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## New Criminal Law Review Symposium on Privilege or Punish: Criminal Justice and the Challenge of Family Ties

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**Authors**

Naomi R. Cahn, Douglas A. Berman, Gabriel J. Chin, Jennifer M. Collins, Ethan J. Leib, and Dan Markel

## DIGGING DEEPER INTO, AND THINKING BETTER ABOUT, THE INTERPLAY OF FAMILIES AND CRIMINAL JUSTICE

Douglas A. Berman\*

The book *Privilege or Punish: Criminal Justice and the Challenge of Family Ties*<sup>1</sup> is a must-read for anyone interested in family law and American criminal justice doctrines. The book is an extraordinary contribution not only because it effectively documents the significant interaction between family status and formal criminal law, but also because it critically assesses the history of and justifications for family status criminal law doctrines. I consider profoundly important the book's descriptive account of "how family members and their interests intersect with . . . the American criminal justice system" (xii), but I find the authors' description of this intersection disappointingly shallow. More significantly, I am troubled by what seem to be key normative assumptions and arguments the authors make in *Privilege or Punish*.

### I. AN IMPORTANT (BUT SHALLOW) SPOTLIGHT ON FAMILIES AND CRIMINAL JUSTICE

As rightly noted by the authors of *Privilege or Punish*, the family issues they examine have yet to be thoroughly analyzed and critically assessed in the modern criminal law literature. The authors are to be complimented for spotlighting the "panoply of laws expressly drawn to privilege or disadvantage

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1. Dan Markel, Jennifer M. Collins, & Ethan J. Leib, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties* (2009).

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persons based on family status alone” (xv). But, given that the authors repeatedly return to the claim that “primary criminal justice values” are “prosecuting the guilty fairly and protecting the innocent from crime and prosecution” (151), I was disappointed by the lack of engagement with some basic realities concerning the interplay of families ties, gender dynamics, and crime and justice.

*Privilege or Punish* is flush with speculations about how criminal law doctrines that benefit or burden family ties might possibly affect criminal justice accuracy and crime control. But the book fails to discuss or even mention fundamental crime data and research concerning how family ties are known to affect criminal offending or prosecution. In my view, the authors’ failure to acknowledge and assess what is already known about the relationship of family status, gender dynamics, and crime is a problematic omission: unless and until we have a deep understanding and full appreciation of the interplay of family connections and crime, accounts and assessments of family-affected criminal laws will be incomplete and potentially distorting.

My concerns are driven by extant data and research concerning the dynamic and consequential relationship between families and criminal offending, especially as these issues intersect with gendered realities. For example, despite roughly equal representation in the general population, the vast majority of violent offenders are men (perhaps nearly 90 percent), but a high percentage of “female violent offenders had a prior relationship with the victim as an intimate, relative, or acquaintance.”<sup>2</sup> These gender differences are especially stark in the context of murder: men are ten times more likely to commit murder than women, but those relatively few women who do commit murder are three times more likely than men to kill a family member or intimate.<sup>3</sup> Such gender differences also affect the relationship between families and criminal victimization: women are more than five times more likely than men to be violently victimized by an intimate partner,<sup>4</sup> and nearly two thirds of female homicide victims “were killed by a family member or an intimate partner.”<sup>5</sup>

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2. Lawrence A. Greenfeld & Tracy L. Snell, Bureau of Justice Statistics, *Women Offenders* 3 (1999) [hereinafter *Women Offenders*].

3. *Id.* at 4.

4. See Shannan Catallano et al., Bureau of Justice Statistics, *Female Victims of Violence* 1 (2009).

5. *Id.* at 3.

In addition, at least for women, there seems to be a statistically significant relationship between family history and serious criminal activity: women subject to criminal justice control “are substantially more likely than the equivalent general population to have never been married,”<sup>6</sup> and “over a third of imprisoned women had been abused by an intimate in the past; and just under a quarter reported prior abuse by a family member.”<sup>7</sup> And, critically, recent criminology research suggests that a sizeable and disproportionate amount of criminal offending by women can be traced back to intimate relationships with men. For example, one recent article concludes, based on interviews with female offenders, that there is “widespread use of devices by males ranging from various forms of manipulation to direct physical coercion in order to ensure female compliance with their criminal activities.”<sup>8</sup>

More fundamentally, there is an extraordinary amount of sophisticated sociological and criminology research examining the relationship between family ties and criminal offending. One recent article has summarized this research and modern findings in this way:

In criminologists’ search for the causes of crime, perhaps no social institution has received more attention than the family. . . . A large body of research in this area reveals many family variables significantly related to crime. Most notably, juveniles commit fewer criminal acts when they are emotionally attached to parents, exposed to consistent parental supervision, reinforced when they engage in prosocial behavior, and exposed to consistent, fair, and nonphysical parental discipline.<sup>9</sup>

Of course, all these data and related research studies provide only a partial snapshot of the complex and dynamic relationships among crime, gender, and family status. But they spotlight why family status implicates

6. Women Offenders, *supra* note 2, at 7.

7. *Id.* at 1.

8. Stephen Jones, Partners in Crime: A Study of the Relationship Between Female Offenders and Their Co-defendants, 8 *Criminology & Crim. Just.* 147, 147 (2008); see also Christopher Mullins & Richard Wright, Gender, Social Networks, and Residential Burglary, 41 *Criminology* 813 (2003); Dorinda Welle & Greg Falkin, The Everyday Policing of Women with Romantic Codefendants: An Ethnographic Perspective, 11 *Women & Crim. Just.* 45 (2000).

9. Carter Hay et al., The Impact of Community Disadvantage on the Relationship Between the Family and Juvenile Crime, 43 *J. Res. Crime & Delinq.* 236, 327–29 (2006).

fundamental sociological and criminogenic realities that must be explored to gain a deep and true understanding of, in the words of the book's subtitle, "Criminal Justice and the Challenge of Family Ties." Unfortunately, *Privilege or Punish* not only fails to engage these key sociological and criminogenic realities, but largely fails even to acknowledge the profound interactions of families ties, gender dynamics, and criminal offending that operate beneath the formal criminal law doctrines being discussed and assailed.

Put simply (and to risk seeming to quibble over semantics), the subtitle of *Privilege or Punish* is problematic and misleading because the authors in fact only examine formal *criminal law doctrines*. The book fails to acknowledge, let alone describe and critically engage, real-world *criminal justice outcomes*. The authors might respond that their goal was only to discuss and assess formal doctrines and not real-world outcomes. If so, they at least should have made this important point clearer in both the title and text. But, more problematically, the authors' argument against family ties benefits is premised on asserted concerns about "accurate and just imposition of punishment" (27–29), about whether criminal justice systems "treat citizens' interest with equal concern" (29–31), and about "incentivizing more criminal activity and more successful criminal activity" (32). In other words, throughout *Privilege or Punish*, the authors make a series of normative judgments about formal family ties doctrines based on suppositions about possible real-world criminal justice outcomes—suppositions that, in my view, are often questionable. It is problematic for much of the authors' normative framework and analysis to be premised upon suppositions about real-world criminal justice outcomes when the text never explores the real-world interplay of family ties, gender dynamics, and criminal offending.

Reflecting on the basic data and research discussed above concerning relationships between families and criminal offending suggests a much different normative story than told by the authors of *Privilege or Punish*. As a matter of real-world criminal justice outcomes, it would seem that for all persons—and perhaps especially for women—*healthy, wholesome, and happy* family ties are likely to advance the authors' asserted normative commitments, while *unhealthy, unwholesome, and unhappy* family ties are likely to undermine these normative commitments. If this is true, then it is misguided for the authors to call for a general presumption against both family status benefits and burdens in the criminal justice system.

Preferable would be a general presumption in favor of benefits for healthy, wholesome, and happy family ties and a general presumption in favor of burdens for unhealthy, unwholesome, and unhappy family ties.

In this space, I cannot and will not try to develop in detail the basis for my own belief that governments ought to have lots of laws—not only criminal justice laws, but also lots of other types of law—that endeavor to support and sustain healthy, wholesome, and happy family ties. But I will assert that most people involved in the day-to-day operation of criminal justice systems realize that “good” family connections and commitments often help *prevent* crime and associated social ills, whereas “bad” family connections and commitments often help *produce* crime and associated social ills. Consequently, I find it especially troublesome that the authors of *Privilege or Punish* often make blanket claims about families and criminal justice without any effort to distinguish between “good” and “bad” families. This is why I fear that, because of the absence of a serious engagement with the dynamic interplay of family connections and crime, the account and assessment of family-affected criminal laws in *Privilege or Punish* is problematically shallow and potentially distorting.

## II. ARE THE AUTHORS REALLY INTERESTED IN “PRIMARY CRIMINAL JUSTICE VALUES”?

I had a nagging feeling while reading *Privilege or Punish* that the authors are not nearly as concerned about criminal justice systems as they are about the construction and norms of family status in modern society. I suspect that the authors’ failure to engage real-world criminal justice outcomes may be because their true project and motivation is to criticize family laws and norms that can result in inequality, gender bias, heteronormativity, and repronormativity. Put more provocatively, I believe that the authors are not really interested in the “primary criminal justice values” of “prosecuting the guilty fairly and protecting the innocent from crime and prosecution” (151), but rather are fundamentally dedicated to assailing a “traditional conception of the family” in favor promoting “voluntary relationships of care” (xx).

The authors’ true goals and commitments in *Privilege or Punish* are indirectly revealed in Part II of the book, which focuses on family ties burdens. In this part, the authors make the surprising—and, in my view,

unsupportable—assertion that considerations of “crime creation and inaccuracy” are “mostly inapplicable in the context of family ties burdens” (82). But, in a notable footnote, the authors concede that certain family ties burdens “are creating a new class of criminals” and may “increase systemic inaccuracy in the criminal justice system” (199–200 n.9). The authors’ eagerness in Part II to discount swiftly considerations of crime control and criminal justice accuracy is startling and telling: in Part I, the authors were eager to make (questionable) suppositions about possible real-world criminal justice outcomes in order to attack family ties benefits; in Part II, they curiously conclude that these considerations are now “mostly inapplicable” when it comes to family ties burdens.

The authors’ disinterest in real-world criminal justice matters is further revealed by their notable decisions (1) to leave the pervasive problem of domestic violence to a very brief coda, and (2) to avoid discussion of the rates and nature of intrafamily homicides, sexual violence, and other serious crimes. Much of the modern evolution of certain criminal law doctrines and practices—ranging from the elimination of marital rape exceptions, to the invocation of uniquely severe sentences when parents rape or kill their children, to the creation of mandatory prosecution programs for domestic violence and mandatory reporting requirements for child abuse—reflect the efforts and desires of policymakers and criminal justice administrators to respond better to the unique and uniquely important challenges presented by domestic violence and other intrafamily crimes. *Privilege or Punish* barely mentions these still evolving criminal justice stories—except perhaps when they serve the authors’ goal of arguing that those criminal law doctrines that respect or reflect “traditional ideals of the family . . . [are] plainly and perniciously discriminatory” (154).

Critically, because my specialty is criminal justice and not family law, I am disinclined to question the authors’ interest in assailing a “traditional conception of the family.” Moreover, I instinctually share the authors’ basic concern that the construction and norms of family status in modern society may harmfully advance inequality, gender bias, heteronormativity, and repronormativity. Nevertheless, many normative assertions in *Privilege or Punish* about family status still struck me as peculiar and off-putting. For example, the authors suggest that family status is a “morally arbitrary” characteristic (29). But I have a very hard time thinking anyone—including the authors themselves—genuinely believe or would persistently assert that an individual’s decision to get married (or divorced) or to have

a child (or to disown a child) is a “morally arbitrary” or ethically inconsequential act.

The authors might respond that their claim of moral arbitrariness is meant to be more limited and only reflects their notion, explained in a footnote, that having a family “is often morally irrelevant from the standpoint of determining criminal liability” (180 n.62). But even stated in this more limited way, the authors’ apparent moral compass seems questionable. Are the authors of *Privilege or Punish* really claiming, for example, that there is no relevant moral difference between a father’s raping his own daughter and raping someone else’s child; that there is no relevant moral difference between a mother’s decision to “kidnap” her own son from an abusive ex-husband and kidnapping someone else’s child; that there is no relevant moral difference between a modern-day Jean Valjean stealing bread to feed his own family and stealing bread to give to a soup kitchen?

The authors may have sophisticated responses to my normative inquiries, but much more needs to be said in this regard to support their arguments for a general presumption against both family ties benefits and family ties burdens. I fear that the authors too readily assume that readers will share their apparent instinct that “having a family” is morally comparable to “being of a certain race or religion” (180 n.62), at least for purposes of the criminal justice system. The normative claims in *Privilege or Punish* are understandable—though still surely contestable—if one agrees that “having a family” is the moral equivalent of “being of a certain race or religion.” But this claim of moral equivalency is hard for me to embrace without more explanation—not only because there are so many different dimensions to “having a family” (many of which can be freely chosen and easily altered), but also because nearly *all* people have at least some family connections through which they have made some kind of felt moral commitment or, at the very least, some kind of personal emotional investment.

At this point, I will summarize by stressing again that I wish the book had engaged with what is already known about the dynamic and consequential real-world relationship between families and criminal offending. I return to this point because I fear that the day-to-day realities of modern crime and punishment have a *much more* profound impact on inequality, gender bias, heteronormativity, and repronormativity than any formal criminal law doctrines. As detailed before, basic crime statistics reveal that men are disproportionately the perpetrators of serious crime and that women are disproportionately their victims, and considerable sociological

and criminology research suggests that supporting healthy, wholesome, and happy family ties may be the best way to reduce serious criminal offending by men directed toward women. Given their normative commitments, the authors of *Privilege or Punish* perhaps ought to be worrying a whole lot less about changing formal criminal law doctrines, and a whole lot more about changing real-world *criminal justice outcomes* that intersect with family matters. Indeed, basic crime data and related research suggest that we might best serve not only “primary criminal justice values,” but also the other goals of the authors of *Privilege or Punish* by ensuring that as many people as possible—and especially crime-prone males without stable social structures—are situated deeply and meaningfully within healthy, wholesome, and happy families.

## CONCLUSION

As noted at the outset, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties* makes a significant and important contribution to modern criminal law literature by effectively documenting the array of formal criminal law doctrines that expressly privilege or disadvantage people based on family status. But because the authors’ real normative concerns seem to be about the construction and norms of family status in modern society, anyone deeply interested in the challenges of family ties for real-world crime and justice may come away from the book more puzzled than satisfied.

