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## PUNISHING FAMILY STATUS

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*This Article focuses upon two basic but under-explored questions: when does, and when should, the state use the criminal justice apparatus to burden individuals on account of their familial status? We address the first question in Part I by revealing a variety of laws permeating the criminal justice system that together form a string of “family ties burdens” or laws that impose punishment upon individuals on account of their familial status. The seven burdens we train our attention upon are omissions liability for failure to rescue, parental responsibility laws, incest, bigamy, adultery, nonpayment of child support, and nonpayment of parental support.*

*Part II develops a framework for the normative assessment of these family ties burdens. We first ask how these laws can properly be understood to be “burdens.” We then look at these sites synthetically and contextually to uncover a pattern underlying most of these family ties burdens; namely, they tend to promote voluntary caregiving relationships. We endeavor to explain why this rationale is instructive and normatively attractive for the design of family ties burdens within a criminal justice system committed to what we call “liberal minimalism.” We conclude Part II by articulating the contours and basis of a critical scrutiny that should attach to family ties burdens in the criminal justice system.*

*Finally, in Part III, we apply our proposed framework to see under which conditions these burdens should be rejected, retained, or redrafted in terms that are neutral to family status but are still capable of promoting and vindicating voluntary caregiving relationships.*

#### INTRODUCTION

*In 2005, Christina Madison watched while her new husband repeatedly punched her four-year-old son in the stomach after the child refused to get dressed for school. Madison did nothing to stop her husband from hitting the child. The child eventually died from internal bleeding as a result of a tear in his intestine. Prosecutors charged Madison for her failure to act; she was sentenced to twelve years in prison.<sup>1</sup>*

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<sup>1</sup> Justin Boggs, *Parents of Slain Victorville Child Receive Long Prison Terms*, DAILY PRESS (Victorville, Cal.), Dec. 30, 2005, <http://archive.vvdailynews.com/2005/113595069729822.html>. For examples of other recent cases where states prosecuted mothers for failing to protect their children from harm inflicted by another, see also Steven M. Ellis, *Court Upholds Murder Conviction for Failing to Protect Son*, METROPOLITAN NEWS-ENTERPRISE (L. A.), Mar. 12, 2008, <http://www.metnews.com/articles/2008/rolo031208.htm> (describing Sylvia Torres Rolon’s conviction for second-degree murder after she failed to protect her one-year-old child from her boyfriend’s severe physical

Stories like Christina Madison's abound. In the absence of her family status, Christina's omission, or failure to rescue her child, would trigger no criminal liability. But because of it, she faces a very significant sentence. In this Article, we examine the various places in the American criminal justice system where the law imposes burdens on defendants on account of their familial status or familial connection to the crime.<sup>2</sup> Where do these burdens exist? Why do we have them? What, if anything, is wrong with them? How can they be reformed? These questions are at the heart of our project, a project that picks up the story from where we left off a year ago.

Specifically, in a study we published last year,<sup>3</sup> we examined how and where the criminal justice system affirmatively *privileges* defendants who are members of a state-sanctioned family unit. Our study uncovered a range of what we called "family ties benefits." For example, many states exempt family members who harbor fugitive relatives from prosecution; many states exempt family members from testifying against each other even in serious felony cases; and individuals who kill or rape family members are often subject to less serious penalties than those who attack acquaintances or strangers.<sup>4</sup> We argued that extending such benefits on the basis of family status can incur serious but often obscured costs in the criminal justice system, particularly in terms of gender equality, fairness across similarly situated offenders, accurate outcomes, and crime prevention.<sup>5</sup> We suggested that more careful design of such policies could help avoid some of the costs associated with "family ties benefits."<sup>6</sup>

But standing alone, the picture painted in our last article is incomplete; in this companion Article, we try to complete the picture. As mentioned above, some forms of criminal liability are triggered because of one's familial status, and for reasons that seem to have nothing to do with compensating for the "family ties benefits" we have already identified. These crimes include omissions liability for failing to rescue certain family members, parental

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abuse); Bill Scanlon, *Mom Guilty in Baby's Death*, ROCKY MOUNTAIN NEWS (Denver), Dec. 22, 2007, <http://m.rockymountainnews.com/news/2007/Dec/22/scared-mom-talks-baby-death-trial/> (describing the case of Molly Midyette, whose ten-week-old son died from injuries inflicted by his father).

<sup>2</sup> Although we use the phrase "American criminal justice system," there are actually many criminal justice systems in the United States operating at the local, state, and federal level under a host of laws, ordinances, principles and policies. Consequently, not all the practices we describe exist around the country in every single system and we try to explain how limited or pervasive the reach of each system is in the family ties burdens we examine.

<sup>3</sup> See generally Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147.

<sup>4</sup> *Id.* at 1158-59, 1162-64, 1167-71; 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 (2007).

<sup>5</sup> Markel, Collins & Leib, *supra* note 3, at 1190-99.

<sup>6</sup> *Id.* at 1201-25.

responsibility laws imposing liability on parents because of crimes or misdeeds committed by their children, and criminal liability for nonpayment of child or parental support.<sup>7</sup> Defendants are also burdened on account of their family status when they face prosecution for incest, adultery, or bigamy.<sup>8</sup> In all seven of these instances, in the absence of the particular familial status of the defendant, the actions or omissions at issue would largely be ignored by the criminal justice system or treated more leniently.

This Article analyzes these “family ties burdens” and asks whether they are justifiable as is or if redesigned. Although scholars have considered these burdens individually, part of our contribution here is viewing these burdens synthetically and explaining what sense, if any, can be made of them when viewed as a whole. Thus, in Part I, we survey the various sites in the criminal justice system where defendants who are members of state-recognized families face special burdens that are not visited upon individuals who are not members of a state-recognized family unit.

We begin Part II by explaining why we have generally taken a “defendant-centered” perspective in thinking about the sites of family ties burdens, since many “burdens” on defendants based on family status may, conversely, have been established to benefit the family members of such defendants (and potential defendants).<sup>9</sup> Focusing on family ties burdens from the defendant’s perspective helps raise awareness of why such burdens are normative yellow flags. As we explain in Part II, family ties burdens have tremendous potential to discriminate in ways we find unjustified.<sup>10</sup> The rest of Part II constructs a

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<sup>7</sup> As we explain later, these family ties burdens might also be referred to as family ties “duties,” in the sense that particular obligations are imposed on individuals because of their family relationships. See discussion *infra* Part II.C. We have chosen to use the term “burdens” because we are focusing upon the state’s decision to use the power of the *criminal law* to induce compliance with those duties in the first instance and to penalize any eventual non-compliance.

<sup>8</sup> We recognize that this group of burdens may fall into a slightly different category than omissions liability, parental responsibility laws, or nonpayment of child or parental support because a desire to enforce a certain vision of public morality might motivate a state’s decision to utilize the power of criminal law. We think it is important to recognize, however, that the state is promoting a certain vision of family within *both* categories of burdens, in that it is essentially trying to foster an environment in which caregiving can flourish, and we must consider whether the use of the criminal law in these contexts effectively serves that goal. In addition, these two categories of burdens are linked in the sense that the existence of a certain family relationship is a prerequisite for imposing liability, and thus both categories warrant analysis under our framework.

<sup>9</sup> We acknowledge that some victims may feel that they, as well as defendants, have been harmed by family ties burdens.

<sup>10</sup> Consider the example of omissions liability. Absent a contract or other special circumstances, a hypothetical Jill cannot rely upon the state to signal to her life partner Denise that Denise is obligated by law to prevent harm to Jill. This pattern risks marginalizing persons who consider themselves family members but are not recognized as such by the state or other institutions. In this sense, targeting persons with unusual

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normative framework to explain under what circumstances burdening family status might be justified. We highlight that the vast majority of the family ties burdens implicate the caregiving function of families. For example, society imposes liability on parents for their omissions to reinforce the notion of a special obligation worthy of enforcement through the criminal justice system: to care for their children by protecting them from harm. The same logic of promoting caregiving plausibly motivates criminalization of nonpayment of child and parental support and some of the other family ties burdens we discuss in Part I. The problem is that promotion of caregiving is expressed through family ties burdens in ways that are, at times, illiberal and insufficient.

This conclusion is underwritten by an underappreciated point about how the criminal justice system allocates family ties burdens. Our research in Part I shows that the criminal justice system tends to enforce family ties burdens against those who have *voluntarily chosen* their caregiving role.<sup>11</sup> In other words, state-imposed burdens tend to fall chiefly on those persons who have voluntarily entered into a status relationship and enjoy the privileges associated with that relationship, thus making it seem more just to require those persons to carry some burdens in return. Building upon this internal coherence, we argue that a voluntary caregiving orientation to burden allocation in the criminal justice system is much more attractive than allocation on formal familial status alone. Whatever one thinks of relational obligation within the family divorced from ideas about consent or voluntarism, when it comes to criminal justice design, liberal principles recommend a focus on voluntary caregiving rather than an arbitrary status-based allocation of duties.

Indeed, a voluntarist approach to family ties burdens is expressive of and consistent with a “liberal minimalist” orientation to criminal law legislation. It is *liberal* in that it justifies additional interference into interpersonal relationships through criminal sanctions only through a showing that individuals have roughly consented to these extra obligations by their antecedent conduct of joining or starting particular relationships. A voluntarist approach is also liberal in a second sense in that it tries to carve out a large space for personal freedom to operate in a way compatible with the personal freedom of others. It is only with respect to these two notions (voluntarism and respect for robust liberties) that we use the term “liberal” or “liberalism.”

And it is *minimalist* in two ways too. First, we seek a narrow tailoring between government objectives and the means used to advance those objectives. Second, we seek to constrain the use of criminal law sanctions when non-criminal measures are available and equally or nearly as effective in realizing the substantial public interest in reducing the prohibited conduct. Thus, even when the promotion of voluntary caregiving motivates the

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treatment on account of familial status is an under-inclusive (and, at times, over-inclusive) mechanism to distribute the criminal law’s tangible and expressive benefits.

<sup>11</sup> There are some exceptions – largely those associated with incest and obligations to pay parental support – which we discuss. See discussion *infra* Part II.C.

establishment of a family ties burden, such burdens are unjustified if there are alternative and equally effective means of achieving the goal without resort to the criminal justice system and its particular power to infringe upon citizens' liberties.

With these principles in mind, Part III rethinks the family ties burdens we identify in Part I, in light of the normative framework developed in Part II. We hope to show why some of the burdens do not pass muster and how others can be preserved in some form, if they are reconstructed to avoid the substantial costs of using family status alone to distribute burdens. While we do not make the constitutional claim that family status should be a suspect classification worthy of strict scrutiny, we do believe that, as a policy matter, the government should be skeptical of the use of family status. In other words, to use the language of equal protection analysis without making the constitutional claim, the objective of the government should be at least "important" and perhaps "compelling," and the means adopted to pursue that objective should be "narrowly tailored" to achieve that objective, looking especially to see if alternative measures might be just as effective. We also believe that impairment of liberties (including those associated with sexual autonomy) by pain of criminal sanction on the basis of family status needs to survive heightened – if not strict – scrutiny as a matter of policy.<sup>12</sup>

One important caveat: there are many wonderful studies on how the criminal justice system causes devastation to families and communities, especially in light of its mass incarceration practices.<sup>13</sup> There is no doubt that many criminal law policies and practices disadvantage families in various ways – and without attention to this sort of disparate impact on families, policy designers risk tearing our social fabric at the seams.<sup>14</sup> We agree that this lens is critically important in evaluating criminal justice policies. Nevertheless, this lens tends to track *indirect* results of other policies. For example, although lengthy sentences for minor drug crimes result in too many children growing up without access to a parent, surely the primary objective behind drug sentencing laws is not to separate children and their parents.<sup>15</sup>

Our focus here is different and has yet to be sufficiently addressed by the community of scholars interested in how the criminal law pressures families. Here, we examine those distinctively purposeful practices that consciously

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<sup>12</sup> We recognize this stands at odds with current constitutional doctrine that permits promiscuous use of severe criminal sanctions. *See generally* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994); Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207 (2004).

<sup>13</sup> *E.g.*, DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* 30-35 (2004).

<sup>14</sup> *See id.*

<sup>15</sup> We recognize, however, that some judges might view these harsh drug laws as a means by which they can separate children from parents involved with dangerous drugs for the good of the child.

target members of families for special burdens on account of their familial status. Scholars have been successful in analyzing the *effects* of certain criminal justice policies and practices on the family.<sup>16</sup> But, most scholars have not recognized the panoply of laws expressly written to disadvantage persons based on family status alone. It seems important and necessary to pause and think through how and why our laws intentionally punish family status, and how in some cases the underlying goals of such a choice might be better served through other means. This Article hopes to clear that ground.

In defining our focus this way, we do not intend to suggest that the particular liabilities addressed in this Article are necessarily guided by the intent of hurting or burdening family life. Indeed, it may be that many burdens on family status are “remedial” or intended to benefit family life even if they penalize particular defendants on account of their familial status. But in this context, it is worth remembering that at one time many laws disadvantaged women, for example, in the name of “protecting” them.<sup>17</sup> Our purpose here is to excavate the family ties burdens currently directly imposed by the criminal justice system and to assess their desirability both now and as they could be.

#### I. AN OVERVIEW OF FAMILY STATUS AND CRIMINAL JUSTICE BURDENS

Certain crimes permit prosecution of a defendant for conduct that would otherwise be lawful in the absence of the defendant’s familial connection to the crime. Incest statutes generally proscribe sexual conduct even between mature, consenting individuals, and other statutes impose criminal liability for the nonpayment of child support, even though we do not ordinarily criminalize a failure to satisfy a private debt. We focus on statutes for certain omissions and parental responsibility liability, incest, bigamy, adultery, and nonpayment of child and parental support. In all these examples, state-determined familial status alters the blameworthiness the criminal justice system assigns to the underlying conduct.<sup>18</sup> Although these examples are not necessarily exhaustive, we believe they are the most frequently found examples of the criminal justice system’s decision to criminalize certain conduct on the basis of family status.<sup>19</sup> In what follows, we provide an overview of the doctrine associated with these

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<sup>16</sup> *E.g.*, BRAMAN, *supra* note 13, at 5.

<sup>17</sup> *See* *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 138-55 (1980).

<sup>18</sup> Statutes criminalizing polygamy raise similar problems as those prohibiting incest between consenting and competent adults. In the absence of a marital connection to a third person, *X* may marry *Y*. In states prohibiting polygamy, *X* may not marry *Y* on account of the prior relationship *X* entered into with *Z*.

<sup>19</sup> In addition to creating criminal liability, family status is used in some jurisdictions as a basis for inferring a breach of trust that serves as an aggravating factor at sentencing. *See, e.g.*, *R. v. Gladue*, [1999] 1 S.C.R. 688, 740-41 (Can.) (“[T]he offence involved domestic violence and a breach of the trust inherent in a spousal relationship. That aggravating factor must be taken into account in the sentencing . . .”).



family ties burdens. In Part III, we discuss and critique the rationales provided for them.

A. *Omissions Liability for Failure to Rescue*

*In June 2002, prosecutors charged Shavon Greene, a twenty-one-year-old mother, with aggravated manslaughter after her boyfriend allegedly beat her twenty-one-month-old daughter to death. The prosecutor did not allege Greene was even present during the beating; instead, the prosecutor alleged she had disregarded warnings from a social services investigator not to leave the child alone with her boyfriend. Greene eventually pled guilty to culpable negligence.*<sup>20</sup>

At a high level of generality, the general rule in American criminal justice (as well as tort law) systems is that citizens are under no obligation to rescue each other.<sup>21</sup> In other words, even if the failure to help another person in distress would constitute a moral failing, the criminal justice system does not generally impose liability on those who keep on walking.<sup>22</sup>

The exceptions to the general rule are well known. As the D.C. Circuit famously stated in *Jones v. United States*:

There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.<sup>23</sup>

In addition, one bears liability if one created the conditions of the victim's peril or if one bears responsibility for the cause of the conditions of peril to the victim (for example, parents of children who pose peril to the victim).<sup>24</sup> There are limits, however, to when liability will be imposed. First, liability will not

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<sup>20</sup> Diana Marrero & Shana Gruskin, *Mom Arrested in Child's Death; Police: Woman Ignored Danger by Leaving Daughter with Boyfriend*, SUN-SENTINEL (Fort Lauderdale), June 21, 2002, at 1B. One of the fascinating aspects of this case is that the boyfriend was eventually acquitted in the child's death, so only the mother's omission was punished. Susannah Nesmith, *3 Years Later, Man Cleared in Baby's Death*, MIAMI HERALD, Feb. 11, 2006, at B4.

<sup>21</sup> See 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.2 (2d ed. 2003); David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 655 (2006).

<sup>22</sup> A very small number of states have adopted so-called "Good Samaritan" statutes, imposing criminal liability in limited circumstances upon those who fail to rescue persons in emergency situations. *E.g.*, R.I. GEN. LAWS § 11-56-1 (2002); VT. STAT. ANN. tit. 12, § 519 (2002).

<sup>23</sup> *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962) (footnotes omitted).

<sup>24</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 115 (4th ed. 2006).

be imposed when rescue requires the defendant to make an undue sacrifice or when the defendant cannot physically perform the rescue.<sup>25</sup> Second, no liability is imposed unless “the defendant’s failure to act . . . [is] accompanied by whatever *mens rea* the crime requires for its commission.”<sup>26</sup>

Of special interest here are the triggering conditions for omissions liability based on family status. The relationship of spouse-to-spouse and parent-to-child are paradigmatic examples of status relationships in which one owes a duty to rescue sufficient to trigger *criminal* responsibility (rather than mere tort liability).<sup>27</sup> Thus, if a defendant “realizes (or culpably fails to realize) his wife is in danger, realizes (or culpably fails to realize) that he can rescue her with minimal risk and/or sacrifice, and realizes (or culpably fails to realize) that she *is* his wife,” then he can be criminally liable for homicide “if he is aware of the existence of the three elements (wife’s peril, his ability to rescue with low risk/effort, and wife’s identity).”<sup>28</sup> In the parent-child context, parents have been held criminally liable for neglect for failing to protect a child from being sexually abused by another individual,<sup>29</sup> and for manslaughter for failing to protect a child from fatal physical abuse inflicted by another.<sup>30</sup> These prosecutions exemplify the family ties burden phenomenon in which persons in certain family relationships are held accountable for harms to family members even when another individual inflicted those harms.

Trying to understand who precisely faces omissions liability based on the status of spouse or parent can be difficult since courts sometimes define these categories with sensitivity to differing circumstances. With respect to spouses or spouse-like relationships, courts have been leery of recognizing the

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<sup>25</sup> *Id.* at 113; *see also* State v. Walden, 293 S.E.2d 780, 786 (N.C. 1982) (denying “that parents have the legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children”); Andrew Ashworth, *The Scope of Criminal Liability for Omissions*, 105 LAW Q. REV. 424, 432-33 (1989) (discussing the requirement that the rescue must be an easy one).

<sup>26</sup> Larry Alexander, *Criminal Liability for Omissions: An Inventory of Issues*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 121, 122 (Stephen Shute & A. P. Simester eds., 2002); *see, e.g.*, R. v. Conde, (1867) 10 Cox Crim. 547, 549 (Cent. Crim. Ct.) (requiring a *mens rea* of “willfully” for conviction of murder and “negligently” for conviction of manslaughter in a case involving parents whose child starved to death after they did not give him food).

<sup>27</sup> At common law, other status relationships could trigger a duty to rescue, such as the duty of a ship captain to the passengers. *See generally* State v. Mally, 366 P.2d 868 (Mont. 1961); LAFAVE, *supra* note 21, § 6.2(a).

<sup>28</sup> *See* Alexander, *supra* note 26, at 139.

<sup>29</sup> *E.g.*, Muehe v. State, 646 N.E.2d 980, 982 (Ind. Ct. App. 1995); *see also* Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 586-88 (1998).

<sup>30</sup> *E.g.*, Smith v. State, 408 N.E.2d 614, 616-17 (Ind. Ct. App. 1980); State v. Schultz, 457 N.E.2d 336, 336-38 (Ohio Ct. App. 1982).

obligation to rescue outside of marriage.<sup>31</sup> Although dating or being paramours is generally not enough to trigger the duty to rescue,<sup>32</sup> some courts recognize obligations between unmarried couples.<sup>33</sup> Where that has happened, however, the liability can often be explained on alternative grounds, such as situations where the long-term girlfriend caused the peril to the boyfriend and thus is assigned a duty to rescue for having created the peril.<sup>34</sup> But drawing the line can be difficult in other places too. Why should couples who married within days of meeting each other have more legal obligations to each other than unmarried couples who have lived together for ten years? Why should heterosexual married couples have duties to rescue each other but not the long-term homosexual couples who are legally prevented from marrying in most states? What should happen when there is a married couple who have lived apart for years but are not formally divorced?<sup>35</sup>

The murkiness is worse in the context of duties to rescue children. To be sure, biological parental linkage is not required to create a duty and thus the law places the same package of burdens on adoptive parents.<sup>36</sup> But courts are divided over whether to extend duties to rescue to people who have not expressly consented to assuming legal responsibility for a custodial role over the children.<sup>37</sup> Further, just as biology may not be necessary to impose a duty to rescue, perhaps there are circumstances where it is not sufficient: what if biological parents have renounced or terminated their parental rights prior to or after conception or birth of the child – think here of sperm or egg donors, or surrogate mothers and the resulting children.

Importantly, consider the status relationships associated with grandparents, cousins, uncles and aunts: all these individuals are never under a duty to rescue their reciprocal relations, nor are siblings, regardless of whether the

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<sup>31</sup> See, e.g., *People v. Beardsley*, 113 N.W. 1128, 1131 (Mich. 1907) (setting aside the manslaughter conviction of a married man whose mistress died after ingesting pills while in his home).

<sup>32</sup> *Id.*

<sup>33</sup> E.g., *State ex rel. Kuntz v. Thirteenth Judicial Dist. Court*, 995 P.2d 951, 956 (Mont. 2000) (holding that there exists a legal duty to summon medical aid if the couple cohabitate).

<sup>34</sup> *Id.* at 956-58.

<sup>35</sup> See Alexander, *supra* note 26, at 139.

<sup>36</sup> See, e.g., ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 48 (1993).

<sup>37</sup> Compare *State v. Miranda*, 878 A.2d 1118, 1131 (Conn. 2005) (overruling the lower court's conclusion that a live-in boyfriend had a duty to rescue his girlfriend's child because it would be difficult to stop liability from extending to "other members of the extended family, to longtime caregivers who are not related to either the parent or victim, to regular babysitters, and to others with regular and extended relationships with the abusing parent and the abused victim"), with *Leet v. State*, 595 So. 2d 959, 962-63 (Fla. Dist. Ct. App. 1991) (finding that the live-in boyfriend of a child's mother had a legal duty to the child to prevent the mother's abuse after establishing a "family-like relationship").

relationship is biological, adoptive, or step-sibling in nature. That said, it is possible that any one of these people might be under a duty toward the victim for other reasons: perhaps they have induced detrimental reliance, agreed to care for the victim, created the perils, etc.<sup>38</sup> But around the country, it is exceptionally rare to find duties to rescue based on familial status relationships outside the context of spousal and parental relations.

#### B. Parental Responsibility Laws

*In St. Clair Shores, Michigan, prosecutors charged Susan and Anthony Provenzano with a misdemeanor for failing to “exercise reasonable control” over their sixteen-year-old son, Alex Provezino.<sup>39</sup> Alex had committed a number of crimes, including burglarizing churches and homes and attacking his father with a golf club. Despite knowledge of some of his burglaries, the Provenzinos supported Alex’s release from juvenile custody, after which he continued to commit crimes. The jury convicted the Provenzinos after fifteen minutes of deliberation. The parents were each fined \$100 and ordered to pay \$2,000 in court costs.<sup>40</sup>*

Parental responsibility laws command widespread attention among politicians, courts, and academics.<sup>41</sup> In order to provide an avenue of restitution for victims and greater deterrence to reduce the incidence of juvenile crime, some jurisdictions impose criminal liability on parents for their children’s misbehavior.<sup>42</sup> Statutes criminalizing the parenting of those like the

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<sup>38</sup> *E.g.*, *Cornell v. State*, 32 So. 2d 610, 612 (Fla. 1947) (upholding a grandmother’s conviction for manslaughter by gross negligence based on facts independent of familial status); *see also supra* note 24 and accompanying text.

<sup>39</sup> Jill Smolowe, *Parenting on Trial: A Couple Is Fined for a Son’s Crimes*, TIME, May 20, 1996, at 50, 50.

<sup>40</sup> *Id.*; *see also* Pamela K. Graham, Note, *Parental Responsibility Laws: Let the Punishment Fit the Crime*, 33 LOY. L.A. L. REV. 1719, 1740-41 (2000).

<sup>41</sup> For a sampling of the attention parental responsibility laws have received and their extended history, *see generally* Eve M. Brank et al., *Parental Responsibility Statutes: An Organization and Policy Implications*, 7 J.L. & FAM. STUD. 1 (2005); Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621 (1997); James Herbie DiFonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1 (2001); Susan S. Kuo, *A Little Privacy, Please: Should We Punish Parents for Teenage Sex?*, 89 KY. L.J. 135 (2000); Tammy Thurman, *Parental Responsibility Laws/Are They the Answer to Juvenile Delinquency?*, 5 J.L. & FAM. STUD. 99 (2003); Leila Atassi, *Parental-Responsibility Law Strikes a Chord: Maple Heights’ Stance Draws Broad Response*, PLAIN DEALER (Cleveland), Apr. 30, 2006, at B1.

<sup>42</sup> More often, however, parents are targets via other avenues for the misdeeds of their children: “statutory civil penalties for property damage caused by their children, eviction from public housing if criminal activity has occurred in their homes, and increased exposure to civil lawsuits filed by victims of youth violence.” DiFonzo, *supra* note 41, at 3. A survey of the civil liability regimes around the country can be found in Brank et al., *supra*

Provenzinos have an extended history,<sup>43</sup> and their popularity seems to ebb and flow.<sup>44</sup> This Section provides an overview of the nature and scope of parental responsibility laws in recent years and how courts have evaluated them.<sup>45</sup>

To begin with, it is worth mentioning that most states have laws specifically prohibiting *any* adults from endangering the welfare of a minor or contributing to the delinquency of minors through specific affirmative actions that can be viewed as proximate causes of the child's wrongdoing, such as knowingly providing guns or alcohol to them.<sup>46</sup> These kinds of statutes are not only ubiquitous, but longstanding, beginning at the latest in 1903.<sup>47</sup> In some instances these statutes may also target any person's omission that arises under special circumstances, as opposed to affirmative acts, and sometimes these statutes create liability resulting in fines or imprisonment without any specific showing of fault required by the government.<sup>48</sup>

In truth, parental responsibility laws might reasonably be seen to encompass civil liability statutes, laws criminalizing the knowing contribution of an adult to a minor's violation of truancy and curfew laws, or laws prohibiting a parent

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note 41, at 19-25. For a discussion of the efforts to impose tort liability on parents for the acts of their children, see Rhonda V. Magee Andrews, *The Justice of Parental Accountability: Hypothetical Disinterested Citizens and Real Victims' Voices in the Debate over Expanded Parental Liability*, 75 TEMP. L. REV. 375, 379-403 (2002). For a discussion of the use of civil damages as a means to reduce juvenile delinquency, see Chapin, *supra* note 41, at 629-38.

<sup>43</sup> See Jerry E. Tyler & Thomas W. Segady, *Parental Liability Laws: Rationale, Theory, and Effectiveness*, 37 SOC. SCI. J. 79, 79 (2000) (noting that the Massachusetts Stubborn Child Law of 1646 authorized the imposition of fines on parents whose children were caught stealing); see also Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WIS. L. REV. 399, 405-06 (noting that "[s]tates have been enacting laws holding parents criminally liable for the delinquent acts of their children for almost a century," primarily through the enactment of statutes making it a criminal offense to contribute to the delinquency of a minor). Cahn adds that parents were frequently prosecuted in juvenile courts under these laws during the first half of the twentieth century. *Id.* at 406-07.

<sup>44</sup> See Leslie Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, But What Kind and to Whom?*, 2006 UTAH L. REV. 5, 6-7.

<sup>45</sup> Given our focus on criminal law here, we note that unless otherwise specified, we will use the term "parental responsibility laws" to refer to those laws imposing criminal sanctions on parents in response to the misdeeds of the children under their supervision.

<sup>46</sup> Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN'S L.J. 205, 213-22 (1997) (listing and comparing statutes); see also Paul W. Schmidt, Note, *Dangerous Children and the Regulated Family: The Shifting Focus of Parental Responsibility Laws*, 73 N.Y.U. L. REV. 667, 676 n.62 (1998).

<sup>47</sup> Schmidt, *supra* note 46, at 675.

<sup>48</sup> See, e.g., N.M. STAT. ANN. § 30-6-3 (LexisNexis 1994).

from providing a weapon to a child or sending a child to a brothel.<sup>49</sup> In this Article, however, we restrict the term “parental responsibility laws” to the category of *criminal liability imposed upon family members based on a theory of failure to supervise*. This category is controversial because under a generalized failure-to-supervise theory, the wrongdoing of the defendant’s child is enough to trigger liability subject, in most cases, to certain affirmative defenses the parent may raise.<sup>50</sup>

These parental responsibility laws are exemplified by an Oregon statute that holds parents criminally liable of a misdemeanor if their child violates a curfew law, truancy requirement, or commits an act bringing the child within juvenile court jurisdiction.<sup>51</sup> The statute does not require a showing that the parent specifically knew about or contributed to the child’s violation or criminal wrong.<sup>52</sup> A Cleveland suburb recently passed a similar ordinance under which prosecutors can criminally charge parents based on the misdeeds of their children;<sup>53</sup> a third offense under the statute can result in parents serving 180 days in jail.<sup>54</sup> Although parents would be permitted to raise as a defense that they had taken reasonable steps to control the child, an Ohio court recently struck down the Cleveland ordinance because it was inconsistent with a state statute requiring the person charged to commit an act or omission as a predicate for culpability.<sup>55</sup> The ordinance, however, was modeled on a similar and highly publicized law in Silverton, Oregon.<sup>56</sup> According to Silverton’s Mayor, the law was successful at reducing juvenile crime because “[w]hen their parents are being dragged into it, most kids . . . realize they’re not the only ones who pay the price for their actions, and kids begin to take stock of themselves.”<sup>57</sup>

Many of the “failing to supervise” laws are created at the municipality level,<sup>58</sup> and thus, they are more difficult to survey and no accurate scholarly estimates exist based on our research.<sup>59</sup> At the state level, it appears that only

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<sup>49</sup> OR. REV. STAT. ANN. § 163.577(1) (West 2003); *see also* Brank et al., *supra* note 41, at 10 (giving statutory examples from Georgia and Iowa).

