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When Family Matters

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ALAFAIR S. BURKE

When Family Matters

ABSTRACT. In *Privilege or Punish: Criminal Justice and the Challenge of Family Ties*, Dan Markel, Jennifer Collins, and Ethan Leib make an important contribution to the growing literature on criminal law and families by documenting the ways that criminal law advantages and burdens actors based on familial status and identifying the potential harms that are unleashed when criminal law recognizes family status. This Feature seeks to complement that contribution by situating the authors' observations within the context of two considerations beyond *Privilege or Punish's* immediate focus: chronological trends and the practical realities that can shape application of formal law. By distinguishing criminal law's traditions from contemporary trends, the Feature identifies both a gradual de-emphasis of legally recognized family forms and an increased willingness to enforce criminal law within families, regardless of how they are comprised. It concludes by arguing that effective enforcement of criminal law within families often requires the criminal justice system to yield to family relationships, not for the purpose of promoting preferred family forms, but to serve the criminal law's familiar retributive and utilitarian goals.

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INTRODUCTION

A man's tires are slashed. A woman is slapped. A child is sexually abused.

Because every penal code in the country criminalizes vandalism,¹ assault,² and child molestation,³ criminal law reaches these harms.

But what if the owner of the slashed tires is the suspect's wife, making the damaged tires joint property? What if the slapped woman was struck by her husband and does not want to press charges? And what if the child was molested by his mother and is incapable, either legally or psychologically, of testifying against her?

In *Privilege or Punish: Criminal Justice and the Challenge of Family Ties*,⁴ Dan Markel, Jennifer Collins, and Ethan Leib ask whether criminal law should ever recognize family relationships, and, if so, when and how? As a descriptive summary, the book exhaustively documents the diverse ways that criminal law both advantages and burdens actors based on familial status. The criminal law creates "family ties benefits" when it confers testimonial privileges upon spouses,⁵ exempts family members from prosecution for harboring fugitives,⁶ permits parents to use corporal punishment against their children,⁷ mitigates murder to manslaughter when provoked by adultery,⁸ shows lenience toward

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1. The common law punished intentional damage to the property of another as the misdemeanor of malicious mischief. 52 AM. JUR. 2D *Malicious Mischief* § 1, at 122-24 (2000). The Model Penal Code refers to the offense as "Criminal Mischief." MODEL PENAL CODE § 220.3 (1980).
 2. At common law, an act of physical violence was considered a battery, and conduct creating the apprehension of violence was an assault. See 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 16.1 (2d ed. 2003) (distinguishing assault from battery). Many modern penal codes, however, dispense with the term "battery" and generally define the infliction of physical injury as some form of assault, and offensive physical touching that does not inflict injury as "harassment." See *id.* at 551 n.2; MODEL PENAL CODE § 250.4 (1980) (defining an offensive touching as harassment).
 3. See LAFAVE, *supra* note 2, § 17.4(c) (tracing the evolution from an early English statute prohibiting carnal knowledge with a child under ten years of age to contemporary state statutes criminalizing sexual activity with a broader range of minors).
 4. DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES (2009).
 5. *Id.* at 3-5.
 6. *Id.* at 6-8.
 7. *Id.* at 9-10.
 8. *Id.* at 10-11.

sex offenders who victimize family members,⁹ and favors family members in pretrial release,¹⁰ sentencing,¹¹ and incarceration decisions.¹² Conversely, the criminal law creates “family ties burdens” when it imposes duties to rescue family members,¹³ holds parents responsible for their children’s crimes,¹⁴ prosecutes incest, bigamy, and adultery,¹⁵ and criminalizes the nonpayment of child and parental support.¹⁶

As a normative project, the book identifies the potential harms that are unleashed when criminal law recognizes family status: the perpetuation of patriarchal norms,¹⁷ discrimination against nontraditional families,¹⁸ interference with crime control and an efficient criminal justice system,¹⁹ infringement upon recognition-worthy liberties,²⁰ and the unnecessary levying of criminal sanctions where other measures might suffice.²¹ Because of these implications, the authors counsel cautiousness against family ties benefits and burdens.²² The authors instead favor a facially neutral criminal law—one in

9. According to the authors, the criminal law privileges family status directly by making it harder to convict men who commit sexual offenses against their wives than those who victimize nonspouses. *Id.* at 11. It does so indirectly when the state prosecutes intrafamily sexual offenses as incest rather than under general sex abuse statutes that would trigger sex offender registration requirements. *Id.*

10. *Id.* at 12.

11. *Id.* at 12–16.

12. *Id.* at 16–19.

13. *Id.* at 63–65.

14. *Id.* at 66–69.

15. *Id.* at 69–72.

16. *Id.* at 72–73.

17. *E.g., id.* at 26–27, 84.

18. *E.g., id.* at 29–31, 83–84.

19. *E.g., id.* at 27–29, 32.

20. *E.g., id.* at 96.

21. *E.g., id.*

22. At the same time, *Privilege or Punish* acknowledges the work of scholars who highlight the importance of families to the development of good citizens. *See, e.g.,* LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 *GEO. L.J.* 1871 (1997). The authors do not argue that criminal law can *never* promote families or particular forms. Instead, they create a presumption against criminal laws that confer family ties benefits and burdens in light of their normative concerns about such laws. MARKEL ET AL., *supra* note 4, at xvii, xix, 25, 85.

which families and family members are advantaged or burdened by generally applicable criminal statutes, without regard to family status.²³

By describing the ways that criminal law privileges and punishes actors based on family status, and by identifying the potential harms of the resulting benefits and burdens, *Privilege or Punish* unquestionably makes a significant contribution to a growing literature at the nexus of criminal and family law. This Feature seeks to complement that contribution by situating the authors' observations within the context of two considerations beyond *Privilege or Punish*'s immediate focus of family ties benefits and burdens: chronological trends and the practical realities that can shape application of formal law. First, using the book's thorough cataloguing of criminal law's reactions to family status, this Feature seeks to distinguish between American criminal law's traditions and its more contemporary developments. Because *Privilege or Punish* is concerned with the criminal law's reliance on formal family status, antiquated and rarely enforced statutes against adultery and the dwindling number of manslaughter statutes that codify spousal infidelity as automatic grounds for provocation are collected alongside more recent inventions such as sex offender registries and the criminalization of the failure to pay child support.²⁴ Similarly, the book rightly condemns the criminal justice system's traditionally light hand toward violence in the family, but the contemporary burgeoning of law enforcement directed against domestic violence is largely beyond its scope.²⁵ By comparing the old against the new, this Feature credits an important shift in criminal law's treatment of families—from previously viewing families as private as long as they conformed to prevailing notions of family, to now enforcing its proscriptions even when it must adjust to do so within the home.

This Feature also explores a second important development in the criminal law's treatment of families: the recognition of the interplay between criminal law and procedure. Recent criminal law scholarship teaches us that real-world

23. The authors instead propose a registry system through which individuals, whether related under family law or not, could opt into a system of voluntary caregiving obligations, punishable by criminal law if violated. This Feature does not address that aspect of *Privilege or Punish*'s proposal. For thoughtful responses to the authors' suggested reform, see Roderick M. Hills, Jr., *Do Families Need Special Rules of Criminal Law?: A Reply to Professors Collins, Leib, and Markel*, 88 B.U. L. REV. 1425 (2008); and Michael M. O'Hear, *Yes to Nondiscrimination, No to New Forms of Criminal Liability: A Reply to Professors Collins, Leib, and Markel*, 88 B.U. L. REV. 1437 (2008).