## PROTECT AND PRESERVE?

Naomi Cahn\*

Families nurture, sustain, protect, and shelter all of us, for better or for worse, for good behavior and for bad behavior. And, as Professors Dan Markel, Jennifer Collins, and Ethan Leib remind us, families provide a legally sanctioned structure for imposing both benefits and burdens on allegedly criminal actors.<sup>1</sup> The publication of their book *Privilege or Punish* provides a constructive opportunity to examine critically the role of family status, family life, and familial responsibilities in the administration of criminal justice.

Criminal justice has historically been concerned with crimes between strangers; indeed, the very development of family ties benefits<sup>2</sup> such as marital privilege shows the privacy that has guarded the sanctity of the traditional family and that has protected crimes occurring within it. In protecting the private sphere of the family *and* promoting harmony within the family, the law has created a set of familial credits and debits that are not only arbitrary but also potentially dangerous. The benefits may encourage, rather than deter, criminal behavior, and the burdens may unjustly penalize otherwise non-criminal actions.

The jurisprudential respect for family along with the traditional deference to internal family matters<sup>3</sup> contribute to the significance of this

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1. Dan Markel, Jennifer M. Collins, & Ethan J. Leib, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties* (2009).

2. E.g., *id.* at xii.

3. On family privacy, see, e.g., Ariela Dubler, *Sexing Skinner* (forthcoming 2010); Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 *Geo. L.J.* 123, 128 (2007).

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reexamination of the relationship between family status and criminal law. The authors' analysis provides a systemic, and systematic, review of the impact of the defendant's familial responsibilities and ties on the criminal justice system. And their suggestions for how criminal law should—and should not—account for family status provide thought-provoking policy recommendations; regardless of how you have thought about these issues before reading the book, the authors challenge you to rethink the various ways that criminal law does, and should, consider familial status. Different aspects of this project involve challenges to the definition of the type of “family” status that subjects an individual to specialized treatment, potential redefinitions and eliminations of various classes of crimes, and—my project here—an examination of the thickness of relationships created by feelings of family connection, and how the law should respond to the emotional and psychological complexities of intrafamilial bonds.<sup>4</sup>

This essay interrogates the standards through which we can justify the differential treatment of family members within the criminal justice system by looking at the creation, nature, and nurture of intrafamilial relationships. First, it critically examines the basis of the liberal minimalist approach that Professors Markel, Collins, and Leib employ. Second, it suggests that any coherent and cohesive standard must provide a more complex understanding of how families actually operate, of the vulnerability and trust created through, and throughout, the family. Finally, it applies this new understanding to domestic violence.

## I. THE BASE: VOLUNTEERING TO BE FAMILY

As an initial matter, I want to explore the justifications for different rules based on family status: we might believe, as do Professors Markel, Collins, and Leib, that a “liberal minimalist” approach to the use of criminal law

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4. On emotion in the law, see, e.g., Dan Kahan, *The Anatomy of Disgust in Criminal Law*, 96 *Mich. L. Rev.* 1621, 1656 (1999); Clare Huntington, *Family Law's Textures*, *Emory L.J.* (forthcoming 2010); Clare Huntington, *Repairing Family Law*, 57 *Duke L.J.* 1245, 1274–93 (2008) (examining the relationship between family law and the “law and emotion” perspective); Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 *Wake Forest L. Rev.* 441, 482–94 (2008) (same); Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 *Yale L.J.* 1694, 1706–35 (2008).

is appropriate. This approach implies stringent protections against the imposition of criminal sanctions, leading, in their view, to a general presumption against either family burdens or family benefits (xix), although they acknowledge that this presumption can be overcome.<sup>5</sup> For family ties burdens (the focus of this essay), overcoming the presumption involves two elements: the familial relationship must be voluntary, and the government must have an “important or compelling objective” as its basis for burdening an individual based on his or her familial relationships (95–96). This state objective turns out quite frequently, according to the authors, to be improving responsible behavior.<sup>6</sup>

Voluntariness and caregiving should, in fact, play important roles in establishing when family ties burdens provide a permissible basis for the imposition or enhancement of criminal penalties. As the authors point out, spousehood and parenthood (from the parent’s perspective) are presumptively such relationships (90–91), in that family members have agreed, by accepting specific roles, to serve as caretakers for one another. The critical issue here, however, is whether the voluntary assumption of these roles *should* be critical to drawing the line between when criminal law can take family status into account and when it cannot. For the authors, it should be. Five crimes—omissions liability, parental responsibility laws, bigamy, adultery, and nonpayment of child support (85)—involve familial relationships based on voluntary caretaking, and so meet this first element; by contrast, incest, which has elements of both voluntariness and involuntariness, and filial responsibility laws may not satisfy this element.

I think the concept of voluntariness in both contexts, whether it be parent/child or spouse/spouse, is highly problematic and insufficiently thick.<sup>7</sup> It is difficult to assure voluntariness in conjunction with parenthood, at

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5. Moreover, as Professors Alice Ristoph and Melissa Murray point out, the critical issue for Professors Markel, Collins, and Leib is a “statist” argument: “. . . whether or not families serve the interests of the state. The relevant perspective is the perspective of the state itself,” *Disestablishing the Family*, Yale L.J. (forthcoming 2010).

6. The state might also seek to respect the intimacy and trust that typify intrafamilial relationships by protecting the victim from ongoing breaches of trust. See *infra* (discussions of incest and domestic violence).

7. Markel, Collins, and Leib do recognize some of the issues involved in voluntariness and the lack thereof, such as when men engage in sexual intercourse having taken precautions not to conceive a baby, where there has been rape, or where pregnancy has been achieved through gamete provision (100–02).

least when it comes to poor people who become parents: their contraceptive use is circumscribed by a financial inability to access birth control. Similarly, it is difficult to assume voluntariness of spousehood in the context of domestic violence. This section explores the concept of voluntariness as a necessary predicate, focusing on one of the most problematic aspects of voluntariness with respect to reproductive choices: socioeconomic class.

In explaining why voluntariness counts, the authors explain, “A mother who does not wish to parent is legally free to use very reliable birth control methods—and she may terminate her pregnancy or place a child up for adoption” (88). Well, not really. Poor women are least likely to use birth control and most likely to experience unplanned pregnancies. To call their parenthood “voluntary” distorts the concept of choice. The highest rates of *unwanted* pregnancies and abortions and the lowest rates of contraceptive use are correlated with income.<sup>8</sup> By contrast, at the other end of the reproductive continuum, for the 6 percent of American couples who cope with infertility, and for those with sufficient financial resources, the quest for a child is truly a voluntary undertaking that may result in either assisted reproductive technology or adoption.<sup>9</sup> The choice to become a parent thus has different meanings, depending on the class of the parents.<sup>10</sup>

Although virtually all American women will use some form of contraception during their lifetimes, there remains enormous variation in contraceptive use/nonuse among sexually active men and women. Wealthy and more educated women are more likely to consistently use birth control: 19 percent of wealthier women (at 250 percent of the poverty line), compared to 29 percent of women living in poverty, did not use contraceptives for some period during a year; and 15 percent of college graduates, compared to 36 percent of those with less than a high school education, did

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8. Naomi Cahn & June Carbone, *Family Classes* (unpublished manuscript 2009).

9. See Naomi Cahn, *Test Tube Families: Why the Fertility Market Needs Legal Regulation* (2009); Debora Spar, *The Baby Business* (2007); Naomi Cahn & Jennifer Collins, *Eight Is Enough*, 103 *Nw. U. L. Rev. Colloquy* 501 (2009) (discussing some of the anger at Nadya Suleman).

10. For general histories of both birth control and birth-enhancing technologies, see Debora Spar & Anna Harrington, *Selling Stem Cell Science: How Markets Drive Law along the Technological Frontier*, 33 *Am. J.L. & Med.* 541 (2007).

not use contraceptives during the same period.<sup>11</sup> Women who are uninsured are almost twice as likely as privately insured women to go without contraceptives for a period of one year.<sup>12</sup>

Abortion is, similarly, a class issue. Poor women *are* more likely to get an abortion than wealthier women. For poor women, the tradeoffs between access to contraception, abortion, and unintended births are acute. The Guttmacher Institute reports, for example, that at the turn of the century the “unintended pregnancy rate rose 29 percent among women living below the poverty level and 26 percent among women living between 100 percent and 200 percent of the poverty level, but fell 20 percent among more affluent women.”<sup>13</sup> Moreover, for poor women, the proportion of unintended pregnancies that resulted in live births increased by almost 50 percent between 1994 and 2001, while it declined slightly for wealthier women during the same period.<sup>14</sup> The rates also rose for high school dropouts and for women between the ages of nineteen and twenty-four, while declining for adolescents and college graduates. These differences reflect access and use of contraception.

Medicaid, the federal program that provides funding for health care for very poor Americans, provides no funding for abortion except, according to the 1977 Hyde Amendment, in cases of rape, incest, or life endangerment to the mother. The Supreme Court has repeatedly upheld restrictions on poor women’s ability to obtain abortions, first deciding in 1977 that a state need not pay for medically necessary abortions, and then upholding the Hyde Amendment three years later.<sup>15</sup> The consequence is that the 40 percent of poor women who are covered by Medicaid do not receive federal funding if they need an abortion. Somewhere from one-fifth

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11. Guttmacher Institute, *Improving Access to Contraceptive Care 3* (2008), available at <http://www.guttmacher.org/pubs/2008/05/09/ImprovingContraceptiveUse.pdf> (last visited Dec. 7, 2009).

12. *Id.*

13. Heather D. Boonstra et al., *Abortion in Women’s Lives 26* (Guttmacher Institute 2006), available at <http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf> (last visited Dec. 7, 2009).

14. Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 *Persp. on Sexual & Reprod. Health* 90, 93 (2006).

15. *Maier v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

to one-third of women on Medicaid who wanted an abortion could not afford to obtain one.<sup>16</sup>

To call the entry into parenthood voluntary for many of these women (and men) recognizes that the decision to engage in sexual activity is typically consensual, but the decision to become pregnant does not necessarily have the same indicia of choice. Moreover, the authors are somewhat cavalier in their suggestion of what women might do if contraception fails: abortion is not always easily available nor an acceptable outcome, and adoption is an emotionally difficult process that has historically had different meanings in different communities.<sup>17</sup> If Professors Markel, Collins, and Leib want to retain voluntariness as an element, then their analysis should account for the class-based nature of the choice to become a parent.

As for the state's interest in imposing different rules based on family, we can start with the state's *parens patriae* interest in protecting children, and then continue with the various state interests in supporting family (with "family" broadly defined). Although the state's role within the family can easily be criticized—it has privileged discrimination within the family, it has fostered patriarchal relationships, and it has harmed children<sup>18</sup>—its role can be positive throughout the family life cycle.<sup>19</sup>

## II. AND WHAT ABOUT INCEST?

Second, even without a voluntariness standard, I entirely agree that the four crimes singled out by Markel, Collins, and Leib—"parental responsibility laws (based on strict and vicarious liability), bigamy, adultery, and

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16. [http://www.hyde30years.nnaf.org/resources/guttmacher\\_public\\_fund.pdf](http://www.hyde30years.nnaf.org/resources/guttmacher_public_fund.pdf) (last visited Dec. 7, 2009). Some of these women are, however, luckier than others if they live in one of the seventeen states that covers medically necessary abortions with state funds. Guttmacher Institute, *State Funding of Abortion Under Medicaid* (2009), available at [http://www.guttmacher.org/pubs/fb\\_contraceptive\\_serv.html](http://www.guttmacher.org/pubs/fb_contraceptive_serv.html) (last visited Dec. 7, 2009).

17. See, e.g., Rickie Solinger, *Wake Up Little Susie: Single Pregnancy and Race Before Roe v. Wade* (1992); Kristin Luker, *Abortion and the Politics of Motherhood* (1985); Kristin Luker, *When Sex Goes to School: Warring Views on Sex—and Sex Education—Since the Sixties* (2007); Naomi Cahn, *Birthing Relationships*, 17 *Wis. Women's L.J.* 263 (2002).

18. For a critique of various biases within the state's definition of family, see Markel et al., *supra* note 1, at 84.

19. See, e.g., Linda McClain, *The Place of Families* (2007); or Huntington, *Repairing Family Law*; Clare Huntington, *Happy Families? Translating Positive Psychology into Family Law*, 16 *Va. J. Soc. Pol'y & L.* 385 (2009).

nonpayment of parental support”—should satisfy a family ties burden analysis of decriminalization for reasons that are discussed below.<sup>20</sup> I also agree that filial responsibility laws are questionable; in our culture, it is the parents who are responsible for their children, and any effort to reverse the flow of money seems designed to circumvent state responsibility.<sup>21</sup> But their list of potential candidates for decriminalization includes (albeit with some caveats) one crime that raises critical issues: incest between adults.<sup>22</sup> This second section of the essay sketches out the justification for continuing to sanction incest, a justification that is based on an examination of the interdependencies created within a family.

Many states have criminalized incestuous relationships based on both consanguinity and affinity.<sup>23</sup> In the civil context, states may bar siblings who are related by adoption, rather than by blood, from marrying.<sup>24</sup> Particularly in a post-*Lawrence* world, many thoughtful commentators have challenged the continued existence of a criminal incest ban.<sup>25</sup> Although there is no debate over

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20. They state: “On the burdens side of the ledger, we support decriminalization in the cases of parental responsibility laws (based on strict and vicarious liability), bigamy, adultery, and nonpayment of parental support; we endorse decriminalizing incest between most adults, though we are divided on certain subissues in the incest context; and we are highly skeptical of criminalization in the nonpayment of child support context, though we concede that more research needs to be done on just how effective criminalization is in achieving compliance. The only area in which we are largely unconflicted about criminalization on the burden side is the omissions (duty to rescue) context.” Markel et al., *supra* note 1, at 150.

21. For an analogous claim about common law marriage, see Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 *Or. L. Rev.* 709 (1996).

22. They explain: “we think that in situations where genuine and mature consent between the parties is possible and where negative externalities can be eliminated, the criminal law should prescind from application” (119).