<sup>50</sup> *See, e.g.*, N.Y. PENAL LAW § 260.10 (McKinney 2000).

<sup>51</sup> OR. REV. STAT. ANN. § 163.577(1) (West 2003).

<sup>52</sup> *Id.*

<sup>53</sup> MAPLE HEIGHTS, OHIO, CODE OF ORDINANCES § 648.20 (2008), *invalidated by* Maple Heights v. Ephraim, No. 90237, 2008 WL 4174861 (Ohio Ct. App. Sept. 11, 2008).

<sup>54</sup> MAPLE HEIGHTS, OHIO, CODE OF ORDINANCES § 698.02 (2008).

<sup>55</sup> *Ephraim*, 2008 WL 4174861, at \*8.

<sup>56</sup> *See* SILVERTON, OR., CRIMINAL CODE ch. 9.24 (1994).

<sup>57</sup> Atassi, *supra* note 41 (quoting Mayor Hector) (discussing the Maple Heights ordinance and comparing it to the Silverton ordinance).

<sup>58</sup> *See, e.g.*, IDAHO CODE ANN. § 32-1301 (2006) (authorizing counties and cities to establish ordinances based on the failure to supervise a child).

<sup>59</sup> We have seen some estimates in the literature suggesting that in the last decade there were about seventeen states with criminal parental responsibility laws, but these numbers

Oregon and Louisiana have parental responsibility statutes that go beyond the general delinquency statutes that apply to all adults.<sup>60</sup> But various cities and towns around the country have similar laws.<sup>61</sup> And some have created unique hybrid laws that both lower the mens rea required for the parent and define conduct by a minor that would not be separately subject to criminal sanction as evidence of “improper parenting.”<sup>62</sup> Proposals to extend such liability are regularly considered around the country.<sup>63</sup>

Jurisdictions vary with respect to how courts greet these legislative efforts. To be sure, there are relatively few reported cases considering the constitutionality of these parental responsibility statutes. In addition to the court that struck down the local Maple Heights ordinance, two state appellate courts have also struck down parental responsibility statutes that rested upon strict liability. In *State v. Akers*,<sup>64</sup> the New Hampshire Supreme Court struck down a statute that imposed criminal liability on parents for a child’s violation of a recreational vehicle usage statute.<sup>65</sup> The court concluded the statute violated the due process clause of the state constitution by imposing liability solely because of an individual’s status as a parent.<sup>66</sup> Similarly, a New Jersey appellate court struck down a town’s parental responsibility ordinance under the United States Constitution’s Due Process Clause.<sup>67</sup> The court concluded that the ordinance’s presumption that repeated juvenile misconduct “was the

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are misleading because some of the statutes cited are just general “contributing to the delinquency of a minor” statutes, which require specific wrongful acts or omissions by the adult and apply to all adults, not just parents or legal guardians. See Schmidt, *supra* note 46, at 675-82.

<sup>60</sup> See LA. REV. STAT. ANN. § 14:92.2 (2004); OR. REV. STAT. ANN. § 163.577(1) (West 2003). The Louisiana statute makes it a crime for a parent, “through criminal negligence,” to permit “the minor to associate with a person known by the parent” to be a gang member, a convicted felon, or a drug dealer or user. § 14:92.2. The statute allows a parent to escape liability if the parent seeks assistance from various agencies in modifying the child’s behavior or if the parent refers “the child to appropriate treatment or corrective facilities.” *Id.*

<sup>61</sup> E.g., ELGIN, ILL., CITY CODE tit. 10, art. V, ch. 10.66 (1995); CORPUS CHRISTI, TEX., CODE OF ORDINANCES ch. 33, art. II, § 33-49 (2004); see also Peter Applebome, *Parents Face Consequences as Children’s Misdeeds Rise*, N.Y. TIMES, Apr. 10, 1996, at A1 (observing the proliferation of “dozens” of ordinances in towns near Chicago in the “last two years”).

<sup>62</sup> E.g., ST. CLAIR SHORES, MICH., CODE OF ORDINANCES ch. 20.560 (2008); SALT LAKE CITY, UTAH, CITY CODE tit. 11, ch. 11.60 (1995). See generally 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.4 (2d ed. 2003) (providing an overview of vicarious liability).

<sup>63</sup> See Schmidt, *supra* note 46, at 682 n.102.

<sup>64</sup> 400 A.2d 38 (N.H. 1979).

<sup>65</sup> *Id.* at 39.

<sup>66</sup> See *id.* at 40.

<sup>67</sup> Doe v. Trenton, 362 A.2d 1200, 1203 (N.J. Super. Ct. App. Div. 1976).

result of parental action or inaction” could not be sustained based on the information about the root causes of juvenile delinquency presented to the court.<sup>68</sup>

But not all courts have reached the same conclusion. The California Supreme Court upheld a parental responsibility statute with criminal penalties.<sup>69</sup> On its face, the statute seemed to be a straightforward attempt to criminalize the act of contributing to a minor’s delinquency, but a 1988 amendment to the statute provoked the constitutional challenge at issue. The amendment read: “For purposes of this subdivision, a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child.”<sup>70</sup> The court rejected the complainants’ challenge that the statute was “unconstitutionally vague” and “overbroad.”<sup>71</sup> Rejecting the vagueness challenge, the court stated that requiring parents to exercise “reasonable care” provided “sufficiently certain” guidance because it “incorporates the definitions and the limits of parental duties that have long been a part of California dependency law and tort law.”<sup>72</sup> The court acknowledged that “neither the amendment nor prior case law sets forth specific acts that a parent must perform or avoid in order to fulfill the duty of supervision and control” over minor children,<sup>73</sup> but the court shrugged off that obvious difficulty, stating that “a statutory definition of ‘perfect parenting’ would be inflexible.”<sup>74</sup> Instead, “law-abiding parents” should look to “the concept of reasonableness” as their guide to statutory compliance.<sup>75</sup>

Notwithstanding some courts’ disapproval of parental responsibility statutes, we anticipate that state and local legislatures will continue to explore regulatory strategies to reduce juvenile misconduct, invariably burdening those of a particular state-sanctioned family status.<sup>76</sup> And burdens they are. Interestingly, these parental responsibility laws frequently create liability for parents based solely on their status as a parent and the misconduct of their

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<sup>68</sup> *Id.* at 1203.

<sup>69</sup> *Williams v. Garcetti*, 853 P.2d 507, 508 (Cal. 1993).

<sup>70</sup> CAL. PENAL CODE § 272(a)(2) (West 2008). The amendment was enacted in response to the perception that California was in the throes of a “gang crisis.” *See Williams*, 853 P.2d at 510.

<sup>71</sup> *Williams*, 853 P.2d at 509. The complainants’ privacy challenge was dropped over the course of the litigation and thus was not ruled upon by the California Supreme Court. *See id.* at 509 n.3. The court summarily rejected the overbreadth challenge. *See id.* at 516-17.

<sup>72</sup> *Id.* at 511.

<sup>73</sup> *Id.* at 512.

<sup>74</sup> *Id.* at 513.

<sup>75</sup> *Id.*

<sup>76</sup> *See Harris, supra* note 44, at 17. Harris’s study of Oregon shows that about one-third of the municipalities participating in the survey had parental responsibility laws but they were rarely – if ever – enforced. *Id.* at 22-23.



child alone, leaving the parent to plead their good parenting skills as an affirmative defense rather than making the prosecution prove the absence of good parenting as part of its case-in-chief.<sup>77</sup>

### C. Incest

*In 1997, Allen and Patricia Muth were convicted of incest after they entered into a sexual relationship and had four children. Allen and Patricia were biological brother and sister, although they did not meet until Patricia was eighteen because she had been in foster care since she was a baby. When convicted, Allen was forty-five and Patricia was thirty. During sentencing, the judge stated, "I believe severe punishment is required in this case. . . . I think they have to be separated. It's the only way to prevent them from having intercourse in the future."<sup>78</sup> The judge then sentenced Allen to eight years and Patricia to five years in prison.<sup>79</sup> Their parental rights to at least one of their children were also terminated because of the incestuous relationship.<sup>80</sup>*

Incest laws, which prohibit both sexual relations and marriage within certain kinship relations, reflect an enduring sexual taboo.<sup>81</sup> Perhaps surprisingly, incest was not a crime at English common law,<sup>82</sup> and it is not even today a punishable offense in all American jurisdictions.<sup>83</sup> It is also another example of a situation where criminal liability may attach to a person only on account of familial status.<sup>84</sup> The elements of incest are usually: (a) sexual relations between persons having a particular prohibited level of consanguinity (or

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<sup>77</sup> See Schmidt, *supra* note 46, at 684 (citing OR. REV. STAT. § 163.577(3)-(4) (1995) as an example).

<sup>78</sup> Jeff Jacoby, *Hypocrisy on Adult Consent*, BOSTON GLOBE, Aug. 28, 2005, at C11 (quoting sentencing judge).

<sup>79</sup> *Id.*

<sup>80</sup> Muth v. Frank, 412 F.3d 808, 811 (7th Cir. 2005).

<sup>81</sup> See 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, 1546 (2005) ("[T]he very term 'incest' is a powerful way to provoke an almost visceral disgust toward any relationship to which it is compared.").

<sup>82</sup> People v. Baker, 442 P.2d 675, 677-78 (Cal. 1968); State v. Scion Barefoot, 31 S.C.L. (1 Rich.) 209, 228-29 (S.C. 1845) (stating that at English common law, incest did not void a marriage but made it voidable); Graham Hughes, *The Crime of Incest*, 55 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 322, 323-25 (1964).

<sup>83</sup> There are three states in which adult consensual consanguineous pairings are not prohibited: Rhode Island, Ohio, and New Jersey. Note, *Inbred Obscurity: Improving Incest Laws in the Shadow of the "Sexual Family"*, 119 HARV. L. REV. 2464, 2469-70 (2006) [hereinafter Note, *Inbred Obscurity*].

<sup>84</sup> States can also prohibit marriage between various pairings of relatives through their domestic relations statutes, even if they do not attach criminal penalties to the relationship. See Margaret M. Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYUJ. PUB. L. 21, 27 (1993). We focus here on criminal statutes.

affinity through adoption or marriage); and (b) the defendant's awareness of that relationship.<sup>85</sup>

While prohibitions of incest are usually general, in theory they can be grouped into three different categories: regulation of sex between adults, regulation of sex between an adult and a minor, and regulation of sex between minors. Most jurisdictions are unlikely to make these distinctions; indeed, under most incest statutes, it is irrelevant whether the participants jointly consent to the sexual activity.<sup>86</sup> The issue of consent bears further mention. In most states, lack of consent is not an articulated element of the incest charge,<sup>87</sup> which, in theory, renders victims vulnerable to prosecution under statutes lacking specificity. Where joint consent exists, as in the *Muth* case, both parties may still be held criminally liable.<sup>88</sup> This crudeness in drafting raises a series of normative questions addressed in Part III.<sup>89</sup>

In the United States, all states but Rhode Island have criminal prohibitions on at least some consanguineous relations between family members who are not the so-called "conjugal couple" (i.e., something like spouses), although states vary in terms of what relationships are prohibited.<sup>90</sup> For example, all states that have criminal incest statutes ban sexual relationships between biological parents and their children, regardless of the child's age,<sup>91</sup> but not all incest statutes prohibit sex between adult step-children and their step-parents.<sup>92</sup> All states with incest statutes also ban sexual relationships between consanguineous siblings and most ban relationships between aunts and uncles and their nephews and nieces.<sup>93</sup> Regarding cousins, there is even more divergence: only eight states criminalize sexual contact between first cousins,<sup>94</sup> but twenty-five states prohibit marriage between them.<sup>95</sup> Some states also extend their prohibitions beyond blood relationships, criminalizing sex

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<sup>85</sup> 41 AM. JUR. 2D *Incest* § 11 n.2 (2008). The defendant's awareness relates to his knowledge of the relationship, not his knowledge of the law that punishes incest.

<sup>86</sup> Note, *Inbred Obscurity*, *supra* note 83, at 2465 ("The criminal incest laws in the vast majority of states apply to [consensual] incest as well by making the crime distinct from the crime of rape.").

<sup>87</sup> 1 AM. JUR. 2D *Incest* § 14 (2008).

<sup>88</sup> *Id.*

<sup>89</sup> See *infra* Part III.C.

<sup>90</sup> See Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 348-49 (2004) (compiling the various state laws on incest). Ohio targets only parental figures for criminal liability for incest, and New Jersey does not penalize parties to incest when both are eighteen or older. Note, *Inbred Obscurity*, *supra* note 83, at 2469-70.

<sup>91</sup> McDonnell, *supra* note 90, at 349.

<sup>92</sup> See, e.g., *State v. Johnson*, 670 N.W.2d 802, 813 (Neb. Ct. App. 2003).

<sup>93</sup> McDonnell, *supra* note 90, at 348-49.

<sup>94</sup> See *id.*

<sup>95</sup> *Id.*

between step-parents and step-children, and some states treat adopted children the same as biological children for purposes of incest prohibitions.<sup>96</sup>

D. *Bigamy*

*In 1953, Marlyne Hammon's father and dozens of other men in her community were arrested and sent to jail on charges of polygamy. Although her father was released shortly thereafter, the family corresponded in secret and continued to live apart because they feared further prosecution. Now an adult, Hammon is involved in a polygamous relationship and advocates for the decriminalization of polygamy.*<sup>97</sup>

Bigamy laws in the United States, broadly stated, prohibit an individual from entering into multiple and simultaneous marriages when the first spouse is still alive and the initial marriage relationship has not been terminated.<sup>98</sup> Criminal laws prohibiting polygamy are nearly universal around the country,<sup>99</sup> and with a few exceptions in certain geographic communities, they are regularly enforced.<sup>100</sup> As we discuss in Part III, these prohibitions raise substantial questions about the proper scope of the criminal law and its relationship to issues of family status.<sup>101</sup>

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<sup>96</sup> *See id.*

<sup>97</sup> Elise Soukup, *Polygamists, Unite!; They Used to Live Quietly, But Now They're Making Noise*, NEWSWEEK, Mar. 20, 2006, at 52, 52.

<sup>98</sup> 11 AM. JUR. 2D *Bigamy* § 1 (2008). Interestingly, some states do not require *X* to actually marry *Y* in order to be guilty of bigamy; extramarital cohabitation suffices to trigger liability. Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 308 n.158 (2004). Some states also punish the single person who knowingly marries the spouse of another person. 11 AM. JUR. 2D *Bigamy* § 1 (2008). This type of legislation is not quite a conventional family ties burden because the state is not treating defendant *X* any differently on account of *X*'s family status or connection; rather, it is because of *X*'s would-be spouse's existing family connection. Thus, unlike the family ties burdens discussed in this Article, which focus on impositions of liability or enhancements on account of a defendant's familial status, this kind of legislation is formally quite different. That is not to say such legislation does not raise its own (quite similar) problems, but we are focused on those statutes that place burdens on persons because of their familial status.

<sup>99</sup> We use the term "bigamy" to refer to the criminal laws prohibiting the practice of polygamy, or taking on more than one spouse, regardless of gender. For a collection of bigamy statutes, see Emens, *supra* note 98, at 290 n.51.

<sup>100</sup> *See, e.g.*, Kirk Johnson & Gretel C. Kovach, *Daughter of Sect Leader Gets Additional Protection*, N.Y. TIMES, June 4, 2008, at A16 (discussing the conviction of Fundamentalist Church of Jesus Christ of Latter Day Saints sect leader, Warren Jeffs).

<sup>101</sup> For our particular purpose, we are focused on adultery laws that operate in jurisdictions where fornication (defined as sexual relations between non-married partners) is not prohibited. To the extent that jurisdictions impinge on all consensual sexual relations outside marriage between mature individuals, there is no specific family ties burden, but it goes without saying that our liberal commitments would trigger hostility to such laws,

### E. Adultery

In 2004, John R. Bushey Jr., the former town attorney of Luray, Virginia, was charged with adultery after his paramour reported the misconduct to the police when the affair terminated. Bushey eventually pled guilty and was sentenced to twenty hours of community service. Along with twenty-three other states, Virginia can prosecute a husband or wife for having consensual sex outside marriage.<sup>102</sup>

Adultery laws, at least in jurisdictions without fornication statutes,<sup>103</sup> prohibit a married individual from engaging in extramarital sex, notwithstanding that such sexual relations would not otherwise be subjected to legal sanction.<sup>104</sup> Perhaps because of adultery's pervasiveness,<sup>105</sup> a majority of states no longer regulate extramarital relations,<sup>106</sup> even though large majorities of Americans continue to view adultery as immoral.<sup>107</sup> Regardless of the cause of adultery's relative demise as a crime, we recognize that most jurisdictions do not actively prosecute or punish this misconduct anymore.<sup>108</sup>

Although one might be tempted to dismiss the significance of adultery laws today, we are loathe to do so in light of the continued enforcement in certain jurisdictions,<sup>109</sup> especially in the military.<sup>110</sup> Indeed, although civilian courts

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which persist in various forms in ten states and the District of Columbia. See Emens, *supra* note 98, at 290 n.49 (collecting statutes).

<sup>102</sup> Jonathan Turley, *Of Lust and the Law*, WASH. POST, Sept. 5, 2004, at B1.

<sup>103</sup> See *supra* note 101.

<sup>104</sup> 2 AM. JUR. 2D *Adultery & Fornication* § 4 (2008). Some jurisdictions retain laws punishing an unmarried person for engaging in sexual relations with a married person. See Emens, *supra* note 98, at 290 n.49. Our analysis is restricted to laws punishing married persons who engage in extramarital sex.

<sup>105</sup> See Emens, *supra* note 98, at 299 n.107 (citing a 1994 National Health and Social Life Survey reporting that thirty-five percent of American married men and twenty percent of American married women have adulterous sex).

<sup>106</sup> See *id.* at 290 n.49 (collecting the statutes of twenty-three states plus the District of Columbia that continue to criminalize adultery).

<sup>107</sup> Lynn D. Wardle, *Parental Infidelity and the "No-Harm" Rule in Custody Litigation*, 52 CATH. UNIV. L. REV. 81, 95 n.57 (2002) ("According to the Washington Post/Kaiser/Harvard Survey Project in 1998, eighty-eight percent of Americans believe that adultery is immoral, while only eleven percent find it morally acceptable.").

<sup>108</sup> See Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 45 n.5, 53 nn.54-57 (1991), for a general history of the criminal treatment of adultery in America since the time of the colonists.

<sup>109</sup> See John F. Kelly, *Virginia Adultery Case Roils Divorce Industry: Conviction Draws Attention to Little-Used Law*, WASH. POST, Dec. 1, 2003, at B1; John F. Kelly, *Virginia Man Challenges State's Adultery Law; ACLU Joins Appeal, Cites Privacy Issue*, WASH. POST, Feb. 26, 2004, at B8.

<sup>110</sup> See Melissa Ash Haggard, *Adultery: A Comparison of Military Law and State Law and the Controversy This Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469, 469-70, 476-77 (1998); James M. Winner, *Beds with Sheets but No*

have generally seen a decrease in adultery prosecutions, there has been a steady source of such prosecution in military courts, often traced to the integration of women into the armed forces in the late 1970s.<sup>111</sup> During the Clinton-Lewinsky scandal, many members of the armed forces were especially critical of their Commander-in-Chief, who could have faced a court-martial on adultery-related charges if he had been a mere service member.<sup>112</sup> Additionally, although someone might not be prosecuted for the crime of adultery, the fact that the criminal laws remain on the books has real consequences in civil contexts other than the military, such as child custody, adoption, and employment.<sup>113</sup> Moreover, there is an odd discrimination resulting from adultery laws that only apply to heterosexual couples, which needs some articulation and evaluation.<sup>114</sup> It goes without saying that as applied to the defendant who is married, adultery laws are a clear and conventional family ties burden.

F. *Nonpayment of Child Support*

*In 1997, an Anchorage, Alaska father was sentenced to five days in prison and five years probation for failing to pay almost \$98,000 in child support.<sup>115</sup> A government official stated: "Our job is to collect money for children. Parents need to realize there are penalties for ignoring their children."<sup>116</sup>*

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*Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073, 1073-74 (1998).

<sup>111</sup> See generally C. Quince Hopkins, *Rank Matters but Should Marriage?: Adultery, Fraternalization, and Honor in the Military*, 9 UCLA WOMEN'S L.J. 177 (1999) (analyzing criminal regulation of sexual infidelity in both the military and civilian contexts); *Military Gets New Rules on Adultery: It's Still a Crime, but Not All Cases Will Be Prosecuted*, CHI. TRIB., July 29, 1998, at C1.

<sup>112</sup> See, e.g., Bradley Graham, *Military Leaders Worry Privately About Impact; Some Troops Offended by Double Standard*, WASH. POST, Sept. 15, 1998, at A10.

<sup>113</sup> Cf. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 110 (2000) (arguing that even unenforced laws are not harmless because they create a criminal class).

<sup>114</sup> Outside of Massachusetts and Connecticut, same-sex marriage is illegal in the United States, and thus adultery laws apply as a class only against those who are married, i.e., heterosexuals. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 5, 2008, at A1. In light of the recent events surrounding Proposition 8 in California, the status of same-sex marriage is still unresolved in that state, most especially for the 18,000 same-sex couples who were legally married before the passage of Proposition 8. Bob Egelko, *Anti-gay Marriage Group Steps Up for Prop. 8*, S.F. CHRON., Nov. 11, 2008, at B-2. Few proponents of adultery laws purport to have this discrimination in mind, but in fact they are likely the result of a cultural erasure of the existence of a gay and lesbian monogamous community.

<sup>115</sup> Press Release, Office of the Governor, State of Alaska, Parent Sentenced for Failure to Pay Child Support (Feb. 9, 1999), <http://www.csed.state.ak.us/PressReleases/fisher.html>.

<sup>116</sup> *Id.*

Ordinarily, the failure to pay a debt to a non-governmental entity (like a local utilities provider) is not a criminal act;<sup>117</sup> an aggrieved party is forced to pursue civil remedies to obtain redress.<sup>118</sup> In contrast, failure to pay child support is a crime. For example, the Child Support Recovery Act<sup>119</sup> (amended in 1998 as the Deadbeat Parents Punishment Act)<sup>120</sup> makes it a federal crime to owe more than \$5,000 in child support or to be in arrears longer than one year if the child lives in a different state than the delinquent parent.<sup>121</sup> In addition, many states statutorily criminalize a parent's failure to pay child support.<sup>122</sup> This statutory regime demonstrates yet another way in which family status can turn an otherwise non-criminal act into a criminal one.

### G. *Nonpayment of Parental Support*

The last area we explore here is a variant of the family ties burden sometimes called filial responsibility laws.<sup>123</sup> These laws, as their name

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<sup>117</sup> Obviously, the failure to pay tax liabilities to the government is criminal. But generally private parties cannot generally the criminal justice system to enforce debts outside the child support context. See Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes upon Academics and Advocates*, 33 FAM. L.Q. 235, 240 (1999).

<sup>118</sup> See *id.*; Posting of Nate Oman to Concurring Opinions, [http://www.concurringopinions.com/archives/2007/05/debt\\_status\\_and.html](http://www.concurringopinions.com/archives/2007/05/debt_status_and.html) (May 25, 2007, 12:34).

<sup>119</sup> 18 U.S.C. § 228 (2000).

<sup>120</sup> Deadbeat Parents Punishment Act, Pub. L. No. 105-187, 112 Stat. 618 (1998).

<sup>121</sup> *Id.*

<sup>122</sup> SCOTT SUSSMAN & COREY MATHER, CENTER ON FATHERS, FAMILIES, AND PUBLIC POLICY, CRIMINAL STATUTES FOR NON-PAYMENT OF CHILD SUPPORT BY STATE 1 (2003), [www.cffpp.org/publications/pdfs/crimstat.pdf](http://www.cffpp.org/publications/pdfs/crimstat.pdf). States have also tried a number of other measures to enforce child support orders, from garnishing wages to suspending drivers' licenses to booting cars. Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1000 (2006); see also Jennifer Goulah, Comment, *The Cart Before the Horse: Michigan Jumps the Gun in Jailing Deadbeat Dads*, 83 U. DET. MERCY L. REV. 479, 486 (2006) (describing how some states post "wanted" posters of deadbeat dads and others send birthday cards, reminding parents of their child's birthday and urging them to pay).

<sup>123</sup> For background information and history on filial responsibility laws, see generally Ann Britton, *America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents*, 26 CAL. W. L. REV. 351 (1990); Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Effectively Enforced?*, 36 FAM. L.Q. 501 (2002); Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & POL'Y 709 (2001); Matthew Pakula, *A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly*, 39 FAM. L.Q. 859 (2005); Andrea Rickles-Jordan, *Filial Responsibility: A Survey Across Time and Oceans*, 9 MARQ. ELDER'S ADVISOR 183 (2007); Katie Wise, *Caring for Our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 563 (2002).

suggests, require adult children with means to provide care or support to their indigent parents. But filial responsibility is actually a bit of a misnomer; many of the very statutes establishing these obligations to parents also encompass the obligation to materially support spouses and children as well.<sup>124</sup> Most of the thirty states that have filial responsibility statutes authorize only civil actions.<sup>125</sup> Nonetheless, twelve states currently authorize courts to levy a criminal sanction upon adult children who fail to provide adequate care for their parents.<sup>126</sup> It bears mention that since the 1970s, the vast majority of state statutes requiring adult children to support their elderly and indigent parents have been enforced rarely or not at all, especially in the criminal context.<sup>127</sup>

As to the mechanics of these statutes, California's language is typical: "[E]very adult child who, having the ability so to do, fails to provide necessary food, clothing, shelter, or medical attendance for an indigent parent, is guilty of a misdemeanor."<sup>128</sup> Massachusetts, like some other states, adds a proviso that such liability will not attach to a person who was not supported by parents as a minor, or to a person who, "being one of two or more children, has made proper and reasonable contribution toward the support of such parent."<sup>129</sup> Our analysis in Part III will focus on the requirement to support parents under these laws.<sup>130</sup>

Having here canvassed the numerous ways family status is burdened in the criminal justice system, we turn to developing a normative framework to assess these various family ties burdens.

## II. A FRAMEWORK FOR ANALYZING FAMILY TIES BURDENS

In the previous Part, we identified some practices we characterize as family ties burdens. Here, we present a normative framework for analyzing whether and how such burdens can be justified. First, we explain why we adopt a defendant-centered perspective despite the fact that when other perspectives are introduced, family ties burdens could be viewed as bringing benefits to the family as an institution or to particular family members other than the defendant. Then, we revisit some of the normative costs of family ties benefits that we adumbrated and explored in our companion article to see if any retain applicability in this new context of family ties burdens. Finally, we highlight the voluntary caregiving feature we see in the structure of many family ties burdens, a feature which can serve as a guide for scrutinizing burdens more generally, especially within a criminal law framework informed by what we

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<sup>124</sup> See Moskowitz, *supra* note 123, at 713-14.

<sup>125</sup> See Rickles-Jordan, *supra* note 123, at 199.

<sup>126</sup> See *id.* at 199 n.136.

<sup>127</sup> See Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM. L.Q. 195, 196 (1992).

<sup>128</sup> CAL. PENAL CODE § 270C (West 2008).

<sup>129</sup> MASS. GEN. LAWS ch. 273, § 20 (2007).

<sup>130</sup> See *infra* Part III.G.

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call a “liberal minimalist” approach (which bears some resemblance to a form of equal protection analysis at the legislative rather than judicial level). This approach includes analysis of how much liberty is infringed upon, whether the government’s interest in the infringement is compelling or important, and how narrowly tailored the law is to address the underlying interest. Our “minimalism” is a way of cashing out a form of narrow tailoring, for it underwrites a general skepticism about using criminal law methods to accomplish goals that can be achieved without the threat to liberties common in criminal laws. Informed by these principles, we offer a potential structure of normative analysis for laws creating criminal liability predicated on the defendant’s family status.

A. *A Defendant-Centered Perspective, Among Others*

In analyzing family ties burdens, we claim the defendant is being treated differently, on account of some action or inaction, because of his family status. In this Section we explain our choice to use a defendant-centered perspective and try to contextualize that choice among the other perspectives one could adopt.

1. The Defendant as the Object of Punitive Coercion

In examining family ties burdens the way we have in Part I, we are clearly looking at the nature of the wrongdoing from the defendant’s perspective. The conduct rules at the core of this Article are aimed at defendants – and it seems necessary to analyze those conduct rules on their own terms. After all, it is the defendants who are coerced in the name of state punishment, and the criminal justice system’s coercive nature is its most important feature demanding justification.

But there is, of course, much more to say on the matter and other perspectives can be taken. Family ties burdens might also be viewed as burdens on or benefits to others: victims, other family members, the state, or society at large.

2. Family Members as the Object of Harm

In some cases, the burden imposed on the defendant also burdens those it is allegedly supposed to help. For example, a woman whose ex-spouse is jailed for failure to pay child support may object that this burden imposes a terrible hardship on her family by reducing the ability of her children’s father to play any kind of meaningful role in their lives. Thus, many of the practices we have described in Part I powerfully affect family interests beyond those of the defendant. Consider how punishment of someone for failing to supervise, rescue, or support a family member might impair that person’s future ability or willingness to supervise, rescue, or support a family member.<sup>131</sup> The nature

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<sup>131</sup> See *infra* Part III.B.2.