24. See *infra* notes 32–53 and accompanying text.

25. See *infra* notes 61–66 and accompanying text.

processes shape the practical effects of formal doctrine.²⁶ However, because it is concerned with distinctions based on formal family status, *Privilege or Punish* largely adheres to the four corners of formal statutory law, forestalling any discussion of what it deems to be the law “on the streets.”²⁷ Perhaps because of that self-imposed limitation, the authors do not explore one reason why criminal law must sometimes adjust to families—not to privilege or punish family for family’s sake, but instead to reach a domestic sphere that the law traditionally treated as private and impenetrable.

This Feature recasts *Privilege or Punish*’s thorough cataloguing of the many collisions between formal criminal law and families through the lenses of time and procedural realities. Looking at changes to the criminal law’s approach to families over time, Part I traces an evolution in criminal law’s treatment of family boundaries and intrafamily privacy. Because criminal law was traditionally reluctant to intervene within families out of concern for intrafamily privacy, traditional criminal law also promoted and regulated the boundaries that divided properly constituted (and presumptively private) families from other relationships that could be policed.²⁸ Over time, however, the lines that separate formal families from other relationships have lost their traditional importance as criminal law has become more willing to enforce its proscriptions within families, despite traditional concerns about privacy. Many of the family ties benefits and burdens documented in *Privilege or Punish* were intended to regulate family boundaries and protect intrafamily privacy. As criminal law has learned to cross family boundaries, the benefits and burdens that served to regulate and protect those boundaries have begun to fall from favor.

Turning to the real-world implications of applying criminal law to families, Part II draws in part on my experience prosecuting cases involving families²⁹ and argues that criminal law has learned not only to reach within families, but also to react to the realities within them. The application of formal criminal law to families is often complicated by the past, present, and future relationships between affected family members. Because of the procedural difficulties of applying formal law to families, the criminal justice system must sometimes

26. See *infra* note 70.

27. MARKEL ET AL., *supra* note 4, at 152 (noting in a brief discussion of domestic violence reforms that “the law ‘on the streets’ falls a bit outside the purview of our book” because the book focuses on “facial benefits”).

28. See *infra* notes 32–37 and accompanying text.

29. Prior to entering academia, I served as a Deputy District Attorney in Portland, Oregon, where I prosecuted domestic violence, child support, and parental responsibility cases, among other offenses.

yield to such relationships, not for the purpose of facilitating or preserving families per se, but to achieve the criminal law's usual objectives of retribution and deterrence within them.

I. PAST VERSUS PRESENT

Privilege or Punish assumes that when criminal law yields to family status, it usually does so not to serve its accepted functions of retribution and deterrence, but instead with the separate purpose of facilitating certain family structures. For example, the authors conclude that "the criminal justice system, with a few exceptions, is not generally an appropriate place to foster a particular vision of family life."³⁰ Similarly, they summarize their wariness of the role that family status plays in criminal law by stating that the criminal justice system "should only rarely and cautiously serve as a vehicle for directly promoting the institution and goods of family life."³¹ This assumption affects both the book's descriptive and its prescriptive content, as the authors depict a criminal law landscape crowded with family ties benefits and burdens and then conclude that most of them serve no legitimate retributive or utilitarian purpose.

The authors' depiction of criminal law's objectives regarding families is especially reflective of criminal law's traditional proscriptions. The feminist critique of criminal law (as with other areas of the law) is that it historically treated families, marriages, and domestic life as "private," insulated from state interference.³² As *Privilege or Punish* correctly notes, criminal law shielded the

30. MARKEL ET AL., *supra* note 4, at 149.

31. *Id.* at 154.

32. See generally CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 193-94 (1989) (noting how traditional legal conceptions of privacy have shielded marital rape and other forms of violence against women); Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 338-48 (2003) (summarizing the law's historical ambivalence toward intervening in family life); Martha Minow, *Between Intimates and Between Nations: Can Law Stop the Violence?*, 50 CASE W. RES. L. REV. 851, 852 (2000) ("[T]he private sphere shielding violence in the home lay beyond the reach of the law . . ."); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1165 (1999) ("One of the most deeply embedded principles in American family law is the principle of family autonomy, which limits the state's intervention in the affairs of the intact family."); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1835-39 (1985) (discussing the "legal tradition of noninterference in the family"); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974 (1991) (maintaining that protection of family privacy should not prevent state efforts to reduce domestic violence); Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2154-61 (1996) (discussing

privacy of families by, for example, conferring testimonial privileges between spouses³³ and, more troublingly, enabling violence toward wives and children, both through formal law and institutionalized acquiescence.³⁴

In light of criminal law's historical prioritization of intrafamily privacy, it is perhaps unsurprising that criminal law traditionally regulated the boundaries that determined family forms and thereby separated private sanctuaries³⁵ from public concern. Although criminal law was reluctant to intervene in the private affairs of properly constituted marriages, it did not hesitate to punish those who violated or challenged the normative ideals of family composition. From this perspective, as Melissa Murray has noted, prohibitions against incest, adultery, sodomy, prostitution, and birth control can all be seen as criminal law's regulation of marriage as a heterosexual and procreative institution.³⁶ So too could we cast the common law's provocation doctrine, which mitigated murder to manslaughter when directed against adulterous wives or interposing paramours.³⁷ In *Privilege or Punish* terms, criminal law's family ties benefits and burdens worked hand in hand to define, protect, reinforce, and police the contours of properly constituted families and the lines of intimacy that distinguished between the public and the private.

But contemporary reforms challenge the traditional narrative about criminal law's treatment of family and family status. Seven years after the Supreme Court recognized a right to contraception within marriages,³⁸ it extended its reasoning to unmarried couples.³⁹ States stopped enforcing

how courts have used the rhetoric of "affective privacy" to privilege violence by upper- and middle-class men).

33. See MARKEL ET AL., *supra* note 4, at 3-6.

34. See *id.* at 9-11, 26-27.

35. Logan, *supra* note 32, at 322, 338-48 (labeling the family as a "sanctuary" from the enforcement of criminal law).

36. See Melissa Murray, *The Private Life of Criminal Law*, in CRIMINAL LAW CONVERSATIONS 692, 692 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) ("[C]riminal law has worked in tandem with family law to police the normative contours of marriage and intimate life."); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1256, 1270 (2009) ("Historically, criminal law and family law have worked in tandem to produce a binary view of intimate life that categorizes intimate acts and choices as *either* legitimate marital behavior or illegitimate criminal behavior.").

37. See, e.g., *Rowland v. State*, 35 So. 826, 827 (Miss. 1904) ("[T]here can be no difference in the degree of the crime, whether the betrayed husband slays the faithless wife or her guilty paramour.").