23. But see *Commonwealth v. Rahim*, 805 N.E.2d 13 (Mass. 2004) (dismissing an incest indictment in a case involving a sexual relationship between a sixty-year-old stepfather and his sixteen-year-old stepdaughter because of lack of blood relationship).

24. See Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 *Duke L.J.* 1077, 1139–46 (2003).

25. See *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (arguing that the Court’s reasoning would call into question the constitutionality of “criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity”); see also Brett H. McDonnell, *Is Incest Next?*, 10 *Cardozo J.L. & Gender* 337, 348–55 (2004) (asking whether, after *Lawrence*, consensual adult incest falls within the zone of intimate behavior covered by the Constitution’s guarantee of liberty); see Note, *Inbred Obscurity: Improving Incest Laws in the Shadow of the “Sexual Family,”* 119 *Harv. L. Rev.* 2464, 2465–76 (2006) (suggesting that incest bans that criminalize sexual relationships between certain relatives,

the need to criminalize parent-child sexual relationships,<sup>26</sup> there are questions about sexual intimacies outside of that core relationship. Professor Courtney Cahill “propose[s] that the law reappraise the extent to which disgust, rather than reasoned argument, sustains laws directed at sexual and familial choice.”<sup>27</sup> She notes that “the incest taboo has continued to provide the language—or grammar—in which we articulate and ‘speak about’ the family.”<sup>28</sup> Professors Markel, Collins, and Leib argue that consensual sexual relationships between adults, which might otherwise be subject to incest laws, should be decriminalized, and to the extent that there is abuse in these relationships, non-family-based criminal laws should apply. Even they, however, would “agree that when sexual misconduct occurs in a relationship of asymmetrical dependency, a sentencing enhancement is warranted for the breach of trust created by that

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whether consensual or nonconsensual, are based on traditional heterosexual norms of marriage and family and “undermine a consistent, consent-based scheme for enforcing incest prohibitions”). Brenda J. Hammer, Note, Tainted Love: What the Seventh Circuit Got Wrong in *Muth v. Frank*, 56 DePaul L. Rev. 1065, 1097 (2007) (questioning an incest ban as applied to a consensual adult relationship where the adults were not raised together as children). There were questions even before *Lawrence*. See, e.g., Ruthann Robson, Assimilation, Marriage, and Lesbian Liberation, 75 Temp. L. Rev. 709, 758–65 (2002) (questioning civil marital incest prohibitions).

26. See, e.g., Robin Fretwell Wilson, The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim’s Siblings, 51 Emory L.J. 241 (2002) (discussing father-daughter incest, and noting that when one child is molested, there is a high risk of additional siblings being sexually abused); see also Robin Fretwell Wilson, Removing Violent Parents from the Home: A Test Case for the Public Health Approach, 12 Va. J. Soc. Pol’y & L. 638, 665 (2005) (arguing that intrafamilial dynamics of potential abuse and exploitation provide a significant justification for the continuation of the incest ban; although these intrafamilial dynamics are less important when the children are raised in separate families, there are additional justifications for continuing to ban incest in this circumstance); see also Jennifer M. Collins, Lady Madonna, Children at Your Feet: The Criminal Justice System’s Romanticization of the Parent-Child Relationship, 93 Iowa L. Rev. 131, 145–49, 166 (2007) (suggesting that, where it is available, prosecutors may file criminal charges under the lesser penalties applicable to incest rather than to child sexual abuse, and arguing that this privileges parent offenders). For further discussion of the incest ban, see Naomi Cahn, Accidental Incest: Drawing the Line—or the Curtain?—for Reproductive Technology, 32 Harv. J.L. & Gender 59 (2009).

27. Courtney Megan Cahill, Same Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo, 99 Nw. U. L. Rev. 1543, 1547 (2005).

28. Cahill, *id.*, at 1610.

dependency” (126). But they have their limits. The authors explain that they favor a rule

that prohibits sexual relations between an adult and any person for whom the adult provides caregiving functions, such that the other person is involved in a relationship of asymmetrical dependency—regardless of consanguinity. Examples of asymmetrical dependents include, on the one hand, foster parents, adoptive parents, step-parents, and biological parents, and on the other hand, all minors under their charge and responsibility. Our concern is that the relationship of asymmetrical dependency lends itself to peculiar risks of abuse such that establishing a norm of protecting vulnerable persons from coercion or improper pressure requires a rule that may be over-protective in some cases (120–21).

Once the parties become adults, however, the authors are far less troubled, although they would impose a few bars such as, for example, a requirement for “registering the relationship with the government if it fits into a certain category of risk, and requiring participants to the relationship to take a sex-education course” (121 n. 72).<sup>29</sup>

Incest laws *can* reinforce the traditional nuclear family form through a definition based on family form.<sup>30</sup> For example, as the authors point out, incest laws would not protect a child with gay or lesbian parents from sexual relations with the nonbiological parent, where the state does not allow same-sex marriage or provide legal recognition to the second parent’s relationship with the child.<sup>31</sup> The incest prohibition does proscribe some seemingly consensual private relationships, breaching the sphere of privacy that surrounds intimate sexual conduct.<sup>32</sup> Nonetheless, it remains

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29. Markel, Collins, and Leib acknowledge some lack of uniformity among them on these issues (e.g., *supra* note 1, 93 n.36, 150).

30. See Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 *Iowa L. Rev.* 1253 (2009).

31. They observe: “Thus, if a gay couple lives in a state where they cannot adopt as a couple together, then the incest statute will not ‘protect’ a child who has been adopted by *X* against the sexual misconduct perpetrated by *X*’s partner, *Y*—assuming that *Y* has not been able to create a legally binding relationship to the child.” Markel et al., *supra* note 1, at 125.

32. The exact nature of this privacy remains contested. See, e.g., Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 *Harv. L. Rev.* 1893 (2004); Linda C McClain, *The Place of Families: Fostering Capacity, Equality and Responsibility* (2006); see also *State v. Lowe*, 861 N.E.2d 512 (Ohio 2007) (*Lawrence* does not invalidate state law criminalizing consensual adult incest when the statute is

critical to recognize the uniqueness of the breach of trust between family members that occurs if these family members engage in sexual relationships, even when the family members are adults. This breach of trust occurs regardless of how one defines (or should define) family, because the breach involves an abuse of power within an intimate relationship.<sup>33</sup> Although I agree that “heightened penalties [may be appropriate] in any context where a breach of trust with a supervisory adult arises—whether schools, churches, or the home” (122), the breach of trust that occurs between a minor child and a parent deserves the most stringent and harshest sanctions; with that recognition, it becomes easier to justify sanctions (albeit not as severe and perhaps not even criminal<sup>34</sup>) on adult relationships that span generations: those between parents and children and aunts/uncles and nieces/nephews.

Given that incest typically occurs between a younger woman and an older man, generally of a different generation (but sometimes not),<sup>35</sup> I remain concerned about power asymmetries in these relationships. Moreover, an assumption that intrafamilial dependencies created during childhood can become sufficiently untangled so that adult consent becomes meaningful reveals a very “thin” and almost bloodless concept of the complexity of emotional bonds within families. Although incest typically carries a lesser penalty than does the crime of child sexual abuse,<sup>36</sup> it should instead be defined as the most serious form of child sexual abuse, with enhanced punishment.

Achieving adulthood does not necessarily remove the vulnerability that was initially created during infancy and childhood. Incest may be among the

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applied to stepfather and stepdaughter), cert. denied, 128 S. Ct. 94 (2007); Terry Turnipseed, *Scalia’s Ship of Revulsion Has Sailed: Will Lawrence Protect Adults who Adopt Lovers to Help Ensure Their Inheritance from Incest Prosecution?* 32 Hamline L. Rev. 95 (2009).

33. See, e.g., Lisa Haberman, *The Seduction of Power: An Analogy of Incest and Antebellum Slavery*, 13 Hastings Women’s L.J. 307, 317 (2002); Jocelyn Ho, Note, *Incest and Sex Offender Registration: Who is Registration Helping and Who is it Hurting?*, 14 Cardozo J.L. & Gender 429, 444 (2008)

34. To be sure, the authors acknowledge that they are limiting their analysis to criminal law; supra note 1, at 127.

35. Most reported criminal cases involve father-daughter sexual relationships. See, e.g., Ho, supra note 33, at 433.

36. Jennifer C. Mitchell, Note, *Crime Without Punishment: How the Legal System is Failing Child Victims of Intra-Familial Abuse*, 9 J.L. Fam. Stud. 413 (2007).

few sexual relationships that should be expressly prohibited, regardless of consent. Similarly, intimate relationships characterized by domestic violence involve an element of involuntariness; battered women find it hard to leave.

### III. SPECIAL TREATMENT

Third and finally, rather than presumptions against special treatment of the family, I would turn this around to a presumption for special treatment, albeit with a revised and more open definition of family that would include gay and lesbian intimate relationships as well as single parenthood. On this broader definition of what constitutes a family, I'm in good company because this is also important to the authors.

Although I'm willing to allow an opt-out provision, the presumption is that anyone in a familial-type relationship has opted *in* to a series of special obligations. Even if we agree that that stringent justification for criminal justice intervention is essential, this must involve a recognition that the family is different. There is something special about the family that adds a complexity to this analysis: it is the expectation of trust that is inherent in our notion of family/hearth. That is the vision the law is imposing—regardless of the form of family that is protected.

To show how this added layer helps provide more texture, consider domestic violence. The Coda discusses the special case of domestic violence, as does the section on child abuse and neglect, and the book alleges that the law seems to assume domestic violence is worse than other kinds of violence. In some ways it is because of the abuse of trust. The long history of the legal treatment of domestic violence in this country, however, shows that the law has not treated domestic violence as seriously as other crimes, and suggests that advocacy efforts have sought to ensure that domestic violence is actually treated similarly to other crimes.<sup>37</sup> Domestic violence should, however, be treated differently from other violent crimes not involving family members. Indeed, one of the “important questions that are beyond the scope of [the book’s] limited efforts” is how “criminalization may itself be threatening to women’s autonomy” (153). Surely this is not a question that would be asked about other violent crimes; we would not suggest that criminalizing violence “may itself be threatening to [the victim’s]

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37. See, e.g., *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

autonomy.” Yet, given the nature of domestic violence, this is a legitimate inquiry. Obviously, domestic violence presents a complex set of issues with respect to criminalization within the family.

A history of domestic violence provides the context, showing the efforts to have the crime treated equally with violence outside the family relationship. When I first began representing victims of domestic violence, the conventional advice to victims was not to tell the police that they were being assaulted by a family member. Police departments receive more calls reporting domestic violence than any other type of crime, and responses to these calls account for one-third of all police time. Yet, historically, police departments have been reluctant to intervene by making arrests for domestic violence. For example, a 1984 study found that the typical police response to these calls was to do nothing but talk to the batterer; a similar study in 1985 reported that, even in incidents where the victim had been severely injured, 50 percent of the officers interviewed would not arrest the abuser.<sup>38</sup> Reacting to pressure from battered women’s advocates and to many civil lawsuits successfully challenging police policies and conduct, by the 1980s, several jurisdictions had started to enact legislation requiring changes in arrest policies for domestic violence offenses.

One of the earlier, and most significant, cases involving a civil challenge to a police domestic violence policy was *Thurman v. City of Torrington*.<sup>39</sup> Between early October 1982 and June 1983, the police department ignored Thurman’s repeated requests for help in protecting her and her child from her husband’s threats. At one point, a police officer watched as her husband kicked her in the head twice. Not until he approached her while she was lying on a stretcher did the police arrest him. In her lawsuit, she claimed that her constitutional rights had been violated by the “nonperformance or malperformance of official duties by the defendant police officers” and the city. The court held that “[a] man is not allowed to physically abuse or endanger a woman merely because he is her husband,” and that a police officer may not “automatically decline to make an arrest simply because the assaulter and his victim are married to each other” (internal citation omitted). The jury awarded Thurman approximately \$2.3 million for

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38. Catherine Popham Durant, Note, When to Arrest: What Influences Police Determination to Arrest When There is a Report of Domestic Violence?, 12 S. Cal. Rev. L. & Women’s Stud. 301, 305–06 (2003).

39. 595 F. Supp. 1521, 1524, 1528 (D. Conn. 1984).

the police department's failure to respond to her repeated requests for assistance.

*Thurman* established that "the police policy of treating women and children abused by male relatives or friends differently from persons assaulted by strangers constituted sex discrimination under the Equal Protection Clause."<sup>40</sup> After additional lawsuits were brought around the country, and as a result of direct pressure from women's advocates, many police departments and legislatures developed new arrest policies for domestic violence offenses.

Once mandatory arrest laws were put in place, many domestic violence advocates addressed a second part of the criminal justice problem: the practices of prosecutors. Depending on the jurisdiction, prosecutors dismissed between 50 and 80 percent of domestic violence cases. However, as the numbers of domestic violence arrests have increased, many prosecutors have begun to endorse "no-drop" policies.<sup>41</sup> A no-drop policy means that it is the prosecutor's decision, not the victim's, whether or not to proceed with the prosecution of a domestic violence case. Hard no-drop jurisdictions require prosecutors to pursue the cases regardless of the victims' wishes and may also require victims to testify, even if they need to be subpoenaed to appear. Soft no-drop jurisdictions encourage victims to participate but allow prosecutors some discretion to drop, depending on the extent of victims' participation.<sup>42</sup>

Proponents of no-drop policies claim that domestic violence is a public issue, and that it should be the responsibility of the state, rather than victims, to hold abusers accountable for their actions; and that aggressive no-drop policies remove the burden of going forward from the victim because, unlike in civil actions, she is not the moving party who must then litigate the case.<sup>43</sup>

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40. Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 *Wis. L. Rev.* 1657, 1668 (2004).

41. Deborah Epstein, Margaret E. Bell, and Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 *Am. U. J. Gender Soc. Pol'y & L.* 465, 466 (2003).

42. Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 *B.Y.U.L. Rev.* 1, 11-12.

43. Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 *Drake L. Rev.* 295, 317-20 (2004); Kalyani Robbins, Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 *Stan. L. Rev.* 205 (1999).

