

2009

Rethinking Criminal Law and Family Status

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Dan Markel, Ethan J. Leib, and Jennifer M. Collins, *Rethinking Criminal Law and Family Status*, 119 Yale L. J. 1864 (2009-2010)

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THE YALE LAW JOURNAL

DAN MARKEL, ETHAN J. LEIB & JENNIFER M. COLLINS

Rethinking Criminal Law and Family Status

ABSTRACT. In our recent book, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties*, we examined and critiqued a number of ways in which the criminal justice system uses family status to distribute benefits or burdens to defendants. In their essays, Professors Alafair Burke, Alice Ristroph, and Melissa Murray identify a series of concerns with the framework we offer policymakers to analyze these family ties benefits or burdens. We think it worthwhile not only to clarify where those challenges rest on misunderstandings or confusions about the central features of our views, but also to show the deficiencies of the proposed alternatives. While we appreciate and admire the efforts of our critics to advance this important conversation, we hope this Essay will illuminate why the normative framework of *Privilege or Punish* remains a more helpful structure to policymakers assessing how family status should intersect with the criminal law within a liberal democracy such as our own.

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INTRODUCTION

On Christmas Day 2009, a radicalized young Muslim from Nigeria attempted to blow up an American jetliner full of innocent passengers. Disaster, as we know, was averted. What we learned in the following days was that the father of Abdul Farouk Abdulmutallab had previously warned the American embassy officials in Nigeria of the dangers his quiet, unassuming, and educated son presented to public safety.¹ While no parents wish to find themselves in the position to issue such warnings, there seems little question that the father here did the right thing. Indeed, we consider his act a credit to the character of a father who would prioritize the well-being of innocent persons over family loyalty. While few cases involve this degree of tension between family loyalty and public safety, the Christmas Day attack recalls a classic criminal justice dilemma between allowing family loyalty to flourish on the one hand, and enabling the state to pursue other critically important goals, including the protection of innocent persons, on the other.

This Antigone-like tension served as the early motivation for the research behind our recent book, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties (Privilege or Punish)*.² As we considered the intricacies of the relationship between familial love and criminal justice, we realized that the tensions in the Abdulmutallab family—like the tensions in the Kaczynski or Madoff families before them³—are related to a larger set of questions. These are the questions that ultimately guide the focus of our book: namely, how does and how should family status matter in a criminal justice system situated in a liberal democracy?

Thus, in *Privilege or Punish*, we set out both to catalog and critique the various ways a person's family status triggers either benefits or burdens to that person in the criminal justice system. The *family ties benefits* we scrutinize include prosecutorial exemptions for family members who harbor fugitive relatives and evidentiary privileges that family members can invoke at a

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1. See Andrew Johnson & Emily Dugan, *Wealthy, Quiet, Unassuming: The Christmas Day Bomb Suspect*, THE INDEP., Dec. 27, 2009, available at <http://www.independent.co.uk/news/world/americas/wealthy-quiet-unassuming-the-christmas-day-bomb-suspect-1851090.html>.
 2. DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, *PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES* (2009).
 3. *Id.* at xi (describing David Kaczynski's decision to disclose his brother's identity as the Unabomber to federal investigators); *id.* (describing the decision of Bernie Madoff's sons to turn in their father to the authorities for investment fraud).

criminal trial.⁴ The *family ties burdens* we analyze include laws imposing liability for failing to protect a relative from harm (omissions liability), parental responsibility laws (i.e., those imposing liability for failure to supervise minor children), and certain “morals” laws such as bigamy, incest, and adultery.⁵

What unifies the spectrum of legal rules we investigate is that each involves the facial treatment of family status in the criminal law rather than disparate impact on family members. Thus, we did not set out to survey the ways families are helped or hurt by the discretionary practices of actors within the criminal justice system or by facially neutral rules that nonetheless have a substantial impact on family life. These effects have been the subject of much important scholarship about the disparate impact of the criminal law and sentencing practices on families.⁶

Rather, we deliberately chose to focus on the facial treatment of an offender’s family status for two important and related reasons. First, although scholars have looked at many of these benefits or burdens in isolation, there has been curiously little effort to analyze the full panoply of these laws systematically or to consider how they interact with each other and with the aspirations of a criminal justice system within a liberal democracy.⁷ Our explicit goal was to analyze all these benefits and burdens imposed by dint of family status and to help judges, policymakers, and academics reflect upon these policies, the messages they are sending, and their potential for benign or invidious discrimination based on a particularly idealized and narrow conception of family. For example, when legislators create an exemption from prosecution for a man who hides his murderous spouse from the authorities, but not for a man who hides his longtime gay lover (whom he cannot, in most states, marry), they are signaling what kind of relationships matter in the eyes

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4. *Id.* at 45. Familial benefits also include sentencing discounts for family members; pretrial release for family members; pro-family prison policies; and the law’s treatment of violence within the family. *See id.* at 45-58.
 5. *Id.* at 99-140. Familial burdens also include nonpayment of child support and nonpayment of parental support. *See id.* at 140-48.
 6. *See, e.g.,* DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004); JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003).
 7. Of course, many other fascinating topics stand at the crossroads of crime, punishment, and family: the relationship between causes of crime and the structure of family relationships; the disparate impact of the criminal justice system on poor families and families of color; and the link between “family privacy” concerns and the perpetuation of violence within the family, just to name a few. However, these questions have also been well-explored by other scholars, and they play relatively little role in our endeavor, except as an intellectual foundation upon which we write.

of the criminal justice system and subjecting certain classes of citizens to differential treatment.

Second, if it is appropriate to critique policy choices that result in unintended third party harms to family life, it is surely appropriate to do so where those choices are explicit and purposeful. For example, we think it fair to presume that most policymakers do not set out to destroy relationships between parents and children when they impose draconian sentences for minor drug offenses, thereby eliminating any meaningful opportunity for these offenders to parent their children. But they do intend to impose a particular conception of family when they extend evidentiary privileges to individuals in one type of romantic relationship and not another. In other words, policymakers should be held accountable for both their direct policy choices and the indirect effects of their policies.

As our book develops in greater detail, family ties benefits and burdens require close scrutiny because of the various ways they might unwittingly or overtly entrench patriarchy and gender domination;⁸ create risk of more crime;⁹ promote inaccuracy in criminal justice outcomes;¹⁰ encroach upon fundamental associational liberties;¹¹ and treat people differently based on factors that are arbitrary or irrelevant to the commission of the offense, such as whether the offender's romantic or caregiving relationship is formally recognized by the civil apparatus of the state.¹² Although these concerns might seem reasonable in the abstract, there is little question that the normative vein of our project is more controversial than its descriptive ambitions.

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8. *E.g.*, MARKEL, COLLINS & LEIB, *supra* note 2, at 26-27, 84 (discussing the history of patriarchy in criminal law, including the origins of the spousal evidentiary privilege and the "marriage" exception to rape accusations).
 9. *E.g.*, *id.* at 32 (suggesting that family ties benefits may incentivize crime by encouraging criminals to keep the criminal activity within the family or solicit help from family members because there is reduced fear of punishment).
 10. *Id.* at 36-43 (arguing that leniency to those who commit perjury or obstruction to protect a family member prevents prosecutors from obtaining necessary information to protect past and future victims and to exonerate those wrongfully accused). These benefits might also increase administrative costs for the criminal justice system to determine the veracity of any such family ties asserted by a defendant. *See Mesa v. United States*, 875 A.2d 79 (D.C. 2005) (disallowing the defendant's claim that a government witness was his common law spouse, and thus should be prevented from testifying against the defendant pursuant to marital privilege).
 11. *E.g.*, MARKEL, COLLINS & LEIB, *supra* note 2, at 118-39 (discussing how incest, bigamy, and adultery laws implicate these concerns).
 12. *E.g.*, *id.* at 48-55, 99-112 (discussing the inequalities associated with sentencing, prison administration, and omissions liability).

The fact that our normative claims have proven more contentious than our descriptive ones is unsurprising. Of the thirteen benefits and burdens we discuss in *Privilege or Punish*, few are present in every state and municipality—indeed, even incest laws vary across jurisdictions with respect to their scope.¹³ We neither ignore nor obscure this variety of approaches among familial benefits and burdens, and we acknowledge that divergent practices often signal reasonable disagreement about the plausible justifications for these rules. So we are not disappointed or even puzzled that the book’s critics raise various challenges to our argument, and we welcome the chance to have a conversation about how better to think about the role of family status in the criminal law.

In what follows, we address the challenges brought by Professors Ristroph, Murray, and Burke, our critics in this Feature of *The Yale Law Journal*.¹⁴ Part I responds to the concerns raised by Professors Ristroph and Murray in their rich and provocative essay. Subsection I.A.1. begins by providing background about our book in order to demonstrate the ways Professors Ristroph and Murray mistake our project as a brief for a form of authoritarianism. As we elaborate, the gist of our normative framework is to encourage policymakers to view family status in the criminal law as a suspect category. Accordingly, we argue that such laws should be subject to an “equal protection” framework of heightened scrutiny based on their potential to disrupt egalitarian norms, unduly burden associational liberties, promote patriarchy, provide incentives to commit crime, and inhibit the fair and accurate punishment of the guilty. Thus, when Professors Ristroph and Murray claim that our book’s argument is “deeply statist, and . . . offers proponents of limited government little but alarm,”¹⁵ they reveal a thorough misunderstanding of both our positions and their implications.

Once the alarmist tone is removed and one earnestly begins investigating the “statist” critique, one finds that our differences with Professors Ristroph and Murray in the family ties benefits context boil down to a few policies: 1) family status-based exemptions from prosecution for harboring fugitives; and

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13. *Id.* at 69-70; see also Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN’S L.J. 337 (2004) (compiling the various state laws on incest).
 14. Readers may also be interested in two other exchanges on the ideas and arguments developed in this book. See *Colloquy on Punishing Family Status*, 88 B.U. L. REV. 1327-1460 (2008) (including responses by Professors Michael M. O’Hear and Roderick M. Hills, Jr. and a reply essay by us); *Symposium on Privilege or Punish: Criminal Justice and the Challenge of Family Ties*, 13 NEW CRIM. L. REV. 119-75 (2010) (including review essays by Professors Douglas A. Berman, Naomi Cahn, Gabriel J. Chin, and a reply essay by us).
 15. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1271 (2010) [hereinafter Ristroph & Murray].

2) family status-based evidentiary privileges.¹⁶ These examples are important because the basic Ristroph-Murray critique rests on the claim that family ties benefits are critical for an “antitotalitarian” culture to flourish. But Professors Ristroph and Murray offer no evidence to support the empirical claim that the family ties benefits cause or correlate with the antitotalitarian culture they wish to nurture. Indeed, few jurisdictions offer the extensive protection for families that Professors Ristroph and Murray think necessary to protect liberal democracies from totalitarianism. So, if our support for certain restrictions on family ties benefits makes us deeply statist or authoritarians,¹⁷ then we are far from alone in the danger we pose to the republic. Moreover, it seems to us that in their concern for individual freedom and limited government, Professors Ristroph and Murray fail to value the public’s interests in retribution or crime control. Our book treats the public’s interests in those projects as not only relevant but vital to promoting the very freedom and limited government they seek to defend.