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

39. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

sodomy laws long before the Court struck them down in *Lawrence v. Texas*.⁴⁰ As the authors note, a majority of states no longer criminalize adultery, and those that do typically leave the prohibition unenforced.⁴¹ Although states do criminalize bigamy,⁴² the few recent polygamy-based prosecutions also involved marriage-neutral charges such as child sexual abuse or welfare fraud, suggesting that prosecutors target polygamists not for plural marriage but for the harms associated with them.⁴³ The trend toward mitigating murder to

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40. 539 U.S. 558, 572-74 (2003) (summarizing a pattern of nonenforcement of state sodomy laws). Even when the Supreme Court initially upheld the criminalization of sodomy in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the trend against such laws was under way. The majority of states had already repealed their sodomy statutes, and even the state of Georgia, although defending the constitutionality of its prohibition in *Bowers*, conceded it was unable to locate a record of any prosecution for private homosexual sodomy under the statute for several decades. *Id.* at 198 n.2 (Powell, J., concurring). As Justice Powell wrote in his concurrence, “[t]he history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct.” *Id.* By the time the Court overturned *Bowers* in *Lawrence*, only thirteen states criminalized sodomy, and prosecutions by those states were rare. *Lawrence*, 539 U.S. at 573.
 41. MARKEL ET AL., *supra* note 4, at 71. The authors maintain that “adultery laws are a clear and conventional family ties burden” because they are enforced within the military and have collateral consequences in custody, adoption, and employment matters. *Id.* at 71-72. However, “the military is, by necessity, a specialized society separate from civilian society,” *Goldman v. Weinberger*, 475 U.S. 503, 506 (1986) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)) (internal quotation marks omitted), and the civil consequences of adultery may stem more from the continued perception that adultery is immoral than the formal criminalization of it.
 42. Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 290 n.51 (2004) (citing bigamy statutes).
 43. John Dougherty, *Polygamist Is Indicted in Assault of a Child*, N.Y. TIMES, July 23, 2008, at A14 (reporting that of six men involved in a polygamy scandal, including previously convicted rapist and sect leader Warren Jeffs, four had been charged with sexually assaulting minors and another one had been charged with failure to report child abuse, while only one was actually charged with bigamy); John Dougherty & Kirk Johnson, *Sect Leader Is Convicted As an Accomplice to Rape*, N.Y. TIMES, Sept. 26, 2007, at A18 (reporting that polygamist sect leader Warren Jeffs was convicted as an accomplice to rape of a fourteen-year-old church member); Dan Frosch, *Texas Report Says 12 Girls at Sect Ranch Were Married*, N.Y. TIMES, Dec. 24, 2008, at A17 (reporting that charges against men from a sect at the Yearning for Zion Ranch in Texas included both sexual assault of a minor and bigamy); Michael Janofsky, *Trial Opens in Rare Case of a Utahman Charged With Polygamy*, N.Y. TIMES, May 15, 2001, at A12 (reporting that prosecutors who had “largely ignored the state’s polygamists except in cases of child abuse and welfare fraud” were prosecuting Tom Green for child rape, bigamy, and criminal nonsupport); Ben Winslow, *Pro-Polygamy Group Strives to Educate: Principle Voices Reaches Outside, Inside Its Community*, DESERET MORNING NEWS (Salt Lake City), July 26, 2008, at B7 (reporting the Utah Attorney General’s policy that “it won’t prosecute bigamy per se, but instead focuses its resources on going after child abuse, sex crimes, domestic violence, and welfare fraud within polygamous communities”).

manslaughter abolishes adultery as a privileged source of emotion and entrusts juries to determine whether a reasonable person in the defendant's position would have been provoked into a heat of passion.⁴⁴ And although wives could not be prosecuted for harboring husbands at common law, currently federal law, the Model Penal Code, and a strong majority of states contain no family-based exceptions to harboring prohibitions.⁴⁵ In short, as even civil restrictions on marriage change faster than many of us ever imagined,⁴⁶ the criminal law no longer concerns itself with the policing of family boundaries. As a consequence, many of the family ties benefits and burdens set forth in *Privilege or Punish* are repealed, unenforced, and/or increasingly disfavored.

At the same time, contemporary criminal law is more willing to intervene *within* family boundaries to act upon conduct that was previously sanctioned as private. *Privilege or Punish* maintains that "the criminal law system still exhibits a great reluctance to interfere in the private life of the family,"⁴⁷ but a separate story can be found in just how much the criminal law's approach to family privacy has changed. For example, criminal statutes mandating the payment of child support⁴⁸ and holding parents liable for the crimes of their children,⁴⁹ both generally disfavored by the authors, evidence a willingness to intervene within families, even at the expense of intrafamily privacy. Similarly, although *Privilege or Punish* highlights the remaining vestiges of the common law's marital rape exception,⁵⁰ an alternative narrative could emphasize the marked

44. See Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 500 (2008) ("Today, provocation is considered legally adequate if the reasonable person in the defendant's shoes would have been provoked into a heat of passion."). The Model Penal Code is even more flexible, instructing jurors that the reasonableness of a defendant's explanation or excuse "shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." MODEL PENAL CODE § 210.3(1)(b) (1980).

45. *Privilege or Punish* emphasizes the exemptions for family members who harbor fugitives, depicting current exceptions as "significantly broader" than the common law exemption for wives because they extend to other family members. MARKEL ET AL., *supra* note 4, at 7. The authors also emphasize that fourteen states "remarkably" exempt family members from harboring even those fugitives who committed serious felonies and another four reduce liability based on family status. *Id.* However, the authors also note that the majority of state penal codes, as well as federal law and the Model Penal Code, contain no family-based exceptions. *Id.* at 162-63 nn.46-48, 52 and accompanying text.

46. Although the state of same-sex marriage is fluid, at one time six states permitted same-sex couples to marry. Abby Goodnough, *New Hampshire Approves Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19.

47. MARKEL ET AL., *supra* note 4, at 27.

48. *Id.* at 140-44.

49. *Id.* at 112-18.

50. *Id.* at 11, 27, 177 n.39.

trend toward abolishment of spousal immunity for rape.⁵¹ The criminal law retains parental rights to reasonable discipline,⁵² but child abuse prosecutions have increased despite the continuation of corporal punishment doctrine.⁵³ Federal law links the receipt of federal funds to state compliance with child abuse reporting and investigation requirements.⁵⁴ State child protective service agencies are more likely to refer cases of neglect and abuse to law enforcement for a criminal investigation,⁵⁵ and prosecutors are more likely to pursue charges.⁵⁶ Once charges are filed, prosecutors are better at making their cases. The National District Attorneys Association established the National Center for Prosecution of Child Abuse in 1985 to provide training and technical assistance to prosecutors across the country.⁵⁷ Police and prosecutors receive