On the other hand, opponents of no-drop policies argue that the policies serve to deprive a victim of her right to autonomous decisionmaking about her options, and may actually place her in further danger if the abuser decides to blame the victim for the criminal proceedings. Opponents also argue that no-drop policies may force the victim to feel a lack of control over the situation, and that, somewhat ironically, she may actually be reluctant to call the police for help if the jurisdiction has adopted a no-drop policy.<sup>44</sup>

#### IV. CONCLUSION

The historical treatment of domestic violence has made family ties into a burden for victims and a benefit for perpetrators. On the criminal side, advocates have pushed for domestic violence to be treated like any other crime, even as they have argued for special treatment for victims. On the civil side, advocates have pushed for different treatment of domestic violence, with civil protection orders now available in all states to anyone who is being abused by an intimate partner.

Domestic violence actually presents two separate sets of issues: first, it shows how some crimes really are different because of the abuse of trust; and second, it shows the importance of considering the rights and interests in the criminal justice system of people other than the defendant. Markel, Collins, and Leib are exactly right on the effect of criminalization: as they point out, family ties benefits and burdens implicate collective visions of the family and defendants' rights. In addition, the approach of the criminal justice system to family ties burdens and benefits also implicates the rights and interests of others with strong interests in the criminal justice system: victims, for example, whose voices do not appear at trial. Consider the allegation of some that mandatory arrest or prosecutory no-drop policies may privilege the interests of policymakers acting on behalf of battered women over the interests of individual women in their own agency and autonomy.<sup>45</sup> Focusing on the defendant alone in the context of

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44. See Mordini, *id.*

45. See, e.g., G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 *Hous. L. Rev.* 237, 281 (2005); Dennis P. Saccuzzo, *How Should the Police Respond to Domestic*

family ties burdens overlooks the very reasons for the extra burdens or benefits. That is, it is because of the defendant's relationships that some of these actions become crimes; looking at the *effect* of the defendant's actions might become an appropriate way to take into account family ties burdens in order to administer justice within the criminal law system.<sup>46</sup> We might seek to develop new policies that allow victims control over choices in the criminal justice and mediation system *because* of their family ties.<sup>47</sup>

Family status brings both benefits and burdens *outside* of the legal system.<sup>48</sup> Acknowledging that family status brings both benefits and burdens *within* the legal system shows how the law can accommodate, and account for, the messy complexities of family life.

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Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest, 39 Santa Clara L. Rev. 765, 779–80 (1999); Sara R. Benson, Failure to Arrest: A Pilot Study of Police Response to Domestic Violence in Rural Illinois, 17 Am. U. J. Gender Soc. Pol'y & L. 685 (2009). Professor Sally Goldfarb argues that the law should craft responses to domestic violence that recognize that a woman may not leave a battering relationship because she "has a deep emotional bond with her partner and wants to preserve and improve the relationship." Sally Goldfarb, Reconciving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?, 29 Cardozo L. Rev. 1487, 1499 (2008).

46. For arguments about expanding our notions of justice and accountability within the international criminal system, see Fionnuala Ni Aolain, Naomi Cahn, & Dina Haynes, *Returning Home: Post-Conflict Reconstruction and Gender* (forthcoming 2010).

47. Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, Fla. St. L. Rev. (forthcoming 2010).

48. As a benefit, consider eligibility for health care insurance based on family status; as a burden, consider Romeo and Juliet who, because of their families' feuds, were doomed.

## MANDATORY, CONTINGENT, AND DISCRETIONARY POLICY ARGUMENTS

Gabriel J. Chin\*

Being a parent, spouse, or sibling, we learn, has a pervasive effect on criminal liability. Family status is an element of criminal defenses (e.g., exemption from liability for harboring a fugitive if the fugitive is a relative), evidentiary rules (e.g., spousal privilege), and crimes (e.g., nonsupport of spouse, children, or parents). Blood ties can transform otherwise innocent behavior into a criminal offense, and vice versa. Of course, scholars, policymakers, and lawyers knew about these laws individually. But collecting them and explaining their effects on liability and criminal procedure from bail to sentencing offers an important insight. This alone renders *Privilege or Punish* a worthy accomplishment; it represents discovery of a new facet of criminal law that had until now had been hiding in plain sight.

The book also proposes reforms, identifying principles it contends should guide policymakers' reevaluation of family status benefits and family status burdens. The book is bracingly clear. Its discussion of family status benefits and burdens are structured the same way. First, a chapter describes the law. The next chapter proposes principles for evaluating the law, including equality, accuracy, and incentivizing desirable behavior. A third chapter proposes reform based on inconsistencies between principles and law, such as ending preferences now available only to heterosexual families based on the principle of equality. By focusing on law reform and policy, the book explicitly targets "public policy makers, lawyers and legislators" as well as scholars.<sup>1</sup>

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1. Dan Markel, Jennifer M. Collins, & Ethan J. Leib, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties*, xiv (2009). The book may be an example of a

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The book reflects expertise, confidence, and careful analysis—which makes the tentative, conditional nature of many of its reforms a surprise: *maybe* immunity from harboring a fugitive should be eliminated, the book argues; *probably* spousal privileges are undesirable. Most of the book’s normative assumptions are widely shared, such as promoting accuracy, deterring crime, and promoting law-abiding behavior. Yet even a legislator who fully embraces the values and principles animating the policy proposals will find that the proposals are something short of a Model Act.

Part of this flows from the book’s candid explanation of the basis for its conclusions. It explicitly relies on empirical evidence as well as, sometimes, empirical assumptions, and acknowledges that its recommendations might change if the real world is not as it assumes. *Privilege or Punish* also recognizes that “there are multiple considerations that will be relevant to policymakers beyond our presumptions and analyses.”<sup>2</sup>

Policy proposals must be accepted by policymakers to become policy. If justice and sound public policy require analysis of multiple factors, it would be helpful for a prescriptive analysis such as this to offer guidance on how to do it. It would also be helpful to distinguish outcomes that are dictated by principle or fact from those that are preferred by an author but could legitimately be rejected in favor of another approach.

The critical audience is the group that agrees at the level of principle, but at the moment disagrees or is unconvinced about the particular outcome. Those who disagree about premises are hopeless; someone convinced that *Loving v. Virginia* was wrongly decided is not susceptible to an argument, no matter how carefully crafted, that prohibition of gay marriage is indistinguishable from antimiscegenation laws. At the other end of the spectrum, those who already agree that prohibition of gay marriage is discriminatory need not be persuaded with analogies or arguments. Thus as a policy proposal, the task of this book is to convince those who share the principles of the authors (who are against patriarchy and heteronormativity and for equality, who are for accuracy and justice in the sense of conviction of the guilty, and who also support liberal minimalism, use of the

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turn to policy in criminal law scholarship. There is a central place for pure theory, but one of the disappointments of criminal law scholarship of the past century is how little impact it has had on criminal law. Darryl K. Brown, *History’s Challenge to Criminal Law Theory*, 3 *Crim. L. & Phil.* 271 (2009).

2. Markel, *supra* note 1, at 36.

criminal sanction only when necessary) but who are not already convinced that family relations should normally not be used to assign criminal benefits and burdens.

Policy prescriptions might be divided into three categories. The first are rules applicable (or prohibited) with little attention to external or empirical considerations. They are based on principle. A rule might be prohibited by the Constitution no matter how desirable it may seem, or by a moral constraint, such as a prohibition on intentionally harming innocents or discriminating on the basis of religion, even if it promised substantial practical rewards. If nonarbitrariness is a value, consistency with precedent or obedience to the decision of a higher court might legitimately dictate an outcome in the absence of overriding considerations—even if the controlling decision itself could reasonably have been decided the other way. A rule of this type might be a prohibition on privileges available only to heterosexual couples or on burdens imposed only on gay families. Policymakers opposed to discrimination on the basis of sexual orientation do not need to know the practical precise consequences of a discriminatory policy to conclude that it should be prohibited.

A second category of rules or policies apply, determinatively, based on empirical considerations. For example, imagine a jurisdiction where the law requires setting bail in an amount necessary to ensure appearance at future proceedings.<sup>3</sup> Research may show whether (or when) family connections make defendants less likely to flee. If the evidence shows that factor reduces risk, it should be considered in setting bail. If that factor does not reduce risk, it should not be considered.

But a subset of these kinds of rules presents a problem. These are rules that are potentially, but have not been, empirically resolved. What are courts to do if data could be generated to resolve a particular issue, but has not, or if data are unreliable or uncertain? For two reasons, it is insufficient to say that these questions should simply be answered through research. First, lack of determinate data does not let judges off the hook; judges must either consider, or not consider, family status in setting bail in every single bail decision. However, the theory could provide that governments should be required to generate the data on this (and of course all other similar issues) as quickly as possible, so that going forward, decisions would be made on the correct basis.

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3. See, e.g., Ariz. R. Crim. P. 7(b).

But this would impose a cost. As important as it is, in general, that cases be decided fairly, accurately, and on reasonable grounds, it is also true that not every unreasonable distinction itself causes more harm than it would cost to fix it. Assume, for example, that the standard fine for an “open container” violation is \$25 in a particular jurisdiction. It might be that, for \$1,000 or so per case, courts could come up with more precisely tailed sanctions; based on prior conduct and impact on the community, a range of sanctions from \$10 to \$50 might be imposed. However, many would doubt that that particular expenditure would most efficaciously promote justice or reduce injustice. If determinative empirical information can be obtained only at substantial expense, a challenger of the status quo should propose that the cost of finding the truth is outweighed by the injustice or unfairness that would result if the good faith, best guess is wrong. Put another way, the typical practice of sentencing people convicted of serious crimes to incarceration for years and months (and often in round numbers), as opposed to differentiating down to minutes and seconds, reflects an implicit and appropriate acceptance of the idea that justice will be doled out as the best available approximation rather than as an exact quantity. The legal system can make no pretense to precise reflection of culpability such that, for example, it is not possible for a more serious offender to receive a greater sentence than a less serious offender in particular cases.

A third category of outcomes are not dictated, because a range of responses are consistent with principle and knowable facts (that is, are not inconsistent with justice or sound policy). Policy analysis is helpful in this area because it can highlight the costs, benefits, interests, values, and other considerations that policymakers should use to choose from among reasonable alternatives. Policy analysis can also identify the parameters beyond which policy would become unsound.

An author may have a recommendation for a problem of this type. But if it is simply a value choice from among several alternatives that would be equally legitimate, as some of the prescriptions of *Privilege or Punish* are, it would be useful to distinguish them from rules urged more forcefully. Choice, discretion, even indulgence of preferences and speculation may be unavoidable with respect to problems that are essentially political, or require weighing incommensurable factors.

If I were in the legislature, I would vote for most of the book’s policy prescriptions. Yet I am uncertain how many, if any, are obligatory even on those who share the author’s premises. It may be that no policy proposals

correct blunders<sup>4</sup>—i.e., laws that are contrary to principle or indisputably empirically unjustifiable based on their acknowledged purposes.

One proposal with which I disagree is the book's critique of evidentiary privileges. Many jurisdictions prohibit both: (1) one spouse from testifying against another during the marriage, and (2) a current or former spouse from testifying about the content of a communication that took place during the marriage.<sup>5</sup> Spouses, then, have protection from inquiry that many others do not enjoy. *Privilege or Punish* opposes these privileges: "it is our view that the family neither needs nor deserves any special protection when the smooth and fair administration of criminal justice is at stake."<sup>6</sup> I claim to share most of the values of the authors, yet disagree with their conclusion because I contest some of their empirical assumptions, and with how the values at stake should be weighed.

The book observes that spousal privilege is rooted in patriarchy; when the wife was merged into the husband's legal personality, allowing her to testify against him would have been tantamount to a violation of the privilege against self-incrimination. But "the testimonial privileges have been modernized in most places to defang their patriarchal origins;"<sup>7</sup> equal protection law since the 1970s would prohibit a husband-only privilege. If "[i]t is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV,"<sup>8</sup> it is equally unwise to discard sensible ideas because they date to unenlightened times.<sup>9</sup> That Kim Jong Il likes Elizabeth Taylor movies says nothing about the merits of *National Velvet*.<sup>10</sup>

4. Other than the prohibition against discrimination on the basis of sexual orientation, which will be accepted by all who agree with the principle.

5. Both are subject to exceptions, for example, suits based on intrafamily offenses or suits by one spouse against another.

6. Markel, *supra* note 1, at 38.

7. Markel, *supra* note 1, at 39.

8. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

9. For example, I would not propose to eliminate the due process clause of the Fifth Amendment even though *Dred Scott* correctly concluded that it was drafted in part to protect ownership interests in slaves.

10. <http://www.imdb.com/name/nm0453535/bio>. I bridle also at the argument that spousal privilege operates "in a male friendly manner: men commit more crime, so it will benefit men more often if their spouses (or mothers or sisters) are prevented from testifying against them"; Markel, *supra* note 1, at 39. This argument proves too much, suggesting that any prosecution legal rule, from eliminating juries to cutting back on indigent defense, is feminist because, after all, most defendants are male. One might as well say that

The question of whether facially neutral spousal privilege perpetuates patriarchy is exceedingly difficult. Perhaps the most excruciating context involves an alleged victim of spousal abuse who does not wish to testify against her husband. Which outcome is antipatriarchal: allowing her to choose not to speak, when the choice may be coerced and the failure of a prosecution may expose her to future violence, or forcing her to testify, thus overriding a choice that may be her own, and compelling testimony that may result in violence against her, or in jail or other penalties for non-compliance? Conceivably, some experiment or data collection could definitively show which rule best promoted, say, victim safety. But even then, the formulation of a legal rule would require comparing incommensurables, such as the value of victim autonomy to the value of prosecution, and those agreeing on facts and underlying principles of justice might still disagree about the best rule.

The book is also concerned with evidence lost by keeping spouses off the stand. The argument is framed in terms both of sound criminal justice policy and of equality. Eliminating the privilege would generate more evidence. But if, as the book recognizes is possible, family privileges “function to prevent family members from lying on the stand,”<sup>11</sup> then the privilege advances, rather than impedes, the search for truth. The privilege may incentivize more crime by reassuring potential participants in family conspiracies. But a spousal conspirator could invoke the privilege against self-incrimination rather than spousal privilege, and a criminal conspirator likely has an above-average propensity to perjury. Accordingly, excusing such a witness might have little probative cost, or even be a net truth enhancer. It is not out of the question that the reason for the continued vitality of the rule is that legislatures, knowing that this type of evidence was generally not valuable, prophylactically prevented litigants from wasting their time pursuing evidence that experience shows is not likely to be forthcoming.

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because most legislators, judges, and prosecutors are male, anything prodefendant is antipatriarchal. And of course, every acquittal of a man potentially benefits female mothers, sisters, and spouses.