While Section I.A. focuses on our differences with respect to family ties benefits, Section I.B. explores our differences in the context of family ties burdens. Here, Professors Ristroph and Murray inaccurately label us “authoritarian[s] with a voluntarist face” wedded to family-blindness or “contract paradigm[s].”¹⁸ These characterizations arise principally in the context of our book’s analysis of omissions liability and adultery. Consequently, we elaborate and clarify our argument, particularly with respect to the specific role voluntariness plays in our assessment of these family ties burdens.

To advance a broader dialogue about how better to conceive and shape the role of family status in criminal law, we turn in Part II to examine the “disestablishment” model proposed by Professors Ristroph and Murray. Although their essay proffers a stimulating discussion of the analogy between family and religion, we are skeptical about the viability and attractiveness of the model they propose. First, Professors Ristroph and Murray offer few details about how to operationalize their vision, and the devil is in the details. Who, for example, would undertake the task of disestablishment? To advance

16. There also appears to be a difference of opinion regarding sentencing discounts for offenders with familial caregiving obligations, but they do not indicate the nature or extent of that disagreement with us. *See infra* Subsection I.A.2.

17. Authoritarianism usually refers to states where the officials lack democratic legitimacy and employ repressive measures in part to retain their hold on power. Professors Ristroph and Murray do not indicate that they have a special definition of authoritarianism or statism in mind when using these labels.

18. *Id.* at 1274-75.

their cause through the courts would seem to substitute judicial preferences regarding social policy for those of elected officials.¹⁹ Yet the alternative prospect of adopting familial disestablishment through state or federal legislatures seems wishful at best. Moreover, the disestablishment norm appears to confuse what counts as authority with what counts as influence. By equating political authority with psychological influence, the disestablishment model cannot justify the state's efforts to create a monopoly on enforced compliance and punishment. Such a view embodies a commitment not to limited government, but to no government at all. Furthermore, the disestablishment model omits from consideration any of the ways in which a democratic government, and the public that supports it, may have at least an equal or even a stronger interest in facilitating critical and reflective individuals than do families.

Finally, the disestablishment model overlooks the reasons why religious disestablishment is likely to be more successful than familial disestablishment as an instrument for cultivating an antitotalitarian ethos. Religious faiths have organizations, long-standing traditions, wealth, and time to challenge the accumulation of state power. Typical individual families, by contrast, lack these resources. Accordingly, we think policymakers would be better off using the "equal protection" approach we provide in our book when searching for a lodestar to guide the distribution of family ties benefits or burdens in the criminal justice system.

In their analysis of our book, Professors Ristoph and Murray focus on family loyalty as a bulwark against expansion of state power. Professor Burke looks instead at how the criminal justice system has progressively evolved in recent decades and how much farther the law should go to ease, rather than impede, prosecutions for crimes within families.²⁰ In her view, this incremental improvement suggests that we are chasing small prey within the criminal justice system by focusing on family ties burdens and benefits. As Section III.A. elaborates, Professor Burke's first concern here really amounts to a few discrete challenges regarding the purpose and scope of our book.

Professor Burke's more explicitly "pro-prosecution" approach to family ties also forwards the notion that the explicit use of family status in burdens and benefits will do a better job at capturing bad actors and deterring crime than the framework we propose, which encourages a focus on caregiving function

19. See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part III: The Lesson of Lochner*, 76 NYU L. REV. 1383, 1385 (2001) (discussing the concerns raised by "Lochneriz[ing]").

20. See Alafair S. Burke, *When Family Matters*, 119 YALE L.J. 1210 (2010).

rather than particular family status. This second argument, admittedly more provocative, suggests that more sensitivity to the real world context in which the criminal law operates would reveal that the family ties benefits and burdens can serve the goals of retribution and crime control, rather than inhibit them. We find ourselves intrigued by this latter claim but, for reasons adumbrated in Section III.B., we are not persuaded, in part because other alternatives to using family status seem at least as promising and do not present the dangers associated with using traditional family status categories.

I. OUR LATENT TOTALITARIANISM?

In an essay that creatively teases out an analogy between the legal treatment of religious practice and the legal treatment of family status,²¹ Professors Ristroph and Murray advocate a norm of “disestablishment” that would prevent the state from valorizing a particular form of familial organization. This disestablishment norm would work in tandem with an individual’s “right to free exercise” with respect to family life.²² According to its proponents, the disestablishment norm would help achieve a legal and political culture of antitotalitarianism in much the same way as disestablishment is described in the context of religion.²³ The disestablishment norm thus protects citizens’ autonomy from the state via institutional pluralism.

Stated at that level of abstraction, we find little with which to quarrel. After all, in the broad scheme of things, we think of ourselves and the policies we endorse as fitting comfortably under the warm blanket of liberal democratic governance. Moreover, like Professors Ristroph and Murray,²⁴ we share the view that one can be basically “pro-family” with respect to public financial aid and social support to families (broadly understood as intimate caregiving networks), yet still harbor real concerns about using the coercive force of the state to promote or require a particular and discriminatory vision of the family in the criminal law.²⁵

21. Ristroph & Murray, *supra* note 15.

22. *Id.* at 1241 (“In several ways, the recognition of rights of free exercise of the family have already led toward disestablishment.”).

23. *Id.* at 1239 (“We should resist the establishment of a single official church and instead embrace religious pluralism, the argument goes, because a populace with a diverse array of religious beliefs is less likely to enable or accept excessive concentrations of government power.”).

24. *See id.* at 1275 n.177 and accompanying text.

25. *See* MARKEL, COLLINS & LEIB, *supra* note 2, at 23–25.

However, in developing their arguments, Professors Ristroph and Murray make certain claims about our own work that do not accurately represent either our views or their implications. This Part clarifies those views (Subsection I.A.1.) and then focuses on our substantive disputes with Professors Ristroph and Murray about family ties benefits (Subsection I.A.2.) and family ties burdens (Section I.B). For all our concerns about being read correctly, our most fundamental difference is not about misplaced labels, but about ideas: we think family members must sometimes lose out to the public's interest when protecting the "family" would occasion social wrongs or injure the criminal justice system. Professors Ristroph and Murray, by contrast, seek to immunize the family from the reach and values of the criminal law.

A. On "Statism" and Family Ties Benefits

In the course of juxtaposing our book against their central argument about "familial disestablishment," Professors Ristroph and Murray make a series of perplexing claims about our views, referring to them as "strongly statist,"²⁶ or later, "authoritarianism with a voluntarist face."²⁷ They label our arguments statist (or authoritarian) because they mistakenly think we believe *the* "relevant perspective is that of the state itself."²⁸ Professors Ristroph and Murray also argue that we view "demands for limited government" to be evidence of "weakness," and that we think those who "prioritize family before state" show signs of "human frailty."²⁹ As a result, our book's argument is dismissed as "deeply statist," and "offer[ing] proponents of limited government little but alarm."³⁰

Like Professors Ristroph and Murray, we agree that liberal democracies flourish in part because of the strength of the associational life within them.³¹ We can easily imagine a productive dialogue with them about how to balance policies that promote family life with other social goals. Unfortunately, the mistaken characterizations of our position fail to capture the nuances of our argument, as the next Subsection shows.

26. Ristroph & Murray, *supra* note 15, at 1241.

27. *Id.* at 1274.

28. *Id.* at 1272.

29. *Id.*

30. *Id.* at 1271.

31. Indeed, this shared starting point is something we emphasized. See MARKEL, COLLINS & LEIB, *supra* note 2, at 22-24, 76-81.

1. *Situating Our Project*

As we noted at the outset, the types of family status-based benefits and burdens surveyed in *Privilege or Punish* are capable of threatening a criminal justice system committed to the basic notion that citizens are born free and equal and should be treated as such under the law. For instance, the book discusses how various family ties benefits and burdens are likely to promote and reinforce forms of gender domination; increases in crime; inaccuracy in punishment; inequalities in sentencing and prison administration; and infringements upon fundamental associational liberties.³² As a result of these concerns, we call for a number of reforms that would broaden legal recognition of who counts as “family” in contexts as varied as pretrial release, sentencing, and incarceration.³³ Moreover, we advocate the reduction or elimination of six family ties burdens (including incest, bigamy, and adultery) extant in the criminal law,³⁴ and we do so specifically in the name of respect for individual autonomy and limited government.³⁵ We submit that, in light of these aspirations, a careful reader would not regard our project as a mere intellectual handmaiden to state power.

We think the tone of alarm at the heart of the Ristroph-Murray critique stems from a failure to credit the possibility that the public interest is both separable from and (at least sometimes) superior to the interests of certain individuals or families embroiled in criminal justice controversies. Importantly, the members of the public are persons whose interests matter too, and they rightfully demand that they be protected from unlawful activity, that the innocent be exonerated, and that the guilty be punished fairly. We believe the public interest in these criminal justice matters can be advanced through the prosecution apparatus of the state. We hold this view, however, because we think the state is legitimately best situated and most likely to pursue these interests impartially, with concern for the competing rights of all its citizens—not because we are attempting to entrench the power of the state as such. Our disagreement, in other words, should not be characterized as pitting an open society against its enemies.

Although Professors Ristroph and Murray do not define their terms, we assume from context that when they call our views authoritarian or statist,³⁶

32. *Id.* at xvi.

33. *Id.* at 150.

34. *Id.*

35. *E.g., id.* at 121.

36. *See Ristroph & Murray, supra* note 15, at 1278 n.187.

they mean that we seek to enhance the power of the state independent of its impact on public welfare or individual rights. But our normative analysis has literally no relation to entrenching state power. We take our putatively pro-state positions out of concerns mentioned before: that the use of family status in the criminal law threatens egalitarian norms, associational liberties, crime reduction, and the fair and accurate punishment of the guilty. Mistakes along any of these lines have ramifications for real people whose freedom and equality matter to us.

To be sure, we do argue that the public interest in accuracy and crime reduction should sometimes take priority over vague encouragement of familial relationships. We think this falls far short of statism, particularly since we otherwise encourage the state to support caregiving networks (familial or otherwise) in a wide range of contexts inside and outside the criminal justice system.³⁷ Our book only argues that a criminal justice system cannot sacrifice its own core values without sufficient justification and a well-tailored method of achieving its goals.³⁸ We remain skeptical that the blunt use of family status is a healthy or necessary practice for the criminal justice system—especially while family status remains an over- and underinclusive metric for identifying caregiving networks.³⁹ That we want public policies to avoid reinforcing patriarchy, discrimination, and gender domination seems strong evidence that we view the state’s power as ultimately limited by principles of liberal justice. Indeed, our book is largely an effort to expose and critique the way the state uses its power to stigmatize and discriminate against those who live outside the traditional family establishment. This attempt to limit power is so integral to our approach that it is hard to see how it could be missed or dismissed.