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and intensity of the punishment for the offender may have serious detrimental effects on the very family members initially harmed by the defendant's antecedent failure to satisfy his duty. The same is true, at least in certain conditions, when we punish offenders for bigamy, incest, or adultery. Incarcerating or fining offenders of these laws may impair their capacity to care for and support their families.

Undoubtedly, no legislator enacts these family ties burdens with the intention of inflicting harm on innocent family members. Yet to the extent the harms to innocent third parties are foreseeable, it is the legislators' obligation to weigh these costs in the balance of deciding whether and how to insert family ties burdens in the criminal justice system.

### 3. Burdens as Devices for Promoting "Family Life and Values"

Another alternative prism arises when we view these laws from the *ex ante* perspective rather than the *ex post* one. In other words, we might consider whether someone within the family – or "the family" as a social institution – could be described as benefiting from the laws creating the "family ties burden." From this view, what appears to be a penalty on familial status in an individual case after the fact could have been created as part of a strategy designed to confer larger benefits to the social institution of the family as a whole.

For instance, the recent criminalization of nonpayment of child support looks like a "family ties burden" in the sense defined earlier. That is because, as a general matter, failure to pay debt does not warrant criminal punishment. Indeed other legal mechanisms exist to help debtors, most prominently, bankruptcy. But now, failure to pay child support, which is a form of debt, is a basis in many jurisdictions for criminal punishment.<sup>132</sup> Thus, failures to meet some kinds of intra-familial financial obligations are now penalized much more harshly than failures to meet other financial obligations.

Characterizing these practices as "burdens" on the particular defendant might be mistaken if we alter the lens through which we are looking at the problem. If we move from an *ex post* perspective focused on the defendant to an *ex ante* perspective focused on the institution of the family, the offender in question might have agreed with having these family ties burdens as laws if he assessed them impartially, that is, if he did not know whether he would end up being the target of these laws later. He might agree with them if he believed that these family ties burdens were important to promote a certain vision of family life within society. Thus, from the *ex ante* position, criminalizing failures to rescue, failures to supervise, or failures to support, and banning incest, adultery, or bigamy may be aimed at (and to some, justified by) keeping certain kinds of families together to perform the work associated with a certain kind of idealized family life. If this is the purpose, the policy of criminalizing nonpayment of child support might provide a benefit, at least *ex ante*, to both

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<sup>132</sup> See discussion *supra* Part I.F.

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the offender and the institution of the family. Imposing the penalty on the offender for his violation of these laws is simply the way to ensure that people do not defect from what they would have agreed to earlier as reasonable and rational persons working in concert with each other to secure the conditions for human flourishing.<sup>133</sup>

#### 4. Burdens as Devices to Serve Goals Beyond Family Promotion

Family ties burdens might have other rationales too – aside from simply promoting a particular vision of family life. First, the various burdens placed on offenders may reflect imperfect or indirect choices of decision makers to enhance distinctive criminal justice goals such as deterrence or retribution. For example, if a state were to have heightened penalties for certain incestuous encounters compared to other sexual assaults, it might be a method to overcome the difficulty of getting incest victims to report the assaults.<sup>134</sup>

Alternatively, the state legislature may be using the criminal justice system to communicate that when one commits a crime against certain family members, one is even more worthy of reproach and condemnation.<sup>135</sup> In this respect, the penalties might be thought to advance the criminal justice system's norm-projection purposes, by demonstrating society's deep values. For example, attacking or neglecting family members is worse than attacking or neglecting non-family members because of the additional breach of trust that a caregiver signals when opting into a relationship of caregiving.<sup>136</sup> If heightened penalties attach in the context of crimes against victims with whom one has opted into a relationship of caregiving, then those penalties might be justifiable because the offensive action or failure to support, supervise, or rescue with respect to that particular victim is worse: when you hurt or fail to protect someone whom you have already signaled to society that you will care for, then one might plausibly say an extra wrong (a breach of trust based on implicit or explicit promise) has been committed. That wrong is not only a wrong against a particular victim, remediable by compensation. Rather, the wrong has a different texture because the wrongdoer has lulled the public into a false sense of security from which they fail to help the person in question.

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<sup>133</sup> Cf. JOHN RAWLS, A THEORY OF JUSTICE 10-15 (rev. ed. 1999).

<sup>134</sup> This strategy draws on the insight that heightened penalties are a plausible way of achieving greater deterrence in certain contexts where there is less likelihood of a victim coming forward. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 888 (1998).

<sup>135</sup> See, e.g., *R. v. Gladue*, [1999] 1 S.C.R. 688, 740-41 (Can.) (discussing the breach of trust associated with violence against one's spouse as an aggravating factor).

<sup>136</sup> But see Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 820 (2006) (discussing a study showing that in practice, parents who lose children through negligent conduct are often treated more leniently than unrelated caregivers who cause death).

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A distinct but related idea is that these apparent penalties serve other legitimate social goals of the state that have little to do with deterrence or norm projection or even the vitality of family life. According to this view, penalties imposed on the basis of familial connections to the crime might serve other purposes that directly benefit the state. For instance, the legislature might believe that imposing impediments to even consensual incest between adult siblings is important to reduce the prospects of increased social expenditures on food stamps and medical care, because the legislators assume that incestuous relationships will produce offspring who are more likely to require subsidized medical support.<sup>137</sup> Again, we will have to weigh very carefully these purported benefits in any one instance: if they serve compelling or important interests, perhaps discrimination on the basis of family status is justifiable. But these compelling interests cannot be assessed in the abstract and must be pursued in the specific context of each burden, an analysis we begin to undertake in the next Part.

#### 5. Burdens in Relation to Family Ties Benefits

We obviously do not deny that the laws creating what we call family ties burdens lend themselves to examination from a variety of perspectives. There is something about these family ties burdens, however, that requires more caution than typically extended in discussion of any one of these laws in isolation, and in isolation from the *benefits* the criminal justice system extends to defendants based on family status. Moreover, in light of the fact that our previous work looked at the *benefits* extended to defendants based on family status,<sup>138</sup> we do not think there is something inherently biased when we look at the *burdens* placed on family ties. To our minds, then, the inquiry at the core of this Article is important – when are family ties burdens justified in creating distinctively *criminal liability*?

One answer to this question would look at these burdens in relation to the various benefits and privileges afforded on account of family ties; it might be thought that the burdens “balance out” this discriminatory treatment pervasive within the criminal justice system, just as, perhaps, family ties benefits may be a form of compensation for the havoc the criminal justice system indirectly wreaks upon families.<sup>139</sup> But balance itself requires further justification to explain why there is a need to have any family ties benefits or burdens at all.

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<sup>137</sup> As discussed in Part III.C, one can design policies to accommodate these concerns in several ways.

<sup>138</sup> We looked at familial status defenses, pretrial release, exemptions from prosecution for harboring fugitives, testimonial privileges, prison accommodations, and sentencing practices. See generally Markel, Collins & Leib, *supra* note 3.

<sup>139</sup> In our forthcoming book, see *supra* note 8, we discuss how these benefits and burdens might interact and what we learn about how we value family when we look at the various benefits and burdens together.

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After all, there would be reciprocity or balance in the absence of both family ties benefits and family ties burdens.

The better approach, we think, sees family ties benefits or burdens or both as serving some “protective” role of a particular notion of family and its associated caregiving responsibilities. But this protective role itself needs further elaboration. Consider the following: how exactly do sentencing discounts for those with family ties and responsibilities, a benefit we examined in our framework last year,<sup>140</sup> rest consistently with criminalizing polygamy, adultery, or incest? At first glance, the benefit and burden seem to be in tension – why would we make allowances based on family ties in one place and then punish based on family ties in the other?

But there may be an identifiable logic here. The former – sentencing discounts based on familial obligations – is arguably protective of family caregiving functions *ex post*. The others can be deemed “protective” of such caregiving functions from an *ex ante* perspective – before any person knows he is going to commit that crime. This is because some might plausibly view incest, adultery, or polygamy (or any of the other family ties burdens) as endangering the caregiving functions associated with the traditional family unit. On this view, these family ties burdens and benefits work in tandem to signal that society cares deeply about promoting particular conceptions of family even when they interfere with other norms informing the construction of an attractive and effective criminal justice system.

While this explanation sounds plausible, it suffers from the randomness of choice as to when to adopt an *ex ante* perspective and when to adopt an *ex post* perspective. It is arbitrary because it chooses to justify the practices by selecting an *ex post* focus on benefits and an *ex ante* focus on burdens without any further explanation of why such a choice is justifiable. The problem is that the protective function could arguably be promoted by selecting an *ex ante* view of benefits and an *ex post* view of burdens. But that would require a radical re-orientation of the rules we have.

To illustrate: when taking an *ex ante* perspective on family ties *benefits*, one might think that if a state decided it will not give sentencing discounts based on family ties and responsibilities, then that would create extra deterrence with those parents sensitive to the signals the criminal law is emitting. The same rationale attaches to spousal testimonial immunities or exemptions from prosecution for harboring fugitives. In those situations, *ex ante*, people might think they will forbear from crime so as not to put their loved ones in jeopardy of having to testify against them or house them when they are fugitives. Forbearing from wrongdoing could be a way to demonstrate how they care about each other because it avoids putting the family members in a tough spot later on, a spot where they have to choose between kinship obligations and citizen obligations. Moreover, because the *ex ante* view means that family members consider themselves as members of a family of a victim as well, they

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<sup>140</sup> See Markel, Collins & Leib, *supra* note 3, at 1171-78.

may be prone to taking a more impartial view about what the better rules are. Examined *ex ante*, most of the family ties benefits should be jettisoned when they interfere with particular criminal justice objectives they otherwise value. All this would be an argument for getting rid of family ties benefits.

By contrast, when examining family ties burdens from the defendant's *ex post* point of view, the defendant will strenuously argue that punishment for the family ties burdens will actually serve to interfere with caregiving roles served (or potentially served) by the defendant – especially when they strip resources (time, liberty, and money) from the defendant that might otherwise be allocated toward caregiving functions.

The preceding discussion shows only that legislators need not have necessarily adopted an *ex post* view of family ties benefits and an *ex ante* view of family ties burdens. Moreover, since legislatures and scholars have not looked at these benefits and burdens systematically as designed to be offsetting, critical and independent analysis is warranted.

#### B. *Revisiting the Costs of Family Ties Benefits*

When we analyzed family ties benefits in our companion article, we scrutinized the plausible justifications for securing the state's aid to help the family.<sup>141</sup> There, we highlighted how critical it is to appreciate how the family both molds the individual and reduces the state's burdens.<sup>142</sup> We recognize that the institution of the family helps create and fashion our individual identities, our “historical,”<sup>143</sup> “constitutive,”<sup>144</sup> or “situated”<sup>145</sup> selves that depend heavily on our families and our familial associations for survival and sustenance.<sup>146</sup> Moreover, since the state cannot or will not live in accordance with what Plato's *Republic* idealizes for the “guardian class” – no private families with all children being held in common<sup>147</sup> – the state recognizes the benefits of keeping families together and solvent. This is a crude way of thinking about the matter, to be sure. But it has a grain of truth; the state simply cannot afford to provide all the services families routinely provide relatively efficiently and effectively, so it “subcontracts” such work to the family and “pays” it accordingly with special protection. Families cannot

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<sup>141</sup> *Id.* at 1187-90.

<sup>142</sup> *Id.* at 1188.

<sup>143</sup> See GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 16 (1993).

<sup>144</sup> See Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 961 (1992).

<sup>145</sup> See MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 200 (1999); Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2050 (1995).

<sup>146</sup> See Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 174 (2003).

<sup>147</sup> See PLATO, *THE REPUBLIC* 158 (G. R. F. Ferrari ed., Tom Griffith trans., 2000).

provide caregiving services completely for free, and can rightfully demand that the state subsidize the hard work of helping children “take their place as responsible, self-governing members of society.”<sup>148</sup> The state helps itself when it subcontracts cheaply the “formative project of fostering the capacities for democratic and personal self-government”<sup>149</sup> and leaves it in generally reliable hands.

Despite the recognition the family’s caregiving role properly warrants, and the risk of irrelevance and illegitimacy that states incur when they fail to treat persons as constituted selves, we ultimately concluded that general arguments rooted in communitarian political theory were insufficient to underwrite special treatment of the family in the *criminal justice system*.<sup>150</sup> In particular, we noted how these benefits on account of familial status cause risks of inequality, gender bias, inaccuracy, and more crime.<sup>151</sup> Consequently, we expressed hesitation and skepticism toward the benefits distributed on the basis of family status throughout the criminal justice system.<sup>152</sup> It is, after all, a basic liberal principle that punishment must be meted out fairly and accurately, without fear or favor for those of different statuses.<sup>153</sup>

The reasons for our skepticism toward the distribution of family ties benefits inform our approach to thinking about family ties burdens. Specifically, we must address whether and to what degree the normative considerations we identified earlier in connection with families ties benefits – patriarchal domination and gender bias, inaccuracy, inequality, and crime-creation – apply in the context of family ties burdens. But because we are also looking at the creation of criminal liability (as opposed to exemptions or benefits), we must also say more about the liberal minimalism that informs our view of the proper construction of criminal liability in a liberal democracy.

Let us begin with the framework used for assessing family ties benefits and how it translates to the context of burdens. One can see relatively quickly that two of these considerations – crime-creation and inaccuracy – are mostly inapplicable in the context of family ties burdens. In other words, unlike family ties benefits, family ties burdens rarely trigger concerns that they will create more misconduct or impede the accurate prosecution of the guilty and

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<sup>148</sup> Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, 1674 (2001).

<sup>149</sup> Linda C. McClain, *Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations*, 72 FORDHAM L. REV. 1569, 1569 (2004); see also MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH*, at xviii (2004). Although space constraints prevent us from giving the subtle and important work of McClain and Fineman their due, we think it important to give a flavor of this form of argument.

<sup>150</sup> See Markel, Collins & Leib, *supra* note 3, at 1226-27.

<sup>151</sup> *Id.* at 1190-1200.

<sup>152</sup> *Id.* at 1190.

<sup>153</sup> *Id.* at 1195-98.

the exoneration of the innocent.<sup>154</sup> Although it may be possible that these two costs will be implicated by a hypothetical burden which we have not identified here, we do not see them as generally applicable in the case of burdens and do not think it would be appropriate to criticize family ties burdens along these dimensions, as was justified generally in the case of family ties benefits.<sup>155</sup>

Two of the normative considerations we identified earlier do seem generally relevant when analyzing family ties burdens: inequality (and its relationship to morally arbitrary discrimination) and the related issue of gender bias.<sup>156</sup> Notice that although inequality and gendered *effects* of a neutrally-drawn criminal justice regulation would not come within the ambit of our discussion – for family ties burdens as we define them must facially discriminate against family status – they are normatively relevant in judging the viability of any particular burden drawn on the basis of family status. So even though omissions liability, bigamy, and nonpayment of child support law are, for example, written in gender neutral terms, once they are identified as facially discriminatory against family members, it is appropriate to ask under our model whether they have effects that reinforce gender stereotypes.

#### 1. Inequality and Discrimination

In many contexts, family ties burdens risk treating similar conduct unequally – and affirmative discrimination against the family is hard to justify. For example, incest prohibitions affecting consensual sexual relations among adults restrict liberties that would otherwise be unregulated and generally protected.<sup>157</sup> Nonpayment of debt becomes a criminal offense in the context of child support while it remains a civil action in most others.<sup>158</sup> Although it is obvious that through the exaction of burdens we are often seeking to protect vulnerable potential victims, the tool of punishing otherwise noncriminal conduct on the basis of familial status alone is surely worth scrutinizing more

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<sup>154</sup> That is not entirely accurate. In cases where family ties burdens are liability-creating statutes on the basis of status – such as bigamy, incest, or nonpayment of child support – they are creating a new class of criminals: persons without family status engaged in this conduct would not be criminals. But this kind of criminogenesis is different from the way in which some of the family ties benefits created incentives to perpetrate misconduct that *would* be punishable regardless of the familial connection or status of the defendant. *Id.* at 1199-1200.

There is also a plausible story to tell in which these burdens increase systematic inaccuracy in the criminal justice system. Because proving the elements of these crimes will often turn family members against one another, it may be harder to achieve truth-telling by relevant players, increasing judicial error rates. Yet this is not the sort of inaccuracy we generally had in mind last year; we were not talking about systemic inaccuracy. *Id.* at 1193-95.

<sup>155</sup> *Id.* at 1193-95, 1199-1200.

<sup>156</sup> *Id.* at 1190-93, 1195-98.

<sup>157</sup> *See supra* Part I.C.

<sup>158</sup> *See supra* Part I.F.

carefully, since it implicates norms of equality and nondiscrimination that a criminal justice system within a constitutional democracy should embrace.<sup>159</sup>

As a general matter, we tend to think that targeting familial status is generally both an over-inclusive and under-inclusive approach to achieving sound policy objectives. It may make sense for the criminal justice system to protect our most vulnerable members of society, but many types of citizens are vulnerable, and targeting the state-defined family is not a sufficiently narrowly tailored means to achieve that objective. Nothing about estranged family members, for example, necessarily renders them especially vulnerable to one another to justify the imposition of special burdens upon offenders and potential offenders. Thus, family ties burdens could be overbroad if they penalized, say, estranged siblings with duties to rescue, support, or supervise. By contrast, many vulnerable citizens warrant protections the criminal law currently and irrationally renders unavailable, such as the families of same-sex couples.<sup>160</sup> Family ties burdens that do not protect people who would agree to such protection and such burdens *ex ante* should be reconfigured to promote the underlying value of voluntary caregiving relationships.

## 2. Gender Bias, Heteronormativity, and Repronormativity

Imposing a burden or penalty on an individual in the criminal justice system solely on the basis of family ties enmeshes the state in a normative dispute over who counts as family and who does not – and in what the family should be doing, namely, procreating.

The position the state takes is not merely conventional; it also threatens to promote a discriminatory and gendered set of policies. Large numbers of persons who might (justifiably, in our view) see themselves as entitled to benefit from the imposition of family ties burdens are excluded. When the state makes choices regarding families, it risks marginalizing persons who consider themselves family members but are not recognized as such by the state. In this sense, use of the family as traditionally delineated is an under-inclusive (and at times, over-inclusive) mechanism to distribute the tangible and expressive benefits conferred by the criminal law when it targets persons with unusual treatment on account of familial status. Although same-sex coupling is the most obvious example of family-like private ordering that is often excluded by the criminal law's family ties burdens (triggering the concern generally labeled "heteronormativity"),<sup>161</sup> grandparents and other

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<sup>159</sup> See generally Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004) (suggesting that grants of mercy are problematic from the perspective of equal liberty under law).

<sup>160</sup> See *supra* notes 31-38 and accompanying text.

<sup>161</sup> On "heteronormativity," see, for example, Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 133 (1998).



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relatives routinely create homes that fall outside the criminal law's design for family ties burdens as well.<sup>162</sup>

Several of the family ties burdens also express a clear policy to promote procreation – an orientation some scholars have termed “repronormativity.”<sup>163</sup> To the extent the criminal justice system is engaged in penalizing citizens criminally to further its repronormative agenda, we think that calls for especial justification. On the other hand, it is plausible that some family ties burdens are a useful counterbalance to repronormativity; although the state promotes having children, the burdens mitigate the effects of subsidizing procreation through tax and civil policies.

Finally, in certain circumstances, family ties burdens are used in ways that reinforce gender stereotypes. Although routinely drafted today in gender-neutral terms, many statutes imposing family ties burdens raise questions about gender relations more broadly; and once a family ties burden is identified, it seems fair game to analyze whether the burden is contributing to gender bias more systematically.

C. *Uncovering a Structure of Family Ties Burdens: Voluntary Caregiving*

Five of the seven family ties burdens we find in the law – omissions liability for failure to rescue, parental responsibility laws, bigamy, adultery and nonpayment of child support – reflect a pattern that, to our mind, has not been sufficiently emphasized. This pattern suggests an internal structure we find helpful in rethinking family ties burdens in our criminal justice system.

Specifically, these five burdens occur in the context of relationships that have a voluntary or “opt-in” nature, meaning that the individual who faces the burden imposed by the criminal justice system has consensually entered into the relationship that serves as the basis of liability for committing or forbearing from actions that would otherwise be lawful. This is not the case with most incest statutes which prohibit certain conduct based on relations that are both voluntarily and involuntarily created,<sup>164</sup> nor is it the case with filial responsibility statutes, which attach liability to persons who did not consent to the relationship – though there is, perhaps, some reason to marginalize this

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<sup>162</sup> See generally Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1 (2005) (suggesting that caregiving performed outside of traditional family contexts can work to subvert family law's discriminatory ideologies).

<sup>163</sup> See, e.g., Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 184 (2001); Martha T. McCluskey, *Caring for Workers*, 55 ME. L. REV. 313, 315 (2003); Symposium, *The Structures of Care Work*, 76 CHI.-KENT L. REV. 1389 (2001); cf. Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 68 (2002) (acknowledging that “women face social pressures to be mothers”); Sasha Roseneil, *Why We Should Care About Friends: An Argument for Queering the Care Imaginary in Social Policy*, 3 SOC. POL'Y & SOC'Y 409, 411 (2004) (rethinking the focus of reproduction within the heterosexual family as the most significant productive activity and space).

<sup>164</sup> See *supra* Part I.C.

example in light of the relatively trivial level of enforcement.<sup>165</sup> But the dominant family ties burdens are imposed on defendants in two kinds of relationships: spouse-to-spouse and parent-to-child.

Although we do not see this pattern as itself authoritative, we do think it is illuminating in various ways. First, when family ties burdens are limited to voluntary relationships, we find the imposition of these burdens more attractive. The voluntary nature of these obligations takes some of the bite out of the charge of discrimination: if parties freely choose relationships that trigger liability after fair notice, liability on the basis of family status seems more defensible, at least as long as the penalty is proportionate to the wrongdoing and the reason for imposing the burden can withstand critical scrutiny of the sort we describe below.<sup>166</sup>

There is a basic trade-off going on: if one wishes to benefit from the ways in which society privileges building family relationships through institutions of distributive justice, then one needs to be aware that greater burdens may be imposed to ensure the discharge of one's caregiving responsibilities. Moreover, in light of the fact that society confers so much leeway, particularly to parents, in how persons treat spouses and children, there is a reason to create a floor of obligations to rescue, support, and supervise. By contrast, extending family ties *benefits* only to those who have opted into relationships of caregiving seems to discriminate more against those who are deprived of the opportunity to develop those relationships of caregiving in the first place. In other words, not everyone can choose (or wants to choose) to marry or procreate – and those who do not make this choice should generally not be treated unfavorably by the criminal justice system.

To be sure, voluntary relations can be fuzzy at the margins: have we really chosen our in-laws even if they have not chosen us? Have we really chosen to have children, when a pregnancy is the result of failed birth control methods? Still, we think the relatively easy cases of spousal and parent-child relationships help expose an important insight about appropriate burden distribution: burdens generally seem more palatable in the context of voluntary relationships of caregiving.

Additionally, the special obligations some family ties burdens impose can be understood in terms of signaling theory.<sup>167</sup> On this view, family ties burdens are imposed on people who have voluntarily entered into and maintained a relationship because by their consent to that relationship they are signaling to others that they are going to be “first responders”; society can then trust them to look after the people with whom they have created a covenant of caregiving.

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<sup>165</sup> See *supra* Part I.G.

<sup>166</sup> See Larry Alexander, *Consent, Punishment, and Proportionality*, 15 PHIL. & PUB. AFF. 178, 178 (1986).

<sup>167</sup> Cf. ERIC POSNER, *LAW AND SOCIAL NORMS* 24 (2000) (discussing how an actor's willingness to bear certain costs or consequences can be a way of “establishing or preserving one's reputation”).

The germ of this idea appears in duty-to-rescue law. Generally, in the absence of a contractual basis, one has no duty to rescue other people.<sup>168</sup> But as we explained in Part I, there are widely acknowledged exceptions to this no-duty principle.<sup>169</sup> For instance, if Alice is walking by the beach and sees Charlie drowning, and then waves off Bob, who was also on his way to rescue Charlie, Alice is then under a special obligation to rescue Charlie. She cannot just walk away at that point absent a special justification such as a new threat to her life.<sup>170</sup> The actions of marrying or parenting can be interpreted to create similar statements about responsibility. When a person enters into a covenant of care in the form of marriage or parenting, one message that decision signals to society is that she will be a “first responder” to the person with whom she is covenanting when that person is in danger.

There is also the notion that those who volunteer to take on the obligations of a spouse or parent have signaled their willingness to create a relationship of trust to care for and support the other spouse or child. When someone fails to rescue, support, or supervise (in the case of minors), there is a breach of that trust relationship, a breach in which the state has an especial interest since the state has been effectively waved back by the person opting into the caregiving relationship.<sup>171</sup>

It follows, we believe, that if voluntariness matters, then a “family ties burden” should not be placed on someone who has had a familial status *imposed* upon him. Consider siblings: almost no child freely chooses whether or not to have a sibling; that decision is generally left up to his parents. Given our particular lens into this issue, it is unsurprising that the law ordinarily does not impose special obligations upon an individual to take risks on a sibling’s behalf.<sup>172</sup> Other family relations fall into the same category. Almost no one freely chooses whether or not to have an aunt, uncle, or cousin, and when people do take on an unrelated aunt or uncle, the law generally ignores that status.<sup>173</sup>

By this logic, it seems clear that some family relationships are involuntary in the sense that they were not deliberately entered into by the relevant parties. Filial responsibility laws, which place burdens on adult children to support

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<sup>168</sup> See, e.g., *Williams v. State*, 664 P.2d 137, 139 (Cal. 1983) (“As a rule, one has no duty [under tort law] to come to the aid of another.”); 3 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS 874 (3d ed. 2007); LAFAVE, *supra* note 21, at § 6.2(a).

<sup>169</sup> See *supra* Part I.A.

<sup>170</sup> See *supra* notes 23-24 and accompanying text.

<sup>171</sup> The metaphor here reaches a bit too far since admittedly the state does not closely supervise adults, ready to step in at any point as part of its own duty to rescue or support. Nonetheless, with every marriage or choice to parent, the actors are explicitly or implicitly stating their intention to care for and support the other person in the relationship.

<sup>172</sup> Cf. LAFAVE, *supra* note 21, § 6.2(a)(1) (listing parent/child, ship captain/seaman, and employer/employee as the most common personal relationships with affirmative duties).

<sup>173</sup> Cf. *id.*

their parents in their dotage,<sup>174</sup> are an example of a family ties burden that is at odds with the general vein of promoting voluntary caregiving relationships. That is because children never consented to their relationship with their parents. Indeed, maybe that is why there is so little enforcement in the case of this family ties burden.<sup>175</sup>

The more difficult question is whether there are family relationships that are, in fact, truly voluntary. At first blush, the most obvious example of a voluntary relationship would seem to be that of spouses – it is certainly true for most cultures in this country that no one is forced to marry, and individuals may freely choose their own partners.<sup>176</sup> To be sure, some human trafficking victims are coerced into marriage, but that is legal wrongdoing, not an instance of what we think to be exemplifying marriage's modern nature.<sup>177</sup> Although some have argued that social and economic forces render marriage compulsory,<sup>178</sup> we think such conclusions are generally unpersuasive. The strong social and economic pressure to marry does not vitiate the voluntariness that renders people's decisions their own for the purpose of being responsible to take on burdens and benefits. Of course, some government policies and social norms prevent an individual from marrying a person of his or her choice, and that, to our mind, is an undue intrusion of the state, since it denies opportunities and expressive benefits on grounds we find morally irrelevant.

As to the parent-child relationship, we see this relationship as generally a voluntary one, despite whatever pressures exist to reproduce.<sup>179</sup> A mother who does not wish to parent is legally free to be abstinent or use very reliable birth control methods – and she may terminate her pregnancy or place a child up for adoption. To be sure, there are complications with this general observation.<sup>180</sup>

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<sup>174</sup> See *supra* Part I.G.

<sup>175</sup> See *supra* note 127 and accompanying text.

<sup>176</sup> For disturbing counter-examples, consider the allegations made against Warren Jeffs, who was charged with forcing young girls into marriages with older men, some of whom were closely related to the brides. See, e.g., John Dougherty, *Polygamist Is Indicted in Assault of a Child*, N.Y. TIMES, July 23, 2008, at A14; John Dougherty & Kirk Johnson, *Sect Leader Is Convicted as an Accomplice to Rape*, N.Y. TIMES, Sept. 26, 2007, at A18.

<sup>177</sup> See generally HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000) (charting changes in law and its effects on the American institution of marriage).

<sup>178</sup> See, e.g., Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 777-800 (2002).

<sup>179</sup> See Andrews, *supra* note 42, at 415 (“[P]arents, generally speaking, have made a choice to parent. This choice, in most cases, represents voluntary action . . .”). Repronormativity is a real issue and underwrites skepticism about some of the family ties burdens that seem drawn with a vision about reproduction in mind. See sources cited *supra* note 163. Still, we do not think repronormativity implicates the voluntariness of the choice to procreate for the purposes of *burdening* that choice.

<sup>180</sup> Some have argued that women have little freedom to reject society's expectations that they will choose to mother. See, e.g., BARTHOLET, *supra* note 36, at 35 (“Women are taught from birth that their identities are inextricably linked with their capacity for pregnancy and

For example, fathers have long been forced by courts to parent against their will in the sense that they are subject to child support obligations even if they take affirmative steps to avoid fatherhood.<sup>181</sup> Still, for the most part, these complications are indicative of the exceptions, not the general case. Most parents want and choose to have children. This is not to say the laws that attach to parents as family ties burdens are always justified. Rather, the fact that these relationships are usually voluntary helps us understand the underlying structure of burden allocation by the criminal justice system.

