program as a needed improvement).

³⁴⁸ One advantage of tailoring prevention programs to high-risk children is that it assists them not to become victims, without needlessly frightening other children who are at significantly less risk. See Tutty, *supra* note 30, at 266.

³⁴⁹ Chambers, *supra* note 218, at 481-82.

³⁵⁰ Cahn, *supra* note 172, at 1089.

IV

POTENTIAL DRAWBACKS OF INTEGRATING THE RISK OF
SEXUAL ABUSE INTO CUSTODY DETERMINATIONS
AND ANALYSIS OF THEIR SIGNIFICANCE

The fact that efforts to protect children are well-intentioned does not immunize them from being counterproductive intrusions into family life.³⁵¹ Although there may be other drawbacks to integrating the risk of sexual abuse into child custody determinations, the following deserve attention.

A. Consideration of the Risk of Sexual Abuse Will Not
Significantly Tax the Courts

Consideration of the risk of postdivorce sexual abuse should not be very taxing on family courts. “[C]ustody determination[s] already require judges to make a series of inquiries to determine the most appropriate custodial arrangement [for a child].”³⁵² The state, in fact, sets the criteria for a custody award and then applies them.³⁵³ Given the state’s extensive involvement in the custody process, an additional inquiry into this risk after divorce should not inordinately complicate the procedure.³⁵⁴ Moreover, because marital dissolution itself supplies the factual predicate for this risk, few additional resources will need to be spent to establish credible evidence of the risk.

Importantly, this factor need not be dispositive: the point is to get it onto the table in custody proceedings, not to make it controlling. Thus, ensuring a child’s safety should not precipitate radical changes in custody determinations nor sacrifice expedient decisions.³⁵⁵

B. Consideration of the Risk of Sexual Abuse Will Not
Substantially Erode Familial Privacy and Parental
Autonomy

Society holds familial privacy and parental autonomy in high esteem.³⁵⁶ As a result, the courts are disinclined to usurp parents’ au-

³⁵¹ Besharov, *supra* note 162, at 136.

³⁵² Cahn, *supra* note 172, at 1096.

³⁵³ *See id.*

³⁵⁴ *See id.*

³⁵⁵ *See id.*

³⁵⁶ *See, e.g.,* Troxel v. Granville, 120 S. Ct. 2054, 2064 (2000) (“[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a ‘better’ decision could be made.”); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one’s children” (citations omitted)).

thority and control over children.³⁵⁷ Although the notion of a private sphere for family life is deeply embedded in society, it breaks down when the family is no longer intact.³⁵⁸

As previously noted, the state sets the criteria for a custody award and then applies those criteria.³⁵⁹ Given the state's extensive involvement in the process, an additional inquiry should not materially diminish the family's autonomy or privacy. Moreover, two of the three approaches outlined in Part III³⁶⁰—inquiring into a parent's willingness to address this risk and awarding the noncustodial parent authority to do so—are generally supportive of parental decision making.

However, curbing sexual abuse in fractured families may require some encroachment upon generally prized parental and familial autonomy. As Margolin and Craft note, it is "clear that child sexual abuse will not be eradicated or seriously reduced unless we are ready to face some rather disturbing truths,"³⁶¹ such as a child's sexual vulnerability after divorce.

C. Integrating the Risk of Sexual Abuse into Custody Determinations Will Not Burden Remarriage and Discourage Divorce

It is plausible that a custodial parent, when faced with the disheartening news that remarried households are conducive to sexual victimization, may be dissuaded from marrying or entering new relationships after divorce.³⁶² This possibility should give us pause for several reasons. Generally, the law promotes remarriage.³⁶³ For

³⁵⁷ See generally Stuart J. Baskin, Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974) (discussing, in the context legal disputes involving children, how courts must balance the competing interests of the child, the state, and the parent).

³⁵⁸ See, e.g., *Kilgrow v. Kilgrow*, 107 So. 2d 885, 889 (Ala. 1958) ("We do not think a court of equity should undertake to settle a dispute between parents as to what is best for their minor child *when there is no question concerning the child's custody.*" (emphasis added)); CLARK, *supra* note 188, § 6.1, at 256-57 (noting that judicial reluctance to intervene in family matters is premised on "the theory that the courts should not make decisions for the parties concerning the details of their marital conduct *when the marriage is still a going concern*" (emphasis added)).