Thus, it is incorrect to say that we adopt a normative framework “that simply asserts the priority of the state.”⁴⁰ Instead, we carefully walk the reader through an analysis of each family ties burden and benefit to examine its

37. Our book issues a qualified endorsement for the retention of several benefits currently tethered to family status within the criminal justice system, provided that the class of persons eligible to receive those benefits is expanded to recognize caregiving functions in a variety of family arrangements, including nontraditional (or nonsexual) ones. *E.g.*, MARKEL, COLLINS & LEIB, *supra* note 2, at 54-55 (describing the function-based proposal with respect to allocation of prison furloughs).

38. *Id.* at 32-35, 95-99.

39. Indeed, we found much to agree with in Professor Murray’s earlier work regarding the need for sensitivity to functional caregiving networks in the sentencing context, and we cited it several times in our book. *E.g.*, MARKEL, COLLINS & LEIB, *supra* note 2, at 174 n.1 (citing Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008)).

40. Ristroph & Murray, *supra* note 15, at 1272 n.167.

justifications against concerns that are broadly relevant to individual freedom and equality under law. Importantly, we begin not from the perspective of the state, but from the standpoint of the individual defendant whose family status is at issue. While the prism of the individual defendant certainly has limitations, we note that the individual is the direct target of coercion under the criminal law, and hence, a reasonable starting place for our investigation.⁴¹

To be certain, though, while the class of affected defendants is our starting point, we do not stop there. Rather, we attempt to identify the full range of rationales, costs, and consequences associated with each of these burdens or benefits. Thus, during the course of our analysis, we frequently describe (without endorsing) certain views about how to justify a particular burden or benefit.⁴² At times, however, Professors Ristroph and Murray conflate our discussion of particular views with the endorsement of those views.⁴³

These mischaracterizations of our views as statist arise principally because Professors Ristroph and Murray focus on our worry that the use of family status will incentivize crime and impede accurate prosecution. But the goal of a fair and effective criminal justice system would reduce to statism only if it also endorsed the cynical use of criminal justice policy to reinforce state power

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41. See MARKEL, COLLINS & LEIB, *supra* note 2, at 75-81. As we stated in our book, we think a defendant-centered perspective is important “because it is, after all, the defendant whose liberty the state seeks to place in peril.” *Id.* at 76. But we recognize that burdens imposed on an individual defendant may burden members of his family and nonetheless serve other social functions, including the promotion of a particular vision of the family as a social institution.
 42. See, for example, our discussion of the rationales offered to justify criminal penalties for the nonpayment of parental support, where we simply note that “[t]he plain objective of these laws is, first, to ensure aid to those who are vulnerable in old age, and second, to educate the public and to reinforce a sense of obligation through the criminal law to parents” *Id.* at 145. In light of the fact that we then conclude criminal penalties in this context are unjustified when analyzed through the lens of our normative framework, it seems plain that we are merely describing a justification rather than endorsing it.
 43. Thus, they write, “To the authors of *Privilege or Punish*, to prioritize family before state is, at best, a sign of human frailty.” Ristroph & Murray, *supra* note 15, at 1272. But the reference to “human frailty” belongs to a judge, not us. Elsewhere in the same note, Professors Ristroph and Murray refer to Chinese culture, which prior to the Cultural Revolution, ostensibly placed family before the state. By implication or association, Professors Ristroph and Murray are suggesting that we are nothing more than Mao’s heirs, willing to encourage the snitching out of wrongdoers against the state at any cost. This is analogy without argument. We could just as easily point out the praise that many would extend to people like the Christmas Day bomber’s father, who warned the United States about the danger his radicalized son presented to innocent persons. Professors Ristroph and Murray make it seem like the choice of protecting family loyalty against the public costs is easy. But a sensible design of social policy and legal institutions should not ignore the costs of putting family loyalty first and excluding or downplaying other considerations.

without the framework of liberal democracy to constrain its enforcement. Our explicit assumption throughout the book was that we were proposing guidance for liberal democracies.⁴⁴

Moreover, a concern for the fairness and effectiveness of a criminal justice system does not render one a state cultist. After all, there is nothing statist about wanting to avoid being victimized by crimes. Nor is there anything statist about requiring a criminal justice system that can take away individual liberty, property, and life to work with reasonable guarantees of reliability. These goals—fair punishment and crime reduction—are basic to any legitimate system of criminal justice. Taking an interest in holding the system accountable to its aspirations may seem like a particular—and perhaps even narrow—perspective, but it is not inherently statist. On the contrary, our goal of reducing the risk of criminal justice errors manifests our desire to protect *individuals* from experiencing crime or wrongful punishment.⁴⁵

In sum, the handful of instances where we endorse the public interest in fair and effective criminal justice against a competing familial interest should not make us vulnerable to charges of statism, authoritarianism, or totalitarianism. Indeed, out of the thirteen benefits and burdens we canvass, the Ristroph-Murray essay challenges only a few of our positions as pro-government. Most of those specific disagreements pertain to family ties benefits, which we address in Subsection I.A.2. below; other issues are raised related to family ties burdens, addressed in Section I.B. Accordingly, let us move away from abstraction for a moment and focus on our concrete disagreements with respect to family ties benefits.

2. Revisiting (Some) Family Ties Benefits

In this Subsection, we explore in greater detail the claim that our skeptical views toward certain family ties benefits reveal a statist worldview at odds with individual freedom and limited government. We identify our areas of stated

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44. For example, when scrutinizing family ties burdens such as incest, bigamy or adultery, we subjected those laws to a framework of “liberal minimalism” that specifically sought to ensure criminal sanctions were consistent with individual freedom and limited government. MARKEL, COLLINS & LEIB, *supra* note 2, at 95-97.
45. Though they do not say so explicitly, perhaps Professors Ristroph and Murray are concerned about the extensions of state power in the context of “victimless” or *mala prohibita* crimes. But even that complaint does not gain traction unless one thinks individual citizens (and groups of citizens) within liberal democracies have no legitimate interest in vindicating the legal interests thought to be advanced by the criminal laws passed by their representative institutions. Professors Ristroph and Murray, in other words, appear to give no credit to the positive dimensions of the project of democratic self-government.

disagreement regarding evidentiary privileges for family members and exemptions from prosecution for harboring fugitives when familial relationships are in play; we then turn to examine the Ristroph-Murray thesis, which argues that such policies are critical to the success of an antitotalitarian political culture. We close this discussion by showing how Professors Ristroph and Murray neither acknowledge nor support the empirical assumptions at the heart of the antitotalitarianism thesis they advance, and that their disagreement with us on these issues, and the related question of how to sentence caregivers, stems from an unwillingness to credit the public's interest in retributive justice and crime control or to see those interests as related to individual freedom and limited government.

One of the policy areas we address in *Privilege or Punish* is the choice by a minority of states to give persons family-based exemptions from prosecution for harboring fugitives. We argue that such policies are misguided because they not only discriminate against those who fail to conform to heterosexist or pro-reproduction visions of family life,⁴⁶ but they also interfere with the public's interest in accurate retribution and crime control.⁴⁷ As we point out in the book, a supermajority of jurisdictions in the United States do not give any special exemptions from prosecution for harboring family members who are fugitives.⁴⁸ We are reasonably sanguine about laws that do not immunize, say, the Christmas Day bomber's father from prosecution for (hypothetically) harboring his fugitive son.

Professors Ristroph and Murray, by contrast, seem to argue that laws that help people like Abdulmutallab evade capture will advance an "antitotalitarian" political culture.⁴⁹ To be sure, there might be some middle ground between our position, which would deny an exemption from prosecution for harboring a fugitive, and the position endorsed by Professors Ristroph and Murray. Perhaps laws that forbid family ties exemptions when the underlying offense is severe or when the fugitive is a recidivist would better mediate the tension

46. The latter is sometimes termed "repronormative": to the extent that our society is biased in favor of those who choose to procreate, there is reason to be concerned for the equal rights and privileges of those who choose not to or cannot. See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183–84 (2001).

47. MARKEL, COLLINS & LEIB, *supra* note 2, at 6–8.

48. *Id.*

49. We should acknowledge that Professors Ristroph and Murray have not commented upon the attempted bombing from this past Christmas Day. We are here applying the claims in their essay to a real-world scenario. Still, we think these applications are completely consistent with their articulated views. See, e.g., Ristroph & Murray, *supra* note 15, at 1278. We could similarly have focused on the Kaczynski or Madoff cases, which were addressed in our book, but we want readers to appreciate that our debate is both important and timely.

between family loyalty and public interests in crime control and retributive justice. Another alternative, which some states have adopted, is to downgrade the offense of harboring fugitives from a felony to a misdemeanor when a familial relationship is implicated.⁵⁰ But these possible reconfigurations do not appear in the analysis from Professors Ristroph and Murray.

Additionally, we also argued against family status-based evidentiary privileges that would, for example, prevent family members from testifying against each other.⁵¹ Put simply, we have no principled opposition to laws that would require Abdulmutallab's father or the Unabomber's brother to testify truthfully, even if this testimony might be used to apprehend or convict a son or sibling. By contrast, Professors Ristroph and Murray recoil from such a requirement—principally in the name of their “antitotalitarian” commitments.⁵² Here too they could have considered some compromise predicated on the severity of the offense alleged or the offender's criminal history or the likelihood that the testimony would provide evidence not otherwise available. But they do not mention these considerations, perhaps because to do so would give comfort to the nascent thrall of state power.

Our more practical argument against such privileges is predicated on the reasons we offered to explain how such privileges interfere with accurate retribution and reasonable crime control. Moreover, as currently practiced, these laws also tend to reinforce a heterosexual “coupling” vision of intimate life.⁵³ While spousal evidentiary privileges persist in various forms across the United States, they are increasingly subject to exceptions for criminal conspiracy or violence within the family, exceptions that address some (though not all) of our concerns about crime control and retribution. With this narrowing of the privilege, and with the general trend toward rejecting other family-based privileges (parent-child, sibling, etc.), we are in substantial sympathy.⁵⁴

50. MARKEL, COLLINS & LEIB, *supra* note 2, at 7 & n.48; *see also* ARK. CODE ANN. § 5-54-105 (West 2007); N.J. STAT. ANN. § 2C:29-3 (West 2007); WASH. REV. CODE ANN. § 9A.76.070 (West 2007); WYO. STAT. ANN. § 6-5-202 (West 2007).

51. For further discussion, *see* MARKEL, COLLINS & LEIB, *supra* note 2, at 36-43.

52. Ristroph & Murray, *supra* note 15, at 1278.

53. For a critique of the way this coupled vision of family life pervades our legal structures, *see* Martha Albertson Fineman, *The Sexual Family*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 45 (M.A. Fineman, J. E. Jackson & A. P. Romero eds., 2009).