D. *Overcoming Family Status Through a Focus on Voluntary Caregiving*

Notwithstanding the ambiguities that might attach in particular situations regarding whether a familial relationship is voluntary, using voluntariness rather than familial status as a basis for distributing obligations is initially quite attractive. Indeed, using voluntariness as a criterion helps us solve the under- and over-inclusive problem that family status alone triggers. Importantly, it allows us to encompass those who view themselves as obligated to others through their own choices and actions regardless of the delineations of an “acceptable” family established by the state. Thus, same-sex partners, unmarried heterosexual partners, grandparents caring for extended family members and even platonic or polyamorous friends living together in a committed caregiving relationship are all engaged in voluntary relationships. They may both *want* and *warrant* the protections and expressive benefits of burdens solely allocated on the basis of family ties in our current policy environment.

Yet how can one go about limiting the extension of such burdens that the state is expected to prosecute with its criminal justice resources? Can a child choose his third closest friend from kindergarten as the person to whom he owes a special obligation of protection? If he does, should scarce criminal justice resources be used to reinforce that obligation? We need answers for both *who decides* and *by what criteria* a particular relationship should be deemed a voluntary relationship in which the party is willing to assume obligations toward another and for which the law is willing to intervene. Moreover, we also need answers to whether an obligation can be imposed even in the absence of a voluntary relationship.

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childbirth and that this capacity is inextricably linked with mothering.”); Robson, *supra* note 178, at 814. Others may perceive a religious obligation to procreate and parent despite their desire otherwise.

<sup>181</sup> See Ethan J. Leib, *A Man’s Right to Choose: Men Deserve Voice in Abortion Decision*, 28 LEGAL TIMES 60, 60 (2005) [hereinafter Leib, *Man’s Right*]. Although it is undoubtedly true that most “deadbeat” fathers are not individuals who had children against their will, in the sense that they attempted to use birth control, had semen stolen from them in a sexual act without vaginal penetration, or were encouraged in sexual situations by partners that were dishonest about their fertility status. It is still likely true that many fathers have support obligations to children they affirmatively would have chosen not to have were the reproductive freedom choice solely within their discretion.

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In our view, voluntariness as a stand-alone criterion is insufficient for assessing whether it is just and attractive to impose or enhance criminal penalties on the basis of a particular relationship. When assessing criminal liability, we suggest that voluntariness be used in conjunction with whether the relationship included an obligation of some form of *caregiving*. Our sense is that many sorts of people assume these caregiving roles and not all of them are familial in nature. Roommates, for example, might choose to adopt an ethos of mutual care over a period of time. If that relationship is freely entered into and maintained by individuals capable of informed and intelligent consent,<sup>182</sup> we do not see why they should not be able to enter into the compacts of care similar to the ones that presumptively characterize spousal or parental relationships.<sup>183</sup> But they should not necessarily be required to adopt all the obligations the law ascribes to parents either. One roommate may only choose to undertake a duty to perform easy rescues while the other might undertake obligations of financial support and a duty to rescue. Friends or roommates should be able and encouraged to create obligations that are capable of both being scaled in size or intensity and enforced through threat of criminal sanction in some cases. If we are going to recognize caregiving responsibilities through the criminal law, they should not be restricted to ones that are familial.

That said, we do think there are meaningful differences between a spousal or parental duty of care and the additional covenants of care we are prepared to recognize. One's familial status qua spouse or parent may be presumptively used to establish that the relationship involves voluntarism, where such a presumption would not be justifiable in the case of roommates. After all, the act of marriage in our society is usually the product of individual choice; and the same goes for the choice to have and raise children, generally speaking. In contrast, the presumption in other relationships would not automatically attach. In the end, then, familial status would be neither necessary nor sufficient to justify a family ties burden. For, in our scheme, even a parent might be able to rebut assignments of family ties burdens by terminating his parental rights and obligations, such as when the child lives far away with grandparents as his permanent and legal guardians.

That raises the question of whether voluntary assumptions of responsibility can be terminated. We think they should be terminable under certain conditions, depending on the context. In the context of married couples, divorce would be the appropriate way to opt out of the special duties of marriage. In the parent-child context, termination of parental rights would be the appropriate way to opt out of the special duties of parenthood. But it is not

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<sup>182</sup> The age of the person matters as does the mental competence; we can imagine excluding from criminal liability those whose competence was below a minimum standard.

<sup>183</sup> We use "compacts" instead of contracts, because we do not think there must be bilateral exchange or consideration to make the declaration of intent to care for another legally binding in this context.

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obvious to us that these potentially costly signaling mechanisms should be the only ways to break the covenants that trigger the special responsibilities of voluntary caregiving. Although for the average dyad (whether parent-child or spouse-spouse), the legal opt-out might not be unduly burdensome, there might be cases when it seems unfair to require divorce or termination. Perhaps in exceptional circumstances parties to these special relationships ought to be able to show they should be deemed “equitably” divorced or terminated for the purposes of the family ties burdens. One way to determine the bona fides of these claimants is to see whether they have tried to capture family ties benefits through either the criminal or the civil system (say, by claiming a dependent for tax purposes). In such situations, we can envision the rare case when parties should be saved the pain and cost of an official divorce or termination.

Spousal relationships, however, should not be treated the same as parents’ obligations toward their children. After all, minor children cannot avoid their own vulnerability.<sup>184</sup> Thus, although letting spouses opt out in their adulthood does not generally offend a sense of fair play, letting parents ditch their vulnerable children without their consent (for minors can not really consent by law) violates the most basic tenets of what many think parents owe their children.<sup>185</sup> But that is just another way of specifying why allowing parental opt-out without termination should be even rarer than allowing spousal opt-out without divorce.

Nevertheless, just because it should be rare does not mean it must be categorically proscribed. Indeed, if we are right that voluntary caregiving underwrites and furnishes justifications for status-based burdens in the criminal justice system, we should seek ways to narrowly tailor the family ties burdens to capture only the right kinds of offenders. If we had to give up our children to good friends for several years because of illness or incapacitation, for example, the scope of criminally enforceable parental duties would have to be adjusted though not necessarily eliminated. If a child visits the parent in prison, it is not wrong to continue to assign the parent an obligation to perform an easy rescue just because the parent is not the primary caregiver anymore. On the other hand, the fact that the parent is in prison may be a good basis for not assigning criminal liability on the basis of nonpayment of support if the parent has no income or wealth to provide for the child’s support.

For most relationships outside of child-rearing, however, we think a registry could be created in which people opt in and opt out of relationships of

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<sup>184</sup> One of us has written that an opt-out should be available to fathers before birth under certain circumstances. See Leib, *Man’s Right*, *supra* note 181, at 61. But this is a very special case, and it presumes a lack of consent on the part of the father of ever entering the relationship of father-child. *Id.* Obviously, different concerns are presented when an adult consents to care for a child and then attempts to withdraw such consent.

<sup>185</sup> For a provocative discussion of what parents owe their children (which also explains why parents cannot opt out), see Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2402 (1995).

caregiving so long as they provide notice to and secure consent from the affected parties.<sup>186</sup> This strategy would allow adults to select a discrete number of additional persons eligible for receiving the adult's responsibility. If unrelated roommates wanted to sign up they could do so (or create such compacts as a prerequisite for living with another adult), signaling commitments of care. If adult children wanted to signal their willingness to shoulder burdens to care for their parents, then that would be an *option*, rather than the *requirement* it is under a few states' rules.<sup>187</sup>

In short, adopting a voluntarist approach to burden distribution in the criminal justice system harmonizes well with what we think the system appears to seek for itself, albeit imperfectly. Moreover, it might provide for a better intellectual fit with the competing interests of promoting freedom and autonomy, which are thought by some to undergird the no-duty-to-rescue pattern of law.<sup>188</sup> Additionally, the difficulties associated with the under- and over-inclusive nature of family status can be remedied in large measure by the use of a registry where one can declare who counts within one's sphere of accepted responsibility for the purpose of some of the crimes discussed here. This would strengthen voluntary assumptions of caregiving responsibilities (of which the family is sometimes a great example) rather than rely upon inflexible categories based upon antiquarian notions of status.

#### E. *Bringing It Together: How to Scrutinize a Family Ties Burden*

In light of all these various considerations, we propose that family ties burdens – whether the ones we described in Part I, or some others that might be contemplated – undergo scrutiny, using a set of normative speed-bumps designed to track our discussion here. Our general approach is that special criminal justice burdens based on familial status alone require justification. Perhaps unsurprisingly, just as we exhibited a tendency to be skeptical toward particular benefits afforded to the family in the criminal justice system in our article last year,<sup>189</sup> we are also inclined to protect individuals from burdens

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<sup>186</sup> For more details on how one such registry could function, see, for example, David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, A Status Other than Marriage*, 76 NOTRE DAME L. REV. 1347, 1348 (2001). Vermont and Hawaii already have “reciprocal beneficiary” statutes that cover some of this territory. See HAW. REV. STAT. ANN. § 572C-1 to -7 (LexisNexis 2005); VT. STAT. ANN. tit. 15, §§ 1301-1306 (2002). The state could create a legal registry to signal who is in one's circle of care, what obligations one has assumed, and what exposure such information should have to the public beyond law enforcement.

<sup>187</sup> See *supra* Part I.G.

<sup>188</sup> See, e.g., Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1452-55 (2008). We may disagree with the no-duty-to-rescue pattern for other reasons, but if we are to have it and its exceptions as they are, the doctrine should at least be operationalized in a way that better promotes the underlying interests.

<sup>189</sup> See generally Markel, Collins & Leib, *supra* note 3.



based simply on familial status. Because we are sensitive to the caregiving contributions that might stand in need of protection from the state, however, we believe that some of the concerns people might have about abandoning family ties burdens can be addressed through careful drafting that substitutes attentiveness to voluntary relationships of caregiving in the place of familial status alone. Thus, our skepticism toward family ties burdens does not entail eliminating all such burdens. Instead, we propose that such burdens undergo a searching inquiry framed by what we will call here a “liberal minimalist” paradigm.

What is liberal minimalism? A liberal minimalist approach to criminal liability is reflective of two basic, though not uncontested, values. With respect to the word liberal, we are relying on its roots to connect to a particular notion of when it is appropriate to use family status as an element of a criminal law. Specifically, we deem a burden to pass muster under our first “liberalism” concern if the relationship which serves as the basis for a family ties burden is one the defendant freely created through her choice. The consent is not always explicitly extended, but it may, in some cases, be reasonably inferred in light of the other options available to the offender. Beyond this first basic liberal concern, there is also a need for some showing that the relationship is one of caregiving. Without this additional element, we risk allowing the criminal justice system’s apparatus to be co-opted by mere contract.<sup>190</sup>

A second and more general liberal concern is that a justice system must allocate liberty to citizens consistent with other persons’ liberty, putting the burden of justification on those who would limit individual liberty.<sup>191</sup> For this reason, in designing laws that target family status, one must assess the liberty interest at stake and how important it is.

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<sup>190</sup> We should note that one can be a “liberal” with regard to the criminal justice system – meaning here, concerned with consent – but status-oriented in other areas of the law, such as family law and civil law. More importantly, to adopt a moral theory about obligation that is non-liberal in the context of family and other close relationships does not decide the question about how the related legal system should be designed. In thinking of institutional design, the choice about how much to build off voluntarism and how much to build off relational obligations is very much contingent on context. See Ethan J. Leib, *Responsibility and Social/Political Choices About Choice Or, One Way to Be a True Non-Voluntarist*, 25 LAW & PHIL. 453, 456 (2006). For more on building a moral theory of obligation relationally rather than from consent, see Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189, 195-96 (1997).

<sup>191</sup> See RAWLS, *supra* note 133, at 220 (“Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.”); JOHN STUART MILL, *The Subjection of Women*, in 21 COLLECTED WORKS OF JOHN STUART MILL: ESSAYS ON EQUALITY, LAW, AND EDUCATION 259, 262 (John M. Robson ed., 1984) (“[T]he burthen [sic] of proof is supposed to be with those who are against liberty [and] who contend for any restriction or prohibition. . . . The *à priori* presumption is in favour of freedom . . .”).

With respect to minimalism in criminal law (an area of justice that is very closely connected with liberty interests on account of its power of coercion and incarceration), we ask if the government has an important or compelling objective it is trying to achieve through the use of the family ties burden. This purpose analysis is obviously fraught with controversy, and so in many situations we usually stipulate to the objective's importance in order to assess the means used to pursue the ends. This means analysis involves two kinds of questions: First, has the government narrowly tailored the criminal sanction to its putative objectives to avoid over- or under-inclusiveness? Second, is there good reason to believe that use of a family ties burden via criminal sanction is justified if and when other alternatives (education, advertising, regulation, tort, or contract) could be equally effective in achieving the state's objective?<sup>192</sup> These questions are important because criminal sanctions that use coercion to limit liberty are especially costly to both the state and to the offender, and are subject to error and abuse. For those reasons, we support a principle of pragmatic frugality both in the drafting of criminal legislation and the amount of punishment imposed. Punishment should be no more severe than necessary to achieve the legislature's reasonable interests, and the legislature should forbear from coercion through criminal sanction when possible. At a relatively high level of abstraction, this is a principle (also connected to proportionality) that theorists of many stripes can embrace.<sup>193</sup> While there is much more that can be said about both these notions of liberalism and minimalism,<sup>194</sup> we do not wish to stray too far from our subject at hand.

As applied to our project on the use of family status to create criminal liability, we think the liberal minimalist agenda, coupled with the concerns about discrimination and gender bias alluded to earlier,<sup>195</sup> trigger a set of questions for the normative review of the family ties burdens we discussed in Part I. These questions are similar (though not identical) to the ones asked by

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<sup>192</sup> The phrase "equally effective" is important. As the criminal law involves powers of norm expression, we must carefully assess whether non-criminal alternatives including social norms carry similar expressive force.

<sup>193</sup> Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 576 (2005); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 709 (2005); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 270 (2005).

<sup>194</sup> See Husak, *supra* note 12, at 207 (stating that a condition of minimalist theory is the use of criminal law as a last resort); Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 OHIO ST. J. CRIM. L. 521, 524 (2005). See generally DOUGLAS HUSAK, *OVERCRIMINALIZATION* (2008) (offering a set of constraints designed to slow the growth of the criminal law).

<sup>195</sup> See *supra* Part II.B.2.

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courts in liberal democracies when they review legislation alleged to impair a fundamental liberty or to rely on a suspect basis for classification.<sup>196</sup>

We must determine as a threshold matter whether the state is in fact targeting a defendant for prosecution (or enhanced punishment) based on his family status.<sup>197</sup> But in the case of the seven burdens discussed in Part I, we can readily conclude that family status is relevant and necessary for the liability the defendant faces. Thus, when it comes to the application of the framework in Part III, we will dispense with this threshold question and instead focus on the rest of the framework developed here, as follows.

First, does the burden fall only on persons who have voluntarily created a relationship of care? Second, does the burden impinge on some liberty that should be recognized as deserving of protection in a liberal society? Third, are the laws drafted in such a way as to be narrowly tailored to the governmental objectives? Fourth, are there non-criminal measures that could be equally effective in achieving the governmental objectives, assuming the governmental objectives were sufficiently compelling or important to be vindicated through law? Finally, in what ways do the existing family ties burdens contribute to concerns about gender, inequality, and discrimination?

This kind of scrutiny will not, to be sure, resolve all questions. Inevitably disputes about the strength of competing claims will persist – and means testing will implicate empirical evidence, which is often indeterminate or simply non-existent. But, as we hope we achieved in our systematic inquiry into family ties benefits,<sup>198</sup> we hope to do some important work in helping to clarify the problems under consideration and alerting lawyers, policymakers, and judges to some of the potentially hidden costs of family ties burdens in the criminal justice system.

### III. APPLICATION OF THE FRAMEWORK TO FAMILY TIES BURDENS

In this Part, we undertake some analysis of the various family ties burdens identified in Part I. As we acknowledged at the very beginning, each of the burdens we have identified requires its own long-form analysis, taking account of its particularized context and its systemic effects on the justice system and relevant family members. Accordingly, all we endeavor to do in this Part is furnish a basis for how our framework contributes to a more comprehensive

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<sup>196</sup> See, e.g., *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 520-21, 2002 SCC 68 (Can.) (analyzing felon disenfranchisement law by examining the legitimacy of the law's objective and the proportionality of the means used to achieve the objective).

<sup>197</sup> If the burden was not imposed on individuals based on their family status, it is not a family ties burden in the sense we mean, even if the policy ends up substantially hurting those with families. Here we refer the reader to our earlier stated conviction that most problems that have a disparate impact on families are best regarded as problems that need to be addressed in the criminal justice system generally, regardless of whom they affect. See *supra* notes 13-15 and accompanying text.

<sup>198</sup> Markel, Collins & Leib, *supra* note 3.

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accounting in thinking through each family ties burden. Our framework recommends caution about the bulk of the family ties burdens we have identified and urges creativity in redesigning these burdens to make them less discriminatory.

A. *Omissions Liability for Failure to Rescue*

The question of omissions liability for failure to rescue is a difficult one, and the analysis seems to vary according to the kind of family status relationship at issue.

1. Parental Duties to Rescue Children

Let us begin with the most common scenario where we see liability imposed: prosecutions of parents who fail to protect their children.<sup>199</sup> What are the rationales for imposing criminally-sanctioned obligations on parents to rescue their children when the children are imperiled and when the parents can easily rescue them? Imposing liability on parents for failing to protect their children seems to vindicate a compelling state interest: the need to protect children from harm.<sup>200</sup> It is in this scenario that our concerns about fostering the caregiving capacity of individuals reach their zenith. This concern for protecting children from harm, however, seems to require that anyone with the chance to make an easy rescue should be under such an obligation. After all, young children are often helpless to protect themselves from harm; responsibility must seem to fall on the shoulders of those adults in the position to be a child's only lifeline. But this is not how the laws of rescue are drafted as a general matter.<sup>201</sup>

So the objective of restricting the duty to rescue a child to her custodial figure has to do, at least in part, with an expressive function about the kind of commitment made by a parent to the world regarding the child. The law seems to be saying that parents who have voluntarily chosen to retain the benefits conferred by the parent-child relationship should endure some burdens in return, and ensuring the safety of a child entrusted to the parent's care represents the most fundamental of reasonable burdens. When a person opts to have children, the parent is signaling to others that the parent will be a first responder.

In this respect, imposing a duty to rescue is analogous to the imposition of liability on those people who have "waved away" others.<sup>202</sup> The goal, of course, is not to tie an albatross around the neck of every parent. Omissions

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<sup>199</sup> See *supra* Part I.A.

<sup>200</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) ("[T]he family itself is not beyond regulation in the public interest . . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . .").

<sup>201</sup> See *supra* Part I.A.

<sup>202</sup> See *supra* Part II.C.

liability does not create a responsibility to rescue against unreasonable risks.<sup>203</sup> It operates only to ensure that when a parent is in a reasonable position to protect the child from imminent harm, the parent takes those measures.<sup>204</sup>

a. *Voluntary Caregiving and Liberty Interests*

In the case of having children, it is fair to conclude in most circumstances that imposing obligations to rescue one's children (defined as minors for whom one has legal custody) is consistent with voluntary caregiving, though the question of what justifies a status-based duty to rescue is a bit more complicated than what grounds the duty in a spouse-like relation. Some parents might resist the ascription of voluntariness to their actions or to the results of their actions.<sup>205</sup> As a general matter, however, we view the risk of pregnancy as a risk people voluntarily assume when they engage in sexual relations, even when using birth control. The question is whether the risk of pregnancy should also be conflated with the risk of being conscripted into parental obligations that are vindicated through the criminal law.

If women have exclusive control over the decision to abort or give the baby up for adoption, that makes the inference more compelling that mothers who raise children should bear responsibility for caring for the child, at least as far as the criminal law is concerned. To be sure, the absence of either of these alternatives would undermine the moral basis for ascribing a burden of care on a person. So too would it be inappropriate to establish omissions liability on sperm or egg donors who make clear that they are renouncing future interests to those accepting the sperm or eggs.

As to men: if men who have taken reasonable precautions in terms of birth control – or who have reasonably relied on express precautions taken by the woman – lack control over the choice to abort or give the baby up for adoption, then it is inaccurate to say that they are consenting to the obligations associated with parenting, unless there is some other way they can categorically renounce their parental rights and obligations. Thus, if one biological parent objects to becoming a parent over the wishes of the other parent, it might be a basis for releasing the objecting parent from the family ties burden.<sup>206</sup> But in the

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<sup>203</sup> LAFAVE, *supra* note 21, § 6.2.

<sup>204</sup> *Id.*

<sup>205</sup> For example, a man may volunteer to have sex but not consent to have a child from that sex. See Sherry F. Colb, *When Oral Sex Results in a Pregnancy: Can Men Ever Escape Paternity Obligations?*, FINDLAW, Mar. 9, 2005, <http://writ.news.findlaw.com/colb/20050309.html>. Or one may claim, under the circumstances of rape or stolen sperm, that he did not even volunteer to have procreative sex. See Leib, *Man's Right*, *supra* note 181, at 60.

<sup>206</sup> One's response here hinges on whether one believes a person who takes precautions against pregnancy still assumes the risk of being commandeered into parenting by the state and the other partner. It might be a remote but foreseeable risk, thus the question then is whether it is just to impose this consequence on the person. Perhaps one should be able to insure against the risk, though it raises moral hazard issues. Professor Collins is of the view

absence of such evidence, it is not unreasonable to place a burden on parents who, through biology or adoption, assume this caregiving role. Indeed, to the extent there are borderline cases, the default should be to burden the parent, which may operate to help the vulnerable child and be a substantial ex ante benefit.

Might the consent argument founder if we ask whether parents specifically consented to taking care of a child with illnesses or behavioral problems? The consent still exists so long as there is a procedure by which parents can terminate their parental rights to the state through voluntary relinquishment. Still, because not all children live with their biological parents,<sup>207</sup> the use of traditional family status to limit omissions liability is a problem. A child could reside with another relative, such as a grandparent, a family friend, or a foster family, to name just a few possible permutations.<sup>208</sup> Alternatively, as we explain below, there may be homosexual couples or gay and straight persons involved in polyamorous contexts who care for the child, but their parenting status may not be jointly recognized by the state.<sup>209</sup> There is also the difficult question about the caregiving responsibilities that occur outside the home in schools, religious institutions, and sports leagues.<sup>210</sup> In all these sites, adults and adolescents with supervisory roles play an increasingly important role in the rearing of children.<sup>211</sup> Therefore, limiting omissions liability to biological parents and their children has the potential to be under-inclusive, in that it does not recognize non-traditional caregiving relationships.

Using only an opt-in registry system of the sort described in Part II seems unsatisfactory when it comes to duties to rescue children. Parents should be presumptively required to rescue and care for their children who are after all without resources to avoid their own vulnerability and cannot sufficiently protect themselves from harm through other means. However, the under-inclusiveness (and in certain circumstances, over-inclusiveness) of biological parentage necessitates a test that focuses on something other than biological parenthood in the context of duties to rescue children: *does the individual in*

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that a man should be on the hook unless his sperm was effectively purloined through deception or coercion. Professors Leib and Markel think a man should not be commandeered into parenting obligations by the criminal law's apparatus if he takes due care prior to and during sex. Leib and Markel believe, for example, if the male discusses the issue with his partner in advance of sexual relations, and they agree to use reliable birth control methods, then if birth control fails the man will not be responsible for more than his fair share of an abortion.

<sup>207</sup> June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1330 (2005).

<sup>208</sup> Indeed, the child at issue in *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962), resided with a family friend at the time of his death. *Id.* at 309.

<sup>209</sup> See *infra* Part III.A.1.c.

<sup>210</sup> See generally Laura Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007) (arguing that much of childhood takes place in spaces outside the home).

<sup>211</sup> *Id.* at 843-44.

*question stand in the position of a primary caregiver to the child?* If the answer to this multi-factored question is yes,<sup>212</sup> then that individual can face liability for failure to rescue on an omissions liability theory absent any relevant and compelling excuse or justification.<sup>213</sup> It is important to note that more than one individual could fall into this category – for example, the mother, father, and grandparent of the child, assuming they all live in the same home. This test would also avoid the over-inclusiveness problem of relying solely on biology. There might be situations where a biological parent has parental rights terminated, and in those situations, we think (and the law concurs) there should be no duty to rescue under the criminal law.

Several options exist for dealing with under- and over-inclusiveness and the use of presumptions or registries. First, one could entirely decouple omissions liability in this context from parental status entirely. While we do not embrace this position, we recognize that if we abolished the established linkage between parental status and omissions liability, that would serve as a default rule that might spur use of the registry and at the same time de-center the role of parents in our quest to ensure the safety of children. Under this rule, family units may choose to require an opt-in as a precondition for hiring nannies and babysitters; private associations such as neighborhood groups or churches might require opt-ins of members to signal that this is an especially caring community. The registry would effectively create an easier method than exists now to facilitate a private ordering regime that the state could monitor for purposes of prosecuting omissions cases.

Alternatively, one could abolish the link between omissions liability and status, and instead simply require all primary caregivers (regardless of status) to face omissions liability.<sup>214</sup> This second option creates a baseline where liability for all primary caregivers is created (as opposed to a baseline of no liability for anyone in the first situation); it would also preserve an opt-in registry for others. Although we generally like this approach, there are some

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<sup>212</sup> In establishing the criteria to answer this question, legislators, prosecutors, or courts may want to consider a variety of factors including: co-residence between defendant and minor; whether the defendant provides financial support to the child; and whether the defendant has formally terminated parental rights, or instead made statements to the public or the government regarding the relationship for purposes such as taxes or other government benefits. On the features that generally trigger legal recognition of parenthood, see David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 132-43 (Supp. 2006).

<sup>213</sup> The other aspects of the omissions liability doctrine should attach; for example, the rescue has to be one that is actually achievable and does not pose undue risks to the rescuer. LAFAVE, *supra* note 21, §6.2(c).

<sup>214</sup> Cf. Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311, 1311-12 (2006) (discussing marriages based on contract law, as opposed to status-based statutes); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1164 (2006) (stating that eliminating marriage as a legal construct would make the status of parties as married or unmarried legally irrelevant).

difficulties with it. One downside is that requiring a duty to rescue by all primary caregivers may risk over-inclusiveness, thus dissuading persons from becoming primary caregivers. Further, it would create some degree of vagueness because the tests for determining who is a primary caregiver will be hard to apply in some borderline cases.

A third option is another hybrid approach to reduce problems of under-inclusiveness. This option would, first, retain the status-based duty for parents as a strong presumption that is rebutted only with the termination of parental rights. Second, it would impose potential omissions liability on all other primary caregivers. Third, it would create an opt-in registry for all others. Our own view is that this third option is probably the most feasible and attractive in part because it involves only an incremental adjustment from the current practice of most jurisdictions. There is not much difference between the second and third option, but the presumption of parent-based duties to rescue makes it arguably cheaper to administer the third option from a social cost perspective. There is also less need to worry about chilling effects, since under this regime parents would generally have responsibility for children, whatever the status of other primary caregivers.

A fourth option is to require all persons to make easy rescues regardless of parental status. This option violates a thick commitment to voluntarism, perhaps, but it might be said that the compelling interest underlying the goal – saving vulnerable lives through actions that pose little to no risk to the rescuer – justifies the infringement. Here we note that such infringements on voluntarism occur in other contexts where the stakes are high, such as the lesser evils defense in criminal law,<sup>215</sup> compulsory vaccinations,<sup>216</sup> and conscription for armed services.<sup>217</sup> And as a practical matter, this option reflects the prevailing norm by which most persons actually do undertake “easy rescues.”<sup>218</sup>

Even if we can agree on the scope of duty attaching to parents and others regarding obligations to rescue minor children, we must also consider whether such obligations persist with children who are no longer minors. Should their primary caregivers still owe them a duty to rescue? If we take the fourth approach – by which we impose general duties to rescue – then the answer is yes. But two of us (Leib and Markel) believe that if we take any of the three approaches that focus on the relationship between adult caregivers and children, then it makes sense to recognize that adult children typically stand in a different position than minor children: they can both utilize a registry system and have more options available to remove themselves from a dangerous

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<sup>215</sup> MODEL PENAL CODE § 3.02 (1985).

<sup>216</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

<sup>217</sup> *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 854-55 (1984).

<sup>218</sup> See Hyman, *supra* note 21, at 656.



situation.<sup>219</sup> In addition, the dynamics of the relationship may be very different with an adult child. It may seem justifiable for parents to wish to sever a relationship with a child who has committed a heinous crime, or even victimized his parents, for example, whereas we would not allow parents of a minor child to walk away from their obligations to that child because of the child's misconduct unless they were prepared to terminate their parental rights. On the other hand, if an adult child were ill or incapacitated in some way, it does not seem unfair to require that the parental status-based or caregiver-based duty to rescue should persist into adulthood. Professor Collins, by contrast, believes the parental duty to rescue one's child should persist into adulthood unless the parent has terminated his or her rights on grounds such as having been victimized by the child's criminal activity.

b. *Minimalism and Means Analysis*

As to whether there are equally effective non-criminal alternatives available to the imposition of omissions liability, there are several options worth considering. Many people would say that a parent's love and the social norms about being a Good Samaritan would mean that any legal remedy is unnecessary. But we often have criminal sanctions prohibiting or requiring conduct that would otherwise be obvious and attractive to most people; thus, the criminal law and its concomitant sanction may be used to deny a defendant's claim that he was denied fair notice of how he was expected to act in a situation where the polity would find his conduct worthy of reproach.<sup>220</sup>

Still, couldn't a tort remedy enunciate the same requirement of responsible behavior here? It might, but chances are that it will be less effective. First, relying on the tort remedy here may be insufficient when there might not be a plaintiff to bring a claim against a parent who fails to rescue a child. Second, the parent might be judgment proof, which would on the margins give those parents inadequate incentives to monitor or maintain the care of their children. Thus, the criminal sanction here may serve both to educate the public about the

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<sup>219</sup> We leave aside for now whether the age of majority for this purpose should be dropped from eighteen to a lower age, such as sixteen.