³⁵⁹ See Cahn, *supra* note 172, at 1096.

³⁶⁰ See *supra* Part III.C.

³⁶¹ Margolin & Craft, *supra* note 69, at 455.

³⁶² See RUSSELL, *supra* note 50, at 268 (describing interviews with "women whose trust in men had been so undermined by their experiences of sexual abuse that they chose not to remarry"). The risk of overreaction is particularly serious given the public's difficulty in assessing risk. See Bennett & Calman, *supra* note 257, at v (noting that reports of a public health hazard may cause "near panic" as well as "virtual indifference"). As Professors Curran, Hall, Bobinski and Orentlicher note, "[f]ear can motivate a wide range of responses, some helpful from a public health standpoint, but some not." WILLIAM J. CURRAN ET. AL., *HEALTH CARE LAW AND ETHICS* 908 (5th ed. 1998).

³⁶³ See MARGARET M. MAHONEY, *STEPFAMILIES AND THE LAW* 13-14 (1994).

example, most states do not require stepparents to provide for a stepchild's support during or after marriage, since to do so "would discourage marriage and the formation of new stepfamilies."³⁶⁴

Moreover, as one premise of family law breaks down—"that parents raise their own children in nuclear families"—it is essential to provide children other opportunities to develop bonded, dependent relationships.³⁶⁵ Indeed, for many children, a parent's new spouse or paramour "may be the only parent that the child has truly known and loved during its minority."³⁶⁶ In addition to emotional support, blended households also benefit children by providing them with additional financial support.³⁶⁷

Nevertheless, data on sexual victimization in blended households suggests that increased skittishness by parents in entering new relationships is not altogether detrimental.³⁶⁸ One strategy sometimes employed by child molesters is to marry or cohabit with women in order to gain access to their children;³⁶⁹ thus, the fact that fewer parents remarry or begin lasting relationships may simply mean that they are carefully evaluating prospective lovers or marriage partners and rejecting potential predators.³⁷⁰ If, however, these newly cautious par-

³⁶⁴ *Id.* (attributing the reluctance to impose duties on stepparents to a "strong, pro-marriage policy"); see also 2 ATKINSON, *supra* note 175, § 10.32, at 536 (describing the refusal to impose a duty of support on stepparents as the dominant view). Although eighteen states have imposed a statutory stepchild support duty, the stepparent's obligation does not survive termination of the marriage. See MAHONEY, *supra* note 363, at 38.

³⁶⁵ Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 962 (1984).

³⁶⁶ *Spells v. Spells*, 378 A.2d 879, 881 (Pa. Super. Ct. 1977) (addressing stepparent visitation rights); see also David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" After Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 102, 117 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) ("[M]any individual stepparents do form strong emotional bonds with their stepchildren. They are seen by the child as 'parent.'"); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 410 (1994) (arguing that the law should "grant[] parent-like individuals greater consideration than the current jurisprudence affords").

³⁶⁷ See Sarah H. Ramsey, *Stepparents and the Law: A Nebulous Status and a Need for Reform*, in *STEPARENTING: ISSUES IN THEORY, RESEARCH AND PRACTICE* 217, 228 (Kay Pasley & Marilyn Ihinger-Tallman eds., 1994).

³⁶⁸ As Professor Jones notes in the context of physical abuse, one must consider the downside to promoting stepfamilies along with the advantages. See Jones, *supra* note 167, at 1239-40.

³⁶⁹ RUSSELL, *supra* note 50, at 268. For a particularly chilling account by a sex offender who deliberately dated women in order to rape their children, see *Videotape: Truth, Lies, and Sex Offenders* (Anna C. Salter, 1997) (on file with author). Diana Russell predicts that "[t]he more women know about [this strategy], the less effective . . . it will become." RUSSELL, *supra* note 50, at 268. One should expect, then, that an enlightened parent will be less likely to remarry or enter into new relationships.