54. *See* MARKEL, COLLINS & LEIB, *supra* note 2, at 4-6 (describing these developments). Of course, to the extent that laws permit one spouse to block the willing testimony of another spouse, we retain our concerns. Even with these retribution and crime control anxieties bracketed, we also worry about the pedagogical effect of laws that teach a specific norm of

These are some of our ostensibly statist views. For Professors Ristroph and Murray to vindicate their opposition, however, they must argue that these “pro-government” policies weaken family ties, and that the presence of family ties burdens and benefits is instrumentally valuable, if not critical, to the goal of antitotalitarianism. We do not think this argument will work. The Ristroph-Murray thesis depends on some fundamentally empirical claims about the impact of these relatively obscure criminal justice policies on the body politic, claims for which our interlocutors provide no evidence. Thus, we are skeptical that Americans in the fourteen states with exemptions for harboring fugitive family members (West Virginia or Florida, for example), are more democratically muscular than the ostensibly docile Americans in the majority of other states (including Texas, New York, and California).⁵⁵ We think it is at least possible that a state is more likely to retain its resilience to totalitarianism by ensuring that individuals are treated without fear or favor in the criminal justice system, not by inviting more erratic operation through accommodations based on family status.

The antitotalitarian thesis also depends on two unstated assumptions. Specifically, one must believe: a) that persons are aware of the precise contours of particular family ties benefits in their states; and b) that these persons are shaping the texture of their family lives (and their resilience to governmental conglomeration of power) in response to these family ties benefits, and not in response to their own affinity for the family members, or social norms, or the variety of other family benefits the state may extend through institutions of distributive justice.⁵⁶

The disagreements summarized above connect back to the way in which Professors Ristroph and Murray give insufficient weight to the public’s interests in retribution or crime control and fail to consider how those goals might be relevant to promoting their goals of individual freedom and limited government. This oversight seems odd to us since, for example, an abused

heterosexist and marital coupling and thereby exclude those who draw their intimate circles differently.

55. According to our survey, the following states had fugitive harboring laws with exemptions based on family status: Florida, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Nevada, New Mexico, North Carolina, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. *See id.* at 7.
56. Cf. Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Explanation*, 24 OXFORD J. LEGAL STUD. 173, 174 (2004) (arguing that potential offenders typically do not know the law, do not care what the law is, and do not incorporate the law’s effects into their decision-making). Of course, people may be responding to both law and love, but to test the antitotalitarian thesis, it would be useful to know how much work, if any, the criminal laws in question really accomplish here.

child might need the protection of the state to regain her freedom from the private violence in which her family members are complicit. Indeed, societies with weak crime controls are less attractive societies in which to live: family members living apart will stay home due to fear of unchecked crime, and perhaps even have less interest in, and opportunity to, participate robustly in civic life and challenge those state policies with which they disagree. In other words, in advancing the benefits of their own alternative, Professors Ristroph and Murray neither consider nor support the assumptions underlying their thesis.

Moreover, in their haste to portray the public's interest in crime control or retribution as a looming threat to limited government, they fail to consider what actually divides us with any detail. For example, they argue that the evidentiary privileges would be instrumental to the culture of antitotalitarianism, and, in a startling *ipse dixit*, offer the same conclusions associated with the policies of exemptions for harboring fugitives and sentencing discounts for caregivers.⁵⁷

The perceived contrast they advance regarding how to handle the sentencing of caregivers deserves a little more mention. Earlier, we noted that Professors Ristroph and Murray contend that they disagree with us about the policy regarding sentencing for caregivers.⁵⁸ All they say, however, is that "A defendant released early from prison to care for a family member has not simply received a free pass; he has been released from one obligation to take up another."⁵⁹ They do not specify whether they view sentencing discounts or exemptions from incarceration as *required* regardless of what the crime is or whether other caregivers are available to perform those responsibilities. Nor is there consideration of the social costs and consequences that might be associated with telling an offender (or the population at large) that their obligations to the public can be relieved by virtue of their obligations to the family.

This lack of specification is important since our own view on these matters cannot be straightforwardly characterized as pro-government or antifamily. As discussed in the book, we urge, among other things, a regime of time-deferred

57. Ristroph & Murray, *supra* note 15, at 1278 ("A similar analysis applies to exemptions from fugitive harboring laws and to sentencing discounts. From an antitotalitarian perspective, it is no answer to assert, as Markel, Collins, and Leib do, that exemptions will impede the state's exercise of its criminal enforcement authority. Part of the value of families is that they ensure that the state is not the only authority in the game.").

58. *See supra* note 16.

59. Ristroph & Murray, *supra* note 15, at 1278 n.187.

incarceration for irreplaceable caregivers.⁶⁰ Do they oppose that view or our other recommendation to permit some custodial sentences to be served in non-contiguous blocks of time?

To be clear, we do not think offenders should be able to render themselves unincarcerable on grounds of family ties and responsibilities. Moreover, we have similar concerns with respect to criminal fines and restitution. For example, in a relatively recent federal case, a defendant tried to avoid paying restitution by arguing that his moral obligation to support his 43-year-old daughter, who was suffering from depression, should trump his obligations to his victim under the criminal restitution statute. The Second Circuit rejected that claim, reasoning that “[c]riminals have obligations to victims that Congress deemed sufficiently important to render them legally enforceable.”⁶¹ Crucially, if the disagreement between us and Professors Ristroph and Murray reaches this far, they should recognize that we share the same purportedly authoritarian or statist tendencies of most jurisdictions on this issue; after all, most states do not recognize the equivalence of these two very different obligations through a “get-out-of-jail” coupon to caregivers.

As can now be seen, it is unlikely that, without these specific accommodations to family promotion, the political culture necessary for liberal democracy will wither. But just to be clear: we never argue that the law should be radically indifferent to family life and its contributions to a well-ordered regime of political liberty. Indeed, we actually emphasize how our institutions of distributive justice should support a pluralistic approach to family life and networks of caregiving. Our particular worry is using the blunt instrument of the criminal law carelessly.

60. See MARKEL, COLLINS & LEIB, *supra* note 2, at 50-51. To capture roughly what we wrote there, the idea is that, assuming the crime was severe enough that some form of incarceration is deemed necessary and desirable, time-delayed incarceration could be imposed on offenders with irreplaceable caregiving responsibilities until alternative and feasible caregiving can be arranged. During the period that the incarceration is deferred, the offender's movement could be dramatically limited so that only work and necessary chores (i.e., taking one's child to the doctor) would be permitted. Additionally, during the time of deferral, the state could attach other release conditions. Failure to abide by the conditions would lead to more severe punishment than would be experienced absent the deferral of the sentence to minimize possible exploitation by the defendant.

61. *United States v. Jaffe*, 417 F.3d 259, 264 (2d Cir. 2005) (Winter, J.) (“To construe ‘dependents’ to include various family members, friends, and lovers based on vague and expandable concepts of moral obligations would put such persons on a par with victims, render enforcement of restitution orders difficult by generating issues as to whether the defendant owes and is actually fulfilling such obligations, and create a variety of depositories useful to shield a defendant's assets from those victims.”).

B. On Voluntarism and Family Ties Burdens

The preceding Section focused on our disagreements with Professors Ristroph and Murray in the area of family ties benefits. In this Section, we turn to the concerns they raise in the context of family ties burdens. To provide some context, we begin with a few words about how we view voluntariness in the assumption of caregiving duties as a prerequisite for the establishment of any criminal law family ties burdens. With that background in mind, we can better understand how Professors Ristroph and Murray misread our approach to both family ties burdens generally and omissions liability specifically. Indeed, once it is clear why we are not wedded either to “contract paradigms” or “family blindness,” we can see how exactly these challenges fit into the larger frame of the Ristroph-Murray antitotalitarian thesis.

1. Our Kind of Voluntarism

A little background should help set the stage. We believe that voluntariness must play a central role in assessing the fairness of allocating criminal liability. On our view, the pattern of voluntariness evidenced by the family ties burdens we studied was consistent with what we thought a liberal state should do more generally: give people some autonomy about entering relationships before using the relational status as an element of a crime.⁶² Thus, our liberal minimalist analysis asks policymakers to determine if offenders singled out for a family ties burden voluntarily assumed caregiving responsibilities. Interestingly, we found that in five of the seven family ties burdens that we explored—adultery, bigamy, parental responsibility, omissions, and nonpayment of child support—liability attached only to a person who voluntarily created the caregiving relationship by entering a spousal or parenting relationship. In addition, we were struck by the near complete lack of enforcement with respect to filial responsibility laws, which require, upon pain of criminal liability, adult children to pay the costs of care for indigent elderly parents.⁶³

62. This autonomy principle is stifled, of course, when the use of traditional family status excludes many people who should be covered because of the voluntary nature of their caregiving roles in others' lives (e.g., gays, polys, committed unmarries, etc.). Our book endeavors to wrest the criminal law away from “the sexual family,” to use Fineman’s phrase, and allow those who give care outside a romantic relationship-centered family become eligible for the various benefits and burdens we identify. See Fineman, *supra* note 53.

63. See MARKEL, COLLINS & LEIB, *supra* note 2, at 72-73.

While this empiricism did not determine our views regarding the nature of family obligations writ large, it did illuminate the limits that ought to govern criminal law in order to render the law coherent with deeper values of freedom and equality. When the criminal law seeks to burden a relationship with a status-oriented approach, respect for liberal values typically requires that the burdens created have been voluntarily assumed. In a world of family ties burdens, being able to choose or reject the relationship is a necessary requirement for the law to comply with our basic commitments to liberalism, autonomy, and nondiscrimination.⁶⁴

Applying these views to omissions liability, we proposed the following structure. Briefly put: If Jack marries Jane or has a child (Jill), he has a duty to rescue, much the same way he would under current law. Additionally, if Jack a) tells another person—Dave, who is neither his spouse nor his child—that he plans to perform costless rescues for him, and b) registers that obligation with the state (via the registry we propose), then Jack could face omissions liability if he failed to perform a costless rescue for Dave.⁶⁵

2. *Misrepresenting Voluntarism: Neither Contractarian nor Family Blind*

We turn now to the analysis of family ties burdens offered by Professors Ristroph and Murray. Their claims about our views seem to rest on confusions about our positions, and, taken together, their analysis amounts to the same critique we earlier faced regarding family ties benefits: namely, that our views dangerously impede the flourishing of an antitotalitarian political culture.

In describing our position on family ties burdens, Professors Ristroph and Murray state that we “treat familial obligation as voluntarist,” thereby “misrepresent[ing] the character of those obligations.”⁶⁶ To be clear, we actually have nothing to say in our book about the “character” of familial obligation as it pertains to individual morality. Indeed, we stipulate that parents or siblings might have legitimate moral claims on us that stem from their relationships to us, quite independent of our choice, and perhaps stemming from moral norms associated with reciprocity, gratitude, or

64. Indeed, Professors Ristroph and Murray should sympathize with our project, for we are also opposed to what they call “thick establishment,” that is, using the criminal law to bind an institution that should have multiple norms and forms to a single acceptable instantiation. Ristroph & Murray, *supra* note 15, at 1259.