<sup>220</sup> There is a problem with this rationale: it might be said about any norm of responsible behavior; there really is not a single unified theoretical account that adequately explains what the boundaries of criminal law are. See Antony Duff, *Theories of Criminal Law*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta ed., Fall ed. 2008), <http://plato.stanford.edu/archives/fall2008/entries/criminal-law/>. Still, that most spouses will comply is not a good reason to do without the law. Will the law "crowd" out otherwise trust-based conduct, as some have suggested? It is hard to see how it would, even if there is some value in compliance outside the law. For a discussion of the "crowding" thesis and its rejection, see Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. (forthcoming Feb. 2009) (manuscript at 59-64, on file with author), and see also Frank Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1545 (2005) ("Whatever the intuitive appeal of the claims that legalization undermines trust, they cannot be sustained once they are subjected to scrutiny and empirical testing.").

obligation parents have toward children and to effectively punish parents for failing to live up to the obligations that accompany the raising of children. When a parent fails to rescue a child under the restrictive conditions that make one eligible for criminal sanction, the parent is making a condemnable choice and is worthy of punishment for that breach of trust described above. The criminal sanction also is appropriate to ensure that parents do not skimp on their responsibilities because they know they might not be attractive tort defendants under existing law.

c. *Gender, Inequality, and Discrimination*

Even if omissions liability based on a parent's failure to rescue passes both our voluntariness and means tests, we need to acknowledge that imposing liability on a parent for failing to protect his child has the potential to perpetuate inequality and discrimination. In those jurisdictions where certain groups are prohibited from marriage and adoption, failure-to-rescue laws facially discriminate against families headed by homosexual couples or polyamorous unions.

For example, imagine a state that does not permit homosexual couples to adopt.<sup>221</sup> Adult *X* might nonetheless formally adopt a child, but *X*'s long-standing partner, *Y*, who may have informally taken on a parental role to the minor, will not be under the duty to rescue the child absent some contract or other basis for omissions liability as discussed in Part I.<sup>222</sup> While this rule discriminates against *Y* on the basis of *Y*'s lack of state-recognized family status, the person who is harmed or left at risk by this discrimination is the minor child.<sup>223</sup> This is just one way in which state rules based on family status can risk arbitrary and unintended harms against children.<sup>224</sup>

Because protecting minors from harm in the context of "easy rescues" is a compelling interest of the state, even a state that does not grant homosexual couples adoption rights should make available a registry by which individuals may volunteer to take on a duty to rescue. Getting "registered" might be a prerequisite that adoption agencies require of couples like *X* and *Y* to ensure that the minor child is in a secure home. If *Y* were not willing to register, that

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<sup>221</sup> Mississippi prohibits "[a]doption by couples of the same gender." MISS. CODE ANN. § 93-17-3(5) (West 2007). Florida goes further and prohibits all "homosexual[s]" from adopting, whether coupled or not. FLA. STAT. ANN. § 63.042(3) (West 2005). However, about half the states now "permit same-sex couples to raise children together through second-parent adoptions or through entry into marriage or a marriage-like union." Meyer, *supra* note 212, at 135.

<sup>222</sup> See *supra* Part I.A.

<sup>223</sup> That is not to deny that *ex ante* *Y* may feel denigrated on the basis of sexual orientation discrimination.

<sup>224</sup> Of course, some traditionalists might argue that children are harmed when entrusted to the care of homosexual couples or those in polyamorous unions. *E.g.*, Press Release, Christian Inst., Blair's Gay Adoption Plans Will Harm Children (May 7, 2002), [http://www.christian.org.uk/pressreleases/2002/may\\_7\\_2002.htm](http://www.christian.org.uk/pressreleases/2002/may_7_2002.htm).

might be a good information-forcing device relevant to *X*'s choice to adopt the minor individually or to continue in a relationship with *Y*. But in cases like this, where *Y* cannot "enjoy" the burden of omissions liability through a default rule that establishes a status-based relationship of obligation, we recognize that the class of *Y*-like persons may think that they are being unfairly burdened by the criminal justice system, while not deriving any of the legal benefits currently afforded to other parents both inside and outside the criminal justice system.

In addition to concerns about inequality and discrimination, we are also worried about how prosecutorial practices regarding omissions statutes are used in a way that may perpetuate gender stereotypes.<sup>225</sup> The first concern is that focusing on voluntarily undertaken caregiving relationships might have a chilling effect that exacerbates gender inequalities operating in the current caregiving practices. In her recent article, Professor Melissa Murray observed that allowing nonparental caregivers to have rights or authority over a child might deter parents from structuring care networks comprised of nonparental caregivers.<sup>226</sup> In a comment to us, Professor Murray suggests the same concerns might attend a policy that extends criminal liability to those who voluntarily provide care. This would further insulate families and caregiving within the private sphere, emphasizing caregiving as a "private" (and presumably, more female) responsibility.<sup>227</sup>

With respect, we think most parents, male and female, would be pleased to know that more caregivers for their children could face omissions liability because that would redound to the benefit and safety of their children. Indeed, to the extent that people are aware of broader omissions liability, it might make them more inclined to separate from their children under certain conditions and view caregiving as a task for the government or non-governmental organizations.<sup>228</sup> In other words, while we understand Professor Murray's

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<sup>225</sup> The fact that a mother is charged in the failure-to-protect scenario is a powerful example of the "mother-blaming" phenomenon that affects not only our legal institutions, but also our cultural norms about parenting. As Professor Becker states, "mothers are expected to be much better and more powerful parents than fathers, always putting their children's needs above their own and protecting their children from all harm." Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for the Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 15 (1995); see also JANE SWIGART, *THE MYTH OF THE BAD MOTHER: THE EMOTIONAL REALITIES OF MOTHERING* 6 (1991); Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 822 (2000).

<sup>226</sup> See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 450 (2008).

<sup>227</sup> We are grateful to Professor Murray for alerting us to this point.

<sup>228</sup> Cf. Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 441 (1996) (discussing the role law has played in changing attitudes towards mother-child separations over time); Erik Eckholm, *Older Children Abandoned Under Law for Babies*, N.Y. TIMES,

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concerns in the context of the extension of rights or benefits to non-parental caregivers, we think that in the context of *obligations* to children by non-parental caregivers this deterrent effect is unlikely to be realized, except to the extent that some non-parental caregivers might be worried about their exposure to criminal omissions liability. But even in this context, this anxiety is misplaced since it is likely that omissions liability would already attach based on some of the other traditional bases for omissions liability discussed in Part I.<sup>229</sup>

The second gender-related worry is that prosecutions based on omissions liability disproportionately target women. Indeed, women are more likely to bear the brunt of such prosecutions simply because they are more often the custodial parent.<sup>230</sup> Further, women are commonly thought to be held by the public to a higher standard of care in child rearing.<sup>231</sup> Naomi Cahn has argued: “Cultural middle-class norms expect all women to be primarily responsible for their children. The criminal justice system supports this norm by criminalizing the abusive and neglectful behavior of parents, penalizing mothers particularly harshly.”<sup>232</sup>

We also cannot ignore the linkage between prosecutions for failing to protect a child and domestic violence. It is important to acknowledge that in many cases where children are being battered, a parent (usually the mother) may be the victim of battering as well.<sup>233</sup> To be sure, in particular situations it might be a male father who is battered, and our approach to omissions liability does not hinge on the precise identity of the defendant qua mother. But the general point here is that the adult victims of violence may have few available options, from their perspective, to remove their children from an abusive situation.<sup>234</sup> They may (correctly) perceive that attempts to leave will escalate the violence.<sup>235</sup> Additionally, they may have no economic options in terms of

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Oct. 3, 2008, at A21 (showing parents abandoning children well past infancy when they are promised immunity from prosecution for neglect).

<sup>229</sup> See *supra* Part I.A.

<sup>230</sup> See Nancy S. Erickson, *Battered Mothers of Battered Children: Using Our Knowledge of Battered Women to Defend Them Against Charges of Failure to Act*, in 1A CURRENT PERSPECTIVES IN PSYCHOLOGICAL, LEGAL AND ETHICAL ISSUES: CHILDREN AND FAMILIES: ABUSE AND ENDANGERMENT 197, 199 (Sandra Anderson Garcia & Robert Batey eds., 1991).

<sup>231</sup> See sources cited *supra* note 225.

<sup>232</sup> Cahn, *supra* note 225, at 822.

<sup>233</sup> See Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 3 (1995) (discussing domestic violence and child abuse as strong predictors of each other).

<sup>234</sup> Cf. *Nicholson v. Scoppetta*, 344 F.3d 154, 158 (2d Cir. 2003) (disapproving of a city agency’s practice of removing children from a custodial parent based on a parental failure to prevent the child from witnessing domestic violence).

<sup>235</sup> See Becker, *supra* note 225, at 19.

being able to find housing or a job that will provide sufficient income to support a family.<sup>236</sup>

These issues are weighty and important, and thus, we need to consider practical options to help mitigate the potential disparate impact of omissions liability. As a policy matter we should partner any attempts to hold parents accountable for their failure to protect with efforts to make it more viable for battered spouses to leave abusive partners – for example by ensuring adequate funding for shelters, job training, and child care resources.<sup>237</sup> The question remains, however, whether the existence of domestic violence should preclude prosecuting the parent for failing to protect the child. Supporters of prosecutions of passive parents argue that even a parent’s status as a victim of domestic violence cannot categorically excuse a failure to prevent the abuse of a child.<sup>238</sup> Even though abuse may have weakened the mother physically or mentally, unless she is “literally a hostage,” she still has options to protect her child that are not available to the child itself; young children, after all, are utterly defenseless and completely dependent upon adults for their protection.<sup>239</sup>

In cases involving domestic violence where prosecution may be appropriate because the parent did have some protective options, there should be strict limitations on when the state can seek to impose liability. First, the focus needs to be on the easy rescue; we should limit omissions liability to those circumstances where a parent had prior knowledge of past abuse and had the practical opportunity to seek help, such as access to a telephone to contact law enforcement authorities.<sup>240</sup> Second, parents who fail to protect in a case involving a fatality should only face the same homicide charge as the actual killer if they had the same, or worse, mens rea. Otherwise, a lesser, and perhaps non-homicide, charge is appropriate to reflect the reduced culpability.<sup>241</sup> Third, in some cases, no conviction is appropriate if the defendant had no easy rescue to make based on her own circumstances and diminished capacity as a battered spouse.

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<sup>236</sup> *Id.* at 18.

<sup>237</sup> *See id.* at 31-32 (urging the provision of stronger “safety nets” for women in abusive situations); Linda Gordon, *Feminism and Social Control: The Case of Child Abuse and Neglect*, in *WHAT IS FEMINISM?* 63, 69 (Juliet Mitchell & Ann Oakley eds., 1986).

<sup>238</sup> Becker, *supra* note 225, at 32 (arguing that regardless of abuse, mothers should still be held responsible for their abuse or neglect of their children and for failing to protect their children from others’ abuse and neglect). Becker further argues that “we must also change other parts of the social and legal system to make it easier for women to escape abusive households with their children.” *Id.*

<sup>239</sup> *See id.* at 21.

<sup>240</sup> *Id.* (“The assumption should be that the adult who was not literally a hostage – not literally coerced at every available second – *could* have acted to end abuse.”).

<sup>241</sup> There may be some cases where the more passive parent is just as culpable as the actual abuser, by providing active encouragement, a weapon, or the like.

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Another option legislatures should consider is adopting a statutory scheme that recognizes the defendant's omission as a crime, distinct and separate from a failure to rescue. A separate statutory scheme would better reflect the idea that there is a meaningful moral distinction between actually inflicting the fatal blows and, for example, making the mistake of leaving a child alone with an individual who has been abusive in the past.

## 2. Spousal Obligations to Rescue Each Other

Regarding spouses, the following analysis both calls for refinement and tracks the discussion above. The state's interests in penalizing a failure to rescue between spouses are: (a) saving human lives in danger; and (b) affirming the significance of marital obligations.

The problem with the first interest is that the means used here – spousal obligations to rescue, policed through the criminal law – is woefully under-inclusive. The second objective, by contrast, makes more sense. While the obligation to undertake “easy rescues” is not specifically articulated in many wedding vows, it reasonably falls under the language often used in those vows.<sup>242</sup> Thus, it makes sense to impose the duty to rescue on those who become vulnerable after they have already made commitments to serve as caregivers.

The notion undergirding the legal obligation here is that spouses who have voluntarily chosen to obtain the benefits conferred by marriage should endure some burdens in return, and facilitating the safety of a spouse is a reasonable burden. When a person opts to marry, the spouse is signaling to others that she or he will be a first responder. In this respect, imposing a duty to rescue is analogous to the imposition of liability on those people who have “waved away” others.<sup>243</sup> Just as with children, the goal here is not to tie an albatross around the neck of every spouse. Omissions liability here simply punishes the breach of trust which marriage creates between the parties to the marriage and those in the political community around them.

Our normative framework in conjunction with this family ties burden applies in a similar way as parental duties to rescue children. Even more so than with children, spouses have already evidenced a strong commitment to take care of each other, and the duty to undertake an easy rescue is easily included in that commitment. With respect to minimalism, as with children, the need to create a spousal obligation seems redundant. While romantic love may seem to render a legal requirement unnecessary, again, criminal law is sometimes used to prohibit or require conduct that would otherwise be obvious and attractive to most people. Finally, as with children, here too reliance on tort remedies as a substitute seems unhelpful. There might not be a plaintiff to

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<sup>242</sup> See, e.g., Nina Callaway, *Your Wedding Vows: Samples of Wedding Vow Wording*, ABOUT.COM, <http://weddings.about.com/cs/bridesandgrooms/a/vowwording.htm> (showing traditional wording of vows promising mutual care).

<sup>243</sup> See *supra* Part II.C.

bring a claim against a spouse who fails to rescue another spouse (though one is more likely in this context than in the child context). Moreover, the spouse might be judgment proof in a civil case involving money damages, and knowledge of one's inability to pay may marginally encourage spouses to have inadequate incentives to rescue. Criminal sanctions here may serve to both educate the public about the obligation spouses have toward each other and to effectively punish spouses for their failure to live up to this obligation.<sup>244</sup>

Any potential prosecution of a person for failing to protect his or her spouse from harm also has a potentially discriminatory impact: it treats differently those who cannot, or who choose not to, enter a spousal relationship sanctioned by the state.<sup>245</sup> For example, in most states these laws currently do not allow homosexual couples to take the same comfort in knowing that omissions liability is parceled out in a non-discriminatory fashion. One way to see how this is discrimination is through analogy: if omissions liability were distributed on the basis of race, such that whites had a duty to rescue their spouses, but blacks did not, it would clearly send a message devaluing the spouses of black people. The same is true by restricting omissions liability to the few family status relationships recognized by the state. Why should a heterosexual man have an obligation to protect his spouse from harm while a gay man in a similarly meaningful and voluntary partnership does not when he and his partner reside in a jurisdiction without same-sex marriage or civil unions?<sup>246</sup> In both instances, imposing liability serves the same valuable functions: increasing safety and promoting an ethos of caregiving relations triggered by voluntary choices. Thus, limiting omissions liability to those in a state-sanctioned relationship seems plainly under-inclusive – it leaves out those

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<sup>244</sup> See discussion *supra* Part III.A.2.

<sup>245</sup> See, e.g., *People v. Beardsley*, 113 N.W. 1128, 1131 (Mich. 1907). Indeed, some states have recognized that limiting liability to formal legal relationships would be plainly under-inclusive. *Leet v. State*, 595 So. 2d 959, 963 (Fla. Dist. Ct. App. 1991) (concluding that the live-in boyfriend of a child's mother owed a legal duty to the child to prevent abuse by the mother after establishing a "family-like relationship" for an extended and indefinite period); *State v. Caton*, 739 N.E.2d 1176, 1181 (Ohio Ct. App. 2000) ("Whether a person stands in loco parentis is a factual question. The term does not signify a formal investiture . . ." (citation omitted)). We believe all states need to move in this direction and we have proposed a clear mechanism by which they could do so. See *supra* Part II.D.

<sup>246</sup> In light of the extent of discrimination against gay individuals in this country, we think it far too risky to hope that courts in all states would extend the same protections and obligations to individuals in a homosexual relationship. As a point of comparison, states are split about whether to allow same-sex partners to recover in tort for wrongful death or infliction of emotional distress, even in those states with domestic partnership laws. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 404 (3d ed. 2006).

who *cannot* get married because of a plainly troubling moral choice made by the state.<sup>247</sup>

For the most part, we do not have much problem with marriage being an over-inclusive obligation because divorce is an option by which the obligation can be terminated. But because marriage is an under-inclusive basis for imposing omissions liability, we think several options should be explored.

One solution would be to decouple omissions liability from marriage altogether, and instead ask parties to any relationship to register *sua sponte*.<sup>248</sup> This would treat all persons the same and without favor. But defaulting to a rule of no duty-to-rescue in marriage could act like a penalty default rule. On the one hand, it would probably encourage more people outside of marriage to think about whom they wish to rescue. On the other hand, it might also add needless costs associated with persons who by virtue of marriage would already be willing to undertake a duty to rescue. A better solution, based on reducing the social costs of the scheme, would be to require duties to rescue in marriages and to create a registry for all others who want to participate in a “compact of care” such that they have a duty to perform easy rescues. Marriages would simply have the implicit term of duty to rescue built into them and others outside marriage (including those in polyamorous relationships) could opt into it. This would also allow persons to insist on seeing evidence of opt-in by another person before they decide to jointly acquire property, cohabit, or perform caregiving tasks for one another.

Let us be clear: we are not certain that it is good policy to have all these omissions liabilities in the criminal law. That our normative framework enables us to justify some forms of imposing liability, if better designed than they are currently, does not mean that our normative framework *requires* these omissions liabilities. But, if we are to have them at all, they must be rendered consistent with our justificatory apparatus.

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<sup>247</sup> We note that some civil union laws, such as Vermont’s, offer same-sex couples the same panoply of rights and responsibilities that exist with heterosexual marriages. *See* VT. STAT. ANN. tit. 15, § 1204 (2002). However, discrimination persists against those involved in voluntary and committed polyamorous relationships or in non-sexual unions who nonetheless seek to enter covenants of care with each other. *Cf.* Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 633 (2007) [hereinafter Leib, *Friendship*] (stating that while other relationships are recognized and protected by the law, friendships receive no such recognition); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 191 (2007) (arguing that a failure to recognize friendship impedes the elimination of state-supported gender role expectations).

<sup>248</sup> By decoupling omissions liability and marriage, we do not run the risk of punishing a purely private breach of contract through criminal law. Since there is no bilateral exchange or consideration with our omissions registry, but only a declaration to the state with binding consequences, the state may decide to punish those who make false claims to the state, or those who lull the state’s agents into complacency vis-à-vis a particular person. The lulling notion, of course, applies only to those few situations where the state already has reason to be mindful of the vulnerability of a particular person.



### 3. Duties to Rescue in Other Relationships

Some might raise concerns that we are too focused on spouses and parents as paradigmatic relationships. The concern would be that we are reifying the sexual family or marriage as the normative ideal for adult interactions. We respectfully disagree. Indeed the point of our registry system is to obviate this concern entirely. People who are not married but “act” as though they are do not have to register, but they may choose to do so; or just one may decide to do so for the other partner since the registry is a place of declaring one’s own assumption of obligation. The registry is not predicated on norms of reciprocity, nor does it require contractual formalities. To be sure, our slight preference for assigning duties to rescue in the context of marriage and custodial parenting is responsive to what we think of as the specific features of caregiving written into the “scripts” of marriage and parenting, but no one should be forced into those roles.

What is more, people should be free to, and encouraged to, assume these obligations outside the scripts of marriage and parenting. The registry discussed in Part II permits siblings, cousins, roommates, or friends to enter into compacts of care, but the idea is not to require it through the criminal law outside voluntary choices or the specific circumstances of the parent-child or spousal relationship. Indeed, we would resist any state’s attempt to impose a legally enforceable relationship of caregiving or a duty to rescue on those persons outside the parent-child or spousal context as we simply cannot say these relationships have been entered into voluntarily – no one chooses their siblings or cousins. In the context of platonic roommates, imposing a duty of care through the criminal law would be a drastic restructuring of the traditional boundaries of that relationship. On the other hand, we certainly believe that individuals should be able to choose a legally enforceable relationship of caregiving through the use of a registry. This allows individuals to signal their commitment both to each other and to those around them.<sup>249</sup>

It is, of course, possible that very few individuals will choose to register – why would they voluntarily assume the risk of a legal liability that they currently do not face? But if that is the outcome, we are no worse off than we are now, as these individuals do not currently face liability. If, on the other hand, some individuals do choose to undertake an obligation to rescue, the benefits that decision conveys in terms of promoting safety and promoting an ethos of care and compassion certainly seem worth the effort. We can also

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<sup>249</sup> Professor Leib has some sympathy with the idea that voluntary friendships can trigger substantial legal duties. See Leib, *Friendship*, *supra* note 247, at 633. Few of these envisioned duties for friendship are criminally punishable upon breach but, admittedly, some are. Leib’s approach to friendship – and his resistance to registries in that context – is, in some ways, inconsistent with the approach taken here. *Id.* at 662-67. To the extent that the approaches differ, Leib is willing to concede that the use of a registry for substantial criminal law liability may be the better way to allocate friendship’s burdens. But the private civil law is another story.

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imagine the state incentivizing such registrations through small tax breaks or norm entrepreneurs (private employers or faith groups) that mobilize “opt in days” to foster solidarity among members of their communities. And because relationships ebb and flow, we could imagine the registry would permit people to withdraw from these compacts of caregiving if notice is given to the affected parties.

Allowing more private-ordering in the context of criminal law regulation (with sufficient attention to third-party harms) is also consistent with the suggestions we make later in the contexts of incest, bigamy, and adultery.

#### B. *Parental Responsibility Laws*

When adults have committed an affirmative act contributing to a minor’s delinquency with a culpable state of mind, the traditional core requirements for a crime have been satisfied.<sup>250</sup> Moreover in those situations where the laws speak to a *general* obligation by *all adults* to forbear from contributing to a minor’s truancy or curfew violation or criminal misconduct, there is no specific family ties burden. But as we saw in Part I, some states and municipalities have created criminal liability for parents when their children commit misconduct based on nothing more than a failure-to-supervise theory.<sup>251</sup>

Discussions of these laws suggest several reasons for their passage: (a) they are thought to reduce crime; (b) they are viewed as vehicles to project norms of parental conduct by instructing parents to monitor their children carefully and to remain actively involved in parenting; and (c) they are regarded as an avenue of restitution to victims for the harms committed by the minors.<sup>252</sup> Despite these plausible justifications, we view these laws as normatively troublesome and think they should be jettisoned for the reasons articulated below.

For purposes of argument, we stipulate that the state has a compelling interest in the reduction of crime, the proper instruction of parental obligations in supervising minor children, and in ensuring adequate compensation to victims of crime. However, we are not of the view that the state claiming to pursue these objectives has shown that the means used are appropriately tailored to these ends, especially if other non-criminal alternatives are available and equally effective.

To begin with, if the goal is to reduce crime, why not require all adults who are in supervisory positions, even if temporarily, to prevent the crime and/or report it if prevention fails? It does not make sense to restrict failure-to-supervise laws to parents for the sake of reducing crime. The second argument, restricting the reach of these laws to parents, makes more sense if the state’s goal is to instruct parents to be involved in raising their children and

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<sup>250</sup> DRESSLER, *supra* note 24, at 91.

<sup>251</sup> See *supra* Part I.B.

<sup>252</sup> See sources cited *supra* note 41.

to act diligently in the supervision of their children. But if that is the case, then it is not clear why mandatory parenting classes, public advertising, civil recovery statutes, and a showing of an affirmative culpable act or omission by the parent would be insufficient. The use of strict liability and a criminal sanction are unnecessary and have problematic effects. As to the adequate compensation of victims, every state has a civil recovery statute or tort in place by which victims can seek compensation from parents for harms perpetrated by their minors.<sup>253</sup> The criminal sanction is redundant in that respect.

#### 1. Voluntary Caregiving and Liberty Interests

Admittedly, these laws attach obligations only to the person who voluntarily creates a relationship (i.e., the parent, not the child). In that respect, these laws are consistent with one aspect of liberalism. However, because these laws create strict criminal liability by punishing parents without proof of an affirmative action (or choice to commit an action), they fail to respect a reasonable liberty-maximizing rule that warrants condemnation and punishment only for defendants who have performed a voluntary action or omission with a culpable mind. To visit the full weight and condemnation of a criminal sanction upon an individual for an action by another person beyond his or her control is antithetical to the spirit of liberty and to a liberalism that respects individuals as individuals.

A plausibly fair interpretation of the failure-to-supervise theory requires proof that the parents could reasonably have done something to prevent the minor's misconduct and chose not to. But the statutes as drafted, which hold parents criminally and strictly liable for the misconduct of their children, lead to absurd results in some situations. For instance, parents could be liable for prosecution when they themselves were the victims of the minor's misconduct. To be sure, some jurisdictions allow this or other reasons (e.g., the parent acted reasonably in the situation) as an affirmative defense,<sup>254</sup> but the absence of reasonableness by the defendant should be part of the government's case-in-chief, not a burden allocated to the defense in a criminal case.

#### 2. Minimalism and Means Analysis

As suggested above, we think imposing criminal liability is misplaced in the absence of a blameworthy state of mind and a wrongful action or omission by the caregiver in question. If a parent acted with something approaching at least criminal negligence, we could better understand the impetus to punish the parent with a light sanction. But imposing criminal responsibility on a strict liability theory does not seem to promote more effective caregiving than a negligence standard. Rather, it would only chill the underlying activity of raising or adopting children or foster children and/or force parents to take unreasonable steps in monitoring their children. This would undermine the

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<sup>253</sup> Brank et al., *supra* note 41, at 3.

<sup>254</sup> *E.g.*, IDAHO CODE ANN. § 32-1301 (2006); LA. REV. STAT. ANN. § 14:92:2 (2004).

very point of trying to cultivate and support voluntary caregiving relationships through family ties burdens.

Here is a concrete example: imagine a parent goes out on a date and leaves a fourteen-year-old alone in the house with unsecured firearms and an unlocked liquor cabinet, when the parent knows the child has attempted to play with the guns and drink liquor on prior occasions. If the fourteen-year-old proceeds to get drunk and use the parent's gun to shoot the neighbor's car, the parent has been reckless, or at a minimum, criminally negligent by "failing to exercise reasonable control" over the child.<sup>255</sup> Imposing liability in this scenario will signal both to this particular caregiver, and other caregivers in the community, that they must supervise their children more vigilantly.

But imagine instead that the child buys the gun on his own with his money from an after-school job and shoots the neighbor's car on the way home from school, despite repeated admonitions by the parents to stay away from guns and people with guns. Under an ordinance like the one passed in Silverton, Oregon and other jurisdictions, parents could face prosecution on a strict liability theory because their child had been charged with a crime.<sup>256</sup> But such a prosecution would have little impact in terms of promoting better caregiving in situations like the one that gave rise to the misconduct in our second hypothetical – there is very little caregiving the parent could have done that would have prevented the crime in question. Perhaps the parent could prevent the child from earning extra money or going to school independently, but children who are determined to find trouble can do it notwithstanding all reasonable efforts by parents.

The consequences of parental responsibility laws warrant consideration too. To the extent criminal law successfully projects norms about correct values, the strict liability standard in some parental responsibility laws will deter people from becoming foster parents, adoptive parents of teenagers, or on the margins, parents of their own biological children. That is not the signal regarding the promotion of caregiving that society should emit. Moreover, to the extent these statutes impose liability on persons who do not choose a culpable act or omission, the criminal justice system loses its capacity to harness cooperation by citizens elsewhere in the law.<sup>257</sup>

As to restitution, there is no reason why a civil tort remedy against the parents (or the minor) would not suffice in providing an avenue of repair to the harms caused by a minor. After the children themselves, parents are likely the

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<sup>255</sup> DiFonzo, *supra* note 41, at 59 n.261 (listing state statutes which use language similar to "failing to exercise reasonable control").

<sup>256</sup> *See supra* notes 51-57.

<sup>257</sup> Cf. Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 149-50 (2008) (explaining that when the criminal law tracks a community's notion of justice, the law earns moral credibility and the ability to shape societal norms); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 482 (1997) (same).

next cheapest cost avoider, and so pinning parents with obligations under civil recovery statutes gives parents a strong incentive to monitor their children closely and provide compensation to victims.<sup>258</sup> To be sure, there is the possibility – as there was above – of parents being judgment proof and of there being no available plaintiff to sue. If parents were reasonably away during the minor’s misconduct – if, for example, the child goes on a supervised school trip with teachers – then quite generally, the assumption that parents are the next least cost avoider may be misplaced. In any event, under the parental liability laws we discuss, the defendant is not being forced merely to pay for harm. The defendant is being condemned through criminal punishment for someone else’s wrongdoing even if the defendant was non-culpably unaware of, and did not participate in, the wrongdoing, and even if the defendant instructed the wrongdoer that such misconduct was forbidden.

To be sure, we allow vicarious liability elsewhere in the criminal justice system, for example, in the crime of conspiracy. Co-conspirators have been permissibly held liable for substantive crimes committed by another member of the conspiracy under the *Pinkerton* doctrine,<sup>259</sup> even if not present at the scene of the crime or aware of the crime’s commission.<sup>260</sup> These efforts are controversial and have been substantially criticized.<sup>261</sup> But the parental responsibility laws differ significantly from the *Pinkerton* scenario. To impose liability under *Pinkerton*, the defendant must have committed the act of joining a conspiracy, and the additional crime by the co-conspirator must be committed in furtherance of the conspiracy and be reasonably foreseeable.<sup>262</sup> In a recent article, Professor Kreit excavates the constitutional foundations for *Pinkerton*, noting that many courts have acknowledged the *Pinkerton* criteria to be due process requirements.<sup>263</sup> If *Pinkerton* establishes a floor to the negligence rule in the context of vicarious liability for conspiracy, then why doesn’t the negligence rule operate in other cases of criminal vicarious liability, such as felony murder,<sup>264</sup> or for our purposes, parental responsibility laws?