³⁷⁰ RUSSELL, *supra* note 50, at 268. Taking dead aim at remarriage as an ideal, David Finkelhor wryly observes that "research certainly contradicts the myth that fatherless children benefit from a replacement. For girls at least, finding a new father to replace the old hardly seems like a favor." FINKELHOR, *supra* note 39, at 124-25.

ents are then entering into more transient relationships, like dating or cohabitating rather than marrying, the danger to girls after divorce may increase rather than diminish.³⁷¹ Transient parental relationships harm girls in other ways, such as decreasing the number of committed adults in the child's life. Appropriate education should stress that it is not remarriage or cohabitation *per se* that fosters victimization, but the propensity of some child molesters to use a child's home as a safe haven for abuse.

A related concern is that parents facing this grim arithmetic of divorce may remain in abusive marriages. "They may reason that because remarriage is risky and because they don't want to live alone for the rest of their lives, they should stay in their first marriages, no matter how detrimental to them."³⁷²

The fear that some women might feel trapped in abusive marriages is an important one. This risk is not unique, however, to the proposal mapped out here, but is instead shared by all education efforts. That is, *any* effort to raise awareness about the sexual vulnerability of girls following divorce will empower currently married parents to consider their options when making the decision whether to divorce. Arguably, society should not keep families in "blissful ignorance" simply because they may not react appropriately to information about this risk.

A more sensible approach to avoiding unintended consequences would be to provide appropriate education. Education programs should stress that while a stable, undivided family may seem like the best antiexploitation program for kids, child molestation may occur in nuclear families.³⁷³ Marital conflict and violence are actually important predictors of abuse in intact households.³⁷⁴ In short, the willing-

³⁷¹ See, e.g., Leslie Margolin, *Child Abuse by Mothers' Boyfriends: Why The Overrepresentation*, 16 CHILD ABUSE & NEGLECT 541, 546, 548 (1992) (noting that mothers' boyfriends committed 69% of the child abuse attributable to male caregivers in single-parent homes, yet performed only roughly 16% of males' child care, making them "responsible for more child abuse than any other nonparental caregivers"); cf., e.g., RUSSELL, *supra* note 50, at 263 (suggesting that risk of sexual abuse by father-substitutes "who are around for short[] lengths of time . . . may be considerably higher" than that by stepfathers who "become a primary parent in their stepdaughters' lives").

³⁷² RUSSELL, *supra* note 50, at 268.

³⁷³ See *supra* note 52.

³⁷⁴ See, e.g., Alexander, *supra* note 45, at 185 (including marital conflict as a "significant predictor[]" for increased risk of child sexual abuse); Fergusson et al., *supra* note 42, at 1359 (reporting, in a longitudinal study of 1265 children born in Christchurch, New Zealand in 1977 and followed from birth until the age of eighteen, that marital conflict was one of five major risk factors associated with the occurrence of child sexual abuse); Gregory J. Paveza, *Risk Factors in Father-Daughter Child Sexual Abuse: A Case-Control Study*, 3 J. INTERPERSONAL VIOLENCE 290, 299 (1988) (finding that "families in which the marital relationship is unsatisfactory are at 7.19 times greater risk for sexual abuse than those families in which the marital relationship is seen as satisfactory").

ness of parents to terminate unsatisfying marriages may be equally important to protecting their children from sexual victimization.

D. Integrating the Risk of Sexual Abuse into Custody Determinations Applies a Generalization, Rather Than Making an Individualized Determination, and May Stigmatize Single-Parent and Blended Families

Lawyers have waged fierce evidentiary battles over whether experts may offer "syndrome" evidence in criminal prosecutions and proceedings to terminate the parent-child relationship on the basis of child abuse or neglect.³⁷⁵ Courts often exclude profiles of abusers and abused children as prejudicial, scientifically unreliable, or insufficiently probative to warrant admission.³⁷⁶

Responding to a child's sexual vulnerability in a custody decision differs from this use of profiles in two essential ways. First, a custody-based approach would utilize divorce as a risk factor *not* to prove culpability or to detect abuse, but rather to guide prevention efforts.³⁷⁷ Second, tailoring prevention efforts to high risk families does not seek to exclude them from child care roles³⁷⁸ in the same manner that using a risk factor in a termination proceeding would. Instead, this process offers parents the preparation and support they need to effectively reduce the occurrence of child sexual abuse.³⁷⁹

A related concern is that responding to the risk of abuse will stigmatize fractured and blended families. The possibility of stigma is twofold: whether a stigma will attach to a noncustodial parent who "loses" a custody battle, and whether stigma will attach to fractured and reconstituted families after divorce.