65. We consider other possible default rules in the context of omissions liability as well as reasons why people might choose to opt into such a regime in our book. See MARKEL, COLLINS & LEIB, *supra* note 2, at 111-12.

66. Ristroph & Murray, *supra* note 15, at 1276.

benevolence.⁶⁷ Rather, as one can glean from the preceding discussion, we only take a position about the institutional design of criminal justice practices. In that context, we think voluntariness matters in two ways: generally, insofar as there typically needs to be a voluntary actus reus, and specifically, in the context of family ties burdens, we think the state may only criminalize conduct involving a defendant's family status if the defendant voluntarily created the caregiving relationship. On the latter point, a liberal state should avoid imposing legal obligations on persons who appear in involuntarily created family relationships; these obligations are, in our view, improperly thrust upon such persons, and if no voluntariness can be ascribed to the person's role in that relationship, it is illiberal to use that relational status as an element of criminal liability. The emphasis on this kind of voluntariness seems to us a reasonable consideration for legislators to contemplate when they are drafting criminal laws that target family relations.

In advancing this claim that voluntariness matters, moreover, we are not asking the law to "pretend" that the relationships of spouses and parents are "strictly voluntary" to search for a reasonable indicator of voluntariness sufficient to impose a family ties burden.⁶⁸ Choices to bear or care for children and choices to get married or to care for intimates are surely constrained—as we explicitly acknowledged in the book.⁶⁹ However, it makes little sense to conclude from the messy nature of human associations that the criminal law should make no inquiry at all into the voluntariness of the relationship (and thus threaten sanctions upon unwilling siblings or uncles or neighbors) or, alternatively, withdraw all threat of sanction for those who breach fundamental caregiving undertakings that others (including the public) have relied upon in allocating scarce resources.

Professors Ristroph and Murray further claim that our view of voluntarism in family ties burdens amounts to a "contract" model, where the breach of an agreement between private citizens could trigger criminal sanctions.⁷⁰ This also is inaccurate. Our scheme requires no bargained-for reciprocity between citizens; nowhere do we urge a new form of criminal liability predicated on bilateral exchanges with the usual markings of offer, acceptance, and consideration. Importantly, we specifically used words like covenants or

67. Indeed, this is a point we adverted to in our book. MARKEL, COLLINS & LEIB, *supra* note 2, at 145.

68. Ristroph & Murray, *supra* note 15, at 1275.

69. MARKEL, COLLINS & LEIB, *supra* note 2, at 100-02 (discussing whether parental or spousal obligations could be regarded as voluntarily assumed).

70. Ristroph & Murray, *supra* note 15, at 1274 (claiming that we argued "that contracts should sometimes serve as the basis for *criminal* regulation of families").

compacts, but not contracts, because we wanted to signal that we were not talking about a bargained-for instance of reciprocity; rather, for us it was fine, for example, if X agreed to rescue Y, but Y made no promise to return the favor.

Just as it is a mistake to think we are wedded to contractually triggered criminal liability, so too do we also reject the “family-blindness” label ascribed to our views by Professors Ristroph and Murray.⁷¹ In the context of omissions liability, for example, we specifically advocated using categories of spouse and parent to form the baseline of persons who would be liable for failure to perform costless rescues.⁷² Our concern, however, was that these family categories were underinclusive, and that more people should be able to express their willingness to be a costless rescuer. For that reason, we advocated expanding eligibility for this duty. Throughout the book, we made clear our concern with the use of criminal law to reinforce the discriminatory and stigmatizing portrait of a limited conception of family that gets protection through the apparatus of the state. Thus, we do not strive for a Platonic criminal justice system that knows no families; rather, we want a criminal justice system that pursues its traditional goals of retributive justice and crime reduction alongside a respect for caregiving networks of many kinds.

More importantly, while voluntariness matters to us in the context of family ties burdens, it is not true that by emphasizing the voluntary assumptions of duties we thereby “perpetuate the view that the wrongdoers’ consent is the source of the right to punish.”⁷³ Indeed, this allegation confuses the question of the ultimate justification of punishment with our more mundane concerns about defining the elements of legitimate crimes. Looking for voluntariness in the creation of a caregiving relationship simply serves for us as a constraint meant to narrow the scope of the criminal law—reinforcing, again, that we favor a *limited* criminal law, not an unreflectively expansive one. To illustrate: in the single context where we think some people should be allowed to opt into a criminal liability regime—omissions liability⁷⁴—the offender’s consent is not the independent source of the right to punish. Rather, the voluntary assumption of the relationship limits the circle of eligible persons whose failure to perform some costless rescue remains the basis for the liability. In other words, voluntariness with respect to the assumption of the

71. Ristroph & Murray, *supra* note 15, at 1273.

72. MARKEL, COLLINS & LEIB, *supra* note 2, at 112.

73. Ristroph & Murray, *supra* note 15, at 1275 n.176.

74. See MARKEL, COLLINS & LEIB, *supra* note 2, at 63-66 and 99-112.

duty to perform costless rescues delineates *whose* omissions may properly serve as a basis for criminal liability; it is not the source of the liability itself.⁷⁵

Finally, one of Professors Ristroph and Murray's challenges gives us an opportunity for further clarification. They highlight what they deem to be an inconsistency: that we reject criminal law enforcement of private promises to remain loyal and faithful in the context of sexual relationships (because we are against criminal adultery laws) but allow criminal liability in the omissions context where "covenants of care," which also seem like private assurances, are permitted or encouraged.⁷⁶ It is a subtle observation on their part, but it does not strike us as an inconsistency because our view is that, in this context of family ties burdens, criminal liability should only attach upon both a voluntarily created relationship and an underlying action or omission that warrants criminal sanction. In the omissions liability context, when spouses and parents (or other opt-in volunteers) fail to perform costless rescues, the voluntariness condition accompanies a wrong that we think is grievous and condemnable.

In the adultery context, by contrast, one is burdening a voluntarily assumed relationship (that of spouse), but the underlying activity of adultery (sex between consenting and mature persons) does not satisfy our second condition for criminal liability—namely, a wrong that warrants condemnation by a minimalist and liberal criminal justice system. Adultery laws, after all, typically do not require any showing of deceit or bad faith as an element of the offense; as a family ties burden, they usually only require one married person having sex with a person not his or her spouse.⁷⁷ Consequently, convictions for adultery can be pursued for sex outside marriage notwithstanding that such sex may be encouraged or authorized by the "cuckolded" spouse for a range of reasons that might seem understandable in context. To us, the wrong of adultery occurs when it is associated with betrayal or deceit, and we assume that most individuals who support criminalization would agree with that proposition.

Even if we're wrong, and *all* adult sex outside marriage is pernicious, we do not see how our positions urging decriminalization of virtually all the family ties burdens render our views susceptible to a charge that they reflect

75. This was a point we developed elsewhere. See Ethan J. Leib, Dan Markel & Jennifer M. Collins, *Voluntarism, Vulnerability, and Criminal Law: A Response to Professor Hills and O'Hear*, 88 B.U. L. REV. 1449 (2008).

76. Ristroph & Murray, *supra* note 15, at 1274 n.175.

77. See MARKEL, COLLINS & LEIB, *supra* note 2, at 71-72. Sometimes, the same laws also criminalize the actions of a nonmarried paramour, but in those situations, they are not family ties burdens, just laws that are arguably illiberal. See *id.* at 138-40.

“authoritarianism with a voluntarist face.”⁷⁸ In six of the seven family ties burdens we study (i.e., all but omissions liability), we seek to decriminalize the burden on family status based on how those burdens either discriminate or impinge on important liberties. We are largely trying to limit, not expand, the scope of the criminal law in recognition of the danger these laws pose to equality, individual freedom and, yes, limited government in the criminal law context. The next subsection explores whether the disestablishment model would offer better guidance regarding the particular shape of omissions liability.

3. *A Closer Look at Omissions Liability and Antitotalitarianism*

All the misunderstandings about voluntariness mentioned above arise under the penumbra of the Ristroph-Murray thesis regarding how disestablishment of family in the criminal law can be used to fend off creeping statism. But once we drill down on the substantive claims of their thesis, it is hard to see what marginal benefits to the cause of antitotalitarianism are achieved by a disestablishment legal norm in the omissions liability context where Professors Ristroph and Murray focus their remarks. Oddly, in that context, Professors Ristroph and Murray do not indicate their preferred rule here.⁷⁹ Put simply we are left to wonder: do they think fewer or more people should be subject to criminal law duties to perform costless rescues?

On the one hand, they might seek to preclude criminal liability for all failures to perform costless rescues. Perhaps they think fewer people should be subject to criminal liability here, because, after all, it's *criminal* liability for individuals who don't do something, and maybe that's a sphere of liberty they want to protect. On the other hand, perhaps they think more people should be subject to duties to rescue to reflect the variegated texture and pull of family life, including perhaps, siblings, uncles, and cousins. This view might be thought to follow from their allegedly deeper sensitivity to the moral norms associated with familial obligation.⁸⁰ A larger scope of liability here would

78. Ristroph & Murray, *supra* note 15, at 1274.

79. Presumably, this is another area of practical disagreement between ourselves and Professors Ristroph and Murray, though we can't actually tell for certain what the Ristroph-Murray policy preference is in this domain, as in others, because their discussion of our book fails to be specific about the real-world policies we set out to analyze. See, e.g., *supra* notes 58-61 and accompanying text (trying to pinpoint the disagreement related to sentencing practices for caregivers).

80. See *supra* note 66 and accompanying text (quoting Ristroph & Murray, *supra* note 15, at 1276).

stand in tension, however, with the idea of disestablishment since to apply the law would require some state action to define and establish what the family is.

Assuming, for instance, that Professors Ristroph and Murray prefer fewer people to be liable for failure to perform costless rescues, we wonder if the political regime that embraces such a policy would do a better job at securing us against totalitarianism than one where individuals can determine whether they might face liability through their own choices. Indeed, facilitating more intimate caregiving networks through expanded omissions liability may promote the very resistance to totalitarianism that Ristroph and Murray seem to want. Ultimately, we have a hard time discerning what their position is with respect to omissions liability or why either of the two possible positions is definitely more conducive to their antitotalitarian goals.⁸¹ Given that our proposal for omissions liability only places liability for failure to rescue on those who, by their words or deeds, have opted into a regime of liability, and only asks them to perform costless rescues, we have trouble believing that this proposal will jeopardize the vitality and stability of democratic self-government.

II. DISESTABLISHMENT AND ITS DISCONTENTS

Like us, Professors Ristroph and Murray believe that the existing legal model of the established family is “inadequate” and overly rigid.⁸² And like us, they seek to “gesture towards an approach that might yield more satisfying models.”⁸³ So we share a common frustration and a common goal—to restrain the state from adopting a restrictive understanding of family life in our complex and pluralistic society.