Putting the constitutional issue aside, we do well to consider whether these laws are likely to be effective at reducing the incidence of crime by minors. Professor Dan Filler suggests that such statutes could be effective if the

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<sup>258</sup> Brank et al., *supra* note 41, at 3 (“All of the states have some form of civil parental liability.”); Chapin, *supra* note 41, at 633-34 (discussing the compensation and deterrence rationales of civil liability statutes).

<sup>259</sup> *United States v. Pinkerton*, 328 U.S. 640, 647 (1946).

<sup>260</sup> See Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 AM. U. L. REV. 585, 590 (2008).

<sup>261</sup> See, e.g., Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 6-7 (1992).

<sup>262</sup> *Pinkerton*, 328 U.S. at 647-48.

<sup>263</sup> Kreit, *supra* note 260, at 598-605.

<sup>264</sup> See DRESSLER, *supra* note 24, at 556-61.

consequences for violation were sufficiently severe and certain, although of course we might not be willing to live with such high stakes.<sup>265</sup> For example, if parents whose children threw an alcohol-filled party for their friends faced a felony conviction and a lengthy prison term, most reasonable parents, Filler argues, would quickly “lock up the booze and perhaps install a nanny-cam to monitor the house.”<sup>266</sup> We think they might take even more drastic measures – put their children on lock-down. Moreover, to be effective, the government would have to enforce these laws more often. Although these statutes are on the books in a number of jurisdictions, criminal prosecutions remain extremely rare.<sup>267</sup> The laws receive most of their attention through media coverage of those prosecutions, such as the St. Clair prosecution discussed in Part I.<sup>268</sup>

But even if these statutes could be made effective, would it be appropriate to use them? As previously articulated, other alternatives might better achieve the goals sought by parental responsibility laws. But it is also important to question the assumptions associated with these laws. Support for parental responsibility statutes is motivated in part by the belief that “poor parenting” is a root cause of much of the juvenile crime in this country. As one family outreach worker exclaimed: “We have an adult problem, not a children problem . . . . If we can get our adults together, the children will naturally fall in line.”<sup>269</sup> One commentator has suggested that, “[t]he rationale behind the parental liability laws – punishing the parents to reduce acts of juvenile delinquency by their children – must be based upon a series of interconnected assumptions”: first, that the nature of the child’s behavior is directly – if not primarily – caused by the quality of the parenting in the household; second, that we can somehow create a “universal model of adequate parenting,” which all parents can and should adopt regardless of their circumstances; and third,

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<sup>265</sup> See Posting of Dan M. Filler to Concurring Opinions, [www.concurringopinions.com/archives/2006/07/strict\\_liabilit.html](http://www.concurringopinions.com/archives/2006/07/strict_liabilit.html) (July 6, 2006, 11:30). There apparently have been few recent empirical studies assessing the effectiveness of these laws. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE REFORM INITIATIVE IN THE STATES 1994-1996, [http://ojjdp.ncjrs.org/pubs/reform/ch2\\_d.html](http://ojjdp.ncjrs.org/pubs/reform/ch2_d.html) (bemoaning the lack of data about whether these statutes are effective); see also Chapin, *supra* note 41, at 653-54.

<sup>266</sup> Filler, *supra* note 265.

<sup>267</sup> Harris, *supra* note 44, at 10.

<sup>268</sup> See *supra* notes 39-40.

<sup>269</sup> Courtney L. Zolman, Comment, *Parental Responsibility Acts: Medicine for Ailing Families and Hope for the Future*, 27 CAP. U. L. REV. 217, 229 (1998) (quoting a statement by Nia Keeling, a family outreach worker) (internal quotation marks omitted); see also Tyler & Segady, *supra* note 43, at 80 (quoting the statement “[s]how me a bad kid and I’ll show you a bad parent,” made at a city council meeting in Southfield, Michigan that ultimately authorized a parental responsibility ordinance (internal quotation marks omitted)).

that the threat of punishment will induce parents to adopt this government-sanctioned model of parenting.<sup>270</sup>

Critics of these statutes contend that the link between poor parenting and juvenile crime is far less certain than proponents suggest.<sup>271</sup> Juveniles are no doubt also profoundly influenced by their peers, their schools, their communities, the media, and perhaps their genetic make-up.<sup>272</sup> In addition, the threat of criminal liability might actually negatively impact parenting, rather than enhance it. One critic suggests that parental responsibility statutes will induce some parents to “over-parent[], that is, by either severely restricting their child’s freedom of action or by excessively punishing the child.”<sup>273</sup> Other parents might respond by “under-parenting,” that is, distancing themselves from their children “by filing un-governability or similar petitions in order to transfer responsibility for their children to the state.”<sup>274</sup> In either case, the relationship between parent and child would become more adversarial and negative, rather than more productive and positive.<sup>275</sup>

### 3. Gender, Inequality, and Discrimination

From the preceding discussion, one can see why we are dubious about these statutes’ capacity to reduce crime through parenting vigilance, signal commitment to parenting values, or provide restitution not available through other measures. Here we note that limiting vicarious liability to those parents within a state-sanctioned family unit seems under-inclusive as well and, therefore, discriminatory. If vicarious liability is embraced by legislatures because of its crime-reduction promise, then it should be applied whenever there is a relationship of asymmetrical dependency and voluntary caregiving, and not just when there is a strictly construed version of the parent-to-child relationship.<sup>276</sup> For at least in this way, more deterrence will be achieved by

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<sup>270</sup> Chapin, *supra* note 41, at 624.

<sup>271</sup> For a discussion of whether poor parenting is in fact a substantial contributing factor to juvenile delinquency, see *id.* at 664-71.

<sup>272</sup> See DiFonzo, *supra* note 41, at 44; see also Cahn, *supra* note 41, at 425-27 (identifying other causes of juvenile delinquency, such as “deficiencies in early childhood education, peer pressure, and inadequate employment opportunities”); Amy L. Tomaszewski, Note, *From Columbine to Kazaa: Parental Liability in a New World*, 2005 U. ILL. L. REV. 573, 583-85 (discussing how factors like the media and biology might contribute to juvenile delinquency).

<sup>273</sup> DiFonzo, *supra* note 41, at 47; see also Cahn, *supra* note 41, at 416-17 (suggesting that some parents do such a poor job of parenting, such as engaging in physical abuse, that their children might appropriately reject their supervisory efforts).

<sup>274</sup> DiFonzo, *supra* note 41, at 48.

<sup>275</sup> *Id.* DiFonzo also argues that jailing a parent deprives the youthful offender and any siblings of a parental influence in the home. *Id.* at 48-49. This criticism is obviously less persuasive if the parenting at issue was truly inadequate or even affirmatively harmful.

<sup>276</sup> Asymmetrical dependency refers to relationships where one person possesses substantial authority and responsibility over another person who is largely dependent for his

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extending vicarious liability's ambit to same-sex or non-married-child-rearing partners, and the importance of supervision as part of caregiving will be communicated to those who have opted to raise or supervise minors. A narrower structure would be to restrict the reach of parental responsibility laws to the same class of people who constitute voluntary "primary caregivers" that would face a duty to rescue children.

Having already considered heteronormativity concerns, here we want simply to recognize that women will likely bear the brunt of these duties to supervise in light of the fact that it is women who most often serve as the head of single-parent homes.<sup>277</sup> Based on a variety of factors, it might be difficult to conclude that parents can effectively control their minor children, especially in the context of a single-parent home. For one thing, the number and physical strength of some children may prove overwhelming in particular situations; the parent might also be a victim of a child's misconduct. Additionally, parents might be afraid that reporting their children to the police could lead to the involuntary termination of their parental rights. These are additional independent reasons to be concerned with the structure of parental responsibility statutes or ordinances. In omissions liability, holding the parent responsible is the last lifeline to prevent real harm to vulnerable and innocent children; in the context of parental responsibility laws, by contrast, the children are generally neither wholly innocent nor in danger.

#### 4. Summary

While the burdens associated with parental responsibility statutes attach to voluntarily created caregiving relationships, and therefore deserve some leeway, our view is that they fail to be fully justifiable as drafted because of the ways in which they raise substantial concerns under our minimalism, gender and inequality inquiries. It bears emphasis that our critique does not affect those criminal laws that apply to any adult who commits a culpable act or omission that proximately contributes to the delinquency of a minor or endangers the minor's welfare, assuming the statutes and courts define those terms with reasonable specificity.

#### C. *Incest*

At the outset, we acknowledge that the topic of incest, like that of bigamy, which follows, is a complicated one. Our modest goal is to contribute some preliminary thoughts to a difficult dialogue about whether the criminal law is an appropriate vehicle to regulate the intimate activities by mature persons. As

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or her well-being on the authority-wielding person. Martha Fineman elaborates upon this notion. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 8 (1995). Our vision of who stands in relationships of asymmetrical dependency does not rest necessarily upon *residency*, but we recognize its general significance.

<sup>277</sup> See Maldonado, *supra* note 122, at 1008-12.



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we discussed in Part I,<sup>278</sup> there are various kinds of incest rules: some regulate conduct regardless of the age of the participants, some regulate conduct regardless of the consent of the participants, and some regulate conduct among intimates regardless of an actual blood relationship. Unsurprisingly, there is overlap across these categories depending on the jurisdiction.

Our emphasis here is on those criminal laws that punish a person's conduct that, but for the family ties of the defendant, would otherwise be lawful in a given jurisdiction. We are specifically *not* talking about the sexual abuse of children, which is sometimes referred to as incest but is clearly and rightly illegal conduct regardless of the identity or family status of the perpetrator. Indeed, as we explain below, we will focus our discussion on consensual sexual conduct between adults, but our analysis also has potential implications for how states regulate sexual conduct between minors and adults and between minors and other minors, which we touch on toward the end of this Section.

Consistent with our positions developed in Part II, 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. Where genuine and mature consent cannot be presumed or achieved, then the sexual activity should largely be investigated and punished the way other sexual misconduct is punished, with the important caveat discussed below regarding the definitions of coercion associated with sexual assault law.<sup>279</sup> Nonetheless, we also believe that sentencing enhancements based on breach of trust can be justified in contexts where a primary caregiver has abused a minor child or other person who might be incapacitated (e.g., an elderly parent or disabled adult child).<sup>280</sup>

Let us begin by determining the objectives articulated on behalf of incest statutes. The most commonly cited rationale for prohibiting consensual relations is that incestuous relationships have the potential to create children with genetic problems if the parties reproduce.<sup>281</sup> Moreover, incestuous relationships have special potential to be abusive and nonconsensual, and this coercion may be difficult to detect, thus calling for a separate and perhaps more severe set of penalties.<sup>282</sup> Additionally, some have viewed the incest

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<sup>278</sup> See *supra* Part I.C.

<sup>279</sup> See *infra* note 297 and accompanying text.

<sup>280</sup> See U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2007) (providing a sentencing enhancement for abusing a position of trust). Notice that this use of sentencing enhancements is fine under our framework: they are not family ties burdens because they apply to all positions of trust. Professor Leib discusses how this provision can be used to protect friendship as a caregiving relationship in Leib, *Friendship*, *supra* note 247, at 691 n.324.

<sup>281</sup> E.g., Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 259 (1984). This may help explain why adoptive children are sometimes excluded from such prohibitions.

<sup>282</sup> See Cahill, *supra* note 81, at 1569. Cahill cites a number of courts that referenced these rationales in upholding incest laws. *Id.* at 1570 nn.105-06 (citing *State v. Kaiser*, 663 P.2d 839, 843 (Wash. Ct. App. 1983); *In re Tiffany Nicole M.*, 571 N.W.2d 872, 878 (Wisc.

taboo as a way to “prevent[] intrafamilial sexual jealousies and rivalries” when a parent figure has relations with both another parent and a child.<sup>283</sup>

Yet, these rationales cannot account for the scope of the incest prohibition in almost all American states.<sup>284</sup> For example, *consensual* relationships between adult siblings who were adopted from separate birth parents raise none of the concerns associated with genetic difficulties, sexual jealousies, or coercion.<sup>285</sup> It is therefore impossible to underestimate the influence of the “disgust factor.”<sup>286</sup> In large part, these relationships are criminalized because Americans view them with distaste or because they are, in some situations, religiously proscribed.<sup>287</sup> At least as to some of these relationships, we think the state should step in to proscribe the sexual conduct; and with regard to others, the state should step aside in the sense of using the *criminal justice system* to sanction the conduct. We do not suggest here that the state cannot resort to other mechanisms, such as civil law or civic education, to express its disapproval of such relationships.

### 1. Voluntary Caregiving and Liberty Interests

In most jurisdictions, incest laws apply to both voluntarily and involuntarily created relationships; parents are prohibited from sex with their children in the same way that siblings are prohibited from having sex with each other.<sup>288</sup> Family ties burdens placed on involuntarily created relationships fail one of our liberal concerns, and should be regarded very carefully before legally authorizing these burdens. However, to the extent they apply to voluntarily

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Ct. App. 1997)). McDonnell cites a related concern of preventing the family from becoming “overly-sexualized,” with family members viewing other members as potential sexual partners. McDonnell, *supra* note 90, at 353.

<sup>283</sup> CLAUDE LÉVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* 479 (Rodney Needham ed., James Harle Bell & John Richard von Sturmer trans., 1969); Note, *Inbred Obscurity*, *supra* note 83, at 2464.

<sup>284</sup> Note, *Inbred Obscurity*, *supra* note 83, at 2469-70.

<sup>285</sup> See McDonnell, *supra* note 90, at 352 (suggesting that states could take a narrower approach by allowing incestuous couples to marry but making it illegal for them to have children). McDonnell does not grapple with the question whether such a statute would be constitutional. *Id.* at 353. Margaret Mahoney makes the point that the genetic issue also cannot justify those state statutes criminalizing relationships between step-parents and step-children. Mahoney, *supra* note 84, at 28. Mahoney also suggests, however, that many of the concerns raised by incest could be present even in relationships between two adults; an incestuous relationship could undermine family harmony no matter the ages of the two parties involved. *Id.* at 32.

<sup>286</sup> Cahill, *supra* note 81, at 1578-83 (discussing how disgust and revulsion drive much of incest regulation).

<sup>287</sup> See Mahoney, *supra* note 84, at 29 (describing how religious history, family welfare, and “community norms” are invoked as potential justifications for incest bans).

<sup>288</sup> As we noted in Part I, only three states do not punish consensual adult sibling sexual conduct. See *supra* note 83.

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created relationships of caregiving, we have little problem in extending some deference to legislative decisions to penalize these relationships.

Our reasons for doing so, however, are not predicated on the biological issues undergirding support for most incest laws. Rather, we think a general rule is appropriate, one 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.<sup>289</sup> 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. Such a law would emit a clearer signal of which relations are prohibited than the mishmash that characterizes current incest laws.<sup>290</sup>

This rule ties in with our more general liberal concern that seeks to assess whether the family ties burden in question unnecessarily infringes on one's liberty. With respect to sex crimes, it is the lack of intelligent and mature consent that should drive the liberal state's punishment of offenders. When a person stands in a position of asymmetrical dependency, it is very hard to determine whether truly voluntary consent was given. There are also complicated questions about whether persons who were once in relationships of asymmetrical dependency, but now are not, could voluntarily consent to have relations with persons with whom they were once vulnerable. Thus at a minimum, some regulatory speed-bumps should be erected to ferret out the existence of genuine and meaningful consent in those contexts.<sup>291</sup>

As to relationships between independent adults, we believe that a respect for autonomy and limited government should permit consenting individuals to engage in the sexual relations they deem appropriate without fear of criminal sanction.<sup>292</sup> That is not to say we endorse any of these relations; rather, we simply think the state should not be using the *criminal* law to tread upon the

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<sup>289</sup> Professors Collins and Leib would add that a past asymmetric dependence relationship would also be justifiably precluded based on concerns of vulnerability. Professor Markel disagrees; on his view, genuine and mature consent may plausibly exist even between adults who were once in a relationship of asymmetric dependence.

<sup>290</sup> See Note, *Inbred Obscurity*, *supra* note 83, at 2469-70.

<sup>291</sup> In other contexts, Professor Markel suggests possibilities including 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. See *infra* note 305. These possibilities might be appropriate in this context as well.

<sup>292</sup> Here we largely agree with the observation in Justice Scalia's dissent in *Lawrence v. Texas*, in which he noted that the Court's majority reasoning makes it difficult to resist the conclusion we draw regarding consensual adult relations. *Lawrence v. Texas*, 539 U.S. 558, 597 (2003) (Scalia, J., dissenting).

intimate associational rights of mature individuals. As they stand, the current laws chill consensual activities by adults that should be unencumbered by threats of arrest, prosecution, and punishment.<sup>293</sup> Indeed, criminal prosecution is ordinarily unnecessary to prevent this conduct; most of these relationships will be deterred by social stigma.<sup>294</sup> We recognize the concern that incestuous relationships have the potential to be abusive and nonconsensual,<sup>295</sup> and we think these concerns are substantial and important. But in the context of adults, these problems can ordinarily be punished through the traditional lack-of-consent crimes: the crimes regulating sexual assault.<sup>296</sup>

We acknowledge that in some circumstances those available “background” laws may be unsatisfactory. For example, it is quite possible that the coercion involved in an incestuous relationship would be psychological rather than physical, and many states still do not consider psychological coercion sufficient to satisfy the required elements of their rape or sexual assault statutes.<sup>297</sup> Thus, although our background laws forbidding sexual assault and rape may be sufficient bases for prosecuting and punishing offenders in cases involving physical coercion, the current status of rape law may leave some non-consensual incestuous relationships outside the reach of criminal law sanctions. Thus, reform of current rape laws continues to be an important goal. It is also important to recognize that various gender inequities within households raise questions about whether consent to an incestuous relationship could ever truly be voluntary, but these are fact-bound inquiries. Assuming there are such consensual relations between mature persons, then prohibiting them from having consensual relations is primarily a form of squeamishness, at least from a liberal criminal justice perspective that does not seek to impose a particularly traditional sexual morality.<sup>298</sup>

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<sup>293</sup> See Posting of Dan Markel to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2008/02/the-sex-ed-lice.html> (Feb. 19, 2008, 18:32) (discussing the shadow effects of incest, adultery, and polygamy laws); see also Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 746 (2006) (lamenting shadow effects on consensual activity in the statutory rape context).

<sup>294</sup> Cahill, *supra* note 81, at 1578-83.

<sup>295</sup> See *supra* note 282 and accompanying text.

<sup>296</sup> See Note, *Inbred Obscurity*, *supra* note 83, at 2467-68.

<sup>297</sup> See, e.g., *State v. Thompson*, 792 P.2d 1103, 1106 (Mont. 1990) (concluding that a principal who threatened to block a student’s graduation unless she consented to sexual intercourse could not be convicted of the crime of “sexual intercourse without consent”).

<sup>298</sup> We recognize that some proponents of incest laws may be sincerely motivated by religious views or other comprehensive moral views, but those views, in a liberal society sensitive to the rights of minorities, are not necessarily views that a liberal criminal justice system must abide by. We also recognize there is an important and complicated separate issue of whether any incestuous marriages should be permitted. Our focus here is on whether current criminal conduct should be decriminalized or reformed, and we will restrict our discussion to that subject.

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In the absence of consent between adults, as we have qualified it here, we think the sexual misconduct should be punished as if the crime were committed by an acquaintance or stranger. However, we support legislative decisions to impose breach of trust enhancements – whether treated as elements of a crime or sentencing factors – for crimes by primary caregivers against persons in relationships of asymmetrical dependency, where the caregiver voluntarily assumed the caregiving relationship.<sup>299</sup>

## 2. Minimalism and Means Analysis

In this Section, we explore the purported objectives of current incest laws, focusing on the degree of narrow-tailoring extant in the current practices. Let us begin with the concern of coercion. This problem, which we think is the government's most compelling interest, can be punished through general laws prohibiting coercive sex. Thus, the need for articulating a specific family ties burden requires justification. One argument associated with coercion is that it is very difficult to achieve adequate deterrence in the family context because of the problems associated with getting minor victims to report parental misconduct. But if that is the case, we can have, as suggested above, heightened penalties in any context where a breach of trust with a supervisory adult arises – whether schools, churches, or the home. It need not be delimited as a family ties burden, and the breach of trust enhancement need not be limited to family status, even if family status serves as a presumption to create an inference of betrayal of trust. Admittedly, this strategy will not resolve a minor's reluctance to report a sibling's or cousin's improper conduct, but that same reluctance can easily arise when it is a close family friend or neighbor who commits the sexual misconduct.

As to the sometimes-articulated goal of preventing intra-familial sexual jealousy, there are reasons to doubt that this is the sort of governmental interest that can vindicate the use of a criminal sanction. For one thing, it is hard to understand why the state concerns itself with sexual jealousy as opposed to economic disparities, parental favoritism, or other forms of jealousy and rivalry. Second, incest laws do not currently attach to all possible relationships that might also give rise to intra-familial sexual jealousy, thereby creating serious under-inclusiveness relative to this goal. A heterosexual woman may marry a man and also sexually desire his father or brother; a heterosexual man might marry a woman and desire her mother or sister. If persons act on these desires, they are not subject to incest laws in the vast majority of jurisdictions,<sup>300</sup> but they will surely trigger intra-familial jealousies.

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<sup>299</sup> While a sentence enhancement may, to some, signal that one victim seems to be “worth more” than another victim, we think there is less reason to be worried about it since an offender in that context has voluntarily created the trust relationship, and the breach of it makes the conduct more reprehensible. That seems a sufficient basis to rebut a possible allegation of unfair treatment of the victim as signaled by the sentence to the offender.

<sup>300</sup> McDonnell, *supra* note 90, at 350-51.

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As to the genetic concerns, there are several responses. First, for persons not engaged in activity capable of causing genetic repercussions – gay cousins, elderly siblings, etc. – the rules prohibiting their relationships are overbroad and cannot be justified on this ground. With respect to those not related by consanguinity, there is no basis for genetic fears at all. Admittedly, such fears increase when we are talking about closely-related persons, such as brothers and sisters.<sup>301</sup> But as others have noted, “in no other legal realm does the government criminally prohibit two people from having children because their offspring are more likely to inherit genetic defects.”<sup>302</sup> Put simply, we have long since retired the idea that eugenics preferences are a reasonable basis for criminal justice policy.<sup>303</sup>

Related to the genetics-based fears is concern for the economic costs of allowing incestuous relationships. In other words, one might be tempted to justify criminal incest prohibitions to reduce the costs associated with increased medical care for children of consanguineous parents. But again, the solution of using incest prohibitions is both over-broad and under-inclusive. First, some couples deemed incestuous may choose not to have children or may not be able to have children, and yet their conduct would still be subject to criminal sanction. Second, we do not use the criminal law as a tool to reduce potential medical costs in any other context so it would be hard to justify its use here. When we criminalize murder or theft, it is not because we want to keep insurance payments down; it is because murder or theft is wrongful. Third, if we were genuinely concerned about increased medical costs, we could test all couples contemplating having children with high risks of disease or complications. But this would be both an offensive policy to many people and it would sweep in far more persons than those who are blood relatives.

The preceding discussion of narrow-tailoring has largely addressed family ties burdens in the context of relations between adults. We acknowledge that concerns about family ties burdens on persons engaged in relationships with minors raise weightier concerns than those arising in the context of consenting adults.<sup>304</sup> While all of us agree that the possibility of coercion is far more

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<sup>301</sup> Note, *Inbred Obscurity*, *supra* note 83, at 2468 n.31.

<sup>302</sup> *Id.* at 2468.

<sup>303</sup> As to how these concerns are addressed outside the criminal justice system, we are more ambivalent. We recognize that some might try to distinguish eugenics (which might be thought to perfect a given gene pool) from genetics-based fears about incest, which are trying to avoid harms to future humans, as opposed to perfecting them. The problem with this distinction is that it assumes a moral baseline of non-incestuous relationships. If a community had endorsed incestuous relationships historically, then efforts to ban such relationships would be viewed by that community as “eugenics” by virtue of the goal of trying to improve the general issue of the community.

<sup>304</sup> It is our view that current incest laws are not terribly effective in regulating adult-minor sex. To the extent that incest laws produce sentencing discounts to sexually abusive family members, the incest regime is complicit in extending a family ties benefit with no

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significant in the adult-child context, and that it is less likely that the minor in question is capable of truly informed consent, we disagree amongst ourselves about how much to credit the consent of minors who choose to have sex with adults to whom they are related, and what measures might be taken to prove such consent to the state.<sup>305</sup> Although many states have a variety of statutory rape laws available to punish and deter adult-minor and minor-minor sex, such laws may not be sufficient to address all the possible concerns arising from these relationships where incest is involved. Thus, we address below the use of family ties burdens in these contexts.

As to sexual relations strictly among minors, we are not all of one mind – proving the point, perhaps, that our lens of access to these laws does not require a singular conclusion on all family ties burdens. One of us (Professor Markel) thinks that sex with and between minors should be regulated in family-neutral ways. This would mean that either the criminal law applies to prohibit sexual activity for all persons under a certain age or that the criminal law does not apply in the context of consensual relations among those credited with the capacity to consent. This is in addition to the general rule that would prohibit sexual activity between supervisory care-givers and dependent care-takers. Thus, there would be no categorical rules prohibiting sexual conduct

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adequate justification for under-punishing those who sexually abuse their dependents. *See* Markel, Collins & Leib, *supra* note 3, at 1190.

<sup>305</sup> Professor Markel, for instance, holds the view that if someone aged fifteen to eighteen invites and chooses consensual relations with another person aged fifteen or higher, that person should be able to engage in the relationship provided certain (admittedly difficult) conditions are satisfied. For example, we could have a policy by which sex education courses would be a prerequisite for sexual activity in the same way that driver's education in some jurisdictions is a prerequisite for permissible driving. On this view, all persons under eighteen wishing to have sex without fear of prosecution would have to secure a sex-education license, which they could get from a variety of possible private or public sources. Posting of Dan Markel to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2008/02/is-teen-sex-lik.html> (Feb. 15, 2008, 17:17) (discussing the logistics of sex-ed licenses). The education would foster awareness of pregnancy, birth control techniques, genetic risks, disease, and physical and psychological coercion. Additionally, even with such a sex-education license, adult-minor or minor-minor sex (regardless of consanguinity) would be presumptively or categorically prohibited when there is a relationship of asymmetrical dependence, co-habitation, or a supervisorial relationship in school, work, or extra-curricular activities. Last, in situations where there is a substantial age difference which could imply coercion, the relationship's sexual turn would have to be declared in advance to designated authorities to certify that these conditions have been satisfied. Prosecution for statutory rape would be threatened in the absence of compliance. *See* Posting of Dan Markel to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2008/02/sex-with-minors.html> (Feb. 7, 2008, 16:31) (providing hypothetical scenarios regarding sexual relations with minors); Posting of Dan Markel to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2008/02/marriage-of-min.html> (Feb. 8, 2008, 12:13) (providing hypothetical scenarios regarding marriages with and between minors).

between, for example, seventeen-year-olds on the basis of family status alone. Under this view, those worried about physical or psychological coercion, abuse, or retaliation can simply rely on the laws available to punish that independent misconduct.<sup>306</sup> If sexual relations are to be decriminalized for those over an age of consent, then it should be immaterial from the state's perspective whether they are brothers, first cousins, or friends. The key would be to ensure an absence of coercion or abuse.<sup>307</sup>

But at least one of us (Professor Collins) finds these conclusions troubling. Sex between minor siblings, for example, does not implicate a significant liberty interest that is worth protecting. In addition, some of the concerns used to justify incest bans take on heightened importance in the context of minors. For example, because the potential public health ramifications of incestuous sex are admittedly non-negligible – and because it would be extremely hard for minors to give meaningful consent to such complex sexual relations – there may be sound reasons to preserve criminal statutes against incestuous sex among minors. Minors, because of their emotional immaturity, are more vulnerable to forms of psychological coercion.<sup>308</sup> In addition, minors in incestuous sexual relationships may be less likely to seek outside help in ending the relationship. It would seem far easier, for example, for a minor to report his forty-year-old uncle to the authorities for pressuring the minor to have sex than it would be to report the minor's brother.

One of us (Professor Leib) cannot make up his mind, though his sympathies are largely with Collins. Indeed, not only are Collins's concerns serious, but there are serious issues raised by the costs associated with creating new and complicated institutions and bureaucracies – would minors be expected to use registries too? – to channel and sanction conduct. There is also, finally, the reality that the juvenile justice system is different from the adult system and probably raises different concerns, which have not been systematically examined or considered sufficiently here to reach a clear conclusion on the merits.

### 3. Gender, Inequality, and Discrimination

There are a couple of important points about gender, inequality, and discrimination that bear mention regarding the use of family ties burdens in the

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<sup>306</sup> See, e.g., N.Y. PENAL LAW § 130.65 (McKinney 2008).

<sup>307</sup> We could permit or require the fact-finder to infer that coercion is present in certain circumstances; for example, do the participants live in the same home together; does one person serve in a caregiving or supervisory role to the other? But both those questions would cut across family status blood lines. For Markel, concerns about medical risks and pregnancy would be addressed through the use of a sex-ed license, which would help secure a safe harbor from prosecution.

<sup>308</sup> Cf. Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 62 (2007) (explaining why juveniles are more susceptible to police coercion).



incest context. First, as we have noted above, incest laws appear motivated in part by concerns about genetic repercussions. That implicates both hetero- and repronormativity, and signals to the polity that we expect couples engaged in sex to procreate. We note, additionally, that to the extent the family ties burden operates *ex ante* in a protective manner (of a particular model of family relations), it denies that protection to those whose families do not fit the particular model informing the contours of most incest statutes. Thus, if a homosexual 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. Of course, *Y* is susceptible to general statutes prohibiting sexual misconduct, but this shows the general redundancy of most incest statutes. Last, we note the incest statutes around the country are generally drafted and, to our knowledge, prosecuted today in manners that do not especially and unfairly burden one sex over another.