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51. Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 7 (“[M]arital rape’ is no longer considered an oxymoron.”); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1375 (2000) (noting that “[v]irtually every state legislature has revisited the marital rape exemption over the last twenty-five years,” but that “[a] majority of states still retain some form of the common law regime”); Karen Morao, *Domestic Violence and the State*, 7 GEO. J. GENDER & L. 787, 791 (2006) (reporting that although some states confer marriage-based defenses in rape cases, “all states have broken from historical tradition and currently recognize spousal rape as a crime”) (footnotes omitted).
 52. MARKEL ET AL., *supra* note 4, at 9-10, 45-46.
 53. See David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, FUTURE OF CHILD., Summer/Fall 1994, at 31, 34 (explaining the difficulty of tracking crime statistics measuring crimes against child victims but reporting that sexual abuse and child mistreatment cases as a whole increased in the 1980s and early 1990s); Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 496-97 (1988) (noting increase in both child abuse reports and substantiated claims); John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873, 880 (1994) (reporting a substantial increase in child abuse prosecutions in the 1980s); Eric C. Shedlosky, *Protecting Children from the Harmful Behavior of Adults*, 98 J. CRIM. L. & CRIMINOLOGY 299, 313-14 (2007) (linking an increase in the number of child abuse prosecutions to the passage of the Adoption and Safe Families Act and a number of highly publicized child abuse cases).
 54. See Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101-5106 (2006)).
 55. See Meghan Scahill, *Prosecuting Attorneys in Dependency Proceedings in Juvenile Court: Defining and Assessing a Critical Role in Child Abuse and Neglect Cases*, 1 J. CENTER CHILD. & CTS. 73, 85-86 (1999) (describing the coordination of civil and criminal child abuse proceedings).
 56. Victor I. Vieth, *The Mutilation of a Child’s Spirit: A Call for a New Approach to Termination of Parental Rights in Cases of Child Abuse*, 20 WM. MITCHELL L. REV. 727, 773 (1994) (citing data from the Bureau of Justice Statistics demonstrating that ninety percent of offenders arrested for crimes against children are prosecuted).
 57. NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, AM. PROSECUTORS RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE, at xxxiv (2d ed. 1993).

specialized training and work with multidisciplinary teams to interview child witnesses.⁵⁸ Legislatures and courts have adopted procedures intended to protect minors who testify against their abusers.⁵⁹ Moreover, despite a parent's right to use corporal punishment, jurors may be less likely to acquit in light of heightened public awareness about child abuse.⁶⁰

The erosion of the traditional border between criminal law and family privacy is perhaps best evidenced by the last thirty years of domestic violence reforms.⁶¹ Indeed, thanks to changes in both formal law and police and

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58. Scahill, *supra* note 55, at 85-86 (discussing multidisciplinary teams that coordinate civil and criminal child abuse proceedings); Jonathan Scher, Note, *Out-of-Court Statements by Victims of Child Sexual Abuse to Multidisciplinary Teams: A Confrontation Clause Analysis*, 47 FAM. CT. REV. 167, 174-75 (2009) (discussing interview training provided by the American Prosecutors Research Institute); *see also* Myers, *supra* note 53, at 899 n.126 (noting improvements in law enforcement training on child abuse and interviewing techniques).
 59. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609-11 (1982) (striking down a mandatory rule requiring closure of the courtroom from the press during a minor victim's testimony in sexual abuse trials, but noting that trial courts have discretion to weigh the interests of the victim against First Amendment interests on a case-by-case basis); John E.B. Myers, *A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 PAC. L.J. 169, 170 (1996) (noting a trend toward the relaxation of the usual evidentiary and procedural rules of the adversary process to facilitate the testimony of minor victims); Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009 (2007) (discussing the admissibility of child hearsay and the competency of child witnesses in light of the Supreme Court's recent Confrontation Clause jurisprudence).
 60. *See* Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1340-41 (2000) (noting the success of national organizations in heightening public awareness of cases involving child abuse). Although spanking by parents remains prevalent, *see* Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 428-29, there is a trend toward the opposition of corporal punishment. The majority of states ban corporal punishment in schools, and the American Medical Association, the American Bar Association, the National Education Association, and other noteworthy professional organizations oppose all forms of corporal punishment. Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 593-94 (2003). In states that define the parental discipline defense in terms of the "reasonableness" of the punishment inflicted, *see id.* at 636-37, juror attitudes toward corporal punishment will shape the scope of the defense. *See generally* CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003) (noting the ways that social norms affect juror applications of criminal defenses requiring reasonableness).
 61. *See* Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552 (2007) (surveying the criminal justice system's advancements in the treatment of domestic violence as a crime); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1539 (1998) ("Legal reforms of the last twenty years mark a shift in the characterization

prosecutorial policies, the criminal justice system sometimes responds more seriously to intrafamily violence than other forms of assault. For example, some state statutes authorize, or even mandate, warrantless custodial arrests for domestic violence misdemeanors that would lead only to a citation if committed against a stranger.⁶² Police and prosecutors devote extra resources to domestic violence intervention through specialized training programs and niche investigative and trial units intended to increase the likelihood of prosecution in domestic violence cases.⁶³ Some state legislatures have authorized longer sentences for violence committed against intimates compared to other victims.⁶⁴

Moreover, criminal law's intervention into intimate and family relationships can be highly intrusive and unwanted. Under no-drop policies, prosecutors pursue criminal charges in domestic violence cases regardless of

of domestic violence from a private to a public problem.”). For an overview of legal reforms targeting the problem of domestic violence, see generally EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* (3d ed. 2003); and ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* (2000).

62. Many states have codified the common law rule that police can arrest misdemeanants without a warrant only if the misdemeanor is committed in a police officer's presence. See *United States v. Watson*, 423 U.S. 411, 419 (1976). Nevertheless, every state in the country permits police to make warrantless arrests in all domestic violence cases, despite limitations on warrantless arrests in other misdemeanor cases. Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1859 (1996). Other states go further and mandate, rather than merely authorize, arrest whenever probable cause exists in a domestic violence case. See Vito Nicholas Ciraco, Note, *Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey*, 22 WOMEN'S RTS. L. REP. 169, 172-75 (2001); Machaela M. Hootor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 677 (1997).
63. See Proclamation No. 7601, 3 C.F.R. 142 (2002) (listing specialized domestic violence prosecution units among important reforms); BUZAWA & BUZAWA, *supra* note 61, at 177-90 (discussing prosecutorial advancements in domestic violence cases); LAWRENCE W. SHERMAN, *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* 25-54 (1992) (discussing contemporary police responses to domestic violence).
64. E.g., ALA. CODE ANN. § 13A-6-132 (LexisNexis 2009) (defining domestic violence in the third degree as a Class A misdemeanor even when committed through harassment, an offense that would otherwise constitute only a Class C misdemeanor under section 13A-11-8); GA. CODE ANN. § 16-5-20(d) (2009) (providing that simple assault committed against a past or present spouse, a cohabitant, or other protected party “shall be punished for a misdemeanor of a high and aggravated nature”). Other states impose lengthier sentences for domestic violence recidivists than other repeat offenders. See, e.g., MISS. CODE ANN. § 97-3-7(3) (1972); MO. ANN. STAT. § 565.063(2) (West 1999); MONT. CODE ANN. § 45-5-206(3) (2009); NEV. REV. STAT. ANN. § 200.485(1) (LexisNexis 2009); OHIO REV. CODE ANN. § 2919.25(D) (LexisNexis 2009).

the victims' preferences and even over virulent objection.⁶⁵ As Jeannie Suk has noted, prosecution in even misdemeanor domestic violence cases can result not only in the fines and incarceration that are traditional punishments in criminal cases, but also in the involuntary imposition of no-contact orders that force separation between offender and victim—even husband and wife—over the parties' expressed wishes.⁶⁶ Importantly, and contrary to the thesis of *Privilege or Punish* regarding formal family ties benefits and burdens, these interactions between criminal law and families are not for the purpose of “promoting the institution and goods of family life,” but rather for the purpose of pursuing the usual deterrence and retributive aims of criminal law, even within families.