The approach we outline in *Privilege or Punish* is informed, although not constrained, by the type of equal protection analysis often used to challenge suspect classifications.⁸⁴ Just as the Supreme Court has employed varying levels of scrutiny to assess the state’s interests and the means used to accomplish them, we urge policymakers to subject criminal laws that benefit and burden defendants based on family status to heightened (not simply

81. This opacity about detail is also on display in the context of implementing the disestablishment model more generally, a point we develop in the next Part.

82. Ristroph & Murray, *supra* note 15, at 1271 n.161.

83. *Id.*

84. *Id.* at 1276 n.181 and accompanying text. We reiterate that this frame of analysis is meant to propose a way of thinking about policymaking in this area; it does not reflect a descriptive claim that courts are constitutionally obligated to consider family status a suspect classification under current equal protection law.

rational basis) scrutiny. This means that state action is *limited*, not enabled, through our equal protection lens. It also means that some laws that benefit or burden persons on the basis of family status may pass a balancing test and some will not. For example, when discriminatory and patriarchal practices are at stake—or when the laws at issue reinforce gender hierarchy and domination—we think it becomes quite difficult to justify the use of family status. This is particularly true in the family ties benefits context, when the interest in using formal family status may sit in substantial tension with the core purposes of the criminal justice system (i.e., to diminish the incidence of crime, punish the guilty, and exonerate the innocent). That said, when the laws in question shift from applying formal to functional categories, we are more optimistic that such laws could survive the type of scrutiny we describe in the book.

In contrast, Professors Ristroph and Murray borrow from a different area of constitutional jurisprudence by adopting a disestablishment norm associated with First Amendment scholarship and, to some extent, doctrine.⁸⁵ Yet it remains hard for us to see how this borrowed frame fits or shapes the problems of family status in criminal justice better than our own frame of equal protection. On the margins, we can imagine that their norm might have more of an accommodationist flavor than our seemingly Spartan approach. The theme we see from their critique appears to be a policy of no family ties burdens but unlimited benefits based on family status. If this is the case, we wonder if there are any limiting principles that might apply.⁸⁶ In any event, it is hard to analyze laws that use family status to allocate privileges or punishments without having the conversation we recommend: one simply must consider the etiology of the laws, their purposes and effects, and the means used to achieve them compared to feasible alternatives, before deciding whether a liberal criminal justice system should target persons with certain family ties for special treatment. The equal protection lens we adopt allows that larger conversation to happen.

85. On the idea of constitutional borrowing more generally, see Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010). The disestablishment norm proposed by Professors Ristroph and Murray certainly has analytic possibilities as a provocative way to contemplate the intersection of family status and the criminal law, our nexus of concern. But although we respect their effort to glean theoretical insights from cases like *Reynolds*, *Meyer*, *Prince*, and *Yoder*, we have a hard time believing that a coherent disestablishment dynamic is at work in disparate cases stretching over a century within the multimember nonsynchronously seated body of the U.S. Supreme Court.

86. For example, they do not think intrafamily violence is something that should remain unpunished by the state, but we did not see other suggestions that facially neutral criminal laws and procedures may be used against the interests of family promotion.

In what follows, we first outline our concerns about the lack of meaningful policy guidance provided by the disestablishment model and then turn to our larger theoretical hesitations about whether and why family should be disestablished.

A. Operationalizing Disestablishment

First, Professors Ristroph and Murray are silent about how far they would go in seeking familial disestablishment. The modern state has always set default rules in order to resolve disputes within and across families, even if those choices have only recently been subjected to academic scrutiny.⁸⁷ In a footnote, Professors Ristroph and Murray recognize the need for the state to make default laws regarding the custody of newborn infants.⁸⁸ But would legislatures really be forbidden from making other laws respecting family establishments? If so, what would stop criminal gangs or syndicates, which often describe themselves in familial terms,⁸⁹ from claiming the benefits of family ties that Professors Ristroph and Murray seem quick to distribute in the criminal justice system?⁹⁰ Further, because their disestablishment model is not restricted to the criminal law realm, it would seem to preclude legislatures from enacting civil laws regarding paternity establishment or child support enforcement. Thus, although they acknowledge the necessity of state involvement in at least one scenario, Professors Ristroph and Murray provide little guidance as to how that involvement should be structured.

87. Twenty-five years ago, Professor Frances Olsen explored how enmeshed the state is in our legal understanding of what counts as family. Francis Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 837 (1985). On her view, just as the legal realists exposed laissez-faire as a “false ideal” because even “deregulators” want the state to adjudicate torts and enforce property and contract rights, so too should we recognize that the cultural meanings of family life are both influenced and determined by law, contingent on whether a court will enforce a particular right to keep a family together or split it apart. *Id.* at 836-37. If this is true, it undercuts the existence of the family as something to be contrasted with the state, because the social meaning of family is derived from a legal backdrop enacted by the state itself.

88. Ristroph & Murray, *supra* note 15, at 1278 n.188.

89. The names of prominent criminal gangs say it all: e.g., La Nuestra Familia, The Black Guerilla Family, and the Aryan Brotherhood.

90. Cf. Ristroph & Murray, *supra* note 15, at 1276 (“To the extent that individuals actively seek public recognition of their familial associations, we would not ask the state to deny that recognition, so long as it is not granted selectively to promote a particular model of the family.”). Curiously, if persons are entitled to define their family relations in an impromptu and unsupervised manner for family ties benefits, there would be little to stop people from claiming their criminal confederates as confidantes or recipients of caregiving.

Second, Professors Ristroph and Murray do not specify who is to perform the disestablishment and why that branch of power should do so.⁹¹ While their argument is, by admission, guided by “principles and political theory,”⁹² we think it equally important to clarify how those principles might be implemented. If the courts undertake full-throated familial disestablishment, that would surely lead to accusations of unrestrained activism or stealth constitutionalism since there is little in the constitutional text or precedent analyzed in the Ristroph-Murray essay to indicate that legislatures are forbidden from familial establishment under any traditional mode of constitutional interpretation.⁹³ Indeed, Professors Ristroph and Murray themselves observe that, as a legal matter, “[l]egislators and other policymakers are free to regulate families *qua* families, and to encourage or discourage certain kinds of familial relationships.”⁹⁴

Entrusting this project to the political branches seems equally problematic. Perhaps legislators may be persuaded to adopt the disestablishment norm after reading the arguments put forward by Professors Ristroph and Murray. But for that to happen, legislators will need reasons to believe that our culture is so weakly opposed to creeping statism that the acid bath of familial disestablishment is required to protect against that threat. We are skeptical that majorities of legislatures will find compelling cultural reasons to embrace the disestablishment norm, and Professors Ristroph and Murray do not signal why such drastic action is now required. More likely, legislators will hear why families should be treated as sanctified entities (like religions) and embrace the orientation to the traditional family, an orientation to which they are already too susceptible.

B. Is Liberal Democratic Authority Different?

Professors Ristroph and Murray promote the idea of disestablishment primarily because it cultivates the possibility of competing “authorities” over

91. Ristroph & Murray, *supra* note 15, at 1277 n.185.

92. *Id.* at 1242.

93. While there is some judicial veneration of parental rights in the context of “free exercise,” *see id.* at 1240, often the judicial rhetoric is simply that. As Professor Hills notes, “Although parents’ rights are frequently mentioned by courts, the right is usually coupled with some other right—freedom of contract, free exercise of religion, free speech, procedural due process—such that the rhetoric about parents’ rights seems more makeweight than independent reason.” *See* Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 172 (2003) (footnotes omitted).

94. Ristroph & Murray, *supra* note 15, at 1240.

persons. They write: “Indeed, to foster some tension between institutions is precisely the point: we seek to preserve separate sources of authority so no single authority gains too much power.”⁹⁵ Professors Ristroph and Murray believe that “[p]art of the value of families is that they ensure that the state is not the only authority in the game.”⁹⁶

Professors Ristroph and Murray neglect to explain their definition of the contested concept of authority.⁹⁷ This is unfortunate because there are major differences between private actors and public authorities.⁹⁸ We believe they must envision “authority” as having meaning outside the political apparatus of the state. But Professors Ristroph and Murray do not address whether nonpolitical authority should be able to challenge, escape, or subvert political authority in a presumptively legitimate liberal democracy.⁹⁹ It is similarly unclear whether they think nonpolitical authorities should be able to punish or coerce individuals, especially if the individual does not consent to that authority, participate in its legitimation, or possess the ability to exit its jurisdiction.¹⁰⁰

On our view, one might be a pluralist (or at least undecided) about the sources of *moral* obligation, and still be cheerfully opposed to the claim that

95. Ristroph & Murray, *supra* note 15, at 1239.

96. *Id.* at 1278.

97. See generally Scott J. Shapiro, *Authority*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382 (Jules Coleman & Scott Shapiro eds., 2004) (exploring the jurisprudential treatment of the concept of authority).

98. See Hills, *supra* note 93, at 151 (noting that distinctions between “private” and public “governments” might include “the rules for their formation and enlargement, the typical range of issues they decide, the size of the territory they rule, the sanctions they are permitted to use, the permissible factors they consider in making decisions, the ways in which their officers are selected and the incentives that influence their officers’ discretion, [and] the ease with which persons can escape their jurisdiction”).

99. On this point, Professors Ristroph and Murray say only that, “we imagine disestablishment as a principle for a world in which there is some ruling authority but not an absolute ruler.” Ristroph & Murray, *supra* note 15, at 1242 n.20. This phrasing is opaque. Presumably, a liberal democratic ruling authority can still enforce its laws on pain of punishment, even if there is no single “absolute ruler” to generate the law.

100. We neither suggest nor deny that exit options and consent are necessary and sufficient criteria for the exercise of punishment by nonpolitical authorities, only that they are relevant criteria. See JOHN RAWLS, POLITICAL LIBERALISM 221-22 (Columbia Univ. Press 1993) (“In the case of ecclesiastical power, since apostasy and heresy are not legal offenses, those who are no longer able to recognize a church’s authority may cease being members without running afoul of state power. . . . By contrast, the government’s authority cannot be evaded except by leaving the territory over which it governs, and not always then. . . . For normally leaving one’s country is a grave step . . .”).

nonstate “authorities” may coerce us to take or forbear from actions or impose penalties upon us that we have not previously authorized through some predicate voluntary action.¹⁰¹ But to claim that the state should not be “the only authority in the game” raises a host of complications and may prove especially dangerous to the well-being of minor children.