³⁷⁵ See ROBERT D. GOLDSTEIN, *CHILD ABUSE AND NEGLECT: CASES AND MATERIALS* 631 (1999).

³⁷⁶ See, e.g., ANDRE A. MOENSSENS ET AL., *SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES* § 19.08, at 1154, 1156 (4th ed. 1995) (noting the resistance by courts to admit expert testimony on Child Sexual Abuse Accommodation Syndrome and arguing for similar treatment of testimony about the profile of "typical" child molesters); John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 66-69 (1989) (explaining that courts often exclude expert testimony regarding the presence of Child Sexual Abuse Accommodation Syndrome when offered to prove that abuse occurred, but noting a few cases that approved such testimony "to explain such things as delay in reporting and recantation").

³⁷⁷ See Finkelhor, *supra* note 5, at 69 (cautioning that "risk factors are more useful as a guide to prevention than features that can be used in the actual detection of abuse").

³⁷⁸ See *supra* Part III.B.3 (noting that consideration of this risk does not favor custody by one parent or the other).

³⁷⁹ Cf. Margolin & Craft, *supra* note 69, at 454 (noting that it is important to recognize male baby-sitters as a high-risk group not in order to discriminate against them, but rather to "offer them the kinds of preparation and supports which would effectively reduce the occurrence of child sexual abuse").

As to the former, it is conceivable that a noncustodial parent might attribute his or her "loss" to a judicial perception of a girl's particular sexual vulnerability if she resides with that parent after divorce. Although one might expect this sentiment, it would not be warranted. Courts in many jurisdictions consider multiple factors in making custody determinations, no one of which is dispositive. But more importantly, consideration of a girl's sexual vulnerability does not tilt a custody determination in favor of either parent. As a consequence, no inference should be drawn from an award of sole custody that the losing parent poses a risk to the child.

A harder question is whether courts can implement the approaches set forth in Part III without stigmatizing fractured and reconstituted families. Because stepparents and parent-substitutes fill an important role in the lives of many children, we must "take great care not to stigmatize [them]."³⁸⁰

As Professor Owen Jones notes, using risk factors as a guide to prevention "immediately put[s] two important goals into tension": the desire to eliminate child abuse and the reluctance to "stigmatiz[e] entire groups on the basis of the transgressions of the few."³⁸¹ Not only are these goals in tension, however, but a trade-off between them is unavoidable:

[T]he costs of aggressively pursuing one goal, such as the prevention of child abuse, must often be defined, in part, in terms of interfering with pursuit of the other, such as the expansion of stepparent rights. Thus, either one cost of reducing child abuse is in stigmatizing stepparents, or the cost of *not* stigmatizing stepparents is some number of otherwise preventable child abuse incidents³⁸²

E. Integrating the Risk of Sexual Abuse into Custody Determinations May Encourage Noncustodial Parents to Fabricate Molestation Charges

One can easily envision a noncustodial parent, armed with an appreciation of a child's sexual vulnerability after divorce, fabricating charges of molestation as a basis for relitigating the custody determination. While there is ample reason to be concerned about such a result, responsible monitoring can address this contingency.

³⁸⁰ Frank F. Furstenberg, Jr., *The New Extended Family: The Experience of Parents and Children After Remarriage*, in REMARRIAGE AND STEPPARENTING: CURRENT RESEARCH AND THEORY 42, 57 (Kay Pasley & Marilyn Ihinger-Tallman eds., 1987).

³⁸¹ Jones, *supra* note 167, at 1238.

³⁸² *Id.* at 1238-39.