It is also untenable for the book to argue that the spousal privilege benefits men, yet promotes interfamily conspiracies; Markel, *supra* note 1, at 41. At least while the privileges are heterosexual-only and apply to spouses, in every interfamily conspiracy, at least one conspirator, and hence beneficiary of the rule, will be female.

11. Markel, *supra* note 1, at 40.

We also do not know much about the types of cases in which the privilege keeps witnesses off the stand. How many prosecutions are derailed by the privilege, and in what kinds of cases? If many murderers are unprosecuted every year because of the rule, that has a far different implication than if almost all serious cases are able to proceed based on other evidence.

But even if these possibly intractable empirical questions are resolvable and show that privileges impede accurate verdicts, they still might be justifiable. One goal of criminal law is to express and thus reinforce community values. The idea that spousal privilege encourages married criminals to share their plans presumes that the existence of the privilege is widely known outside of the legal community. That noncriminal married couples know they are free to share private thoughts without risk of compelled disclosure, and that all of society knows that the state values and protects this particular intimate relationship, are goods which must be weighed against the bad of increased or undetected crime. Even if we could quantify (1) the crimes created, (2) the crimes that cannot be prosecuted successfully because of the privilege, (3) the crimes dissuaded and the other prosocial communications fostered, and (4) the effects of knowledge of state support for marriage on the society at large (through, say, MRI studies of the brain), we still would not have a definitive answer to the question of whether the benefit was worth the cost. The policy is neither right nor wrong but represents a matter of opinion about how much state support of marriage is worth compared to other valuable ends.

*Privilege or Punish* also proposes that the privileges implicate equality, because spouses<sup>12</sup> receive a benefit denied to those not coupled. While true, in the absence of a systematic argument that provision of any benefits to married couples is illegitimate, a legislator sympathetic to the approach could conclude that this accommodation was reasonable. This is not inequality based on a classification that generally should not be the basis of benefits or burdens—e.g., the book does not attack the lower federal income tax rates for married couples filing jointly. Nor is it inequality about a right that should be available on the same basis across the board—e.g.,

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12. Many Americans including myself believe it is unjust to restrict marriage to heterosexual couples, but this critique is not restricted to criminal law and is associated with a determinate reform, equalization. The argument assumes that this equality problem has been resolved.

the book does not argue that everyone (or no one) should have evidentiary privileges for private communications. This objection reduces to an argument about particular legal methods of supporting the family, inherently a matter of judgment and discretion even among policymakers sharing the same basic values and theoretical approach. Accordingly, it is a substantial concession for the authors to acknowledge that “there very well may be appropriate places for the modern liberal state to recognize and accommodate the significance of family life and caregiving networks.”<sup>13</sup> After that, we are talking about the price.

To give another example, I question the proposed inclusion of spanking in criminal assault statutes from the position of devil’s advocate, because I am not a fan of corporal punishment. But there is a perfectly reasonable case for leaving genuinely excessive parental discipline to child abuse statutes while keeping spanking legal.

One argument is from the perspective of liberal minimalism. The authors want to use the criminal sanction only when it is necessary and its goals cannot be achieved in any other way.<sup>14</sup> Why, then, the rush to the criminal code here? Just as they propose with spousal and child support statutes, and the prohibition against bigamy, civil regulations can be and are used to deal with parents who are basically well intentioned but too violent.

Another argument comes from the gulf between criminalization on the books and suppression of conduct in the world. Is it really likely that we will see substantial numbers of criminal prosecutions for spanking if it were criminalized? Because of the difficulty of discovery of the offense and prosecutorial discretion, it is probable that few if any parents guilty of simple

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13. Markel, *supra* note 1, at 149.

14. For example, application of the principle of liberal minimalism is unlikely to change many minds, because almost everyone agrees that the criminal sanction should be used only when necessary, and almost everyone insists that the criminal laws they support are in fact necessary. As Professor Brown explained, regarding the persistence of antisodomy laws:

arguments *for* criminalization of nonprocreative sexual activity were made persuasively to many *within terms of the harm principle*. That is, advocates for sodomy laws marshaled reasons why even private, consensual sodomy does in fact cause grave social harm—because it degrades morality of participants and of society generally, and it contradicts centuries of moral consensus; because it leads to predatory sexual behavior, especially against children; because it spreads disease, etc.

Brown, *supra* note 1, at 281. Liberal minimalism is a device that will identify only non-debatable cases.

spanking would be brought to court. If aggressively enforced, we would risk the same kind of intrusion into private life that the “war on drugs” has engendered. If unenforced, the law is likely pointless.

Then there is the issue of crafting the law’s terms. It is reasonable to use physical means of controlling children that would be unreasonable for adults. A small child standing perilously close to the curb of a busy street, for example, can permissibly be snatched up; a child can be compelled by a parent to receive a vaccination, or a spoonful of mashed peas can be gently inserted into a baby’s mouth when he opened it only to squeal. I assume that the authors would approve of many of these and other nonspanking physical touchings of children that would constitute assault if done to an adult.

If the criminal justice system were to address this problem, all we have is arrest and jail. If a policymaker with other tools were to consider it, she might conclude that resources would best be deployed to parent and pediatrician education to persuade parents not to spank in the first place, rather than trying to prosecute after the fact.

Even well-developed values and principles, coupled with high-quality information about the empirical effects of legal rules, will not always lead, as if mathematically, to a particular code or even a rule on any particular issue. Once unjust discrimination and unambiguously unwise policies are eliminated, issues will remain that, consistent with a particular theoretical approach, can legitimately be resolved in a range of ways.

## **(WHEN) SHOULD FAMILY STATUS MATTER IN THE CRIMINAL JUSTICE SYSTEM?**

*Jennifer M. Collins,\* Ethan J. Leib,\*\* and Dan Markel\*\*\**

We would like to begin by thanking Professors Berman, Cahn, and Chin for the time and care with which they have engaged our work and for furnishing us with an opportunity to discuss, clarify, and rethink some of the key claims and concerns associated with our recent book, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties*. Needless to say, we appreciate their very kind words about our project and its contributions. In this Essay, our focus will be on responding to the interesting criticisms lodged against our book; we hope to do so in a way that is helpful in advancing the conversation about the intersection between criminal justice and family status beyond these pages.

### **I. ON THE NATURE OF POLICY ANALYSIS: OUTSIDE THE EMPIRE OF EMPIRICISM?**

Based on the comments of both Professors Jack Chin and Doug Berman, it seems appropriate and necessary for us to say a bit more about the methodology of *Privilege or Punish*. In particular, we need to highlight and clarify the role of empirical evidence within the overall project pursued in the book.

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### A. Professor Berman's "Empirical" Critique

Professor Berman's critique observes, at the outset, the "extraordinary contribution" our book makes in terms of spotlighting attention on the various ways the criminal justice system's *laws* impose various burdens or benefits on persons by virtue of their familial status.<sup>1</sup> We are relieved to see that acknowledgment—that was our book's explicit focus. Unfortunately, he then chides us for not considering the relationship between family status and "fundamental crime realities," and for not discussing various studies identifying patterns of crime connected to the presence or absence of family ties and/or gender dynamics.<sup>2</sup> Similarly, Professor Chin notes the contribution the book makes by discovering "a new facet of criminal law that had until now been hiding in plain sight."<sup>3</sup> But his essay encourages us to be clearer about the degree to which empirical conclusions are necessary to reach firm conclusions regarding the book's recommendations. These challenges warrant careful response.

In the Introduction to our book, we specifically noted that many scholars have tried to look at the empirical issues Professor Berman in particular is interested in, especially with respect to what he calls the "relationship of family status, gender dynamics and crime."<sup>4</sup> We acknowledged, moreover, the tremendous scholarship cataloguing, among other things, "the devastating impact that the incarceration of relatives can have on the family members left behind."<sup>5</sup> Furthermore, to the extent such research yields clear signals, we could not have been more transparent about the need for these effects to be considered as part of an overall evaluation of criminal justice policies. As we wrote, "There is no doubt that many of the criminal

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1. Douglas A. Berman, *Digging Deeper into, and Thinking Better about, the Interplay of Families and Criminal Justice*, 13(1) *New Crim. L. Rev.* 119 (2010).

2. *Id.* at 122 ("Privilege or Punish not only fails to engage key sociological and criminogenic realities involving family ties, but it fails even to acknowledge the profound interplay of families ties, gender dynamics, and criminal offending that operate beneath the formal criminal law doctrines they discuss and assail.").

3. Gabriel J. Chin, *Mandatory, Contingent and Discretionary Policy Arguments*, 13(1) *New Crim. L. Rev.* 142, 142 (2010).

4. See Dan Markel, Jennifer M. Collins, & Ethan J. Leib, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties*, xiv (2009).

5. *Id.* (citing, e.g., Donald Braman, *Doing Time on the Outside* (2004); Sandra Enos, *Mothering from the Inside: Parenting in a Woman's Prison* (2001); Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2003)).

law's policies and practices disadvantage families in many ways—and without attention to this sort of disparate impact on families, policy designers risk tearing our social fabric at the seams.”<sup>6</sup>

All that said, we thought we were quite clear that our endeavor had a different objective. Rather than focus on, for example, the effects on offenders, victims, or third parties associated with “facially neutral” criminal justice policies, we emphasized that we would focus our attention, using tools of legal analysis and political theory, on those criminal laws that consciously target defendants for special privileges or burdens on account of their familial status.<sup>7</sup> Contrary to Professor Berman’s claim that this focus on analysis of criminal *law* was somehow obscured,<sup>8</sup> we said as much on our book jacket and in our Introduction no less than a handful of times.<sup>9</sup>

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6. *Id.* For example, the collateral consequences to innocent persons in the context of irreplaceable caregivers motivated our proposal for “time-deferred incarceration.” See *id.* at 48–53.

7. In terms of family ties benefits, we examined roughly six areas: evidentiary privileges, exemptions for family members for harboring fugitives, violence within the family, pretrial release, sentencing discounts based on family ties, and prison policies. In terms of family ties burdens, we studied seven areas: omissions liability for failure to rescue, parental responsibility laws, incest, bigamy, adultery, nonpayment of child support, and nonpayment of parental support.

8. See Berman, *supra* note 1, at 122 (“The authors might respond that their goal was only to discuss and assess formal doctrines and not real-world outcomes. If so, they at least should have made this important point clearer in both the title and text.”).

9. The suggestion that our subtitle, which uses the words “criminal justice” (and not “criminal law”) connotes a dramatically different focus, and that we are somehow being coy or furtive about our focus, seem rather odd. Professor Berman himself can read what he quoted from our book earlier in his review: namely, that we focus on the “panoply of laws expressly drawn to privilege or disadvantage persons based on family status alone,” Markel, Collins, & Leib, *supra* note 4, at xv. Our Introduction to the book, moreover, is littered with statements regarding our focus of inquiry. See, e.g., *id.* at xiii (noting that we are interested in asking descriptive and normative questions about “the facial treatment of family status” within the criminal law); *id.* at xv (“[W]e have chosen here to focus on explicit legislative or judicial choices to privilege or burden individuals with family relationships.”); *id.* (“We believe policymakers need to reflect upon the explicit choices they have made, choices that have been insufficiently analyzed in a synthetic manner by academics before this project. Once we have a framework for analyzing the explicit family ties benefits and burdens, one might be able to apply elements of that framework to the unstated and more obscured informal benefits and burdens. But to develop that framework in the first instance, we focus on facial benefits and burdens.”); *id.* at xv (“Scholars have been successful in analyzing the effects of certain criminal justice policies and practices on the family. But most scholars have not recognized the panoply of laws expressly drawn to privilege or disadvantage persons based on family status alone. Some have addressed singular instances of the larger phenomenon

Professor Berman might then say that, even if such a focus on criminal laws rather than *criminal justice outcomes* were better articulated, it doesn't excuse the failure to undertake a more wide-ranging excursion into the empirical findings of criminologists who have examined the "relationship of family status, gender dynamics, and crime." Our response here has several layers.

First, when we discovered relevant empirical evidence about the efficacy associated with the specific laws and policies we study,<sup>10</sup> we cited it and addressed it.<sup>11</sup> In various instances, such as the discussion of evidentiary privileges, our conclusions were tempered and more tentative in light of concerns raised by extant or possible empirical findings.<sup>12</sup> Unsurprisingly, this sensitivity to the existing evidence and the possibility of confounding empirical results is noted by Professor Chin in his essay.

Second, it is important to note that, for many of the specific areas we studied, we saw no directly relevant empirical research. To illustrate, consider the following: Do states granting exemptions to family members who harbor fugitives have higher crime rates than states that do not? Do states with incest, adultery, parental supervision, or parental support laws have lower rates of crime than those states that don't? Have states that dropped family ties burdens experienced a surge in crime or an increase in quality of family life? Do those states without "family ties benefits" to defendants have any markers suggesting stronger or weaker family life? Lower or higher crime rates? Do states with more immunities for spouses get more or less accurate information in criminal justice proceedings? Do immunities lead to what Professor Berman calls "healthier" or more "wholesome" families? We could go on.

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we chart, but we are the first to offer a synthetic approach. It seems important and necessary to pause and think through how and why our laws intentionally target family status and how the underlying goals of such a choice might better be served in some cases. This book clears that ground." Our book jacket's summary of the book also makes clear that we are focused on "the panoply of laws (whether statutory or common law-based) expressly drawn to privilege or disadvantage persons based on family status alone."

10. See *supra* note 7.

11. E.g., Markel, Collins, & Leib, *supra* note 4, at 128–35 (discussing empirical studies associated with polygamy); *id.* at 189 n.77 (discussing Bedard & Helland's study showing that the farther away a prison was located from a female defendant's family, the greater the decrease in crime).

12. E.g., *id.* at 140–44 (discussing deterrence effects associated with criminal laws related to deadbeat parents); *id.* at 40 (discussing the possibility that evidentiary privileges protect the criminal trial from being polluted by perjuring family members).