Because *Privilege or Punish* focuses on formal divisions based on family status, not the enforcement of general criminal law within families, it spends few pages outside the sentencing and corrections context discussing today's most common interactions between the criminal justice system and families. As a descriptive matter, however, the increased enforcement of criminal law within families runs counter to the book's depiction of a world dominated by benefits to defendants who victimize family members. Moreover, as a normative matter, if one believes that criminal law should seek deterrence and retribution even within families (as the authors surely do), to advocate only for the neutral enforcement of general criminal laws is too simple. The criminal justice system, after all, traditionally conferred privacy upon recognized families. It is no surprise, then, that the pursuit of criminal law objectives within families can present novel problems for police, prosecutors, and courts. As criminal law has learned to reach within families, it has also learned to react to their uniqueness. Many of these reactions are found not in the formal law on which *Privilege or Punish* focuses, but at the intersection between formal doctrine and real world practice.

II. FORMAL DOCTRINE VERSUS PRAGMATIC EFFECTS

Privilege or Punish concerns itself almost entirely with the four corners of formal criminal law. While noting that the criminal justice system confers

65. SCHNEIDER, *supra* note 61, at 284–88; Hanna, *supra* note 61; Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1672–74.

66. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006); *see also* LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 33 (2003) (arguing that the pursuit of criminal charges over the victims' wishes is “mostly symbolic” and largely ineffective).

informal benefits and burdens upon family,⁶⁷ the authors maintain that scholars and policymakers must first have a framework for analyzing family ties benefits and burdens before applying that framework beyond formal law.⁶⁸ To “develop that framework in the first instance,” they opt to “focus on facial benefits and burdens.”⁶⁹ By adopting this approach, they assume that a proper framework for analyzing benefits and burdens can be crafted by looking solely at formal law. However, a growing body of literature demonstrates the importance of examining formal doctrine in the context of the procedural realities that shape its application.⁷⁰ Moreover, even if one accepts the authors’ framework, created through the lens of formal law, the application of that framework should take real world processes into account. Instead, *Privilege or Punish* focuses only on formal law, without tackling the practical difficulties of applying formal law within families. Indeed, the authors appear to recognize the importance of real-world processes when they note that formal law is often dominated by “life on the streets.”⁷¹ In light of this concession, their decision nevertheless to focus almost exclusively on formal law in isolation is puzzling.⁷²

67. To illustrate informal benefits, the authors note that a police officer might decide not to arrest a suspect for assaulting a family member, or that a juror might vote to acquit a husband of raping his wife because the juror believes, despite the law, that a man is entitled to demand sex from his wife. MARKEL ET AL., *supra* note 4, at xv.

68. *Id.*

69. *Id.*

70. *E.g.*, Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001) (criticizing the Supreme Court’s sentencing jurisprudence for failing to consider its effects in a world of guilty pleas); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997) (examining the ways that formal evidentiary rules might affect prosecutorial discretion); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (discussing the intersection of substantive criminal law, procedure, and funding realities); Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006) (providing an empirical look at the ways in which formal criminal codes affect charging and plea bargaining). *See generally* Darryl K. Brown, *Watching Legislatures for Apprendi’s Effects on Plea Bargaining*, 5 CAL. CRIM. L. REV. 1, ¶ 14 (2002) (noting the “important modern trend in the scholarship of criminal law (and other areas) to look at how real-world dynamics are likely to shape the practical effect of formal rules”).

71. MARKEL ET AL., *supra* note 4, at 26 (noting that although “wife beating” was eventually criminalized, in “life on the streets . . . the act of wife beating was often viewed as a nonevent from the eyes of the state”).

72. Moreover, because general criminal law was often unconcerned with intrafamily conduct, existing substantive criminal law may not capture the harms unique to intrafamily offenses. For example, Deborah Tuerkheimer and I have called for the criminalization of domestic violence separate from the general statutes typically used to prosecute it. *See* Burke, *supra*

Examining formal law as it is applied is especially important in cases involving families. *Privilege or Punish* is wary of family-based criminal law in part because “[t]he American family is a far more complex entity today than our current system of benefits and burdens acknowledges.”⁷³ But the authors concern themselves primarily with one dimension of this complexity, the evolving definition of “family.” Families, however, no matter how they are defined, are also complex in their interpersonal, economic, and emotional dynamics. It is precisely because of these complexities that the criminal law cannot always remain “general.” Instead, it must acknowledge and yield to the unique considerations that arise when criminal law reaches into the home.

To the extent that contemporary criminal law continues to make family-based distinctions,⁷⁴ many of these distinctions can be seen as pragmatic mechanisms through which criminal law must operate given the complexities of prosecuting offenses within families. For example, in *Privilege or Punish*, the authors argue that some state statutes give preferential treatment to family members by excluding incest from the registration and notification requirements triggered by other sexual offenses.⁷⁵ They also indicate that they are troubled when offenders are permitted to plead guilty to incest instead of generally applicable sexual abuse statutes.⁷⁶

However, these criticisms do not reflect the real-world difficulties of prosecuting child sex offenses, particularly those committed by family members. Children often delay reports of abuse because they fear the breakup of their family, the defendant’s incarceration, or the anger or skepticism of other family members.⁷⁷ They can be reluctant to testify against fathers and guilt-inflicted when they do.⁷⁸ Even if a case does go to trial, proving the truth

note 61; Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call To Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004). This Feature does not address the issue of whether general criminal law is sufficient to target intrafamily crimes, but the question is another that *Privilege or Punish* largely overlooks.

73. MARKEL ET AL., *supra* note 4, at 154.

74. Part I, *supra*, established that many of criminal law’s family ties benefits and burdens have been repealed or are unenforced or disfavored.

75. MARKEL ET AL., *supra* note 4, at 11.

76. *Id.* at 69.

77. See NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, AM. PROSECUTORS RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 76, 429 (3d ed. 2004) (discussing the delayed reporting of intrafamily sexual abuse cases).