An intensity rarely present in other lawsuits permeates contests over children.³⁸³ This is so not only because a child's future is at stake but because the "loss of [a child] is a terrifying specter to concerned and loving parents."³⁸⁴ Compounding the inherent discord in custody matters, some divorcing parents use custody as a weapon to bully their spouses into making economic concessions in divorce proceedings.³⁸⁵ Not surprisingly, then, custody and visitation matters—unlike other disputes—"are rarely settled once and for all."³⁸⁶ Instead, "[r]elitigation [of the custody determination] frequently continue for years beyond the initial decision."³⁸⁷ For the hapless child trapped in the middle, protracted litigation is both emotionally and psychologically destructive.³⁸⁸

In an area fraught with "unresolved anger and desire for revenge,"³⁸⁹ reformers should be particularly chary about giving parents an occasion to rehash lost battles. This misgiving may be particularly warranted with regard to sexual abuse, which some fear lends itself to fabricated or dubious accusations.³⁹⁰

Verified reports of child sexual abuse have increased twenty-five-fold in less than twenty years, largely as a result of increased education and awareness of abuse.³⁹¹ During this time, the number of unsubstantiated reports has also escalated and is estimated to be as high as

³⁸³ Katz & Warfman, *supra* note 146, § 10.01[2], at 10-12 ("Contests over children are often bitter and are among the most impassioned of all disputes known to law."); *see also, e.g., In re Marriage of Bevers*, 326 N.W.2d 896, 897 (Iowa 1982) (describing the strategy in one protracted custody battle as "character assassination").

³⁸⁴ *Garska v. McCoy*, 278 S.E.2d 357, 360 (W. Va. 1981).

³⁸⁵ *Cf., e.g., Sefkow v. Sefkow*, 427 N.W.2d 203, 212 (Minn. 1988) (urging courts to bifurcate proceedings to prevent a parent's manipulation of the system "to achieve personal goals that have little to do with the best interests of the child").

³⁸⁶ Katz & Warfman, *supra* note 146, § 10.01[2][b], at 10-10.

³⁸⁷ DONALD T. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES: A STRATEGIC APPROACH* 8 (rev. ed. 1998); *see also* JUDITH AREEN, *FAMILY LAW: CASES AND MATERIALS* 488 (4th ed. 1999) (observing that custody contests "are not only more intensely fought [than divorce proceedings] but may continue for years after the divorce decree is rendered"); Andrew S. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 80 (1969) (presenting a system to minimize the ability of a party to challenge custody once a court has decided it).

³⁸⁸ SAPOSNEK, *supra* note 387, at 11 (observing that custody battles may be "destructive to the welfare, best interests, and emotional health of . . . children" (quoting COMM. ON THE FAMILY OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *NEW TRENDS IN CHILD CUSTODY DETERMINATIONS* 122 (1980))).

³⁸⁹ Elizabeth J. Smith, Note, *Non-judicial Resolution of Custody and Visitation Disputes*, 12 U.C. DAVIS L. REV. 582, 584 (1979).

³⁹⁰ *See generally* LOUISE ARMSTRONG, *ROCKING THE CRADLE OF SEXUAL POLITICS: WHAT HAPPENED WHEN WOMEN SAID INCEST* (1994) (tracing history of public reactions to claims of child sexual abuse).

³⁹¹ *See* Besharov, *supra* note 162, at 135 (noting that the number of confirmed cases of child sexual abuse grew from 6000 in 1976 to 152,000 in 1993).

65% of all reports.³⁹² Based on this flood of unsubstantiated charges, some observers contend that the country is gripped by mass hysteria regarding child sexual abuse.³⁹³ A series of widely publicized cases involving dubious accusations,³⁹⁴ questionable interview techniques,³⁹⁵ and retracted allegations fans the flames of doubt over the merit of molestation charges.³⁹⁶ Not surprisingly, then, a substantial minority of the public believe that "it is virtually impossible for a person accused of child sexual abuse to get an impartial trial."³⁹⁷

Defenders, however, emphasize that not all unsubstantiated reports result from fabricated charges. Under expansive mandatory reporting statutes, an unsubstantiated report may result from a parent's suspicions of abuse that the parent subsequently learns were unwarranted. For example, an unsubstantiated report may stem from sports-related genital injuries, or from conscientious healthcare professionals "reacting to ambiguous symptoms and behaviors in children."³⁹⁸

Unlike unsubstantiated reports, deliberately contrived allegations are much less rampant.³⁹⁹ Instead, "[s]tudies of allegations of abuse

³⁹² *Id.* at 139 (basing this estimate on the author's state-by-state analysis of unfounded reports); *cf.* Finkelhor, *supra* note 37, at 43 (reporting that approximately 50% of child sexual abuse reports are characterized as "unsubstantiated" by child abuse agencies).