Importantly, and disappointingly, nothing Professor Berman alludes to provides an answer to these specific questions. This should not come as a surprise. After all, most scholars, whether in law schools or criminology departments, have not studied the effects of most of the laws that were the focus of our book. Indeed, as Professor Chin avers, most of these laws were “hiding in plain sight”—and thus obscured from systematic and synthetic legal analysis, which the book undertakes,<sup>13</sup> and empirical study as well, which the book does not. Thus, for the most part, as nonspecialists in empirical studies, we were left in the position of identifying and encouraging fruitful avenues for further empirical research that would test our hypotheses about the effects associated with these various family ties benefits or burdens. Although those tests will have to await future study, we still believe we have offered useful observations and normative analysis that could help policymakers process such empirical evidence if it becomes available.

What’s more, Professor Berman’s scholarly citations, which reflect the predictable gender patterns associated with criminal incidence, are all red herrings as far as we can tell: he doesn’t identify how any one of them focuses on outcomes related to criminal laws that are creating benefits or burdens based on *legal family status*.<sup>14</sup> Instead he alludes to research undertaken by criminologists that are part of a “social control” theory meant to explain what factors reduce crime more generally. But these tactics fail to directly intersect with the specific objects of our study. For example, Professor Berman quotes an article to the effect that

A large body of research in this area reveals many family variables significantly related to crime. Most notably, juveniles commit fewer criminal acts when they are emotionally attached to parents, exposed to consistent parental supervision, reinforced when they engage in prosocial behavior, and exposed to consistent, fair, and nonphysical parental discipline.<sup>15</sup>

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13. Importantly, we don’t claim that each of the family ties burdens or benefits was obscured from prior analysis; it would be silly to suggest that incest or evidentiary privileges for family members were hitherto unexplored. What we hope was innovative about our efforts was trying to see what connections and critiques can be made by looking at the various benefits and burdens in tandem and juxtaposition.

14. See generally Berman, *supra* note 1.

15. *Id.* at 121 (quoting Carter Hay et al., *The Impact of Community Disadvantage on the Relationship between the Family and Juvenile Crime*, 43 *J. Res. Crime & Delinq.* 236, 327–29 (2006)).

Assuming *arguendo* this is all true, none of it calls into question a single prescription of ours. After all, we repeatedly acknowledged the role of families in reducing criminogenesis and in socializing citizens, among other important tasks.<sup>16</sup> We say nothing in our book that casts doubt on the wisdom of subsidizing family interests through civil institutions of distributive justice that would foster emotional attachment to parents; nothing that denies the benefits of encouraging juveniles to “engage in prosocial behavior”; and nothing in derogation of “consistent, fair, and nonphysical parental discipline.” Indeed, we actually express hostility to criminal law defenses that redound to parents when they physically assault their children in the name of “parental discipline.”<sup>17</sup>

To challenge any of our particular policy judgments on empirical grounds, Professor Berman would need some evidence that indicates, or even suggests, where we were off the mark. But Professor Berman not only fails to adduce empirical evidence to challenge our prescriptions, he also never challenges the prescriptive conclusions we draw with respect to a single instance of a burden or a benefit. Put simply, nothing in his essay gets to the particulars and suggests that the way we would prefer to alter a particular law has been shown to be antithetical to good “criminal justice outcomes.”

Indeed, as a prescriptive matter, all Professor Berman asseverates is the following:

As a matter of real-world criminal justice outcomes, it would seem that for all persons—and perhaps especially for women—*healthy, wholesome, and happy* family ties are likely to advance the authors’ asserted normative commitments, while *unhealthy, unwholesome, and unhappy* family ties are likely to undermine these normative commitments. If this is true, then it is misguided for the authors to call for a *general presumption against both family status benefits and burdens in the criminal justice system*. Preferable would be a general presumption in favor of benefits for healthy, wholesome and happy family ties and a general presumption in favor of burdens for unhealthy, unwholesome and unhappy family ties.<sup>18</sup>

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16. See, e.g., Markel, Collins, & Leib, *supra* note 4, at 25 (“All things being equal, we do not think states can succeed without being attentive to the way in which selves are constructed through families—and we agree that if states are going to feed on the capacity-generating benefits families confer, it is not inappropriate for families to demand some subsidization in return. Families may be labors of love, but they are full of real undercompensated labor all the same.”); see also *id.* at 53–56 (emphasizing the role family members and loved ones can play in facilitating successful prisoner reentry).

17. See Markel, Collins, & Leib, *supra* note 4, at 45–46.

18. Berman, *supra* note 1, at 156 (emphasis on “*general . . . system*” added).

This claim is intriguing but entirely undeveloped. Professor Berman doesn't specify a single example of a criminal justice policy that would constitute a burden that should be placed on "unhealthy, unwholesome, and unhappy family ties." Nor does he identify one benefit that should be enjoyed by defendants in order to cultivate "healthy, wholesome, and happy family ties." We also note some discomfort with Professor Berman's use of the word "wholesome" here. Who gets to decide whether any particular family grouping is "wholesome?"<sup>19</sup>

Interestingly, Professor Berman's preference to support "healthy" family ties and burden "unhealthy" ones is nominally juxtaposed against our "general presumption" against the use of family status benefits and burdens. Although Professor Berman's review faults us for not having "dug deeper" into the study of family ties,<sup>20</sup> we wish he had read the book's description of the "general presumption" more attentively. As the book makes clear in the Introduction, develops in chapters 2 and 5, and implements in chapters 3 and 6, the general presumption we craft is intended to operate as nothing more than a speed bump that raises several kinds of reasons to be cautious about the use of family status. Specifically, the speed bump forces the policymaker to subject the use of family status in a particular context to something akin to equal protection analysis regarding suspect classifications.<sup>21</sup> The presumption forces the beginning of the inquiry, not the end of it.

Thus, importantly, we did not say that the law should jettison all manifestations of family status in the criminal law.<sup>22</sup> Rather, once we see that a criminal law uses family status, we argue that some scrutiny is warranted to ensure that the various benefits or burdens are justifiable vis-à-vis the core commitments of an effective and fair criminal law that prioritizes the security, liberty, and equality of citizens.

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19. Moreover, Professor Berman fails to indicate which of the burdens and benefits we've studied would actually help or hinder any families, wholesome or otherwise.

20. See *id.*, "Digging Deeper."

21. As we explain, we want policymakers, when tempted to use family status as the basis for a benefit or burden, to make sure there is an important or compelling objective and that the means adopted to pursue that objective are "narrowly tailored" to achieve that objective, looking especially to see whether alternative measures might be effective, such as a focus on function rather than status. Markel, Collins, & Leib, *supra* note 4, at xvii.

22. See, e.g., *id.* at 103 (arguing that we should preserve status-based duties to rescue for parents or spouses as a strong presumption that is overcome when parents terminate rights or when spouses divorce).

As we summarize in our Coda, some of the family ties benefits or burdens should be eliminated, while others can be plausibly justified once they are re-tailored in a manner that is less likely to raise concerns that the benefits or burdens are operating in ways that denigrate people living outside the traditional paradigm of heterosexual and repronormative families. As we noted above, Professor Berman doesn't challenge the result or reasoning of any of the applications of the general presumption.

### **B. Professor Chin's Plea for Clarity Regarding Empirical Values**

The preceding discussion vis-à-vis Professor Berman helps set the stage for our response to one of the critiques by Professor Chin, who helpfully does focus attention on one of our policy assessments regarding intrafamilial testimonial privileges. Before we engage that specific disagreement, however, Professor Chin raises a larger challenge: namely, he asks that we specify more clearly which of our policy conclusions would be better analyzed with more empirical information, and which ones are impervious to more data gathering. For instance, he writes:

What are courts to do if data could be generated to resolve a particular issue, but has not, or if data is unreliable or uncertain? For two reasons, it is insufficient to say that these questions should simply be answered through research. First, lack of determinate data does not let judges off the hook; judges must either consider, or not consider, family status in setting bail in every single bail decision. However, the theory could provide that governments should be required to generate the data on this . . . as quickly as possible, so that going forward, decisions would be made on the correct basis.<sup>23</sup>

In advancing this possibility, Professor Chin correctly reminds readers that getting empirical information is not costless and that justice should be “dole[d] out as the best available approximation rather than as an exact quantity”<sup>24</sup>—so we should be careful before anyone insists that the government perform empirical studies of every this and that.

But as should be clear by now (if it wasn't already clear in the book),<sup>25</sup> the methodological strategy of the book was to erect normative speed

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23. Chin, *supra* note 3, at 144.

24. *Id.*

25. See Markel, Collins, & Leib, *supra* note 4, at 150 (“We are open to being proven wrong through credible empirical evidence that would show that the benefits or burdens are

bumps to get judges and policymakers to think about why family status as a trigger for exemptions or liabilities, subsidies or taxes, within the criminal justice system might be troubling. Empirical evidence may show that they are, after all, needed because they prove valuable or necessary to achieve a compelling or substantial interest. Of course, a judge faced with applying a law that uses family status as a benefit or burden may not see herself as free to ignore the legislature; but in exercising the judge's discretion (say, within sentencing or statutory interpretation), we think our considerations certainly have some force.

Still, our primary audience for our recommendations was not the judges simply required to follow laws but those who make them, whether through common law development or through legislation, ordinance, or administrative regulation. We cannot force those people to do empirical analyses, and we know doing it well can be costly and complex. But without much already available to us on the empirical side before we began, our book at least furnishes a starting point for policymakers to consider the various normative costs and consequences involved in the criminal justice policies under analysis.

Professor Chin wishes we had been clearer about when we thought we saw a trump card that would render our prescriptions impervious to empirical challenge. In short, he sees three types of policy analysis: (1) when the commitment to principle renders almost all empirical analysis irrelevant, (2) when empirical analysis determines the right policy result, and (3) when a range of policy outcomes are plausibly consistent with principles and knowable facts.<sup>26</sup> Perhaps it is possible to divide the world of our policy recommendations into these three categories, and Professor Chin is certainly right that we didn't use these categories to summarize our book's contents. Unfortunately, when we wrote the book, we hadn't had the benefit of Professor Chin's typology to make clear when a policy prescription fell into one of the categories he specifies.

It is true that we think certain choices within criminal justice policy are likely to be immune from empirical contestation. For example, our

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necessary to achieve some compelling state goal that cannot be achieved through less discriminatory means. At the very least, we hope our evaluation of the benefits and burdens defendants receive throughout the criminal law encourages other thinkers and policymakers to develop more refined and systematic thinking about these pervasive practices.”)

26. See Chin, *supra* note 3, at 144.

commitment to nondiscrimination within the criminal justice system with respect to gays, single parents, and those with (or without) “nontraditional” families is quite strong, though we might divide amongst ourselves over how many Type I errors (mistaken convictions = false positives) or Type II errors (when the factually guilty go unpunished = false negatives) we would stomach to achieve equality in this respect. Nonetheless, the usefulness of the normative framework we develop in the book remains: policymakers will at least have a clearer sense of the various values at stake, some of which might be incommensurable.

Still, looking back at the book now, we don’t think it would be hard to identify places when we argue that empirical evidence would be particularly useful to settle a question of whether a family status policy is a good idea and when we are pretty confident that our normative commitments produce conclusions that are virtually immune to empirical evidence. Indeed, when we were summarizing our conclusions in the Coda,<sup>27</sup> we were clear that we remain open-minded to what better empirical evidence might show, but we expressed strong doubts that discriminatory treatment on the basis of status rather than caregiving function would ever be a narrowly tailored solution to further any compelling state interest.

Perhaps another way of answering Professor Chin’s charge is simply to say that almost all our final conclusions fall into category (3) because they are all provisional, with one exception: if the criminal justice system is going to use benefits and burdens tied to caregiving responsibilities, it must not discriminate against gays, single parents, or other individuals in alternative caregiving arrangements. Such policies would fall into category (1), where we doubt empirical evidence is likely to sway us.

Even summarizing our ultimate conclusions this way, however, casts at least some doubt on the usefulness of Professor Chin’s typology. After all, with some recommendations, we argued “in the alternative,” i.e., if you don’t extend to gays or others wrongly excluded, the burden/benefit must be rejected, but if you don’t discriminate, you can adopt or retain X policy, assuming the empirical facts are as we suppose. That’s what makes it hard to insert our recommendations cleanly into the categories Professor Chin provides.

Still, it is fair to generalize that many of our ultimate conclusions fall into category (3). As Professor Chin recognizes, the value of policy analysis

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27. Markel, Collins, & Leib, *supra* note 4, at 150.

in category (3) is to “highlight the costs, benefits, interests, values and other considerations that policymakers should use to choose from among reasonable alternatives. Policy analysis [within category (3)] can also identify the parameters beyond which policy would become unsound.”<sup>28</sup> That is what we hoped to do, for the most part. If we were successful there, the book performed its core function. As was clear to careful readers of the book, we could not always reach agreement on our prescriptions regarding the various laws under scrutiny in the book; surely we can’t be surprised that we can’t secure full agreement from readers.

Indeed, precisely for this reason, Professor Chin’s effort to show why he disagrees with one of our provisional conclusions—that we should by and large abandon intrafamilial testimonial privileges—doesn’t really shake the foundation of our book. To be sure, he makes some important points, undermining several admittedly weaker links in the chain of our arguments on that issue.<sup>29</sup> But Professor Chin’s specific thrust doesn’t require too much of a parry. That we didn’t capture every nuance under each of our normative guideposts only shows what we already know: policymakers will need to use our normative guideposts to consider different values and empirical foundations for judgment. That they might weigh accuracy more than equality in some cases is within the realm of reasonable disagreement.

Without more empirical evidence to answer some basic questions about what the likely effects of spousal privileges are, we can’t say definitively what a perfect criminal justice system should do. Would the eradication of the privilege lead to more lying or to more accurate information? We think the latter, but we don’t have the smoking gun study on that one, and

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28. Chin, *supra* note 3, at 145.

29. Kudos to Professor Chin, in particular on his footnote 10. Still, it remains unclear why Professor Chin is so averse to establishing presumptions (as speed bumps) against legal rules when the etiology of a law is patently troublesome. If a state were currently living under laws established during and by a theocratic regime, and then, over time, the state tried to rectify many of its laws to eliminate discrimination against religious minorities, would it be so terrible to lodge skepticism toward those remaining laws, especially when those remaining laws, even though facially neutral, operate in a manner that disadvantages those religious minorities? To be clear, we weren’t suggesting that the etiology, standing alone, was a reason to strike down a law that has already been modernized and “cleansed.” Rather, we were making a narrower claim: that criminal laws that had once served the ends of patriarchy need to be examined to ensure that they no longer are drafted in such a way as to continue facilitating state-sanctioned subordination of women.

we're uncertain how one would measure that anyway. Perhaps Professor Chin's instincts on that issue differ—but we notice that he isn't waving such a study in our face, either. Our effort at coming up with a provisional conclusion was based on what we think we know and on the values we forthrightly admitted; thus it constitutes a first pass at applying our framework. The framework is more important than the ultimate evaluation, which we concede requires more information, when plausibly available and subject to assessment, and may require policymakers to prioritize among incommensurable values. As we've maintained: bring us a study and, if it holds up, we'll add it to the mix.