78. Mark K. Cavins & Lori Smith, *Keeping Kids on Your Side: An Innovative Approach to Child Sex Abuse Victims*, PROSECUTOR, Mar.-Apr. 2003, at 20, 20-21 (reporting results of an empirical study of the Cook County State’s Attorney’s Office and concluding that “love, trust, power or authority increases a child’s potential for recantation and/or reluctance”); *Is Testifying*

of a victimized child's testimony beyond a reasonable doubt can be difficult, especially in intrafamily cases. More so than other offenders, fathers can explain away their presence in bedrooms and bathrooms. They can depict their children's mothers as brainwashing witness tamperers looking for revenge or an upper hand in child support and custody matters, and their children as well-intentioned but manipulated fabricators.⁷⁹ What sounds like sexual contact in a police report is reframed at trial as an innocent misunderstanding, blown out of proportion by police and prosecutors. As a consequence, the benefits of avoiding trial in intrafamily sexual abuse cases are considerable.⁸⁰

Viewed in the context of plea bargaining realities, the criminal law's differential treatment of incest compared to other sex offenses can be seen not as a direct preference for family status, as *Privilege or Punish* largely assumes, but instead as a reaction to the realities of enforcing general criminal law prohibitions within families. Indeed, the vast majority of reported incest cases involve not the consensual adult relationships to which *Privilege or Punish* devotes so much tolerant attention,⁸¹ but sexual abuse by fathers of children who cannot give legal consent.⁸² Permitting defendants in such cases to plead

Harmful for Sex Abuse Victims?, PROSECUTOR, Nov.-Dec. 1994, at 6, 6-7 (summarizing "mixed conclusions" of three separate studies but reporting that all researchers agreed that child sex abuse victims "registered high rates of stress and anxiety" before testifying, and that children who testified multiple times "tended not to improve as much as children who testified only once or not at all"); Roland C. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1 J. CHILD SEXUAL ABUSE 153 (1992) (reporting that children are reluctant to testify in intrafamily sex abuse cases); cf. NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 77, at 218 (noting that "[d]iscomfort" from trial is "unavoidable," but that the child witness's distress can be mitigated and "must be weighed against the threat posed by the defendant").

79. NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 77, at 430-33 (laying out common defense arguments in child abuse cases, including a child's history of bad behavior, allegations of coaching by another parent involved in custody and divorce battles with the defendant, and claims that the child is lying to retaliate against strict parenting); Myers, *supra* note 53, at 939-40 n.295 ("It is unfortunately true that in a small percentage of contested child custody disputes unscrupulous parents fabricate allegations of sexual abuse and persuade or coach children to make false allegations.").
80. See ELLEN GRAY, *UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEXUAL ABUSE* 98 (1993) (reporting in an empirical study of child sexual abuse cases that diversion is used to keep families intact when the defendant provides financial and emotional support); NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 77, at 212-13 (discussing the benefits of early guilty pleas).
81. MARKEL ET AL., *supra* note 4, at 69-70, 118-27. Even with regard to incest between adults, one might reasonably question whether these relationships are truly consensual, an issue that is well beyond the focus of this Feature.
82. Christine A. Courtois & Judith E. Sprei, *Retrospective Incest Therapy for Women*, in HANDBOOK ON SEXUAL ABUSE OF CHILDREN 270, 274 (Lenore E. Auerbach Walker ed., 1988)

guilty to incest and thereby avoid the stigma of a rape or sexual abuse conviction and what would otherwise be mandatory sex offender registration is sometimes the best way to secure a conviction and incarceration while sparing the victim from testifying and avoiding the risk of acquittal. From a utilitarian perspective, a negotiated plea to incest is preferable to an acquittal because it permits incapacitation of the offender and provides deterrence.⁸³ Even a retributivist would favor an incest conviction over acquittal because it permits the imposition of deserved punishment.⁸⁴ However, because *Privilege or Punish* limits its focus to formal law, it overlooks the important utilitarian and retributive functions served by current plea bargaining and sex offense registration approaches for incest cases involving minor victims.

Privilege or Punish's brief discussion of domestic violence prosecutions similarly underestimates the impact of plea negotiations on the enforcement of general criminal law within families. Although the authors largely omit any discussion of contemporary law enforcement directed against domestic violence, they indicate that they would disfavor any approach that treated domestic violence offenders "better" than offenders who committed comparable crimes against strangers or acquaintances.⁸⁵ As an example, they compare diversion against traditional prosecution.⁸⁶ This quantification of punishment overlooks the picture on the ground. As an initial matter, it is unclear that diversion should be characterized as a more favorable result for

("Until recently, a widely held belief was that peer incest (i.e., between siblings and between cousins) was the most frequent Recent research . . . suggests that intergenerational contact, especially father-daughter and stepfather-daughter, is the most prevalent") (citation omitted); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 61 (observing that "most" incest cases "involve minors unable to give legal consent").

83. For presentations of a utilitarian view of punishment, see JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 322-38 (C.K. Ogden ed., 1931); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973); John Stuart Mill, *Utilitarianism*, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 895, 899-916 (Edwin A. Burt ed., 1939); and Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 319-34 (1984).
84. For presentations of a retributivist view of punishment, see generally IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (John Ladd trans., 1965) (1797); MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 238-45 (1984); MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF CRIMINAL LAW* (1997); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1632-33 (1992); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992); H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 INQUIRY 249 (1965); and Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, 4 CRIM. JUST. ETHICS 3 (1985).
85. MARKEL ET AL., *supra* note 4, at 152.
86. *Id.* at 151.

offenders than a traditional case disposition. Recognizing that traditional prosecutions can lead to repeated formal dispositions without addressing an offender's root problems, jurisdictions have increasingly turned to problem-solving courts.⁸⁷ Domestic violence diversion programs reflect this trend.⁸⁸ In exchange for dismissal of formal charges, these programs often require prolonged and intensive counseling aimed specifically at the underlying causes of intimate violence.⁸⁹ From a utilitarian perspective, meaningful diversion programs are arguably more effective than the pro forma convictions, fines, and brief periods of incarceration that are typical in misdemeanor assault cases. Because many defendants will be returning to relationships with their victims, sentencing options that involve ongoing monitoring of the defendant and seek to alter the defendant's propensity for violence against the victim could be more likely to prevent recidivism than a typical misdemeanor assault sentence.⁹⁰ However, because *Privilege or Punish* focuses almost entirely on

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87. See generally GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* (2005) (describing the growing trend toward problem-solving courts); Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 *FORDHAM URB. L.J.* 897 (2003) (examining Red Hook, New York's community courts); Eric Lane, *Due Process and Problem-Solving Courts*, 30 *FORDHAM URB. L.J.* 955 (2003); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 *WASH. U. J.L. & POL'Y* 63, 83-92 (2002).
88. Rekha Mirchandani, *Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State*, 33 *LAW & SOC. INQUIRY* 853 (2008) (situating a case study of Salt Lake City's domestic violence courts within an examination of problem-solving courts generally).
89. See Robert T. Jarvis, *A Proposal for a Model Domestic Violence Protocol*, 47 *LOY. L. REV.* 513, 529 (2001) (describing a Texas jurisdiction that offers one year of deferred probation requiring twenty-six weeks of family violence counseling for first-time domestic violence offenses); Tamar M. Meekins, "Specialized Justice": *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 *SUFFOLK U. L. REV.* 1, 32-33 (2006) (describing Washington, D.C. Domestic Violence Court, where defendants who have no substantial criminal histories and who have not inflicted significant injuries receive deferred sentencing requiring nine months of domestic violence counseling); Mirchandani, *supra* note 88, at 872 (noting that a typical participant in Salt Lake City's diversion program underwent twenty-six counseling sessions over six months); see also Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local,"* 42 *B.C. L. REV.* 1081, 1128-29 (2001) (questioning the efficacy of specialized domestic violence courts).
90. See JEFFREY FAGAN, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* (1996), available at <http://www.ncjrs.gov/pdffiles/crimdom.pdf>. Although Dr. Fagan notes that insufficient evidence exists from which to assess the efficacy of domestic violence treatment programs, *id.* at 18-20, he also observes that the complexities of domestic violence compared to crimes between strangers can undermine the efficacy of traditional deterrence. *Id.* at 28-30.

formal law, it assumes that traditional punishment is the more appropriate response.