³⁹³ *See, e.g.*, RICHARD A. GARDNER, *SEX ABUSE HYSTERIA: SALEM WITCH TRIALS REVISITED* (1991) (comparing the hysteria surrounding child sexual abuse cases to that found during the Salem, Massachusetts witch trials).

³⁹⁴ At the 1987 McMARTIN Preschool Trial, the state prosecuted Ray Buckley and his mother, Peggy McMARTIN Buckley, on sixty-five counts of satanic ritual child abuse of 350 children at a California preschool. After a thirty-three month trial costing \$13,000,000, the jury acquitted the BUCKLEYS on fifty-two counts while deadlocking on the remaining counts against Mr. Buckley. *See* Don J. DeBenedictis, *McMARTIN Preschool's Lessons*, A.B.A. J., Apr. 1990, at 28-29.

³⁹⁵ *See, e.g.*, State v. Michaels, 642 A.2d 1372 (N.J. 1994) (affirming a reversal of a nursery school teacher's conviction on sexual abuse charges because of improper questioning of alleged victims by investigators); Mary deYoung, *The Devil Goes to Day Care: McMARTIN and the Making of a Moral Panic*, 20 J. AM. CULTURE 19, 21 (1997) (describing the "relentless[] grilling" by social workers of the children enrolled in the McMARTIN Preschool).

³⁹⁶ *See, e.g.*, Katy Butler, *Did Daddy Really Do It?*, L.A. TIMES, Feb. 5, 1995, (Book Review) at 1 (describing the experience of a bulimic woman who retracted charges of sexual abuse against her parents). In a predictable legal twist, women who have retracted allegations of molestation have later filed suit against their therapists, maintaining that "bad therapy led them to false memories of past abuse." Carol Ness, *Self-Help Author Sued Over False Memories: Woman Says Book Made Her Believe She'd Been Molested*, S.F. EXAMINER, May 18, 1994, at A1.

³⁹⁷ GRAY, *supra* note 2, at 18 (internal quotation marks omitted) (reporting that in its random 1988 survey, the Minnesota Center for Survey Research found that 41% of a sample of over one thousand adults shared this view).

³⁹⁸ Finkelhor, *supra* note 37, at 44.

³⁹⁹ The important distinction between unsubstantiated reports and deliberately fabricated ones helps explain the stark disagreement between estimates of "unfounded" reports wielded by participants in debates over the merits of these allegations. Supporters of the reporting system emphasize deliberate fabrications, while detractors stress the rate of unsubstantiated reports.

report very low incidence of untrue allegations."⁴⁰⁰ Allegations in custody disputes have a similar track record. A recent study found that sexual abuse allegations in contested custody cases are no more likely to be unfounded than those in the general population.⁴⁰¹

Evidence of a widespread "witchhunt" by malicious professionals is similarly sparse.⁴⁰² In fact, defenders point to the large percentage of unsubstantiated cases *as proof* of a "fairly balanced operation of the child protection and criminal justice systems."⁴⁰³ If hysteria occurred at the institutional level, they urge, it "might be signaled by a suspiciously *high substantiation rate*, as workers abandoned critical evaluation of reports, or by a suspiciously high rate of prosecution or conviction, as prosecutors, judges, and juries railroaded accused individuals."⁴⁰⁴ Instead, the criminal justice system's track record with sexual abuse cases suggests "a tempered rather than hysterical response."⁴⁰⁵

Nevertheless, because fabricated allegations do occur, any reform should proceed with caution. The relevant inquiry is not whether false allegations will occur if courts integrate this risk into custody determinations—they surely will.⁴⁰⁶ The relevant inquiry is whether *all* efforts to raise parental awareness about sexual vulnerability may lead

⁴⁰⁰ D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 1020 (1998); *see also* JOHN E.B. MYERS, *A MOTHER'S NIGHTMARE—INCEST: A PRACTICAL LEGAL GUIDE FOR PARENTS AND PROFESSIONALS* 134 (1997) [hereinafter MYERS, *A MOTHER'S NIGHTMARE*] (cataloguing studies finding low rates of fabricated reports of child sexual abuse); 1 JOHN E.B. MYERS, *EVIDENCE IN CHILD ABUSE AND NEGLECT* § 4.4, at 227 (2d ed. 1992) (recognizing that there is rarely any indication in unsubstantiated cases that individuals deliberately fabricated their reports); Tutty, *supra* note 30, at 273 (concluding that while "false accusation do occur, they are extremely rare").