What we won't add to the mix, however, is Professor Chin's argument that the spousal privileges might be justifiable because the criminal law may be used to "reinforce community values."<sup>30</sup> At least there, we do have a "category (1)" backstop: that the criminal law cannot be used to reinforce a discriminatory community value. If jurisdictions are not willing, for instance, to open up marriage to same-sex partners, we simply aren't willing to let a liberal state reinforce a discriminatory institution with the apparatus of the criminal law. But, of course, even if the state does open up marriage to gays and does nothing more, it still creates a world that places coupling ahead of individuals or noncoupled groups—a posture that stands, in the criminal justice context, in need of strong justification beyond "reinforcement of community values." So although Professor Chin's helpful critique is forthright about his desire to promote equality in marriage for gays, and thus fix some of the problems we identify, he does not think it's impermissible for the criminal justice system (or other aspects of the state) to distribute benefits (or burdens) that would operate to promote coupledness as against the interests of those who would remain single or polyamorous. Whether such policy design in the context of distributive justice is tolerable remains highly contested; it's something about which the three of us have substantial concerns.<sup>31</sup> But it is precisely the *criminal* law's ability to reinforce community values so coercively that makes these

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30. *Id.* at 148. Professor Chin himself won't have the criminal law reinforce community values that discriminate against gays. See *id.* at n.11.

31. For an excellent and lacerating overview of the extent to which our civil laws promote and privilege family status, see Ruthann Robson, *Compulsory Matrimony*, in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate, 2009).

discriminatory statements so dangerous, requiring us to be very careful about avoiding such statements altogether.

Indeed, it's partly for that reason that we must also protest Professor Chin's claim that liberal minimalism "is a device that will identify only nondebatable cases."<sup>32</sup> Professor Chin advances his point by reference to Professor Darryl Brown's discussion of how sodomy prohibitions were frequently thought justified by the harm principle.<sup>33</sup> Unfortunately, we don't think this is enough to substantiate his claim against liberal minimalism. First, we don't equate liberal minimalism with the harm principle as such. Even if we had done so, that people might have made spurious arguments in the past under the guise of the harm principle (as in the examples furnished by Prof. Brown) doesn't mean that the harm principle or other limiting strategies have no capacity to police the boundaries of when it's permissible to invoke such a principle or limit.

More importantly, we used the modifier "liberal" prior to minimalism to convey two important meanings in our book. One had to do with the significance of being able to ascribe voluntariness to a person's action prior to criminal liability (through some germane exercise of autonomous choice), and the second had to do with ensuring the criminal law didn't trample on fundamental individual liberties. Thus, for example, if socially conservative legal moralists wanted to impose criminal law burdens on siblings or uncles or aunts by virtue of the "harms" such burdens were meant to prevent, our liberal minimalism would point out that this form of familial status is, on its own, an impermissible basis to create criminal liability, since no one "opts in" to such familial status. Maybe that seems like a "nondebatable" case, but consider: many people (including people who don't necessarily think of themselves as social conservatives, such as Professor Cahn) would reject our proposal to get rid of incest laws placing criminal prohibitions upon mature consensual sexual relations between adult siblings or aunts and uncles and their nephews or nieces. If that's the case, then liberal minimalism cannot be so easily dismissed as Professor Chin seems to suppose.<sup>34</sup>

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32. See Chin, *supra* note 3, at n.13.

33. See *id.* (quoting Darryl K. Brown, *History's Challenge to Criminal Law Theory*, 3 *Crim. L. & Phil.* 271, 281 (2009)).

34. Professor Chin also argues that liberal minimalism should counsel in favor of keeping the parental discipline defense because excessive parental violence could be civilly regulated. Although we embrace the idea of "parental and pediatric education" to prevent spanking,

Liberal minimalism, one might reasonably think, has implications beyond criminal law. But we didn't avoid analysis of the civil law and the institutions of distributive justice in the book just because of our comparative advantage as scholars of criminal law. Rather, we think criminal law has distinctive commitments and dangers that make it necessary to be *especially* concerned about discrimination on the basis of family status within its domain.<sup>35</sup> That we leave open the possibility of legitimate reasons for civil legal institutions to consider family status doesn't render our analysis akin to a simple barter about price.<sup>36</sup>

We'll close this section of our reply by reference to one argument we wish to emphasize about the nature of empirical studies that overlaps in its relevance to answering both Professor Berman and Professor Chin. Although we've earlier alluded to the point here, we think it's worth reiteration that empirics only get you so far when analyzing the justifications underlying criminal laws. Consider the following examples:

- It shall be required of young brown-haired women to financially support older blond-haired women in their neighborhood if the blonds need the money; the failure to take adequate care of a needy older blond woman will render the younger well-off brown-haired woman eligible for criminal punishment.
- Jews will not be permitted or required to testify against each other in courts of law; the same goes for Presbyterians.

If states adopted rules like these, wouldn't it be worth setting out a preliminary set of reasons to think that these laws raise yellow or red flags? If states had rules like these permeating their legislative codes, we don't think, *pace*

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one of the reasons public enforcement against parental violence (beyond a de minimis standard) is necessary is because there is no plausible private enforcement mechanism: children will be typically unable to bring suit against parents. Cf., e.g., Markel, Collins, & Leib, *supra* note 4 at 104–05, 109, 113.

35. We recognize that civil and criminal justice can blend at points: for example, violations of tax laws can often be enforced with the apparatus of criminal justice. However, when the criminal law gets involved, we think there are serious reasons to be concerned about an overly promiscuous use of criminal sanction (e.g., infringing on basic liberties) as well as an arbitrary use of such sanction (e.g., denigrating persons by virtue of status, not conduct).

36. See Chin, *supra* note 3, at text accompanying n.12. We note the possibility that civil law could promote "family life" that is repronormative without being inherently discriminatory toward gays and lesbians.

Professor Berman, that it would be “problematically shallow or distorting” for criminal law professors to venture their considered views that these laws raise a number of troubling concerns based on what we know so far and could reasonably predict. It would be perfectly appropriate to note that these designations based on gender or religion or hair color are problematic in light of our aspirations for a just and safe legal order within a liberal democracy. The first rule, for instance, implicates concerns about arbitrary discrimination and unfair “takings” through the use of criminal law; the second raises similar concerns of arbitrary discrimination, and further presents a risk that the criminal justice system will face an increased level of Type I and Type II errors that jeopardize retribution and crime prevention—in the name of cultivating “fellow-feeling” among certain coreligionists.<sup>37</sup>

If we asked people to do an analysis of such laws as drafted, we wouldn’t judge them as having failed to dig deep simply because they weren’t able to produce empirical evidence showing Type I or Type II errors. Nor would we think the endeavor is a failure because they didn’t marshal empirical evidence of the crimes that weren’t committed because the privilege between the coreligionists conduced to less crime, rather than more crime. Assuming the possibility of such a deterrent effect, it would be pretty hard to verify empirically the crimes that weren’t committed as a result of the existence of these privileges. At best, we could see if jurisdictions with such evidentiary privileges had higher or lower crime rates, or perhaps we could see if a state that adopted such a privilege experienced a decline or rise in crime subsequent to its enactment or adoption. Thus, it might be true that “unless and until we have a deep understanding and full appreciation of the interplay of family connections and crime, any account or assessment of family-affected criminal laws will be shallow and potentially distorting.”<sup>38</sup> But if that’s the standard by which all legal analysis is

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37. Imagine two Jews and a Christian, Shimon, Levi, and Paul, respectively. Paul is, at T<sub>1</sub>, mistakenly convicted for a murder actually committed by Shimon. At T<sub>2</sub>, Shimon commits another murder, witnessed only by Levi, who also knows that Shimon committed the earlier murder and that Paul did not. The “proposed” rule prohibiting Jews from testifying against each other would mean that, if the prosecutors wanted to prosecute Shimon for the crime at T<sub>2</sub>, there would be increased risk of a false negative (i.e., Shimon escapes punishment); meanwhile Levi’s inability to inculcate Shimon for both crimes makes it more difficult to prove to others that Paul is the victim of a mistaken conviction, i.e., the rule increases the risk of a Type I (false positive) error.

38. Berman, *supra* note 1, at 120.

judged, especially at the beginning of a research agenda, it would be an odd one to use. Or so we think.

## II. PROFESSOR BERMAN'S NAGGING FEELINGS ABOUT OUR "TRUE" GOALS

The second part of Professor Berman's review raises a cluster of disparate inquiries.

### A. What Kind of Criminogenesis Matters?

First, Professor Berman argues that we're less interested in the criminal justice system and its distinctive values than we are in the "construction and norms of family status in modern society."<sup>39</sup> Professor Berman draws this inference about our "true project and motivation" and "true goals and commitments" by looking at Part II of our book, where, in the course of examining which factors should apply to the scrutiny of family ties burdens, we note that family ties burdens are less likely than family ties benefits to incentivize more crime directly or to disrupt the accurate prosecution of the guilty or exoneration of the innocent. We are puzzled by Professor Berman's speculations that the interests we identify as relevant to the first half of the book (having to do with family ties benefits) are less sincerely considered than the ones we think relevant to Part II (having to do with family ties burdens).

Let's stipulate for the moment that the criminal justice system has a compelling interest in reducing and punishing the incidence of (at least) *malum in se* crimes. For reasons we elaborate in the book and that should be readily perceptible to readers of this Essay, it seems likely to us that intra-familial evidentiary privileges or laws granting exemptions from prosecution for harboring family member fugitives are practices that create risks that will inhibit the just prosecution and punishment of persons engaged in *malum in se* crimes. By contrast, we expressed doubts that the family ties burdens we explore (e.g., criminal laws requiring adult children to pay for the costs of indigent elderly parents) will *directly* reduce Type I or Type II errors with respect to (*malum in se*) crimes. Of course, as we noted in

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39. Id. at 123.

the book, such laws obviously will create a new form of criminal liability for offenders who violate the laws creating family ties burdens, but that points to a different kind of criminogenesis concern than the one we were raising in Part I.<sup>40</sup>

If Professor Berman's claim is that family ties burdens such as parental support laws or bigamy laws *indirectly* serve to reduce or punish the incidence of *malum in se* crimes, then, if true, that would be a problem for our claim that the family ties burdens typically do not raise issues associated with the goal of reducing Type I and II errors. But, *contra* Professor Berman, we do actually consider such arguments when they have been raised in defense of these family ties burdens, such as parental supervision laws.<sup>41</sup> And if that's Professor Berman's argument, he has, again, adduced no evidence showing that states without such family ties burdens are suffering worse crime rates (especially with respect to *malum in se* crimes) than states with such family ties burdens.

## B. The Implications for Domestic Violence

In the same vein, and again, quite curiously, Professor Berman suggests our "true goals" associated with "our general presumption" against the use of family status leads us away from discussing the laws of domestic violence more.<sup>42</sup> Why, he asks, don't we address developments ranging from the "elimination of marital rape exceptions, to the invocation of uniquely severe sentences when parents rape or kill their children, to the creation of mandatory prosecution programs for domestic violence and mandatory reporting requirements for child abuse?"<sup>43</sup> We can't quite espy the connection between these "true goals" and this selection of what we do and do not examine.

But more importantly, as we explain in the Coda, we do have explanations for why we don't address the domestic violence laws in great detail, notwithstanding our view that these laws are a significant and important aspect of our fight against the scourge of domestic violence.

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40. This was the significance of the point we made in the footnote Professor Berman references. Markel, Collins, & Leib, *supra* note 4, at 199–200 n.9.

41. E.g., *id.*, at 112–18 (discussing deterrence evidence and arguments associated with parental supervision laws).

42. Berman, *supra* note 1, at 119.

43. *Id.* at 124.

As an initial matter, our studies revealed no obvious and consistent pattern to whether domestic violence laws across the states operate as either benefits or burdens. For example, the states continuing to accord some preferential treatment to perpetrators of marital rape could be characterized as conferring a benefit to a defendant based on his family status,<sup>44</sup> whereas a law mandating arrest in cases of domestic assault, but not stranger assault, could be characterized as a burden, assuming the “shall-arrest” law was triggered by legal family status, rather than just coresidence or intimate association. In other words, there is diversity regarding whether one’s family status triggers an enhancement or a mitigation of punishment in the domestic violence context.

Moreover, the book developed two significant claims relevant to the design of domestic violence policy. First, although much work to improve the situation has already been done in this regard in recent years, to the extent a domestic violence law is written in terms of traditional family status, we urged shifting the focus to circumstances and function, not legal family status.<sup>45</sup> (Co-residence or intimate association would be helpful factors to look at; the production of a marriage certificate, by contrast, should not be a necessary condition to serve as an element that triggers the intended protections.) Thus, needless to say, an individual victim should not be denied the protection of a state statute on restraining orders because she is in a same-sex relationship rather a heterosexual one. Second, if jurisdictions decide to impose burdens based on functional categories such as voluntarily assumed caregiving relationships, then we think it is justifiable (from the standpoint of our normative framework) to impose additional burdens (in terms of liability or punishment enhancements) because of the moral wrong associated with a caregiver abusing the trust owed to the recipient of care. We described this in the book as a separate wrong involving an abuse of trust that affects the public because the person who breaches a voluntarily entered caregiving relationship (e.g., a spouse or parent) has engaged in a form of “sequestering” and “lulling” of the sort that is analogous to the kind of duty that has traditionally triggered omissions liability at common law.

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44. See Markel, Collins, & Leib, *supra* note 4, at 11.

45. Of course, to the extent many states have drafted domestic violence laws in terms neutral to family status, they generally fall outside our designated focus of attention. As we said earlier, our decision not to examine them in depth obviously does not deny their significance to the criminal justice system as a whole.