Moreover, even if one accepts the depiction of diversion as a less serious intervention than conviction and incarceration, just as with intrafamily child sexual abuse cases, proving domestic violence cases beyond a reasonable doubt can be difficult, making a systemic alternative to trial attractive. Diversion programs, in particular, can enhance cooperation from victims who might otherwise refuse to testify. Whether out of loyalty, guilt, financial dependence, love, or some combination, many victims do not want their abusers to be incarcerated or stigmatized by criminal convictions. They do, however, want the violence to stop. The counseling and state supervision mandated by diversion offers the potential for future change without a formal conviction.⁹¹

Just as plea bargaining considerations might shape the criminal justice system's response to intrafamily crime, so can other forms of prosecutorial discretion that shape the enforcement of formal law. For example, *Privilege or Punish* is skeptical of both parental responsibility laws and the criminalization of the failure to pay child support.⁹² In both instances, the authors indicate that noncriminal sanctions would be more appropriate.⁹³

However, contemporary law enforcement can be nuanced, and prosecutors and policymakers need not always choose between civil and criminal sanctions. In both the parental responsibility and child support contexts, the real-world implementation of statutory prohibitions can often soften seemingly draconian formal law. As a prosecutor, I worked on both child support enforcement and parental responsibility cases. In neither context were cases referred to us by general police officers. Civil servants staffed the child support cases, filing wage and tax refund garnishments, searching for unreported bank accounts, and meeting with obligor parents to establish payment agreements. They forwarded only the most willful failures of support to prosecutors to seek incarceration, and family court judges, not criminal courts, heard the resulting

91. See Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, CT. REV., Spring 2000, at 28, 33 (noting the clash between the realities of domestic violence prosecutions and "a strict application of our adversarial legal system," which may in domestic violence cases "exacerbate the problem and increase the danger to victims").

92. MARKEL ET AL., *supra* note 4, at 112-18 (applying a normative framework to parental responsibility laws); *id.* at 140-44.

93. *Id.* at 114-15 (arguing that a negligence standard for parental liability would be more appropriate than the imposition of strict liability); *id.* at 144 (recommending a restorative justice process for failure to pay child support, "a solution that minimizes the use of the criminal sanction to ensure these obligations are met").

cases.⁹⁴ Similarly, parental responsibility prosecutions came to us not through unsympathetic patrol officers but from school counselors and social workers who worked with officers assigned to specialized units that focused on juveniles. When working with families to identify the underlying cause of their children's delinquency, the teams would only rarely invoke the possibility of charges against the parents, and even then did so primarily to overcome parental apathy.

My personal experiences applying criminal parental responsibility and child support statutes were not unusual. Although today's parental responsibility laws have early roots,⁹⁵ they must be evaluated in the context of other juvenile justice reforms. In the mid-nineties, arguably the height of the most recent wave of juvenile crime prevention efforts, the Department of Justice concluded that "[w]hile some states impose criminal liability on parents of delinquent youth, many more have enacted less stringent types of parental responsibility laws."⁹⁶ For example, states require parents to attend delinquency proceedings, pay the costs of court proceedings or state detention or treatment of their children, attend counseling with their children, or participate in parental training courses.⁹⁷ The possibility of criminal charges is often used as leverage to persuade otherwise uncooperative parents to participate in such programs,⁹⁸ perhaps explaining in part why law enforcement supports parental responsibility laws even as it rarely enforces them formally.⁹⁹

94. My office indicted a parent on criminal charges only once during my five years there. Instead, we most often filed civil contempt proceedings. See *supra* notes 87-92 and accompanying text. In one case, a self-employed obligor who reported annual losses to the Internal Revenue Service while mysteriously supporting his own seemingly comfortable lifestyle told a judge that a contempt finding was acceptable to him because he could use some time off and would bring a book to the jail cell. Within twenty-four hours I received a phone call from a Sheriff's Deputy: a prisoner who had been removed from his cell for work duty to line the rising Willamette River with sandbags wanted me to know he could write a check for sixteen thousand dollars if I could get him out of the rain.

95. See James Herbie DiFonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1, 38-39 (2001).

96. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES 1994-1996, at 19 (1997), available at <http://www.ncjrs.gov/pdffiles/reform.pdf>.

97. *Id.* at 19-20.

98. See Seth Mydans, *Mother is Charged Because a Son Is California Street Gang Suspect*, N.Y. TIMES, May 4, 1989, at A18 (noting that a California parental responsibility law was "intended to give the police leverage in pressing parents to meet some minimal standards of supervision in a culture of poverty where family control has often broken down").

99. An empirical study of the enforcement of local parental responsibility laws in Oregon found that the laws were rarely enforced, but that police chiefs nevertheless supported them. Leslie

Criminal prosecutions for the failure to pay child support are similarly infrequent. Although *Privilege or Punish* focuses on criminal statutes that punish the failure to pay child support,¹⁰⁰ states more commonly invoke a court's contempt powers, and the use of civil contempt proceedings is far more common than criminal contempt charges.¹⁰¹ Civil contempt proceedings, although culminating in incarceration, are intended to coerce, not punish.¹⁰² Moreover, as with my experience in practice, most jurisdictions couple civil and criminal remedies in child support cases within the same enforcement offices,¹⁰³ so that contempt proceedings and criminal prosecutions are used in combination with other approaches,¹⁰⁴ including those that *Privilege or Punish* advocates as alternatives, such as wage garnishment, tax refund interception, and passport and state license suspension.¹⁰⁵ The authors concede that "conviction and probation may well be valuable in inducing a repeat offender to pay" and that even incarceration might be appropriate as "an option of last resort."¹⁰⁶ But to know whether prosecutors who enforce child support orders

Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, but What Kind and to Whom?*, 2006 UTAH L. REV. 5, 10, 22-23. Most parents were issued verbal warnings, and citations were generally issued only after multiple contacts from police. *Id.* at 24.

100. MARKEL ET AL., *supra* note 4, at 72.

101. Lisa Kelly, *If Anybody Asks You Who I Am: An Outsider's Story of the Duty To Establish Paternity*, 6 YALE J.L. & FEMINISM 297, 311 n.20 (1994).

102. Susan B. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U.L. REV. 491, 503 (1989); Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 104 n.60 (2008).

103. E.g., ARIZ. REV. STAT. ANN. § 25-509(A) (2000) ("The attorney general or county attorney may establish, modify or enforce such a duty of support by all means available, including all civil and criminal remedies provided by law."); CAL. FAM. CODE § 5245 (West 2004) ("Nothing in this chapter limits the authority of the local child support agency to use any other civil and criminal remedies to enforce support obligations . . ."); MD. CODE ANN., FAM. LAW § 10-103 (LexisNexis 2006) (stating that State's Attorney and local support enforcement offices may "use any other civil or criminal remedy to enforce a child or spousal support order"); MASS. GEN. LAWS ANN. ch. 119A, § 2(a) (West 2008) (mandating an agency to enforce child support orders "through civil and criminal proceedings"); WASH. REV. CODE ANN. § 74.20.220(7) (West 2001) (recognizing the authority of attorney general and prosecuting attorneys "to use any and all civil and criminal remedies to enforce, establish, or modify child support obligations").