⁴⁰¹ *See* Jessica Pearson, *Ten Myths About Family Law*, 27 *FAM. L.Q.* 279, 294 (1993); *see also* MYERS, *A MOTHER'S NIGHTMARE*, *supra* note 399, at 134 (concluding that "there is no convincing evidence that a substantial portion of the allegations are false"). Importantly, fabricated charges of abuse are not without risk to the accuser in custody contests. Rather than having nothing to lose, a noncustodial parent who fails to meet the stringent standard of proof risks prosecution or may jeopardize joint or sole custody. *See, e.g.*, MINN. STAT. § 609.507 (1999) (making the false report of child abuse in a custody hearing a misdemeanor); MYERS, *A MOTHER'S NIGHTMARE*, *supra* note 399, at 107 (noting that unsubstantiated allegations in custody contests can "backfire" on the accuser); Meredith Sherman Fahn, Note, *Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter*, 14 *WOMEN'S RTS. L. REP.* 123, 125 (1992) (discussing the risk of losing custody for a mother who accuses a father of child sexual abuse but fails to meet the stringent standard of proof required to sustain the charge).

⁴⁰² Katz, *supra* note 337, § 31.04[1], at 31-97.

⁴⁰³ Finkelhor, *supra* note 37, at 45.

⁴⁰⁴ *Id.* (emphasis added).

⁴⁰⁵ *Id.* For example, a 1987 American Bar Association study found that, like most crimes, only a fraction of the substantiated allegations of sexual abuse are forwarded for prosecution. JANE ROBERTS CHAPMAN & BARBARA E. SMITH, *AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, CHILD SEXUAL ABUSE: AN ANALYSIS OF CASE PROCESSING* 48 (1987).

⁴⁰⁶ It is plausible that once every divorcing spouse's attention is specifically directed at potential sexual abuse, the rate of fabricated charges may rise.

some parents to misuse the information as a weapon.⁴⁰⁷ If this is so, an increase in fabricated charges may represent a necessary cost of equipping well-intentioned parents with the knowledge to shield their daughters from abuse. Rather than abandon this entire venture because of a risk of unknown proportions, there are appropriate precautions available. For example, representative couples could be followed prospectively to assess whether the abuse allegations they raise are any more likely to be fabricated than those raised by the general population.

CONCLUSION

In the past, society has left the “awesome burden of stopping the perpetrators, who are usually much older male adults, . . . largely . . . to the young female victims themselves.”⁴⁰⁸ Now that social science has illuminated the link between divorce and a child’s sexual vulnerability, society can and should take on the burden of mitigating this risk to female children.

This Article explores one approach to achieving this important end—embedding concerns about sexual exploitation in custody determinations. A custody-based approach represents a scientifically grounded, commonsense effort to target prevention to those children most at risk. Although acting in anticipation of known risks to children may expand existing custody formulations, the fact that it is not known which children in which families will be harmed should not lull judicial decision makers into inaction. The record of family functioning developed in repeated scientific studies convincingly establishes that being in a fractured family may harm significant numbers of girls. Thus, it is simply insufficient to wait for abuse to occur.

A custody-based approach does not, however, exhaust all available options. By examining the use of custody, this Article attempts to kindle debate about other approaches that encourage greater parental scrutiny and investment in their children after divorce.

But the risk of sexual abuse in fractured families speaks to larger challenges facing family law today. As the American family continues to morph into a variety of nontraditional forms, like single-parent households and blended families, the law has several choices. It can try to stop this progression. States, for example, can channel couples into nuclear families by making divorce more difficult to obtain. The

⁴⁰⁷ See Besharov, *supra* note 162, at 135 (attributing the increase in reports of suspected child abuse to successful information campaigns educating the public about child maltreatment); Katz, *supra* note 337, § 31.02[1][f], at 31-31 (noting that “extensive media coverage given to the phenomena of physical and sexual abuse of children has played a role in the increasing number of reports to authorities concerning child maltreatment”).