### C. Why Family Status Ought to Be Largely Irrelevant to Criminal Liability

In further service to his thesis about our “true goals,” Professor Berman also challenges the analogy we make between religious affiliation or ethnic background on the one hand and the family status of the defendant on the other.<sup>46</sup> As we emphasize at different points, our view does not deny the psychological or moral importance of bearing the responsibilities and role of parent, sibling, daughter, and so forth.<sup>47</sup> Rather, we challenge the moral significance that family status ought to play in the distribution of benefits or burdens within the criminal justice system when we are able instead to focus on more clearly delineated functions. In that respect, we reiterate our point that family status is morally irrelevant to the determination of liability and punishment, just as one’s religious affiliation or ethnic background is in the absence of other relevant information.

To elaborate a bit more, we think it’s worth examining Professor Berman’s three specific contextual challenges on this point. First, regarding the issue of whether parents who rape or kill their children should be exposed to higher sentences,<sup>48</sup> we already mentioned how our Coda in fact addresses this question directly, arguing that this scenario usually permits a finding of a separate abuse of trust that occurs in that situation, and thus, that such a wrong permits increased punishment.<sup>49</sup> Of course, on our account, the application of the enhancement should not turn simply on whether the defendant is a parent or the victim is a minor child; rather the inquiry should be focused on whether the defendant can be said to have voluntarily undertaken a relationship of caregiving to a victim who can be said to be especially vulnerable to exploitation through that trust relationship, and whether such a trust relationship could be understood by the public to exist. That focus would encompass consideration of a range of factors beyond just bloodlines or legally recognized status relationships. So the voluntarily assumed caregiving relationship is the morally significant point upon which benefits and burdens ought to turn. The label of brother, mother, or uncle does little work alone.

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46. Interestingly, some other critics of the book try to gain traction by stressing the analogy between family status and religious affiliation. See Alice Ristroph & Melissa Murray, *Disestablishing the Family*, Yale L.J. (forthcoming 2010).

47. Markel, Collins & Leib, *supra* note 4, at 180 n. 62.

48. See Berman, *supra* note 1, at 124.

49. See Markel, Collins, & Leib, *supra* note 4, at 153.

This focus on function and circumstance, not family status, influences the outcomes in the other two cases Professor Berman proposes as tests: (a) a “mother’s decision to ‘kidnap’ her own son from an abusive ex-husband and kidnapping someone else’s child,” and (b) a “modern-day Jean Valjean stealing bread to feed his own family and stealing bread to give to a soup kitchen.”<sup>50</sup>

In the former situation, the defendant mother might be able to prove an affirmative defense (resulting from fear that the child will be endangered by the abusive parent); in other words, the status of the kidnapper as parent does not, in our view, legitimize the desire for leniency or no liability—it is the plausibility of the justification (or excuse) operating for the defendant. In the second hypothetical, we might wonder whether Valjean has better information (than a stranger) regarding imminent danger to the family, and that is what motivates the theft; if true, he too might be a suitable claimant for an affirmative defense.

Importantly, it is not, in our view, Valjean’s standing as caregiver as such that would negate liability or warrant reduced punishment. Indeed, if circumstances were such that an indigent neighbor knew of Valjean’s family’s imminent starvation, we would want the indigent neighbor to be able to benefit from an affirmative defense; we don’t see why one would limit the availability of the defense only to someone who stood in a legally recognized relationship to those within the Valjean family. Well, actually, we do see why—it is easy to use simple categories that the law has drawn on in the past for administrative ease, based on historical moral blind spots. But we spent great effort in the book trying to convince readers that administrative ease or uncritical embraces of tradition are no excuse for reflexively choosing status over factors like function and consent when it comes to matters as serious as criminal justice.

### III. PROFESSOR CAHN

Professor Naomi Cahn adds some welcome historical and cultural texture to some of the issues regarding voluntariness, incest, and domestic violence that we discuss in our book. That said, we’re not persuaded about the specific challenges to us that she advances.

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50. Berman, *supra* note 1, at 125. Note that Professor Berman’s hypothetical gives us no reason to think a person kidnapping someone else’s child will be saving that child from abuse.

### A. Voluntariness and Motherhood

Professor Cahn begins her essay by discussing the voluntary nature of family relationships, which we cite as an important consideration when evaluating whether a particular family ties burden is justified, and suggests that our account of voluntariness in the parent-child and spouse-spouse contexts is “highly problematic and insufficiently thick.”<sup>51</sup> Although she briefly mentions that voluntariness is hard to locate in the spousal context when there is domestic violence, she then focuses her discussion here entirely on the parent-child relationship and suggests that “poor women are least likely to use birth control and most likely to experience unplanned pregnancies, and so to call their parenthood ‘voluntary’ distorts their relationship with their children.”<sup>52</sup>

As we acknowledged in the book, there are some “complications with this general observation of voluntariness” in the context of parent-child relationships.<sup>53</sup> We are grateful to Professor Cahn for fleshing out the important role that poverty can play in influencing an individual’s decisionmaking regarding procreation.<sup>54</sup>

Nonetheless, even though it is true that poverty may affect a woman’s choices regarding procreation, we do not think that undermines our arguments. First, as long as individuals freely choose to engage in sexual conduct, and as long as the state continues to give individuals the option to terminate their parental responsibilities (e.g., by placing their children up for adoption), we believe it is appropriate to characterize the obligations that arise from the status of parenthood as voluntarily assumed, even

51. Naomi Cahn, *Protect and Preserve?* 13(1) *New Crim. L. Rev.* 127, 129 (2010).

52. *Id.* at 130. For what it’s worth, just as we acknowledge many of the difficulties associated with assuming voluntariness in the parental relationship under certain circumstances, our book also addresses the challenges to voluntariness that might erupt in the spousal context. See, e.g., Markel, Collins, & Leib, *supra* note 4, at 87–88. We specifically identified human trafficking victims forced into marriage as an example where voluntarism can easily be rebutted, but we concede that premarital domestic violence might also, in certain circumstances, be sufficient to rebut the ascription of voluntariness in the spousal context too.

53. Markel, Collins, & Leib, *supra* note 4, at 88.

54. And we recognize that various civil laws provide strong incentives for marriage and procreation. See generally Robson, *supra* note 31. That said, we don’t think the array of social influences and legal and economic incentives, as such, amount to coercion or compulsion in any form recognizable to ordinary linguistic or legal usage.

if the choice to retain parental rights is an emotionally or financially difficult one.

Importantly, even if parenthood under such circumstances *were* deemed involuntary, there is the significant question about how the law should judge the relative capacities and vulnerabilities of poor mothers vis-à-vis their children. If a woman becomes a mother in part because no subsidized forms of birth control are available, the administrators of Medicaid refused to pay for her abortion, and no abortion providers are willing to work pro bono,<sup>55</sup> would Professor Cahn really be willing to suggest that this poor woman should be relieved from the responsibility to protect her infant from imminent peril if she could do so at no risk to herself? In that situation, we think ensuring the safety of a child “remains the most fundamental of reasonable burdens,”<sup>56</sup> at least until she hands the child over to the state or some other private party who would assume the responsibility of care. Don’t get us wrong. Our society surely needs to do more to improve access for poor women to health care generally, and to contraception and abortion in particular. But those class-based problems don’t seem to us to be sufficient to relieve parents of a duty to perform costless rescues—a duty we think is voluntarily assumed given the available (though no doubt difficult and emotionally fraught) “avoidance” options of forbearing from sex, using contraception, abortion, or terminating one’s parental rights.

## B. Incest (among Adults)

Although Professor Cahn agrees with our views on most of the family ties burdens, she wants to challenge our views of incest. We think her principal disagreement with us here centers on whether incest bans should prohibit relationships between individuals who were once in a relationship of asymmetrical dependency—meaning parents and children, in all forms that relationship can take, including step-parenting and foster parenting—even after the children reach adulthood. For example, she argues that “it remains critical to recognize the uniqueness of the breach of trust between family members

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55. See Cahn, *supra* note 51, at 131 (describing how many poor women who want to have abortions cannot obtain them because Medicaid funding may generally not be used to fund abortions absent rape, incest, or endangerment to the life of the mother.)

56. Markel, Collins, & Leib, *supra* note 4, at 100.

that occurs if these family members engage in sexual relationships, even when the family members are adults.”<sup>57</sup>

Professor Cahn’s essay affords us the chance to reiterate our position on this issue. Two of the three authors (Collins and Leib) fully agree “that persons who once had a relation of asymmetric dependence should be precluded from future relations,” even when the parties are both adults, because of precisely the concerns that Professor Cahn identifies.<sup>58</sup> Professor Markel, on the other hand, believes that even these individuals may be able to form a relationship based on genuine and mature consent, assuming the parties were willing to take measures to signify that genuine and mature consent before others.<sup>59</sup>

To the extent that Professor Cahn is suggesting that the criminal law should be used to prohibit all relationships between adults of different generations, even when all the parties are mature adults, the three authors are of one mind on this issue—i.e., that a blanket prohibition via criminal law is improper. Imagine an uncle and niece, who meet for the first time when the niece is thirty-five years old and the uncle fifty-five. If the parties are truly capable of genuine and mature consent, we do not believe that the *criminal* justice system, with its threat of coercive stigma and/or incarceration, should be utilized to infringe upon their intimate associational rights in the absence of any showing of coercion. The state remains free to use mechanisms of civil justice, for example by denying marriage licenses, and the powerful weapon of social stigma to signal its disapproval of such relationships; we take no position on that issue.

### C. Domestic Violence

Finally, Professor Cahn turns to the issue of domestic violence and illustrates the seriousness of the problem and the long neglect of this issue by the criminal justice system. We largely agree with her descriptive characterizations of the problem. Moreover, as mentioned earlier, we think there is a basis for enhanced penalties in the context of crimes against those under one’s voluntary care based on an abuse of trust theory.<sup>60</sup> Professor Cahn

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57. Cahn, *supra* note 51, at 136.

58. Markel, Collins, & Leib, *supra* note 4, at 211 n.70.

59. *Id.* at 121; 211 nn.70, 72, 74.

60. Markel, Collins, & Leib, *supra* note 4, at 152–53.

appears to agree, arguing that “some crimes really are different because of the abuse of trust,”<sup>61</sup> and as we plainly indicated above and in the Coda to the book, we concur.<sup>62</sup> As we wrote and elaborated earlier, “breaking a covenant of care by inflicting injury [with mens rea] is thus a greater moral wrong than inflicting an injury on an individual to whom such a specific covenant of care is not owed . . . .”<sup>63</sup> But as we also emphasized, the abuse of trust theory supporting an enhancement would not be restricted to family members. We could imagine a range of people outside the spouse or parent context who might also warrant increased punishment based on voluntary assumptions of supervisory or custodial care.

Moreover, toward her conclusion, Professor Cahn endorses the controversial claim that victims should be able to dictate or control the criminal justice outcomes associated with domestic violence cases.<sup>64</sup> Whereas we may disagree (amongst ourselves) to varying degrees with the substance of the claim that victims should be given outcome-determinative influence on domestic violence as well as other crimes, we will prescind from extensive comment on Professor Cahn’s apparent prescription. After all, to the extent modern domestic violence statutes in American jurisdictions do not turn on family status, but instead focus on co-residence and/or intimate association, we don’t think our framework has anything unusually special to say regarding how to strike the balance between victims and prosecutors in this delicate context.<sup>65</sup> That’s why we thought this issue was beyond the scope of our book, a conclusion Professor Cahn notes.

61. Cahn, *supra* note 41, at 139.

62. Professor Cahn argues, however, without citation, that the “the book alleges that the law seems to assume domestic violence is worse than other kinds of violence,” Cahn, *supra* note 41, at 137. Professor Cahn misreads us here; the book recognizes that there is a diversity of approaches under past and current law regarding whether domestic violence is more condemnable than “nondomestic” violence. See Markel, Collins, & Leib, *supra* note 4, at 151 (noting that states have taken “wildly inconsistent” positions regarding domestic violence laws). Our normative approach, however, explains why we think domestic violence involving an abuse of power or trust warrants enhanced penalties.

63. *Id.* at 153.

64. Cahn, *supra* note 41, at 141 (“We might seek to develop new policies that allow victims control over choices in the criminal justice and mediation system because of their family ties.”).

65. We do commend to readers, however, that they consider the tensions identified by Jeanne Suk in her recent book, *At Home in the Law: How the Domestic Violence Revolution Is Transforming Privacy* (2009).

Unfortunately, Professor Cahn mistakenly thinks that, merely because we acknowledge this tension between victim autonomy and prosecutorial obligation, we are somehow committed to recognizing the need for special treatment for family ties.<sup>66</sup> Here, we disagree on two grounds. First, as mentioned above, the challenges posed by these laws to victims' autonomy arise in the domestic violence context regardless of whether the victim was related to the perpetrator. Second, and more importantly, the tension between recognizing the desires of victims and the desires of the prosecutors or public is a tension that, *contra* Professor Cahn, has long transcended the domestic violence context.<sup>67</sup>

#### IV. CONCLUSION

It is always rewarding to have an opportunity to reply to critics—especially distinguished ones who have taken the trouble to ask the hard questions. We reiterate our gratitude to them for engaging our work and giving us food for thought as we stand back and look at the product of our years of work together. We hope that this Essay captured a few useful observations and addressed some of our critics' largest concerns.

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66. Cahn, *supra* note 41, at 137 (“Domestic violence should, however, be treated differently from other violent crimes not involving family members.’ Indeed, one of the ‘important questions that are beyond the scope of [the book’s] limited efforts’ is how ‘criminalization may itself be threatening to women’s autonomy’ (153). Surely this is not a question that would be asked about other violent crimes; we would not suggest that criminalizing violence ‘may itself be threatening to [the victim’s] autonomy.’ Yet, given the nature of domestic violence, this is a legitimate inquiry. Obviously, domestic violence presents a complex set of issues with respect to criminalization within the family.”).

67. Indeed, this well-trod territory over the rights and roles of victims (across all crimes, not just ones involving domestic violence) has long been an obsession for theorists ranging from retributivists to restorative justice proponents, among others. See generally Markus Dubber, *Victims in the War on Crime: The Use and Abuse of Victims’ Rights* (2002); George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 *Buff. Crim. L. Rev.* 51 (1999); Michael S. Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 *Buff. Crim. L. Rev.* 65 (1999); and Douglas E. Beloof, Paul G. Cassell, & Steven J. Twist, *Victims in Criminal Procedure* (2nd ed. 2005).