Unlike groups of lawyers, clergy, or professors who opt into a regime of professional regulation, minor children have not signaled their acquiescence to coercion by parents. Moreover, unlike adults, they are not in a position to make their way in the world with the same degree of ease. While courts sometimes gesture in the direction of parental rights,¹⁰² we do well to remember that parents are only presumptive rulers over their children, because the state has ultimate (and, to our mind, justified) authority to disrupt or terminate parental relations on the basis of neglect, abuse, or abandonment.¹⁰³ Thus, the authority parents exert over their minor children is and should be a conditional one, predicated on the reasonable assumption that parents will more often than not make the right kinds of decisions for the well-being of their minor children.¹⁰⁴

Children, like other citizens, should be encouraged to reflect critically upon their obligations to family, religion, and state. But in promoting the family’s capacity to perform that task, Professors Ristroph and Murray do not account for the possibility that a liberal democratic government might have an equal or greater interest in cultivating critical and questioning sensibilities than families (or religions) do.¹⁰⁵ Nor do they entertain the possibility that tyranny might

101. Thus, we recognize that, for example, not exiting a professional or homeowners’ association may permissibly allow that association to regulate members of the association. But those regulations or penalties for breach apply only after a willingness to abide by those norms has been evidenced by prior voluntary action and a refusal to exit the jurisdiction of the private organization’s influence. See Hills, *supra* note 93, at 161 (“Consent and exit, therefore, go together to legitimize the power of private organizations”). Indeed, these systems of private authority often must appeal to public officials to enforce their regulations; public authority is a backdrop. To be clear, Hills does not believe that such conditions are always sufficient and he offers reasons to be skeptical of this conventional account associated with Rawls.

102. See, for example, the cases mentioned *supra* note 85.

103. Cf. James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CAL. L. REV. 1371, 1374 (1994) (arguing that the rights of children, not parents, should be “the legal basis for protecting the interests of children,” and that parents should be afforded child-rearing privileges rather than rights).

104. Cf. Hills, *supra* note 93, at 174-75 (observing that parental rights are recognized to the extent they exist for the purpose of securing the child’s well-being). Indeed if deference to family authority were not conditional in this respect, it would be hard to explain why society should deny parents authority over *adult* children.

105. See Marc O. DeGirolami, *No Tears for Creon*, 15 LEGAL THEORY 245, 253 (2009) (“The government’s interest in cultivating an inquisitive, questioning, and critical sensibility, so

effectively harness images and rhetoric of family life to entrench and legitimize state power.¹⁰⁶

As the foregoing makes clear, the underdeveloped use of the word “authority” puts Professors Ristroph and Murray in an awkward spot. If they mean authority in the normative sense of having a right to command, then their encouragement of many “authorities” allies them with the anarchical view that there is no reason to prefer compliance with the actual law over compliance with what our parents, priests, or professors demand. To us, *this* is a source of alarm. Political institutions should, of course, earn moral credibility among the citizenry.¹⁰⁷ But if the authority of the liberal democratic state is understood as no different from private community norms, then public officials are only advice givers, and we are promoting *no* government rather than *limited* government.¹⁰⁸ For that reason, liberal democracies should be willing and unashamed to announce the supremacy of the law against other sources of influence or persuasion.¹⁰⁹

Do such views about public political authority render us vulnerable to the charges of being “authoritarians”? We doubt it. For there is no necessary incompatibility between a commitment to democratic authority and substantive limits on that authority.¹¹⁰ Moreover, while placing limits on

that a child may be better equipped to participate as a citizen in a democratic government, may conflict with the parents’ or the community’s interest in cultivating an unreflective and intuitive decency, learned not by reading books or developing the skills of intellectual inquiry and deft argumentation but by observing and modeling the habits and manners of admired fellows or teachers deeply committed to a particular practice or way of life” (internal citations omitted)).

106. See, e.g., CLAUDIA KOONZ, *MOTHERS IN THE FATHERLAND: WOMEN, THE FAMILY, AND NAZI POLITICS* (1988).

107. See, e.g., TOM TYLER & YUEN J. HUO, *TRUST IN THE LAW: BUILDING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002).

108. Moreover, on this view, officials within private “authorities” might also be able to stifle or punish dissent. Cf. Madhavi Sunder, *Cultural Dissent*, 54 *STAN. L. REV.* 495, 504-06 (2001) (expressing concern that giving groups too much power under laws protecting freedom of association would chill or eliminate challenges by those who seek to modernize the traditional terms of membership).

109. See Shapiro, *supra* note 97, at 438 (“Deferring to democratically elected authority or selected policies under conditions of meaningful freedom is deferring to one’s fellow citizen. In doing so, one pays respect to the importance that people are allotted a certain control over their lives and the fairness of sharing that power equally.”).

110. As the philosopher Tom Christiano has explained,

The principle of public equality on which the argument for democracy is founded also grounds a set of liberal rights (freedom of conscience, association, speech and private pursuits). The reason for this is that democratic assembly that

familial influence might be hard for some to accept, society needs an ultimate adjudicator and coordinator in the position of *political* authority, and such a view is perfectly consistent with liberal democratic governance that makes space for the efflorescence of family life.

In sum, the disestablishment model need not reduce to anarchism,¹¹¹ but the arguments offered by Professors Ristroph and Murray elide the need for a political authority with the power to both govern the family and protect all citizens in a way that families do not. This is not to say that public governments should never consider the interests, competence, or vitality of families or other “private governments,” a point Professor Hills wisely emphasizes.¹¹² But there remains a role for a public government whose authority to promulgate the law and extract compliance is superior to, and categorically separate from, the influence families exert on individuals within liberal societies. It is not an authoritarian’s vice to want a fair and democratic public authority to coordinate the bumpy chaos of our social union of social unions. Our equal protection lens recognizes that by placing careful limits on state authority; the proposed disestablishment model might leave us without any authority at all.

C. Religious Organizations Versus Families

We close our critique of the disestablishment norm by noting that religious organizations are different from families in ways that create more meaningful checks on state power. Religious institutions are more likely to organize vis-à-vis the state than ordinary families preoccupied with the mundane concerns of everyday life, ranging from health care to jobs to education. To be sure, there are organizations dedicated to strengthening family life through legal reform,

fundamentally denied these liberal rights to individuals would publicly violate the duty of equal respect to those individuals. Those who violate the basic liberal rights of others are publicly treating them as inferiors. To the extent that the democratic assembly’s claim of authority is grounded in the public realization of the principle of equal respect, the authority would run out when the democratic assembly makes law that undermines equal respect. This establishes, at least for one conception of democratic authority, a substantive set of limits to that authority.

Tom Christiano, *Authority*, Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/authority> (last visited Apr. 26, 2010). Consistent with this vision, many of the limitations to the authority of the state we develop in our book are attempts to cash out that fidelity to equal respect and concern.

¹¹¹. Ristroph & Murray, *supra* note 15, at 1242 n.20.

¹¹². See Hills, *supra* note 93.

including those who promote some of the family ties burdens and benefits we identified.¹¹³ And it is certainly possible that some or many families inculcate stronger norms of loyalty than do religious institutions. Even so, the ability of a given family to organize social factions that disrupt or destabilize state power is weakened by the limited financial resources, time, and energy of the individual family unit. Thus, we question the degree to which the disestablishment norm advocated by Professors Ristroph and Murray would actually foster their antitotalitarian ideal.

Moreover, the fundamental question still needs to be answered: why should family be disestablished and not something else or many other things? Indeed, if one really wants to find good institutional competition for the state, the more obvious place to look would be modern corporations, not families. But the mere suggestion of disestablishing corporations seems to refute itself. So what is special about the family? We did not see much explicit recognition by Professors Ristroph and Murray of the special if not unique historical reasons that counsel in favor of disestablishing *religion*. Nor did we see any examination of the necessary or sufficient criteria that would indicate whether other institutions should also be disestablished. Assuming some criteria exist, we can't tell whether Professors Ristroph and Murray also endorse disestablishing publicly sponsored media outlets, universities, and cultural institutions. These institutions also might be thought to serve as tools for entrenching state power in some respects or as instrumental sites for cultivating critical reflective citizenship in other contexts.

In sum, after considering Ristroph and Murray's failure to provide any detail in operationalizing their disestablishment model, their ambiguous and probably implausible view of authority, and their failure to acknowledge important differences between family and religion, we would continue to urge lawmakers to embrace our equal protection model instead. Ours is more likely to advance individual liberty and limited government effectively, while at the same time it preserves recognition of the importance of caregiving obligations in structuring and giving meaning to citizens' lives.

III. ON PAST VERSUS PRESENT; POLICY VERSUS PRACTICE

In contrast to the critique by Professors Ristroph and Murray, Professor Burke offers an unabashed pro-prosecution perspective. Her generous and thoughtful essay seeks to "complement [our] contributions" by focusing on two additional considerations: first, the progress achieved in American

113. Cf. Families Against Mandatory Minimums, <http://famm.org> (last visited at April 20, 2010).

criminal law with respect to criminal regulation of the family, and second, “the interplay between criminal law and procedure.”¹¹⁴ As Section III.A. elaborates, the first point really amounts to a few discrete challenges regarding the purpose and scope of our book. The second argument is more provocative, arguing that sometimes we need to explicitly use family status more in criminal law in order to achieve retribution and crime control goals. We find ourselves intrigued by this latter claim but, for reasons adumbrated in Section III.B., we are ultimately unconvinced.

A. *The Relevance of Trends*

Professor Burke’s essay begins by observing that the criminal law is now doing a substantially better job than it did a few decades ago with regard to addressing intrafamily violence.¹¹⁵ Although we question whether the picture of family violence she presents is complete¹¹⁶ and accurate,¹¹⁷ adopting her perspective about criminal law trends simply bolsters our argument that many benefits and burdens are outmoded, unnecessary, and inconsistent with our liberal commitments.

114. Burke, *supra* note 20, at 1214.

115. *Id.* at 1217-22.

116. Professor Burke argues that nowadays “prosecutors are more likely to pursue charges” in child abuse and neglect cases, citing a 1994 article for the proposition that “ninety percent of offenders arrested for crimes against children are prosecuted.” *Id.* at 1220. But more recent law enforcement statistics show that only 60% of family violence victimizations were even reported between 1998 and 2002, and only 36% of the incidents reported resulted in an arrest. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, FAMILY VIOLENCE STATISTICS 2 (2005). These numbers include all family victimizations, but the statistics on child victims are even more bleak. The Bureau of Justice Statistics concluded that only 32% of the incidents involving violence against a victim under the age of eighteen were reported to the police. *Id.* at 24.

117. As one of her illustrations of this “positive” trend in criminal law, Professor Burke points out that some jurisdictions have “abolish[ed] adultery as a privileged source of emotion and entrust[ed] juries to determine whether a reasonable person in the defendant’s position would have been provoked into a heat of passion.” Burke, *supra* note 20, at 1218-19. As Victoria Nourse argues in her pathbreaking article, this was not necessarily a salutary trend in the law; instead, it has led to men claiming to have been provoked sufficiently for a manslaughter verdict simply by a woman’s attempt to leave or even to dance with another man. See Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1332-33 (1997). Far from “challeng[ing] the traditional narrative about criminal law’s treatment of family and family status,” Burke, *supra* note 20, at 1217, “[o]ur most modern and enlightened legal ideal of ‘passion’ reflects, and thus perpetuates, ideas about men, women, and their relationships that society long ago abandoned.” Nourse, *supra*, at 1332.