⁴⁰⁸ RUSSELL, *supra* note 50, at 395.

establishment in Louisiana and Arizona of "covenant marriages" attempts to do this.⁴⁰⁹

Or legislators and policymakers can recognize the difficulty of turning back the clock on social change⁴¹⁰ and embrace nontraditional families as an important thread in the American family fabric. The movement to expand stepparent custody and visitation rights, in order "to bring them into parity with biological parents," is such a response.⁴¹¹ This approach tries to make the best situation out of the family contexts people find themselves in now.

Nonetheless, it is clear from the empirical research that it may be unduly optimistic to assume that nontraditional families function like traditional ones.⁴¹² This Article demonstrates, for example, that sexual abuse occurs more often and with greater severity in single-parent and blended households. Similarly, other empirical studies show that a child in a stepparent household is 120 times more likely to be beaten to death than a child living with his genetic father in an intact household.⁴¹³ Children with disabilities in single-parent households, likewise, are at a significantly elevated risk for both abuse and simple neglect.⁴¹⁴

Rather than proceeding as if these differences simply do not exist, or attempting to roll back the formidable social forces giving rise to nontraditional households, the law can take a middle path: it can recognize the particular challenges facing nontraditional families, taking as its guide the considerable social science data on how these fami-

⁴⁰⁹ Louisiana and Arizona permit couples to opt for stricter "covenant marriages," which obligate the couple to complete premarital counseling and meet tougher standards in order to divorce. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-901 to -906 (West 2000); LA. REV. STAT. ANN. § 9:272 (West 2000). Others states, such as Florida, endeavor to strengthen marriage by compelling high schools to offer "marriage and relationship" skills classes. FLA. STAT. ANN. § 232.246(1)(i) (West Supp. 2000).

⁴¹⁰ WALLERSTEIN ET AL., *supra* note 1, at 296-97 (noting that less restrictive divorce laws provides a "greater sense of freedom" and permit many children and adults "to escape violence, abuse, and misery to create a better life," and concluding that "[c]learly there is no road back").

⁴¹¹ Jones, *supra* note 167, at 1238.

⁴¹² WALLERSTEIN ET AL., *supra* note 1, at xxix ("[T]he divorced family is not a truncated version of the two-parent family. It is a different kind of family in which children feel less protected and less certain about their future than children in reasonably good intact families.").

⁴¹³ *Id.* at 1208. British children living their mother and a cohabitant are thirty-three times more likely to be physically abused and seventy-three times more likely to be killed than children living with their natural parents. *See* ROBERT WHELAN, BROKEN HOMES AND BATTERED FAMILIES 29 tbl.12, 31 tbl.14 (1994) (reporting a risk of physical abuse for children living with two natural married parents of 0.23 compared to the risk of 7.65 for children living with their natural mother and a cohabitee, and reporting a risk of fatal abuse for children living with both natural, married parents of 0.31, compared to a fatal risk of abuse of 22.90 for children living with their natural mother and a cohabitee).

⁴¹⁴ *See* Brinig & Buckley, *supra* note 63, at 52, 53 (noting that disability is associated with neglect and abuse).

lies function.⁴¹⁵ Society should support and strengthen the important role that single parents and stepparents play in the lives of many children.

The choice is simple. We can continue to pretend that we live in a world in which every family is like Ozzie and Harriett, or we can begin to respond intelligently to the challenges facing fractured families.

⁴¹⁵ As Professor Schneider aptly remarked in another context, "It is no doubt true that you cannot get from *is* to *ought*. But you ought to know what *is* is before you say what *ought* ought to be." Carl E. Schneider, *Bioethics with a Human Face*, 69 *IND. L.J.* 1075, 1077 (1994); see also Ramsey & Kelly, *supra* note 83, at 684 (noting that although social science "research cannot replace the normative aspects of decision making" it can "help decision makers to be better informed about policy problems and possible solutions").