104. See Patterson, *supra* note 102, at 118 ("The contempt process is used only with those contemnors from whom support cannot be obtained through other enforcement techniques, including wage withholding and seizure of assets.").

105. MARKEL ET AL., *supra* note 4, at 142.

106. *Id.* at 143.

treat incarceration as a first or last resort requires a look beyond formal law to discretionary charging decisions.

To point out, as I have, that cases involving intrafamily sexual and physical violence might be charged, plea bargained, or sentenced differently than other cases is not to advocate the efficacy or moral appropriateness of that reality. Domestic violence scholars, for example, vigorously debate the merits of offering offenders treatment in lieu of prosecution.¹⁰⁷ Diversion programs might trouble retributivist theorists in particular because of the absence of formal punishment.¹⁰⁸ Even utilitarians debate the efficacy of treatment in lieu of punishment.¹⁰⁹ Similarly, for purposes of this Feature, I do not offer a full-throated defense of the use of rarely enforced criminal charges, such as parental responsibility or criminal nonsupport statutes, as leverage to coerce state-preferred behavior. Any significant consideration of that practice would require a much broader discussion about the desirability of law enforcement discretion generally.¹¹⁰ However, law enforcement's restriction of both parental responsibility and failure to support statutes to only the most derelict parents, even though discretionary and unformalized, at least arguably serves

107. Scholars have not reached a consensus on whether nontraditional sanctions are appropriate in domestic violence cases. Compare Hanna, *supra* note 61, at 1542 ("In comparison to other crimes, preferring treatment to incarceration for domestic violence looks like lingering sexism."), with Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 608-09 (1999) ("In some cases, strategies such as cultural or community support, shelter stays, or even diversion for the batterer make the most sense.") (citation omitted). *Privilege or Punish's* assumption that treatment evinces leniency toward domestic violence does not reflect this ongoing debate.

108. Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1507-08 (2003) (noting the political and moral tensions created when criminal courts offer treatment for domestic violence).

109. For example, advocates for battered women worry that nonpunitive sanctions can increase the likelihood and severity of future assaults. *Id.* at 1507 n.26.

110. There is considerable debate among academics regarding the amount of discretion that law enforcement should enjoy, and under what circumstances. See generally David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1063-64 (1999) (setting forth the risks of law enforcement discretion); Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 442-43 (2000) (discussing the inevitability of police discretion); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1169-70 (1998) (suggesting that politically empowered communities might be better suited than courts to evaluate the appropriate use of police discretion); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 652 (1997) ("[I]n the community policing era, the accountability of police both to the communities they serve and to the rule of law is best assured by recognizing explicitly the inevitability—and even, properly managed, the desirability—of police discretion.").

retributive purposes by increasing the likelihood that a punished parent's conduct was voluntary.¹¹¹ From a utilitarian perspective, the discretionary enforcement of these prohibitions arguably limits prosecution to those parents whose future conduct can be affected and who have not responded to other forms of incentive. *Privilege or Punish*'s focus on formal law forecloses exploration of the reasons that *might* justify these practices and, in doing so, misses the opportunity to discuss how criminal offenses relating to families are actually prosecuted.

CONCLUSION

Privilege or Punish exhaustively documents the ways that criminal law gives effect to formal family status. It also identifies serious normative concerns that are raised when criminal law's proscriptions rise and fall with familial ties, and makes a compelling argument that we should consider family-based distinctions in criminal law with caution.¹¹² My observations in this Feature are intended to build on and amplify these important contributions to the growing literature on criminal law and families. When criminal law's traditions are distinguished from contemporary trends, and when formal law is analyzed not in the abstract but through the lens of real world processes that shape its application, *Privilege or Punish*'s catalogue of family ties benefits and burdens tells an evolutionary tale about the interactions between criminal law and the definition of family: criminal law's treatment of families is not only moving, but in a direction that the book's authors would presumably desire—away from formal family-based distinctions.

Whereas criminal law traditionally valued family privacy over the enforcement of its prohibitions within families, the contemporary criminal justice system reaches within families with increasing regularity to enforce its proscriptions. As familial privacy has become less sacrosanct, criminal law's concern with the boundaries that serve to differentiate family relationships, and thereby separate the private from the public, has also waned. At the same

111. See C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 46 (1987) ("We can then formulate retributive theories of punishment as those theories which maintain that punishment is justified because the offender has voluntarily committed a morally wrong act.").

112. *Privilege and Punish* also adds another dimension to the current debate over gay marriage, as we realize that a narrow definition of family excludes not only within tax, property, inheritance, and other civil laws, but also on questions involving life and liberty. See Hills, *supra* note 23, at 1427–28 (resisting *Privilege or Punish*'s proposal to abolish family status from criminal law and instead favoring reform of the categories that define family).

time that criminal law has learned to reach within families, it has also learned to respond to them. Because of unique enforcement challenges presented by the application of formal law to families, the criminal justice system sometimes yields to familial considerations—not eagerly, but with reluctance, and not to promote or enforce preferred family forms, but to serve criminal law’s traditional purposes of retribution and deterrence.

While some would say that no discussion of criminal law and families is complete without a thorough consideration of the criminal justice system’s changing response to domestic violence,¹¹³ *Privilege or Punish* discusses the topic only briefly and in conclusion, in part because police and prosecutorial leniency toward domestic violence is often informal, and “the law ‘on the streets’ falls a bit outside the purview of [their] book.”¹¹⁴ Indeed, it is precisely because police and prosecutors enforce criminal law against domestic violence without regard to formal family status that the criminal law’s response to domestic violence largely falls beyond the scope of the book.¹¹⁵ But domestic violence enforcement is one of the most common contexts where contemporary criminal law intersects with family considerations, and thirty years of significant domestic violence reform demonstrates that the criminal law is learning how to apply itself within families and to react to family considerations. Moreover, criminal law often reaches into families without relying on formal family status to do so. Most domestic violence laws are defined not exclusively by a marriage between offender and victim, but by the intimate relationship between them—whether married or not, gay or straight, polyamorous or monogamous.¹¹⁶

Privilege or Punish compellingly documents and critiques the ways that criminal law formally privileges and punishes actors based on family status. When reframed to account for changes in the criminal law’s treatment of families over time, and the procedural realities that can shape practical application of formal law, the authors’ observations also tell a broader story about the collisions between criminal law and families.

113. See *supra* notes 61-66 and accompanying text.

114. MARKEL ET AL., *supra* note 4, at 152. The authors also shy away from a lengthier discussion of domestic violence because states “take wildly inconsistent positions.” *Id.* at 151.

115. *Privilege or Punish* discusses only briefly the “special and pronounced problem of domestic violence.” *Id.*

116. See Burke, *supra* note 61, at 559-63 (providing an overview of states’ domestic violence statutes); Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 193 (2005) (“Generally speaking, unmarried partners are included in criminal domestic violence statutes . . .”).