#### 4. Summary

Having applied our normative framework from Part II, we see that in many jurisdictions, incest laws by their scope create family ties burdens not only in the context of consensual sexual conduct between adults, but also when states otherwise permit consensual sexual conduct between adults and minors, and between minors and minors. In the context of adults, and subject to the caveats above, we find this burden on intimate associational rights unjustifiable because the interests underlying incest laws can be promoted through more appropriate measures short of invoking the criminal law. In the context of incestuous sex between adults and minors, and minors and minors, we are divided about whether incest laws – which create liability where, in the absence of a family relationship as designated by the state, none would otherwise exist – should survive scrutiny. That said, we 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 dependency. Those enhancements would be sensibly extended even to those secondary caregivers who exert supervisory powers over minors – including teachers, scout leaders, and faith group leaders.

However one redrafts criminal law in the incest arena to address the various difficult issues surrounding adult-adult, adult-minor, and minor-minor incest, we doubt we will gain much traction with the political community that favors these laws in the near future. That said, the topic of consensual adult incest has actually been the subject of some legal and political discourse of late because of its links to the same-sex marriage debate. Some have suggested – with an intention to alarm – that if we legalize same-sex marriage, the legalization of

incest is sure to follow.<sup>309</sup> But in contrast to the issues of gay rights and same-sex marriage,<sup>310</sup> there is no committed and vociferous mainstream advocacy movement of which we are aware that is currently arguing for the liberalization of incest laws.<sup>311</sup>

Similarly, there is very little legal scholarship seeking to make an affirmative case for greater recognition of intra-familial romantic relationships; rather, discussions about incest usually involve simply pointing out that many of the arguments made in favor of the criminal laws are problematic. For example, commentators remark that the evidence related to the possibility of genetic harm is far less certain than once believed, and in any event, many of the relationships currently prohibited do not trigger this concern at all.<sup>312</sup>

There are a few recent exceptions in the academic literature to this general pattern. For example, Christine Metteer argues that the individual's constitutionally protected right to marry trumps the state's interest in prohibiting incestuous marriages when the parties are related only by affinity rather than consanguinity.<sup>313</sup> More provocative is Ruthann Robson's claim that "[t]he proffered explanations for incest prohibitions should be deeply problematic for any same-sex marriage advocate."<sup>314</sup> She argues that attempts to justify prohibitions against incest by appealing to religion or longstanding community mores should be soundly rejected because "tribal customs should not govern our current cultural mores and constitutional notions any more than

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<sup>309</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (suggesting that the constitutionality of laws prohibiting adult incest were called into question by the Court's decision in *Lawrence*); Cahill, *supra* note 81, at 1544; Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, in 55 SUP. CT. REV. 27, 60-65 (Dennis J. Hutchinson, David A. Strauss & Geoffrey R. Stone eds., 2003). The same slippery slope concerns about incest were also raised by opponents to the legalization of interracial marriage. For a very interesting discussion on that topic, see Cahill, *supra* note 81, at 1554-57.

<sup>310</sup> Bigamy is also increasingly on the agenda. See Jeffrey Michael Hayes, Comment, *Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists*, 3 STAN. J. C.R. & C.L. 99, 104-13 (2007).

<sup>311</sup> See, e.g., Sunstein, *supra* note 309, at 62 (stating it cannot be said that incest "prohibitions run afoul of some emerging national awareness"). One organization, however, is seeking to liberalize cousin marriage. Cousin Couples, <http://www.cousincouples.com> (last visited Oct. 1, 2008).

<sup>312</sup> See, e.g., McDonnell, *supra* note 90, at 352-53; Note, *Inbred Obscurity*, *supra* note 83, at 2465-66.

<sup>313</sup> Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL'Y 262, 272-73 (2000); see also Bratt, *supra* note 281, at 259-67. At least one state supreme court has agreed with this general proposition. See *Israel v. Allen*, 577 P.2d 762, 764 (Colo. 1978) (striking down a state statute prohibiting marriage between brother and sister related only by adoption as unconstitutional).

<sup>314</sup> Robson, *supra* note 178, at 762.

*Leviticus* should prevail.”<sup>315</sup> She also argues that we should reject the genetics justification, because it “depends upon identity between marriage and procreation – the same logic that is used to resist same-sex marriage.”<sup>316</sup>

Our own view of the matter is, as we have said, limited to the reach of the criminal law. We think these criminal prohibitions, regardless of their motivation or provenance, are problematic from our liberal minimalism perspective, as well as from the viewpoint that considers how family ties burdens trigger concerns of inequality and discrimination, especially in the context of mature individuals engaging in consensual sexual relations.<sup>317</sup>

#### D. Bigamy

Our analysis of bigamy takes some cues from the preceding discussion of incest. The rationales for bigamy laws (by which we refer to the criminal bans on the practice of polygamy) are familiar and, in America, deeply rooted.<sup>318</sup> They are nonetheless under-scrutinized,<sup>319</sup> which is something we hope to remedy below. In describing the objectives of bigamy laws, some have adverted to the many “[p]opular depictions of polygamists in the media and in society[, which] generally focus on the prevalence of underage brides, accounts of sexual abuse, and the subservient role of women in these relationships.”<sup>320</sup> Indeed, historically, polygamy has been decried by some as a tool to subordinate women<sup>321</sup> and thus bigamy laws would presumably be responsive to those concerns. One might also fear that polygamy raises the costs of social welfare programs. The underlying assumption here appears to be that if a person has eight spouses and their offspring for whom she or he must provide care and resources, there is greater concern that these people might become charges of the welfare state. Last, some critics of polygamy

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<sup>315</sup> *Id.* at 763.

<sup>316</sup> *Id.* at 764.

<sup>317</sup> *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (concluding that the liberty rationale for invalidating bans on same-sex sodomy statutes entails the invalidation of other morals legislation including bans on consensual incestuous relationships).

<sup>318</sup> For legal background on American bigamy laws, see generally *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>319</sup> See Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL’Y 101, 106 (2006). Sigman’s article and some others provide an exception to this pattern of neglect. See *id.*; see also Emens, *supra* note 98, at 362; Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 737-57 (2001); Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 439 (2003) [hereinafter Strassberg, *Post-Modern Polygamy*].

<sup>320</sup> See Hayes, *supra* note 310, at 105.

<sup>321</sup> See Sigman, *supra* note 319, at 169-74.

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have stated that polygamy is especially dangerous to the governance of the liberal state itself.<sup>322</sup> We flesh out these claims on behalf of bigamy below. Our perspective on how to approach this family ties burden will, we hope, illuminate the debate and raise questions about whether the criminal law is the proper tool with which to respond to the practice of polygamy.

### 1. Voluntary Caregiving and Liberty Interests

To begin, we note that bigamy laws address our first liberal concern in that the legal burden of a criminal penalty applies only to someone who has previously created a voluntary caregiving relationship. Thus, when a criminal penalty based on family status is imposed on *X*, who is married to *Y*, for also marrying *Z* during an extant and valid marriage to *Y*, that is a burden on *X* that can be regarded as one for which *X* was on notice. That notice of and implicit consent to the burden partially diminishes the problem of bigamy laws, but it does not provide an affirmative and independent justification for these family ties burdens. They must still undergo further scrutiny.

Our second inquiry, drawing from a very basic account of liberalism, asks whether there is some liberty at stake that a society committed to advancing one's liberty should respect. Our view is that the act of plural marriage itself can be expressive of one's basic rights to establish intimate associational rights without undue intrusion by the state. We also believe that the right to terminate those marriages is a right properly belonging to individuals within a liberal state. So, using the terms above, if *X* marries *Z* even though *Y* opposes *X*'s second marriage to *Z*, *Y* should be able to terminate his marriage to *X* via divorce. And if *X* and *Y* had signed an agreement that *X* would not undertake a second marriage, then that should be enough to keep *X* from marrying *Z* while *X* is also married to *Y*. But statutes simply and completely criminalizing polygamy infringe on the fundamental rights of consenting mature individuals to enter into covenants of mutual care with other persons. Thus if we are to criminalize this behavior, the reasons should be very substantial.

### 2. Minimalism and Means Analysis

#### a. *Coercion and Minors*

Recall that the first objection to repealing bigamy laws is that polygamous practices are thought to entail the frequent coercion of underage persons, usually females.<sup>323</sup> In light of the recent events involving the Fundamentalist

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<sup>322</sup> Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 405-12 (2003) [hereinafter Strassberg, *Crime of Polygamy*].

<sup>323</sup> This was a particular problem with the recently convicted Warren Jeffs, who married off barely post-pubescent girls in his community and at the same time effectively banished teenage boys from the community to "make more girls available for marriage to the elders." Julian Borger, *Hellfire and Sexual Coercion: The Dark Side of American Polygamist Sects*, GUARDIAN (London), June 30, 2005, at 15.

Latter-Day Saints community in Texas,<sup>324</sup> this is a very substantial (though obviously contingent) consideration, especially because such girls often have had little recourse to reach beyond the relatively insular communities in which they were raised. To be sure, the problems that arise in prosecuting persons guilty of misconduct – the unwillingness or inability of family members to testify against the perpetrator, and the participation or enabling of the family members in the abuse – arise in monogamous situations too. But the problems are especially stark here, where an entire community may support the polygamist adult male and not his underage wives.

There is another important consideration related to the coercion of underage women. Some practitioners of polygamy seek to evade criminal sanctions by simply not declaring to the state that the parties have entered into what would otherwise be a formal marriage relationship.<sup>325</sup> These minors, forced into a sexual relationship against their will yet not formally married, clearly need protection too. Yet, bigamy laws are not always drafted or interpreted to target this wrong.<sup>326</sup> Indeed, they sometimes render the coerced parties themselves as criminals.<sup>327</sup> That we must vigilantly guard against harm to minors does not mean that we must necessarily prohibit the decision of three or more consenting adults to enter into a polygamous relationship. Using broadly-written polygamy bans to fight coercion or exploitation of minors is over-inclusive and facially discriminatory because it punishes those adults with polyamorous desires or dispositions willing to abide by norms requiring both consent and maturity.

There are other laws available to punish the commandeering of immature or non-consenting minors without infringing upon legitimate associational rights and interests. First, as suggested in connection with the incest discussion, we should make sure the law is especially scrutinizing of, and skeptical toward, sexual and marital relationships involving minors, especially when the relationship involves an asymmetrical dependency.<sup>328</sup> A child bride could be deemed, upon adjudication, to be asymmetrically dependent upon her adult “husband” for care; presumptions that persons eighteen or over are not asymmetrically dependent, and that minors are, could be rebutted by particular circumstances. Thus, under our approach, relationships established upon

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<sup>324</sup> See sources cited *supra* note 176.

<sup>325</sup> See, e.g., Geoffrey Fattah, *Bigamy Law Debated*, DESERET NEWS (Salt Lake City), Feb. 3, 2005, <http://deseretnews.com/article/1,5143,600109729,00.html> (debating the application of a bigamy law to a man with a “spiritual” third wife).

<sup>326</sup> *But see* State v. Holm, 137 P.3d 726, 732 (Utah 2006) (holding that the bigamy statute in Utah covers both state-sanctioned marriages and those that are not state-sanctioned).

<sup>327</sup> See, e.g., Feminist Majority Foundation, *Utah: Plural Wife Is First Woman Charged in Polygamy Case*, FEMINIST DAILY NEWS WIRE (Oct. 16, 2002), <http://feminist.org/news/newsbyte/uswirestory.asp?id=7073>.

<sup>328</sup> See *supra* Part III.C.1.

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pressure or coercion would be prohibited (though the “poly” aspect of this prohibition is essentially irrelevant since it would apply to monogamous marriages too). We should also be vigilant about allowing parental authorization of marriages below an age of maturity and consent because that could facilitate abuse within communities committed to flouting those normative benchmarks. This concern for coercion of minors (and adults) is, however, relevant in the context of both monogamous marriages and polygamous ones.

In sum, although we need laws that prohibit the coercion of persons into marriage or sex, these laws need not be drafted in such a way that unnecessarily infringes upon the rights of mature persons to structure their family lives in the way they feel appropriate. Rather, the government can develop specific strategies for dealing with acute dangers of coercion of minors or adult trafficking victims into marriages. In light of our commitment to being minimalist about the criminal law’s reach, if policy-makers are determined to structure laws to incentivize particular arrangements within the household, they should not do so through the criminal law when a panoply of equally effective civil law options are available.

b. *Economics*

Another reason some might think criminalizing polygamy is appropriate is based on the economics of social welfare. If a person has eight spouses and their offspring for whom she or he must provide care and resources, there is greater concern that these people might become charges of the welfare state. The problem with this argument is its contingent and highly speculative nature; as scholars have shown, the economics of polygamy are quite complicated and thus might not justify any criminal encroachments on the rights people have to intimate association.<sup>329</sup>

First, in any given polygamous cluster, there might be economies of scale attaching to family units that allow for the optimization of human capital. One polygamy activist in Utah paints her participation in a polygamous relationship in exactly such a manner.<sup>330</sup> Her husband has eight other wives and children with a number of them. One of the wives is employed by the others to tend to the collective children for several years at a time while the other wives are free to pursue careers of their choosing for longer periods of time. Other research shows that women are materially better off in societies where polygamy is allowed or encouraged.<sup>331</sup> To be sure, it is not our goal to improve the lot of women at the needless expense of any other group, but we advert to such

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<sup>329</sup> See Sigman, *supra* note 319, at 151-55 (considering the various economic theories which may encourage polygamy).

<sup>330</sup> See Emens, *supra* note 98, at 315-17.

<sup>331</sup> See Sigman, *supra* note 319, at 152 n.430; see also ROBERT WRIGHT, *THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 96-99 (1994).

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studies simply to show that who benefits from polygamous arrangements is a more complicated matter than often assumed.

Second, if an economic burden on the state were a sufficient reason to infringe upon an otherwise important liberty in associational freedom and privacy, the state could take a more narrowly tailored measure to ensure the financial viability of such unions: disqualification of certain spouses from social benefits if they fail to show that they have adequate means.<sup>332</sup> Indeed, one could insist that adding more spouses is subject to higher taxes or proof of assets – both of which are non-criminal rules that can achieve the same end of reducing numbers on the dole. Obviously, these rules should be crafted in gender-neutral terms.

Polygamous arrangements are not to everyone's taste, but in a world where women empirically continue to shoulder the brunt of child-rearing at the cost of their careers, flexibility in marital arrangements might be a way to minimize the social and personal costs of abiding by these extant social norms.

c. *Bigamy Laws as a Safeguard Against Defiance of the Liberal State*

As alluded to earlier, some propose banning polygamy because of the general injuries the practice inflicts on liberal democratic states. For example, Professor Strassberg argues, with respect to some polygynous communities,<sup>333</sup> that children from polygamous unions impose an unusual burden on the state because they are often concealed; that polygamous practices conduce theocratic communities that fail to abide by or support the government's rules; these practices create a secrecy that leads to the denial of individual civil rights; and these polygynous communities fail to pay sufficient taxes.<sup>334</sup>

These arguments, while well-motivated, are largely misplaced. Concealment-based harms are only a challenge in the context of a state that criminalizes polygamy. It is the threat of criminal liability that often drives the parties underground. Putting aside social norms that will bend over time, and recognizing that these norms have already changed somewhat, there is no *legal* need to conceal polygamous relations if bigamy laws are repealed. If we were worried that people were denied their civil rights, then that would be a separate reason to intervene in any specific situation, but there is nothing inherently denigrating of civil rights by expanding options for plural marriage. If we are worried about concrete legitimate wrongs – such as failure to pay taxes – resulting from the theocratic tendencies of certain polygynous communities,

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<sup>332</sup> We presume most people will not be comfortable with this solution. But we are not convinced there is a problem to solve in the first place; if there is, this is one natural conclusion among others.

<sup>333</sup> It is important to note that the official Mormon institutions no longer support or encourage polygamy, but there are communities that are Mormon-inspired and continue these practices; it is largely on these off-shoots that Professor Strassberg focuses. Strassberg, *Crime of Polygamy*, *supra* note 322, at 354.

<sup>334</sup> *Id.* at 405-12.

we have separate laws available to punish violations of any given law. It is not as if polygamous communities are the only communities in which fundamentalist views pose a threat to the vitality and security of a liberal state. Using polygamy bans to remedy such harms on these grounds is essentially irrational as a government policy.<sup>335</sup>

### 3. Gender, Inequality, and Discrimination

Some arguments Professor Strassberg mentions bear especial scrutiny because they run parallel to arguments opposing polygamy based on cultural or racial bias. As various scholars have shown, with ample record to support the argument in the Supreme Court's nineteenth century cases upholding bigamy laws,<sup>336</sup> opposition to polygamous practices is often rooted in prejudice against other cultural practices.<sup>337</sup> While opposition to polygamy today is not usually expressed in racial or ethnic undertones,<sup>338</sup> it does sometimes take on a cast of hostility to religious views.<sup>339</sup>

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<sup>335</sup> Professor Strassberg has emphasized the harm of polygamous communities to liberal democracies on different grounds. Drawing on a Hegelian perspective, for example, Strassberg indicated that polygamous marriage cultivates despotism or inhibits the development of liberal values such as equality among persons. See, e.g., Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1537 (1997) [hereinafter Strassberg, *Distinctions*] (commenting that monogamous marriage is "peculiarly suited to cultivate the freedom to pursue particular ends and the freedom of self-governance by rational ethical principles which must be characteristic of citizens of a free state"). In response, Professor Sigman persuasively notes that the social science literature does not "significantly substantiate the theory that polygamy bars the development of romantic love within a private intimate sphere, that polygamy causes despotism, or that monogamy causes the development of the liberal state." Sigman, *supra* note 319, at 176. From a theoretical perspective, moreover, we are puzzled why Professor Strassberg would be willing to tolerate the decriminalization of laws limiting polyfidelity involving mature individuals if these Hegelian concerns were paramount. See Strassberg, *Crime of Polygamy*, *supra* note 322, at 429 (concluding that there is little evidence to justify bans on polyamory when it involves mature individuals). Additionally, our sense is that liberal regimes retain their credibility by reducing the instances in which they use the criminal law to interfere with the autonomous and consenting choices of the individuals involved. Taking a firm stand against polygamy requires liberal regimes to abandon their commitment to respect most forms of private ordering in the absence of obvious and substantial negative externalities.

<sup>336</sup> E.g., *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

<sup>337</sup> See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 648-49 (2005); Martha M. Ertman, *The Story of Reynolds v. United States: Federal "Hell Hounds" Punishing Mormon Treason*, in *FAMILY LAW STORIES* 51, 54-56 (Carol Sanger ed., 2008).

<sup>338</sup> Historical opposition to polygamy sometimes invoked explicitly racist rationales, for example, that polygamy was something that was "almost exclusively a feature of the life of Asiatic and of African people," not something that was appropriate "among the northern and



A more powerful reason to be worried about decriminalizing bigamy is that polygamy, on some views, serves to facilitate the subordination of women, even when they are adults.<sup>340</sup> Although bigamy statutes are facially neutral to women, and thus prohibit both polygyny and polyandry,<sup>341</sup> we acknowledge the sociological and anthropological evidence showing that polyandry is much rarer.<sup>342</sup> Nonetheless, the research on this topic indicates that claims of thoroughgoing subordination of women go too far in light of the diverse reasons that polygamy erupts and the diverse forms polygamy takes under different conditions.<sup>343</sup> Moreover, it is a mistake to resist polygamy (or more specifically, polygyny) as oppressive to women without noting that the same norms that exist within some polygamous communities also exist within some

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western nations of Europe.” *Reynolds*, 98 U.S. at 164; *see also* Francis Lieber, *The Mormons: Shall Utah Be Admitted into the Union?*, 5 PUTNAM’S MONTHLY 225, 234 (1855).

<sup>339</sup> It seems that much of the historical American animus against polygamy is rooted in religious discrimination against the Mormon faith tradition and its adherents. *See, e.g.*, Martha M. Ertman, “*They Ain’t Whites, They’re Mormons*”: *An Illustrated History of Polygamy as Race Treason 2* (Univ. of Md. Legal Studies Research, Working Paper No. 2008-37, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1270023](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270023). Additionally, many Christians traditionally viewed polygamy with disdain and continue to do so today. Sigman, *supra* note 319, at 142-43.

<sup>340</sup> Sigman helpfully explains why polygamy may be more marginally abusive to women but also why these claims are suspect. *See* Sigman, *supra* note 319, at 172-73. She states: (1) polygamy invites secrecy, undermining women’s ability to get help if needed; (2) the structure of polygamy suggests that the husband will not have sufficient time to devote to each wife or their children; (3) the treatment by other wives may be abusive; and (4) the types of people who voluntarily choose polygamy may be attracted to the uneven power dynamic.

However, there is no evidence that polygamy per se creates abuse or neglect. Having sister wives can be a support network. The status of senior wives versus junior wives and the relationships among these women vary between cultures. In fact, by banding together, women sometimes wield more power to change their husband’s problematic behavior. Yet sometimes co-wives are perpetrators [of the abuse against women].

*Id.*

<sup>341</sup> Cheshire Calhoun, *Who’s Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023, 1039 (2005) (“What these historical details remind us is that gender inequality is a contingent, not a conceptual, feature of polygamy.”).

<sup>342</sup> Sigman, *supra* note 319, at 161-63.

<sup>343</sup> *See id.* at 163-64 (“Rather than the gender biased monolith some have made it out to be, polygyny is a multi-faceted choice of family structure, rooted in the economic, sociological, cultural, and biological particulars of a given society.”); *see also* Remi Clignet & Joyce A. Sween, *For a Revisionist Theory of Human Polygyny*, 6 SIGNS 445, 467 (1981) (demonstrating the diversity of polygynous marriages).

monogamous communities.<sup>344</sup> There is also some empirical evidence indicating that abuse is no more likely in polygynous communities than in monogamous ones.<sup>345</sup> Indeed, perhaps because of the marginalization of polygamous practices, polygamy supporters argue that it is harder for female victims or allies of victims to report abuse because it might lead to bad consequences for the victim.<sup>346</sup> Of course, this same reluctance to report abuse or coercion is a concern in monogamous relationships; but unlike in monogamous relationships, the victims of abuse in polygamous relationships might face serious collateral consequences from the state, such as the termination of parental rights.<sup>347</sup>

Consequently, we have to sift carefully among the potential causes of harms to women. As Professor Shayna Sigman trenchantly writes:

The belief that polygyny causes gender discrimination or a low status of women in a given society is a classic example of the fallacy of *post hoc ergo propter hoc*. That polygyny can be found in societies that treat women poorly does not mean that the practice itself causes the gender inequality. Often, the true culprit of oppression merely lies in limitations on property rights for women, a practice that can be facilitated through polygamous life, but need not be. Indeed, where polygyny can help women economically by linking them with men who can provide more resources, it is the societies with less gender discrimination that are found to have this arrangement.<sup>348</sup>

Moreover, there is the powerful point that taking away a woman's right to participate in a polygamous arrangement is itself a way of subordinating women. Again, as Professor Sigman observes: "prohibiting polygamy infantilizes women, declaring them incapable of providing consent and foreclosing true choice by criminalizing one of their options for family living."<sup>349</sup>

In response to the claim that bigamy laws support the anti-subordination of women, we note that many of the claims regarding the subservience of women

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<sup>344</sup> *E.g.*, Strassberg, *Distinctions*, *supra* note 335, at 1589 ("[M]onogamous marriages in nineteenth-century America were based on the same patriarchal ideas about women's nature and gender roles as polygamous Mormon marriages.").

<sup>345</sup> *See* Sigman, *supra* note 319, at 173 nn.595-96; *see also* Hayes, *supra* note 310, at 107 n.47 ("If there are crimes being committed, and underage child brides, that needs to be prosecuted . . . . [But,] what's the difference between that and other lifestyles with children in them?" (citing Interview with Nancy Perkins, Reporter, *Deseret Morning News* (Apr. 12, 2006))).

<sup>346</sup> *See* Hayes, *supra* note 310, at 107.

<sup>347</sup> *Cf.* Janet Elliott et al., *CPS Calls Sect Its Largest Case Ever*, *HOUSTON CHRON.*, Apr. 8, 2008, at A1 (describing the adversarial custody hearings which would begin for each child found in the polygamous compound).

<sup>348</sup> Sigman, *supra* note 319, at 164 (footnotes omitted).

<sup>349</sup> *Id.* at 172.

in plural marriages have also been made with regard to monogamous marriage and the legal institutions accompanying it. So if anti-subordination is the goal, then two questions arise: whether, as an empirical matter, plural marriage prohibitions in fact achieve marginal harm reduction; or, alternatively, whether marriage as a legal institution should be abolished.<sup>350</sup> In light of the fact that many prominent feminists have over the years argued for decriminalizing bigamy, including Susan B. Anthony and Elizabeth Cady Stanton,<sup>351</sup> we should evaluate more carefully blanket claims about the subservience of women in plural marriage made in the absence of hard empirical evidence. We also note that empirical evidence of polygamy's harms in liberal democracies will be difficult to come by so long as the practice remains banned.

Last, we think bigamy laws' effects on homosexual unions of two or more persons warrant attention. Obviously to the extent homosexual couples are denied the right to marry one partner, they are also denied the right to marry two partners simultaneously. Bigamy laws just add further insult to injury since whatever protective benefit or function the bigamy laws were designed to achieve for heterosexuals is denied to homosexual families. Despite this problematic discrimination, however, we note that the particular problem can be solved either by leveling down (decriminalization for all) or leveling up (expanding criminalization).<sup>352</sup> Thus, discrimination on the basis of sexual orientation could also be overcome by an *expansion* of bigamy laws, one that would encompass and sanction the misconduct of homosexual couples who have chosen to register their union with the state for this purpose alone, or for other protections and benefits the state might offer to homosexual couples.

#### 4. A Solution

Assuming the liberty to enter multiple covenants of mutual care is morally defensible on the grounds that the autonomous, honest choices of mature persons deserve respect, then it seems that the state should abandon the business of criminalizing polygamy, and let private ordering, and perhaps civil taxes and subsidies, determine who marries whom. This would entail, of course, that persons with same-sex or poly orientations should be able to group together as well without fear of prosecution.

In practical terms, we propose the decriminalization of bigamy as between mature, consenting adults. Partners who wanted to secure exclusivity of marital relations could contract around such a rule through a private contract calling for, if desired, liquidated damages. This would place the burden of

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<sup>350</sup> See sources cited *supra* note 214.

<sup>351</sup> See Nancy L. Rosenblum, *Democratic Families: "The Logic of Congruence" and Political Identity*, 32 HOFSTRA L. REV. 145, 162 (2003).

<sup>352</sup> Cf. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388, 1436 (1988) (describing similar "level-up"/"level-down" options in the context of distribution of the death penalty based on the victim's race).

talking about the preference for imposing the family ties burden on the person who wanted the family ties burden imposed. Given our general leering about family ties burdens, this burden-shifting makes sense in light of the contract law theory of default rules.<sup>353</sup>

There are several advantages to this regime. First, it encourages couples to discuss in advance of their marriage whether both parties have a desire to keep the union monogamous. Second, it allows couples the flexibility to work out these issues without fear of the criminal law sanction. In other words, couples could create agreements in which polygamy is prohibited, but without the involvement of criminal law penalties. Third, it allows those who want the benefits that accrue from having a penalty to opt in to a regime of regulation by contract. To be sure, such a regime forces individuals to have conversations that might be uncomfortable, but the statute would prove to be a powerful information-forcing device prior to marriage. Fourth, because liquidated damages provisions are only enforceable to the degree they are a reasonable estimation of the damages to an individual, they can be set at a level sufficient to communicate condemnation of the breach of trust, while still ensuring the party in breach can remain a productive member of society and a caregiver to any dependents. How exactly one should estimate the worth of the breach is surely a difficult question. But we suspect a common sense judgment can be made about what might count as an impermissible penalty clause.

That we think bigamy should be decriminalized does not mean the state must affirmatively endorse “poly” relationships. Emphatically, the views developed here (as in our discussion of all these family ties burdens) are limited to the proper scope of the criminal law. Our argument does not require that the state forbear from promoting certain kinds of relationships through the civil system – if the state wanted to endorse those views which believe children are better raised through stable monogamous marriages,<sup>354</sup> it could do so through the use of civil subsidies and taxes, rather than criminal penalties. We do not necessarily agree that the state should use the civil justice system in this way, but at the very least, the civil justice system’s carrots and sticks do not trigger the most fundamental liberty interests of citizens.

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<sup>353</sup> It is hard to say whether a rule that defaults to decriminalization of bigamy would be a penalty default rule or a market-mimicking rule. Although the overwhelming majority of Americans oppose polygamy, the pattern of non-prosecution for most instances of polygamy over the years suggests (weakly) that there is not much support for enforcing polygamy bans. See Sigman, *supra* note 319, at 140-41 (observing a lack of prosecutions over much of the last fifty years, and general apathy among Utah law enforcement to prosecute polygamists); Dirk Johnson, *Polygamists Emerge from Secrecy, Seeking Not Just Peace but Respect*, N.Y. TIMES, Apr. 9, 1991, at A22 (“[I]n recent years, as state law enforcement officials have adopted an unwritten policy of leaving them alone, polygamists have gone public.”).

<sup>354</sup> Cf. Leah Sears Ward, *A Case for Strengthening Marriage*, WASH. POST, Oct. 30, 2006, at A17 (arguing that society should focus on encouraging marriage).

Despite the appeal of some of these recent arguments in favor of decriminalizing bigamy, opposition to the practice continues to be widespread in American society. As of 2004, more than ninety percent of Americans still viewed polygamy as immoral.<sup>355</sup> Polygamy activists will have to demonstrate to Americans that the parties to these unions are genuinely consenting, and that the externalities of such practices, both on the state and on any resulting children, will be close to trivial.