By emphasizing these systemic improvements, however, Professor Burke seems to suggest that we are chasing small prey. She writes that “many of the family ties benefits and burdens . . . are repealed, unenforced, and/or increasingly disfavored.”¹¹⁸ But this formulation gives Professor Burke too much latitude. At least half of the burdens and benefits we study appear to be relatively pervasive across the states, including incest; bigamy; omissions liability; spousal evidentiary privileges; parental discipline defenses to the use of physical violence against children; sentencing discounts for family members; and family-based accommodations during punishment.¹¹⁹

Our book’s goal is to accurately describe, but not oversell, the current status for each benefit and burden.¹²⁰ Moreover, we do not harbor any illusion that the concerns posed by these benefits and burdens are the most pressing deficiencies in our criminal justice system.¹²¹ We simply think it is important to consider whether it is just or wise to retain, reject, or modify these family ties policies.¹²² Why spare the jurisdictions that retain these benefits and burdens from careful analysis? To use an analogy: a handful of states have legalized same-sex marriage in recent years. Should we stop worrying about, and fighting against, the discriminatory treatment still accorded same-sex couples in the vast majority of states?¹²³ Because thirty-six states do not give protection

118. Burke, *supra* note 20, at 1219.

119. For example, “all states but Rhode Island have criminal prohibitions on at least some consanguineous relations between family members.” MARKEL, COLLINS & LEIB, *supra* note 2, at 69. Moreover, “bigamy laws are universal across the country.” *Id.* at 70.

120. For example, we note that “only eight states criminalize [sexual] contact between first cousins, but twenty-five states do not permit first cousins to marry.” *Id.* at 70 (footnote omitted).

121. Indeed, to those who see family ties benefits as a beneficent response to the general crisis of over-punishment, we respond that the causes of overpunishment are better addressed directly in manners largely neutral to family status. See, e.g., MARKEL, COLLINS & LEIB, *supra* note 2, at 180 n.63.

122. In this respect, we can correct Professor Burke on a minor detail. Although it is obviously true that we believe family ties benefits and burdens are worth careful study, we do not claim that the world of criminal law is “dominated by [family ties] benefits.” Burke, *supra* note 20, at 1223 (emphasis added). To the contrary, we recognize that we are looking at only a half-dozen family ties benefits and seven categories of burdens. These numbers pale in comparison to the thousands of extant federal criminal statutes alone. Nothing we wrote was intended to suggest a criminal law dominated by family ties benefits (or burdens for that matter).

123. In addition, the fact that a very few states have legalized same sex marriage in no way addresses the concerns of those who wish to live in an alternative family arrangement not based on a spousal model, regardless of their orientation.

to family members who obstruct justice on behalf of a relative, should we stop worrying about the fourteen that still do?

A related critique also connects to the scope of our project; specifically, Professor Burke laments our comparatively thin treatment of domestic violence.¹²⁴ Although we agree with Professor Burke that the issue of family violence is critically important, and that American criminal law has improved somewhat with respect to policing and punishing intrafamily violence, our book only lightly touches on domestic violence for two reasons. First, legislation addressing domestic violence today rarely uses family status as a vehicle for benefits or burdens; instead, as Professor Burke appreciates, there is a tendency to use functional categories such as co-residence, supervisory relationships, or intimate association as criteria for application.¹²⁵ As a result, legislative neutrality to family status in domestic violence policy frequently serves as a lodestar, not a problem requiring our attention. Second, to the extent that family status is expressly applied in the context of domestic violence laws, the states demonstrate a bewildering diversity as to whether family status is used as a vehicle for a benefit (e.g., lighter penalties) or a burden (e.g., stiffer penalties).¹²⁶ Accordingly, we turned our attention to other intersections between criminal law and family life that exhibited more consistent treatment. That said, our framework is still useful for thinking through some important domestic violence issues, such as who should be subject to such laws and whether sentence enhancements for breach of trust should attach.¹²⁷

Finally, as part of her polite complaint about the scope of our project, Professor Burke contends that we only “highlight[] the remaining vestiges of the common law’s marital rape exception” without observing that an “alternative narrative” of progress can also be told.¹²⁸ However, we do acknowledge that alternative narrative, writing that “[i]n recent years, we have, of course, seen some progress in criminal justice policy, such as the repeal of marital rape exemptions.”¹²⁹ The fact that we chose also to address the work that remains to be done reflects our recognition that this is a complex and

124. *E.g.*, Burke, *supra* note 20, at 1224 n.72.

125. *E.g.*, *id.* at 1234 (noting that “most domestic violence laws are defined . . . by the intimate relationship” of the parties, and not by marriage certificates).

126. *See* MARKEL, COLLINS, & LEIB, *supra* note 2, at 151 (referring to studies showing that states have taken “wildly inconsistent” positions regarding domestic violence laws).

127. *Id.* at 152-53.

128. Burke, *supra* note 20, at 1219.

129. MARKEL, COLLINS, & LEIB, *supra* note 2, at 9 (footnote omitted).

evolving area,¹³⁰ and explains why we cannot endorse Professor Burke's claim that "the criminal law no longer concerns itself with the policing of family boundaries."¹³¹

B. What Policy Owes to Practice

Professor Burke's second major point moves from history to procedure and current practice. Specifically, she contends that our narrow focus on facial treatment of family status in criminal law prevents us from acquiring a better understanding of how family ties benefits and burdens operate as tools of retribution and deterrence, rather than simply as tools of family promotion.¹³² We explained at the outset why we focused on the facial treatment of family status.¹³³ Professor Burke's claim mistakenly presupposes that we tried to understand family ties benefits and burdens only through the lens of family promotion. In fact, in all instances of family ties benefits, we explain to what extent concern for retribution and crime control would be undermined by family ties benefits. Professor Burke's challenge asks us to consider whether and to what extent these traditional criminal justice goals also *justify* (as opposed to challenge) these benefits. Yet we did this too; where we thought these goals could plausibly be invoked as rationales, we identified and addressed those situations, particularly in the context of family ties benefits. For example, we considered the various ways pretrial release and prison policies might be designed to facilitate the public's interest in reducing flight risk and recidivism.¹³⁴

To be fair, Professor Burke might argue that we should not have bracketed the concerns of retribution and crime control in the context of family ties burdens, where we instead focused on how these burdens facilitate inequality and encroached upon what we called liberal minimalism.¹³⁵ Thus, as her

130. Indeed, Professor Burke cites some of the same research we relied upon in our book, making her challenge to us in this context even more puzzling. See MARKEL, COLLINS & LEIB, *supra* note 2, at 178 n.45 (citing Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1375 (2000)).

131. Burke, *supra* note 20, at 1219.

132. *Id.* at 1223.

133. See *supra* notes 6-7 and accompanying text.

134. See MARKEL, COLLINS & LEIB, *supra* note 2, at 46-48; *id.* at 53-56; see also *id.* at 190 n.82 (addressing the argument that family ties benefits are ways of cultivating a culture of compliance through earned moral credibility for the criminal justice system).

135. For our explanation of why we did this, see MARKEL, COLLINS & LEIB, *supra* note 2, at 82, 199 n.9.

primary example of where practical considerations of retribution and crime control should mandate the use of family status when distributing burdens, Professor Burke cites the problem of prosecuting sex offenders who victimize their children. She argues that prosecuting individuals for the family-based offense of incest, rather than a more generalized sex offense, is more responsive to the complex “interpersonal, economic, and emotional dynamics” of the family.¹³⁶ Professor Burke seems to be suggesting that defendants would be more likely to plead guilty to incest, rather than to rape or sexual abuse, because an incest charge is less stigmatizing and may result in the offender avoiding the requirement to register as a sex offender.¹³⁷

We are not persuaded by this suggestion. To begin, we question whether a conviction of incest is in fact less stigmatic in the eyes of the public than a conviction for a more generic-sounding crime like “second degree sexual offense.”¹³⁸ If the rationale for charging incest rather than a general sex offense is to induce a guilty plea by allowing the defendant to avoid sex offender registration, we must emphasize our concern with the corresponding signal that sexual abuse of a family member is less serious than sexual abuse of a stranger or acquaintance.¹³⁹ Precisely because sex crimes against children frequently involve the additional wrong of an abuse of trust, the caregiving function of a parent should trigger in these situations the imposition of a greater burden, rather than any kind of benefit.¹⁴⁰ Thus, assuming that prosecutors need the family status-based tool to induce the plea bargain, the better solution might be to create sex crime categories that do not inflexibly require registration as part of the package of penalties.¹⁴¹

136. Burke, *supra* note 20, at 1225.

137. *Id.*

138. N.C. GEN. STAT. § 14-27.5 (2009).

139. For a more detailed discussion of these issues, see 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, 148-49 (2007).

140. See MARKEL, COLLINS & LEIB, *supra* note 2, at 153; Jennifer M. Collins, Ethan J. Leib & Dan Markel, *(When) Should Family Status Matter in the Criminal Justice System?*, 13 NEW CRIM. L. REV. 151, 168 (2010).

141. The question of registration requirements is a tremendously complicated one, and firm conclusions about the wisdom of such policies are beyond the scope of this Essay. However, we do want to highlight a few of the competing concerns with giving prosecutors the flexibility to charge a general sex offense (triggering registration requirements) or a family-based offense (inducing a plea deal). On the one hand, many people believe in the value of sex offender registration or communal notification laws, notwithstanding the numerous critiques of their principle and practice. See WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* (2009). Even if

But all this brings us back to the point we first made. This discussion of the practical challenges associated with prosecuting incest rests at the margins of the project we explicitly undertook. We agree that the practical implications of these various policies are interesting, important, and worthy of further exploration. But much has been written on those topics, and we do not think analysis of the law on the streets should crowd out consideration of the law on the books. In drafting the laws that govern us, officials can send powerful, stigmatizing, and exclusionary messages that deserve analysis and, in some cases, emphatic rejection.

CONCLUSION

We close here on a note of gratitude both to the editors of *The Yale Law Journal* and to Professors Burke, Murray, and Ristroph for their collective attention to the issue of what role family status should play in the criminal law. We hope this conversation will inspire others to begin their own about this vexing and important topic.

such laws do achieve any communal protection against recidivism, flexibility about whether to impose these requirements in cases of intrafamily violence and abuse may benefit culpable persons who escape registration requirements by allowing the prosecution to secure a conviction through a plea deal. In order to assess whether this flexibility could be justified, we would have to know whether (and which kind of) defendants would not be otherwise prepared to plea to a generic sex crime. Even if a strong empirical benefit could be demonstrated, we would still have grave concerns about any policy that effectively signals to prosecutors that intrafamily sexual offenses are less serious than sexual offenses committed by an acquaintance or stranger.