#### E. *Adultery*

As we saw in Part I, almost half the states still retain adultery laws.<sup>356</sup> Adultery laws are sparingly used to prosecute individuals outside the military context.<sup>357</sup> To be sure, some might view this state of prosecutorial desuetude as a sign of progress that we are no longer interested in pursuing “mere” morals legislation. However, there is still support in various regions to retain these prohibitions, even if they are largely symbolic.<sup>358</sup> The reasons for this support are worth consideration: some may view adultery’s potential harm to children, or spouses who do not consent to their partner’s non-exclusivity, as profound and worthy of criminal sanction. Indeed, a decision to commit adultery has the potential to undermine an individual’s ability to perform necessary caretaking functions, in that one’s energies and attention will be focused outside the family unit rather than within it. Moreover, some may view these laws as helping to further the state’s interest in keeping the institution of marriage strong and stable.

##### 1. Voluntary Caregiving and Liberty Interests

As with bigamy laws, the current prohibitions on adultery attach only to voluntarily created relationships – indeed, the paradigmatic one of marriage. In that sense, adultery laws meet the first liberal concern we highlighted in Part II.<sup>359</sup> However, there are still other considerations. When adultery is defined simply as a married person’s sexual relations with a person not his or her spouse, then the question is whether there is some normatively attractive liberty to commit adultery such that a liberal society should respect it or at least tolerate it by not harnessing upon it the condemnatory power of the criminal law. On the one hand, when adultery is performed with duplicity, it hardly warrants praise. But that still leaves the question of whether it warrants the condemnation associated with criminal sanction, especially if non-criminal

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<sup>355</sup> AEI STUDY IN PUB. OPINION, AM. ENTER. INST., ATTITUDES ABOUT HOMOSEXUALITY AND GAY MARRIAGE 51 (2004).

<sup>356</sup> See *supra* note 106.

<sup>357</sup> See *supra* notes 108, 110 and accompanying text.

<sup>358</sup> See Joanna Grossman, *Punishing Adultery in Virginia: A Cheating Husband’s Guilty Plea Is a Reminder of the Continued Relevance of Adultery Statutes*, FINDLAW, Dec. 16, 2003, <http://writ.news.findlaw.com/grossman/20031216.html>.

<sup>359</sup> See *supra* Part II.E.

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alternatives are available, as we discuss below. On the other hand, imagine a devoted couple wherein one person faces prolonged illness or some emotional development precluding the desire or capacity for sex or intimate companionship. One can easily imagine couples who might jointly authorize, either through a prenuptial agreement, or through open or tacit consent, to a partner's sexual relations with someone outside the marriage. It is hard to understand why a liberal state should be opposed to that private ordering arrangement if harms to third parties are trivial to non-existent.

## 2. Minimalism and Means Analysis

The objective of preventing betrayals of the marriage bond can be achieved through various non-criminal law norms, though admittedly it is hard to tell whether these non-criminal means are equally effective. Even in those states without adultery laws, however, there are still strong social norms against cheating in one's marriage. The strength of these social norms should not surprise us; comparable social norms against gambling, private tobacco use, and prostitution are to be found in various liberal democracies throughout the globe. It is hard to believe that the modern state could not adopt effective norm-shaping and regulatory strategies that encourage and incentivize faithful monogamous unions without the use of the criminal law.<sup>360</sup>

## 3. Gender, Inequality, and Discrimination

Because only a very few jurisdictions permit same-sex marriage, it bears emphasis that adultery laws work primarily for the benefit of partners (and, arguendo, children) to heterosexual marriages and not to partners (or children) of gay unions. Although we think adultery laws should generally be abolished based upon the very limited state interest in proscribing this conduct, we think this added discrimination is very problematic. We note, however, as is true of bigamy laws, the discrimination can be overcome by an *expansion* of adultery laws, one that would sanction the misconduct of gays who have chosen to register their union with the state for this purpose alone, or for other protections and benefits the state might offer to homosexual couples. Yet this expansion (to alleviate discrimination) sits in tension with our commitment to minimalism.

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<sup>360</sup> Indeed, many states have a multitude of civil law mechanisms which signal disapproval of adultery and encourage monogamy. In North Carolina, for example, spousal support laws are used to send very powerful messages: if a judge finds that the "supporting spouse" engaged in an act of "illicit sexual behavior," the judge *must* award alimony to the dependent spouse. N.C. GEN. STAT. § 50-16.3A(a) (2007). On the other hand, if the dependent spouse engaged in sexual misconduct, the judge *cannot* award alimony, no matter how destitute the dependent spouse may be. *See id.*

#### 4. A Solution

We understand the viewpoint that at least in certain contexts involving duplicity, adultery statutes help punish and deter injury to persons who did not consent to extramarital sex – the spurned spouse. But what adultery laws do not permit, and what they should, is a life in which both parties consent to one or both parties living in marriage but outside the bonds of monogamy, whether permanently or temporarily. This would have the effect of destabilizing the conflation of marriage with persistent *sexual* companionship.

As with bigamy, we view adultery laws that criminalize the extramarital sex of married persons as facial family ties burdens warranting careful scrutiny, despite the fact that they are triggered by virtue of a voluntarily created relationship of caregiving. That is because, in the absence of such adultery laws, the proscribed activity would otherwise be lawful. Given that adultery laws are drafted in gender-neutral terms across the country, we do not believe they inherently raise issues of patriarchy or gender bias against women.<sup>361</sup> Nonetheless, because same-sex marriage is not permitted in almost all American jurisdictions, adultery laws protect the interests of (potentially) betrayed heterosexual partners while not being similarly available to those in same-sex partnerships. For us, that is a basis for rethinking adultery laws.

Assuming that adultery statutes could be made indifferent to sexual orientation, would there be any reason to retain them in some fashion? We think the strategy we endorsed in the bigamy context is instructive.<sup>362</sup> We would begin with a statute creating a default rule that decriminalizes adultery because of the way adultery intrudes on the choices of autonomous and consenting individuals. But we would encourage prospective partners to contract around that default rule if they wished by agreements that called for liquidated damages.<sup>363</sup> This regime virtually mirrors the advantages we have laid out in the discussion of bigamy.<sup>364</sup>

It needs emphasis that the burden for contracting around the default rule of permitting adultery must fall upon the individual who has information

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<sup>361</sup> Some have argued that the United States military actually has an implicitly gendered approach to prosecuting adultery within courts-martial. See Hopkins, *supra* note 111, at 234-35.

<sup>362</sup> See *supra* Part III.D.2.

<sup>363</sup> See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1779 & n.87 (2005) (suggesting that perhaps marriage one day could “mov[e] closer to a system of default rules within which couples could structure their own lives,” for example by choosing to have “reliance or expectation damages” available for the breach of certain promises).

<sup>364</sup> See *supra* Part III.D.4 (listing the advantages of having couples address the issue of monogamy on their own without fear of criminal law sanction, regulating any monogamy agreement by contract, and allowing couples the ability to set liquidated damages so they communicate condemnation of the breach of trust while still ensuring the breacher remains a productive member of society).

regarding his or her preference for monogamous relations.<sup>365</sup> Thus, the person wanting the extra burden imposed has to raise the issue and force a conversation about monogamy. In light of the difficulties raised by many family burdens, this is where the burden should lie. This is also consistent with our sense that if we are to have other family ties burdens like duties to rescue or supervise, the benefits flowing from these duties should be available for a wide range of persons who either have signaled their caregiving commitments through parenthood or partnership, or who are not in such relationships but who nonetheless want to create a compact of caregiving.

Admittedly, we toyed with an idea – inspired by an article by Professor Elizabeth Emens<sup>366</sup> – that parties should be able to opt into a regime of voluntary criminal law regulation, such that breach of a contract for monogamy could lead to criminal prosecutions for bigamy or adultery.<sup>367</sup> But upon further consideration, we recognized the unfairness of using public

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<sup>365</sup> It is hard to say whether decriminalization of adultery works to create a penalty default rule or a market-mimicking default rule. It is a penalty default rule if we assume most people want their marriages to look more like “covenant marriages,” which require higher entry and exit costs. See generally Steven L. Nock et al., *Covenant Marriage Turns Five Years Old*, 10 MICH. J. GENDER & L. 169 (2003) (describing the terms of covenant marriage and analyzing satisfaction rates of those who have chosen them). If couples want exclusivity, the law will force them to take active steps to communicate and discuss that preference. On the other hand, it may be possible to infer (based on patterns of non-prosecution for adultery, and assuming prosecutorial responsiveness to majoritarian will) that most people do not want to have the criminal law enforce these matters, even if they view adultery in low regard. In that respect, the statute serves as a market-mimicking default rule. One flag of caution we want to raise is that if a jurisdiction adopted a default rule of decriminalization, it has to be aware of how default rules can be “sticky,” and how such stickiness might affect the prospect of law’s ability to affect behavior. For example, if we create a rule that defaults to allowing extramarital sex without any legal stigma, it might actually encourage that behavior even if the goal of the default rule is simply to encourage partners to have conversations and agreements about the scope of their relationship to each other. Of course, this result might occur if we simply decriminalized adultery without giving the opportunity for partners to secure promises of exclusivity through marital agreements. On “sticky” default rules, see generally Ronald J. Mann, *Contracts – Only with Consent*, 152 U. PA. L. REV. 1873 (2004); Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383 (2007).

<sup>366</sup> Emens, *supra* note 98, at 361-75.

<sup>367</sup> *Id.* at 365. We note that Professor Emens, after weighing various costs and benefits, ultimately preferred simple decriminalization of adultery statutes, noting the possibility that these statutes might be unconstitutional after *Lawrence*. *Id.* at 374-75. On the particular issue of post-*Lawrence* constitutionality, our sense is that if adultery statutes are drafted to be more respectful of the autonomous choices of individuals opting into a regime of regulation to prevent the kinds of harms that might materialize both to betrayed spouses and to any children of such a marriage, then it is likely they would survive constitutional scrutiny. Nonetheless, we too prescind from “contractual criminal law regulation” but principally for reasons having to do with fairness and externalities.



resources to investigate, prosecute, and punish conduct that amounted to a breach of private promises to each other. The notion that average people would have to pay more taxes or suffer the effects of diverting scarce prosecutorial resources to prosecute the failure of a private party to live up to its contractual sexual expectations seemed ultimately unworkable. By contrast, even in the absence of “contractual criminal law regulation” of adultery or polygamy, parties of any sexual preference can contract for monogamous commitments on pain of liquidated damages, and private ordering could thus be made to supplant the clunky machinery of the state’s prosecutorial apparatus.<sup>368</sup>

In sum, because we believe the protections of the criminal law should not be arbitrarily denied to couples of different stripes, and because we think there are serious minimalism concerns and some liberalism concerns with categorical rules against adultery, we support the decriminalization of adultery laws. This would put everyone on the same footing. At the same time, it would permit parties of all sorts to contract around a world without criminal penalties.<sup>369</sup> As we explained above, we would prefer to set the default rule in a way that incentivized the person wanting the family taxes imposed to ensure the agreement of the other spouse.

Thus far, we have not said much about what criminal law consequences, if any, should be visited upon a person who has sexual relations with a married person.<sup>370</sup> (Recall that in some jurisdictions, adultery statutes encompass the “outside” person who intrudes upon the marital relationship.)<sup>371</sup> We think the reach of these statutes goes too far, violating our second liberalism principle,

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<sup>368</sup> One way to reduce the externality, however, would be to have the social cost of the sanction placed on the contracting parties. Thus, if the sanction was capped as a misdemeanor punishable only by a sentence of community service with no collateral consequences, it would dramatically reduce the concern of a socially costly punishment. The imposition of that penalty could be permitted by statute to vest in those civil or family courts adjudicating the breach of the contract. We also note that there are some cases that have invalidated various contracts made between spouses, but the agreements we are discussing here are antenuptial; those are usually enforced if both parties are informed by counsel and reflect a basic fairness in exchange between the parties.

<sup>369</sup> The family law implications of these proposals for property distribution or other issues are matters beyond the scope of our criminal law focus here. However, our liberty-respecting framework for polygamy raises important and interesting questions about the reach of family ties benefits, such as whether a person with several spouses should be entitled to spousal privileges with all of them, etc. This is a topic we hope to take up in our book, where we can better juxtapose these issues for the reader.

<sup>370</sup> The “outside” person, *X*, is (knowingly or unknowingly) intruding upon the marital space between *Y* and *Z*. Our analysis of what penalty should attach to *X* is contingent upon *X*’s marital status. If *X* is unmarried, no penalty should attach, in our view, assuming *X* is a competent and mature individual. If *X* is married, his treatment at the hands of the criminal law should be contingent upon what kind of exclusivity his marital contract calls for.

<sup>371</sup> See *supra* note 104.

and that such adultery statutes should also be modified to end criminal liability for those persons. But note that when the adultery statutes extend criminal liability to those third persons, there is no family ties burden imposed on the basis of *that person's* familial status or familial connection to the crime. Properly understood, those provisions of adultery laws are not family ties burdens as we define them.

F. *Nonpayment of Child Support*

As we described in Part I, criminal sanctions have been adopted across the country to ensure that parents do not flout their obligations to provide material support for the well-being of their children.<sup>372</sup> This development has occurred for a few reasons. First, it is politically attractive for politicians to stand against parents who neglect their children.<sup>373</sup> Second, and more importantly, the nonpayment of child support is a serious problem in our society.<sup>374</sup> It obviously harms children, who rely on support payments for subsistence. Moreover, it harms the single parents left to struggle alone for the care of their children. Because more single-parent households are headed by mothers, it ultimately leaves women to bear most of the brunt of parenthood and its unique challenges.<sup>375</sup> It also harms society at large, in that taxpayers may be forced to shoulder the burden of financially supporting those children who end up on the welfare rolls as a consequence of the nonpayment of child support. It is, accordingly, unsurprising that our criminal justice system takes special interest in child support debts. Although all unpaid debts risk harming classes of creditors, when the classes of creditors are especially vulnerable children with very little recourse to self-help options, we can see why it would be appealing at first blush for policy-makers to look to the criminal justice system to help make sure these debts gets paid. Let us see if these reasons stand up to scrutiny.

1. Voluntary Caregiving and Liberty Interests

Criminally punishing parents for debts to their children and former spouses clearly triggers the concern that most family ties burdens do: it punishes the same conduct – failure to pay a debt – differently based on the familial status of the debtor. For the reasons adverted to earlier in Part II, we can explain why these family ties burdens continue to have some appeal: parents can plausibly be deemed to have consented to assume certain obligations and responsibilities by having their children. The family ties burden here is one that is imposed on persons voluntarily creating these caregiving relationships.

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<sup>372</sup> See *supra* Part I.F.

<sup>373</sup> Cf. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529-30 (2001) (stating that legislators have a great incentive to appeal to voters by both generating outcomes and taking symbolic stands).

<sup>374</sup> See Maldonado, *supra* note 122, at 1008-12.

<sup>375</sup> See *id.*

But the case of a criminally punished obligation to support one's children may reveal a limitation of our approach, because one could plausibly retort that it is too facile to say that the nonpayment of a contractual debt to a phone company, for example, is the *same conduct* as the nonpayment of child support. In other words, one could argue that our society has differential views about the *blameworthiness* of these two forms of nonpayment precisely because we see them as different sorts of conduct, not as the same conduct treated differently on the basis of status. We cannot deny that this re-description of the burden has some rhetorical force; however, we still think our organizing method of scrutiny helps expose something deep and pervasive about how the criminal justice system interacts with a normative conception of the family.

Our first liberal concern focusing on autonomy seems met by these laws. Our second liberal concern asks whether there is some underlying liberty worthy of respect to the act of not satisfying one's obligations to support one's child. Our short answer is that it depends. As discussed in Part II, there are some situations where the obligation should not attach. A sperm donor may be the genetic parent but if he disclaims, prior to the donation of the sperm, all future rights to the resulting offspring, he should not be held to pay child support. Similarly, a couple who gives a child up for adoption, and thus terminates their parental rights, should not be on the hook. But someone who has voluntarily entered into a parenting relationship should not be able to enjoy the benefits associated with parenting without also facing the obligations to be a minimally competent and supportive parent. The question is whether those obligations should be fixed by criminal law, and if so by what kinds of sanctions.

## 2. Minimalism and Means Analysis

The use of the criminal sanction should be used sparingly if there are non-criminal alternatives that might be equally effective at satisfying the goals here. Using the criminal justice system with respect to this particular duty to support is not likely to be an effective use of criminal sanctions. First, depending on the penalty imposed, criminal sanctions might risk putting "deadbeat" parents in prison, where they certainly will not be able to earn money to help support their children. Prison or other forms of forced separation also prevents the debtor parent from having meaningful relationships with their children – even if their only failure as parents was being too poor to pay support. If the sanction is a fine that goes to the state, then that is money that might otherwise be needed to go to the child.

But these criticisms of imprisoning or fining "deadbeat" parents do not close the debate. As earlier acknowledged, the ability of the criminal law to have an educative or expressive effect is worth careful attention. Having a criminal statute apply in a way that does not itself make matters worse for the child may

be possible through alternative or intermediate sanctions.<sup>376</sup> For one thing, in these contexts, the adjudication alone may be valuable for both general deterrent and specific communicative purposes. When a public body declares, “you have flouted one of your most pressing obligations, the support of the children, and you warrant condemnation,” that can be a powerful tool in shaping attitudes. But it might be that alternative non-criminal measures can also bring home that message to the offender in question, and to the public at large. Moreover, our anxiety about using the criminal sanction promiscuously here is that it focuses attention too narrowly on the economic aspects of parenthood, devaluing other important contributions to parenthood. When applied mostly to fathers, as it is, it further reinforces outdated views about fathers discharging their parental obligations through money rather than direct caregiving.<sup>377</sup>

Our minimalist approach would try to ensure that we have considered how else to reduce the incidence of nonpayment of child support. It is worth noting that a number of other non-criminal enforcement mechanisms already exist to induce individuals to comply with their mandated child support payments. Wages can be garnished, tax refunds can be intercepted, and licenses and passports can be suspended.<sup>378</sup> Further, these remedies can often be pursued outside the criminal courts, such as through state administrative agencies or through mediation. These civil proceedings can potentially promote the important ends that animate the current laws with more sophisticated, more sensitive, and less troublesome or stigmatic means. And without the stigma of criminal conviction, debtor parents can more easily get the jobs, education and housing needed to meet their obligations. Primarily, these other enforcement mechanisms might be sufficient to keep “deadbeat” parents in their children’s lives while at the same time ensuring that children receive the funding to which they are entitled.

We cannot avoid the core question, however: when these mechanisms fail, say with repeat offenders, should enforcement through the criminal justice system, and in particular the use of incarceration, be an option of last resort? There is at least one study, albeit somewhat dated, that suggests that criminal sanctions can be effective in reducing the incidence of the problem. Professor David Chambers “found a close parallel between payments and jailing: the counties that jailed more did in fact collect more.”<sup>379</sup> But other mechanisms

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<sup>376</sup> See generally Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001) (discussing the use of guilt punishments as alternative sanctions not involving public shaming).

<sup>377</sup> See Maldonado, *supra* note 122, at 1000.

<sup>378</sup> See, e.g., WEISBERG & APPLETON, *supra* note 246, at 700-01 (describing various enforcement mechanisms).

<sup>379</sup> DAVID L. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 84 (1979). Chambers studied enforcement efforts in Michigan between 1972 and 1975. *Id.*;

have been shown to be even more effective than incarceration, with suspension of driver's licenses being the most effective stick.<sup>380</sup> Generally then, incarceration should not be an available sentencing option for this offense, because, among other reasons, incarceration affirmatively *impedes* caregiving rather than fostering it. More empirical evidence would be helpful in coming to final resolution on this issue since if jailing were the most effective means of making deadbeat parents pay support, we would have to concede that the case for criminalization would be stronger.

### 3. Gender, Inequality, and Discrimination

Although the statutes that criminally punish “deadbeat” parents are drafted in gender-neutral ways, fathers are most often the ones imprisoned under these laws.<sup>381</sup> It is undeniable that punishing mostly men for failing to pay child support contributes to a gender stereotype that assumes that men are supposed to be breadwinners and women are supposed to be caregivers. This system contributes to and reinforces gender hierarchy in our society – and it therefore raises our general concerns about family ties burdens.<sup>382</sup>

Although we applaud the drafting of these laws in gender-neutral language, more work can be done to take focus off the family in particular, so as to focus more on voluntary caregiving relationships.<sup>383</sup> Again, our general approach is to deflect attention away from state-sanctioned families and promote the reorientation of family ties burdens to target relationships of voluntary caregiving. We suggest broadening the ambit of whatever approach the law takes to the punishment or treatment of nonpayment of debts of child support to include all nonpayment of debts of support to those in asymmetrical relationships of voluntary caregiving. That would avoid the discrimination typically occurring *ex ante* against persons in same-sex or polyamorous relationships and at the same time would extend to the children of such unions the “protective” benefit these burdens are supposed to achieve.

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*see also* Drew A. Swank, *The National Child Non-Support Epidemic*, 2003 MICH. ST. DCL L. REV. 357, 375-78.

<sup>380</sup> *See* Swank, *supra* note 379, at 378.

<sup>381</sup> A woman has been jailed for failing to pay child support in at least one case. *See* David Stout, *In Rare Role Reversal, Mother Is Jailed for a Failure to Pay*, N.Y. TIMES, July 26, 1995, at B5.

<sup>382</sup> It is critical to remember that in thinking about these burdens from an *ex ante/ex post* perspective that we be especially mindful of how gender affects this particular context. *See* discussion *supra* Part II.A.3. Assuming a veil of ignorance in designing these policies, no one knows what gender they will be; and these policies quite clearly impact the genders differently, however facially neutral they are drawn.

<sup>383</sup> To the extent that nonpayment of child support can be thought of as a form of omissions liability, we have already acknowledged above that omissions liability can be justified under several circumstances; these justifications could also apply in this context as well. *See supra* Part III.A.

#### 4. A Solution

We cannot deny that there are countervailing values that justify these laws in many people's minds. As we suggested, these debts, when unpaid, can largely harm vulnerable children and even primary caregivers themselves. So what does our particular framework offer to the public policy community on the issue of nonpayment of child support? Must the legal system get out of the business of these prosecutions?

Based on what we noted above, we would favor a solution that minimizes the use of the criminal sanction to ensure these obligations are met, including perhaps the processes of restorative justice to communicate the nature of the wrong to the debtor parent but also to give a forum in which the debtor can explain to the relevant persons and stakeholders why the debt is not paid. In those cases where the criminal sanction is used to condemn unjustified selfish behavior by the debtor parent, it should be applied to only and all those persons who have undertaken a voluntary caregiving role towards the child, thus using a sanction that actually promotes or is consistent with the caregiving obligations of the offender.

#### G. *Nonpayment of Parental Support*

In Part I we described the family ties burden created by criminal statutes that punish adult children who fail to provide financial support to their indigent parents.<sup>384</sup> Because of the rarity with which prosecutions are made under these laws,<sup>385</sup> we will be relatively brief in our assessment, which is, on the whole, negative.

The plain objectives of these laws are: first, to ensure aid to those who are vulnerable in old age; and second, to educate the public and reinforce an obligation through the criminal law to parents based on gratitude or a notion of unbargained-for reciprocity.<sup>386</sup> Do these laws pass muster under our normative framework?

##### 1. Voluntary Caregiving and Liberty Interests

These laws fail our concern with voluntary caregiving because it creates a family ties burden on a person who did not voluntarily establish a relationship with the indigent parent. The adult child is penalized simply by virtue of being the indigent parent's child and, in many cases, the beneficiary of the parent's past support and care.

From the perspective of our concern with liberty, should an adult retain the liberty to support only those he volunteered to support? The answer to this, at least from a liberal legal perspective, is yes. Obviously, it is appropriate and praiseworthy for an adult with means to support his parents, whether based on

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<sup>384</sup> See *supra* Part I.G.

<sup>385</sup> Kline, *supra* note 127, at 196.

<sup>386</sup> *Id.* at 205-06.

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love, reciprocity, or gratitude. But it is not the business of the criminal law to require that support, and when it does, it violates a basic precept of criminal law by condemning a person for failing to act grateful. This seems too slender a reed to justify criminal sanctions.

## 2. Minimalism and Means Analysis

We begin by looking at the first objective of these laws. Here it is to ensure necessary aid to indigent and vulnerable persons, usually when they are elderly and without physical means to help themselves. To our mind, the obligation to help such persons is one that is agent-neutral, and thus, if it is to be undertaken, it should be undertaken and funded by the public at large; otherwise, it discriminates against those indigent elderly persons without children or those whose children predeceased the parents. In any event, there is no special need for using the criminal sanction to ensure support when social services funded out of taxes could more readily ensure that the public interest in protecting the indigent elderly is satisfied.

As to the second objective, given our liberal orientation, we are doubtful that the state has an important public interest in vindicating norms of care based on gratitude. Assuming *arguendo* that we stipulate to the compelling or important nature of the second goal – of educating the public and reinforcing an obligation to parents based on gratitude – we do not understand why the civil remedies available to enunciate this obligation would be insufficient.

As with duties to support children, if the goal is ensuring norm projection and compensation, the goal can be expressed and the money can be obtained through civil actions or garnished through wages and tax refunds. If a criminal penalty were to attach, such that the person went to prison or had to pay a fine to the state, that sanction would usually impede the first goal of ensuring adequate resources to the vulnerable elderly parent *ex post*, even if it might achieve some marginal deterrence *ex ante* against the prospect of adult children walking away from their parents. We would invite empirical scholars to weigh this cost based on existing data, but we would not really seek out new legislative experiments based on our view that imposing this obligation on children is improper.

## 3. Gender, Inequality, and Discrimination

Regarding the concerns about gender, inequality, and discrimination, we note first that imposing criminal liability on those violating filial responsibility norms discriminates *ex ante* against children raised by parents in those gay or polyamorous unions that are not recognized by the state. These children are told, effectively, that they are not viewed as children of the person they properly regard as a parent. The discriminatory injury to the child is admittedly quite slight. But these laws also have the effect of denying to gay and polyamorous parents the “protective” benefit these burdens are supposed to achieve.

While the urge to promote an ongoing ethos of reciprocal care between parents and children is a powerful one in some cultures, we must bear in mind a child's relationship with his parents is not voluntary in the same sense as a parent's relationship to his children; after all, no child asks to be born, let alone to *these* parents. Thus, it is no surprise to us that many jurisdictions are reluctant to impose such liability now, even when that position leads to seemingly harsh results.<sup>387</sup> Because of the voluntariness problem, an opt-in registry makes sense in the context of adult children who wish to signal their compacts of care with their parents. And if they want, parents can opt to signal their ongoing commitment to their children by agreeing to face liability for failing to protect or support them as adults.

But in the end, the current state of affairs, where about a dozen states use the criminal sanction to establish filial responsibility norms,<sup>388</sup> violates our normative framework on every dimension. We therefore think these laws should be abandoned. If the criminal laws are to be retained for their expressive and/or compensatory purposes, however, they should at least not involve fines or incarceration, and the reach of the law should be expanded to include under its umbrella persons who would otherwise be excluded.

Last, we think it bears mention that although there was once wide legislative support for filial support laws in both civil and criminal form, these rules do not act with much force. The reason for that desuetude, we think, is an increased appreciation for the voluntarist basis for holding people criminally liable. We also think the significance of that norm helps explain why, for example, we almost never see family ties burdens prominently used against persons – siblings, grandparents, or aunts, for example – who did not themselves voluntarily undertake to create that relationship of caregiving. That norm of promoting voluntarily caregiving illuminates much of the terrain we have surveyed here, and it lends promise to the project of how better to reform our existing laws.

#### CONCLUSION

We hope to have accomplished three things in this Article. Most concretely, we have demonstrated that there are a series of burdens that defendants face in the criminal justice system on account of their family status, when that status is recognized as part of a state-sanctioned family unit. Although our previous work on the range of family ties benefits might suggest that family status could only help a defendant,<sup>389</sup> our exploration here reveals that that picture is incomplete. There are many ways that the criminal justice system goes out of its way to punish persons on account of their family status. The pervasiveness

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<sup>387</sup> Cf. *Billingslea v. State*, 780 S.W.2d 271, 276 (Tex. Crim. App. 1989) (holding that an adult child's failure to seek medical care for an ailing live-in parent does not constitute criminal negligence because there was no statutory duty to act).

<sup>388</sup> Rickles-Jordan, *supra* note 123, at 199 n.136.

<sup>389</sup> See generally Markel, Collins & Leib, *supra* note 3.



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of this phenomenon has not, to our knowledge, been previously explored and we encourage scholars and policymakers to take interest in these findings.

Second, we made an effort to organize a normative framework for thinking through whether special penalties should attach to family status. What we discovered is that these sorts of penalties are more palatable when they are efforts to reinforce relationships of voluntary caregiving. Indeed, drawing on and adapting the normative framework we used in our earlier study, we developed a set of tests or questions that we used to assess these family ties burdens. First, did the burden fall on persons who had voluntarily created a relationship of care? Second, did the burden impinge on some liberty that should be recognized as deserving of protection in a liberal society? Third, were the laws drafted in such a way as to be narrowly tailored to the governmental objectives? Fourth, were there non-criminal measures that could be equally effective in achieving the government objectives, assuming the government objectives were sufficiently compelling or important to be vindicated through law? Finally, in what ways do the existing family ties burdens contribute to concerns about gender inequality and discrimination?

Finally, we tried to spell out how our normative framework might contribute to thinking through each of the family ties burdens we were able to identify here. We recognize, however, that ultimately we cannot hope to have analyzed each family ties burden exhaustively – for they are each embedded within a policy space of their own and each burden functions differently to control different kinds of conduct. Nevertheless, our hope has been to respond to older debates and start new ones through the framework we have adopted and the policy choices we have suggested. Indeed, we hope that looking at these burdens synthetically will illuminate how the criminal justice systems are tempted to use each particular family ties burden to punish family status in several ways – and how we might reorient these burdens in a more normatively attractive light.